Court of Appeal File No. COA-24-CV-1328
Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/
Respondent in Appeal

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC

Respondents/
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Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has 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, and 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. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. 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.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no 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.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) 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 by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); 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.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

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Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). 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.

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.

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 $65,000,000. 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 $50,000,000 on the winding-up of Soundair.

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.

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.

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.

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.

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, 1991. 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.

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.

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.

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.

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?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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.

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.

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.

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?

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 doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten 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.

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.

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 v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.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)

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 (C.A.), at p. 11 C.B.R., p. 314 N.S.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)

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 to 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.

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 ten 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.

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.

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 v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.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.

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. Bkcy.), 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.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), 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.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), 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)

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.

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.

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.

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.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-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.

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.

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.

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.

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

2. Consideration of the interests of all parties

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 (1986, Saunders J.), supra. 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".

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, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), 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.

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

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.

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 (1986), 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 consideration 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 finding 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.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., 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.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.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)

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.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the 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?

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.

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 order to make a serious bid.

The offering memorandum had not been completed by February 11, 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.

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.

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.

Moreover, I am not prepared top 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.

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 seven 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, it would have told the court that it needed more information before it would be able to make a bid.

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.

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.

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., p. 548 D.L.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., p. 550 D.L.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.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, 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.

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

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.

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.

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.

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 debtors' assets.

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 interlender 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 interlender 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 $6,000,000 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.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 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.

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 interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

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.

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.

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.

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-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- 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), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). 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.

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 therefrom), 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):-- 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.

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 Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively 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 (the Bank). 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.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., 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 having 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.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, 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 [pp. 17-18]:

> 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.

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 $3,000,000 to $4,000,000. 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 downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.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 the 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.

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.

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.

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.

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. Bkcy.) 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.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for 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 C.B.R.:

> 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 the commercial efficacy and integrity.

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, at pp. 92-94 O.R., pp. 531-33 D.L.R., 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., p. 314 N.S.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.

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.

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.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> 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 1. 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.

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 this 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 "hard ball" 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.

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.

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.

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.

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.

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 $18,000,000. 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.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

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.

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.

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 $10,000,000 and $12,000,000.

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 $3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

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.

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.

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.

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.

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.

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 any 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.

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.

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 interlender 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.

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 three 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.

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.

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.

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 three 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.

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 three 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.

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 [p. 31]:

> They created a situation as of March 8, 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.

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".

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 interlender condition removed.

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 constitutes approximately 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 $3,000,000 to $4,000,000.

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.

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.

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 a 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.

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.

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.

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.

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, it knew that CCFL was interested in purchasing Air Toronto.

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.

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.

For the above reasons I would allow the appeal with 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-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 2

In the Court of Appeal of Alberta

Citation: River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, 2010 ABCA 16

Date: 20100118
Docket: 0903-0191-AC
0903-0236-AC
Registry: Edmonton

Between:

Bank of Montreal

Not a Party To the Appeal
(Plaintiff)

- and -

River Rentals Group Ltd., Taves Contractors Ltd. and McTaves Inc.

Respondent
(Defendant)

- and -

Hutterian Brethren Church of Codesa

Appellant
(Other)

- and -

Bill McCulloch and Associates Inc.

Respondent
(Other)

- and -

Don Warkentin

Respondent
(Other)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice R. Paul Belzil

Memorandum of Judgment

Appeal from the Orders by
The Honourable Chief Justice A.H. Wachowich
Dated the 2nd day of June, 2009 and
Dated the 17th day of June, 2009
(Docket: 0903 03233)

Memorandum of Judgment

The Court:

[1] At the hearing of this appeal, we announced that the appeal is allowed with reasons to follow.

[2] Bill McCulloch and Associates Inc. is the court-appointed Interim Receiver and/or Receiver Manager of the corporate Respondents ("the Taves Group") by order dated March 5, 2009. Prior to that date, the Receiver had become Trustee in Bankruptcy of the Taves Group.

[3] The Receiver issued an information package and called for offers to purchase the assets of the Taves Group which included a property known as the Birch Hills Lands. The call for offers was dated April 17, 2009. The deadline for submission of offers was on or before May 7, 2009 (the tender closing date).

[4] On June 2, 2009, the Receiver brought an application before Wachowich C.J.Q.B. to approve the sale of the Birch Hills Lands to the Appellant. The Appellant's offer was $2,205,000. An appraisal concluded that the most probable sale price was $1,560,000. Counsel for the Receiver explained that "the Receiver did effect wide advertizing in local and national newspapers. Sent out 160 tender packages and made the tender package available on the Receiver's website." (A.B. Record Digest, 3/30-33)

[5] Fifteen offers were received on the Birch Hills Lands, six of which were for the entirety of the parcel.

[6] In his submission to the Chief Justice, counsel for the Receiver stated:

> "Now, what we have advised the party that we're looking to accept is that we can't put them in possession yet until the Court approves the offer. That has caused some angst given the time of year and it is agricultural land, but we're not in a position to put people on the land before we get court approval to do so. So - - and that's fine, they're still - - they're still at the table so we're good with that.
>
> The offer that the Receiver is recommending acceptance of is - - was from the Hutterite Church of Codesa. That offer was for $2,205,000 ... the offer is very significant ... it was an excellent offer."
>
> (A.B. Record Digest, 5/46 -6/19)

[7] In considering other tenders with respect to other portions of the property of the Taves Group, the Chief Justice expressed his views regarding the importance of adhering to the integrity of the tender process:

> "You know, we ran a tender process, tender process is meant to be - - there are certain rules. It is like, you do not change the rules of baseball or football during the middle of the game. This is the same thing except in this particular case the Court is prepared to exercise the - - its inherent jurisdiction to extend the time in Mr. Taves' position. But I - - you know, I could be the person who says no, Mr. Taves, you were late, I am sorry. Next time use Fed Ex."
>
> (Appeal Record Digest, 12/11-19)

And further:

> "We could be coming back right and left. I am inclined, you know, to grant the applications as submitted on these tenders because the tender process was followed properly. That was the market at the time, this is the people that - - this is how they bid. You know, circumstances change and when circumstances change, somebody is the beneficiary of it, some - - somebody is the loser on this. But the rules were adhered to and having the rules adhered to if, you know - - if you want to - - if you want to go to the Court of Appeal after the order is entered and say to the Court of Appeal, guess what, oil is now at $90, we want this one resubmitted. And if those five people are wise enough to accept that argument, then good luck to you but - - but you know, I am inclined to say we follow a process, the law has to be certain. The law has to be definite. This is what we did and we complied." (Appeal Record Digest, 12/40-13/8)

[8] One of the persons who had tendered an offer to purchase the Birch Hills Lands was the Respondent Don Warkentin. Counsel for the guarantor, Mr. Orrin Toews, addressed the Court. He explained that Mr. Warkentin had submitted an offer of $2.1 million "on the understanding that he would be receiving possession of the property sometime in the fall." Counsel further explained that "I believe it was the Receiver while during the initial auction, that it was brought to his attention on May 21st that he would in fact get possession of the property much earlier than he was anticipating. And on that basis he increased his bid by 200,000 which brings his offer to 2.3 million dollars cash." (A.B. Record Digest, 13/27-36) He submitted that Mr. Warkentin's offer be accepted.

[9] In response, counsel for the Receiver advised the Court that he had been in written communication with counsel for Mr. Warkentin "and there was no indication in that correspondence that he thought he would get [possession of the lands] in the fall." (Appeal Record Digest, 14/18-20) He added: "I think the tender package is clear that the way it was supposed to close is after the appeal periods on any order has expired. ... So how anybody could reasonably conceive that possession wouldn't be granted until the fall based on that escapes me." (Appeal Record Digest, 14/20-25) He further added: "But the bottom line was at the time tenders closed, Mr. [Warkentin]'s offer was found wanting." (Appeal Record Digest, 14/36-38)

[10] On the basis of that information, the Court ruled as follows:

> "Well, you know, rather than adjourning it to hear from Mr. Carter, what I am - - what I am inclined to do with that piece of property, because of - - is - - because of an uncertainty as to occupation, dates of occupation or potential lease or whatever it may be, it is too late to put in the crop right now anyway so - - ... Retender on this one and make it clear in the tender." (Appeal Record Digest, 15/7-19)

[11] Wachowich, C.J. then granted an order extending the deadline to submit revised offers to purchase the Birch Hills Lands; with submissions restricted to the Appellant and Warkentin. During this extension period, Warkentin submitted a bid higher than the Appellant's. The Appellant did not increase its original offer. Subsequently, on June 17, 2009, Wachowich, C.J. granted an order directing that the Birch Hills Lands be sold to Warkentin. An application by the Appellant to reconsider the June 17, 2009 order was dismissed. The Court also granted a stay order for parts of the June 2 order and the entirety of its June 17 order, pending the determination of the appeal of the June 2 order. The Appellant appealed the June 2 order on July 22, 2009; and appealed the June 17 order on August 13, 2009 (the appeals were consolidated on August 20, 2009).

[12] On applications by a Receiver for approval of a sale, the Court should consider whether the Receiver has acted properly. Specifically, the Court should consider the following:

> (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.
>
> ***Royal Bank of Canada v. Soundair Corp.***, [1991] 4 O.R. (3d) 1 (C.A.) at para. 16

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

> (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

(b) whether the circumstances indicate that insufficient time was allowed for the making of bids;

(c) whether inadequate notice of sale by bid was given; or

(d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (C.A.)
Salima Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (C.A.) at para. 12.

[14] The central issue in this appeal is whether the chambers judge, mindful of the record before him, should have permitted rebidding and whether he should have thereafter entertained and accepted the higher offer of $2.51 million plus GST tendered by Mr. Warkentin during the extension period.

[15] The relevance of higher offers after the close of process was considered by the Ontario Court of Appeal in ***Royal Bank v. Soundair***, ***supra***. Upon review of the jurisprudence, the Court stated at para. 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. ..."

[16] The chambers judge made no such finding. Indeed, he made no assessment whatever of the conduct of the Receiver. The only evidence before the Court at the June 2, 2009 application was the Receiver's fifth report and the affidavit of Orrin Toews who proffered no evidence that the Receiver acted improvidently in accepting the offer of the Appellant.

[17] Moreover, the June 2, 2009 order neither considers the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids to purchase the Birch Hills Lands pursuant to the call for offers.

[18] This Court has consistently favoured an approach that preserves the integrity of the process. See ***Salima Investments Ltd.***, ***supra***, and ***Royal Bank of Canada v. Fracmaster Ltd.***, 1999 ABCA 178, 244 A.R. 93.

[19] That was also the view of the Nova Scotia Supreme Court (Appeal Division) in ***Cameron v. Bank of Nova Scotia, supra***, at para. 35:

> "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 a 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. ..."

[20] In addition, there was no cogent evidence before the chambers judge of any unfairness to Warkentin. On the contrary, the impugned order of June 2 conferred an advantage upon Warkentin who then knew the price that had previously been offered by the Appellant when re-tendering his offer.

[21] In cases involving the Court's consideration of the approval of the sale of assets by a court-appointed Receiver, decisions made by a chambers judge involve a measure of discretion and "are owed considerable deference". The Court will interfere only if it concludes that the chambers judge acted unreasonably, erred in principle, or made a manifest error.

[22] In our opinion, the chambers judge erred in principle and on insufficient evidence ordered that the property in question be the subject of an extended re-tendering process. The appeal is allowed. An order will go setting aside paras. 26 through 32 of the June 2, 2009 and the June 17, 2009 orders, and approving the tender of the Appellant on the terms and conditions upon which the Receiver originally sought approval.

Appeal heard on January 7, 2010

Memorandum filed at Edmonton, Alberta
this 18th day of January, 2010

Berger J.A.

As authorized: Rowbotham J.A.

As authorized: Belzil J.

Appearances:

D.R. Bieganek
for the Respondent - River Rentals Group, Taves Contractors Ltd. and McTaves Inc.
for the Respondent - Bill McCulloch and Associates Inc.

G.D. Chrenek
for the Appellant - Hutterian Brethren Church of Codesa

T.M. Warner
for the Respondent - Don Warkentin

TAB 3

Business Development Bank of Canada v. Pine Tree Resorts Inc. et al. [Indexed as: Business Development Bank of Canada v. Pine Tree Resorts Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair J.A. (in Chambers)

April 29, 2013

115 O.R. (3d) 617 | 2013 ONCA 282

Case Summary

Bankruptcy and insolvency — Practice and procedure — Appeals — Second mortgagee appealing order granting first mortgagee's application for appointment of receiver over mortgagor's assets — Second mortgagee wishing to exercise its rights under s. 22 of Mortgages Act — Leave to appeal required as appeal did not fall within s. 193(a) or s. 193(c) of Bankruptcy and Insolvency Act ("BIA") — Test for leave to appeal under s. 193(e) of BIA being whether proposed appeal raises issue of general importance to practice in bankruptcy/ insolvency matters or to administration of justice generally, is prima facie meritorious and would not unduly hinder progress of bankruptcy/insolvency proceedings — Proposed appeal not satisfying those criteria — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 — Mortgages Act, R.S.O. 1990, c. M.40, s. 22.

BDC held security for the money owed to it by Pine Tree by way of a first mortgage and general security agreements. Romspen was the second mortgagee. Both mortgages were in default. Romspen wished to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act* to put BDC's mortgage in good standing and take over the sale of the property. It proposed to pay all arrears of principal and interest, together with BDC's costs, expenses and outstanding realty taxes, but did not propose to repay HST arrears, which constituted a default under the BDC security documents. BDC applied successfully for the appointment of a receiver over the Pine Tree's assets. Pine Tree and Romspen sought to appeal that order. Romspen intended to argue that it was entitled to exercise its [page618] rights under s. 22 of the *Mortgages Act* as the arrears of HST did not jeopardize BDC's security because they were a subsequent encumbrance, and therefore it was not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22.

Held, leave to appeal should be denied.

Leave to appeal under s. 193(*e*) of the *Bankruptcy and Insolvency Act* was required. The appeal did not involve "future rights" within the meaning of s. 193(*a*). Section 193(*c*) did not apply as an order appointing a receiver did not bring into play the value of the property. In determining whether to grant leave to appeal under s. 193(*e*), the court will look to whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly

hinder the progress of the bankruptcy/ insolvency proceedings. In this case, the application judge's considerations were entitled to great deference and, in any event, were purely factual and case-specific and did not give rise to any matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. Moreover, Romspen's s. 22 argument was not *prima facie* meritorious. Finally, all parties agreed that the property in question had to be sold, and there was a need for the sale to proceed expeditiously. Interfering with the timeliness of that process could potentially impact on the success of the sale. Leave to appeal should not be granted.

Baker (Re) (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580, 83 O.A.C. 351, 31 C.B.R. (3d) 184, 53 A.C.W.S. (3d) 933 (C.A., in Chambers); *Fiber Connections Inc. v. SVCM Capital Ltd*., [2005] O.J. No. 1845, 198 O.A.C. 27, 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10 (C.A., in Chambers); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc*., [2003] O.J. No. 5761 (C.A., in Chambers); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp*., [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.); *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395, 30 C.B.R. (3d) 90, 52 A.C.W.S. (3d) 957 (C.A., in Chambers), **consd**

Other cases referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of), [1997] A.J. No. 869, 206 A.R. 295, 48 C.B.R. (3d) 171, 73 A.C.W.S. (3d) 727 (C.A., in Chambers); *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 1999 ABCA 255, 244 A.R. 103, 12 C.B.R. (4th) 186; *Century Services Inc. v. Brooklin Concrete Products Inc*. (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A., in Chambers); *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135, 71 O.A.C. 56, 25 C.B.R. (3d) 210, 47 A.C.W.S. (3d) 242 (C.A., in Chambers); *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.); *Theodore Daniels Ltd. v. Income Trust Co*. (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315, 135 D.L.R. (3d) 76, 25 R.P.R. 97 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 [as am.], (*a*), (*c*), (*e*)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Mortgages Act, R.S.O. 1990, c. M.40, s. 22, (1) [page619]

APPEAL from an order appointing a receiver.

Milton A. Davis, for appellants Pine Tree Resorts Inc. and 1212360 Ontario Limited.

David Preger, for appellant Romspen Investment Corporation.

Harvey Chaiton, for respondent Business Development Bank of Canada.

Endorsement of **BLAIR J.A.** (in Chambers): —

Overview

[1] On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

[2] Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

[3] For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

[4] BDC is owed approximately $2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately $4.3 million.

[5] The inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements. [page620]

[6] Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the notice of power of sale for redemption.

[7] Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

[8] Pine Tree supports Romspen's plan because it involves re-opening the inn for the upcoming summer season and attempting to sell the property on a going-concern basis. BDC

rejects this option as unrealistic because it views the inn's operations as being an irretrievably losing proposition.

[9] Romspen argued before the application judge -- and argues here as well -- that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40 to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses and outstanding realty taxes. However, it does not propose to repay approximately $250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

[10] In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centrepiece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

[11] On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the [page621] mortgage and -- where there are unperformed covenants -- performing those covenants as well.

Is Leave to Appeal Necessary?

[12] In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, [1997] A.J. No. 869, 206 A.R. 295 (C.A., in Chambers).

[13] The portions of s. 193 of the *BIA* relied upon by Romspen and Pine Tree are the following:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (*a*) if the point at issue involves future rights;
>
> . . . . .
>
> *(c)* if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . . . .
>
> *(e)* in any other case by leave of a judge of the Court of Appeal.

[14] Neither (*a*) nor (*c*) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

[15] "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.), at para. 17. See, also, *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 1845, 10 C.B.R. (5th) 201 (C.A., in Chambers).

[16] Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

[17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(*c*). As [page622] noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

[18] In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The test

[19] In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(*e*). As he noted, at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

[20] One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.). It asks the following questions:

(i) Is the point appealed of significance to the practice as a whole?

(ii) Is the point raised of significance in the action itself?

(iii) Is the appeal *prima facie* meritorious?

(iv) Will the appeal unduly hinder the progress of the action?

[21] These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or [page623] (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(*e*) of the *BIA*: see, in addition to *R.J. Nicol*, for example, *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135 (C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker (Re)*, (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker (Re)*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded, at p. 381 O.R., that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol* and the *Power Consolidated* criteria -- without apparently distinguishing between them -- as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this court.

[27] I take from this brief review of the jurisprudence that, while judges of this court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently -- one that incorporates the *Power Consolidated* notions of overall importance to [page624] the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the

following are the prevailing considerations in my view. The court will look to whether the proposed appeal

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

(b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/ insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my [page625] view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this court in determining whether leave to appeal should be granted in restructuring cases under the *CCAA*: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A., in Chambers), Feldman J.A., at para. 15; and *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both *CCAA* and *BIA* insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the test in the circumstances

[34] I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

[35] First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case-specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

[36] I would not grant leave to appeal on those grounds.

[37] The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission [page626] is the argument that the outstanding HST arrears -- although a default in the observance of a covenant under the BDC mortgage -- could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

[38] I have serious reservations about the likelihood of success of this submission on appeal.

[39] Romspen relies upon the jurisprudence of this court establishing that a mortgagor -- and therefore, a subsequent mortgagee -- is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315 (C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a $250,000 covenant -- payment of the outstanding HST arrears.

[40] For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*,[1] and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case. [page627]

[41] I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

[42] Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

[43] There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

[44] For the foregoing reasons, I decline to grant leave to appeal.

Disposition

[45] There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the *BIA*. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

[46] No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Application dismissed.

Notes

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1 Section 22(1) provides:

> 22(1) Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
>
> (*a*) at any time before sale under the mortgage: or
>
> *(b)* before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,
>
> *the mortgagor may perform such covenant* or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.
>
> (Emphasis added)

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

End of Document

TAB 4

Court of Appeal for Saskatchewan
Docket: CACV3667

Citation: *Re Harmon International Industries Inc.*, 2020 SKCA 95

Date: 2020-08-06

Between:

Harmon International Industries Inc.

Applicant/Proposed Appellant (Respondent)

And

Hardie & Kelly Inc., receiver of Harmon International Industries Inc.

Respondent/Proposed Respondent (Applicant)

And

Pillar Capital Corp.

Interested Party (Initial Applicant)

And

The City of Saskatoon

Interested Party

Before:	Jackson J.A. (in Chambers)
Disposition:	Applications dismissed
On application from:	QB 1401 of 2019, Saskatoon
Application heard:	July 30, 2020
Counsel:	Ryan Pederson for the Applicant Jeffrey Lee, Q.C., and Paul Olfert for the Respondent (Hardie & Kelly) Mike Russell and Kevin Hoy for Pillar Capital Corp. Alan Rankine for the City of Saskatoon

Jackson J.A.

I. Introduction

[1] The issues in this application concern whether Harmon International Industries Inc. [Harmon] is entitled to pursue an appeal in the Court of Appeal from a sale process order made under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. In addition to addressing questions of fresh evidence and late filing, the issues involve the application of this Court's recent decisions in *Patel v Whiting*, 2020 SKCA 49 (in Chambers) [*Patel*], and *MNP Ltd. v Wilkes*, 2020 SKCA 66 [*Wilkes*].

[2] By way of introductory background, the assets of Harmon are currently the subject of a receivership order made under the *BIA*. As part of that ongoing process, the receiver, Hardie & Kelly Inc., obtained a sales process order [Order]. The Order authorizes the receiver to enter into two listing agreements with ICR Commercial Real Estate [ICR] to effect a sale of the Harmon assets and also sets a listing price. It is that Order that Harmon seeks to appeal.

[3] The Order was issued on June 5, 2020. On June 11, 2020, Harmon's former counsel served a notice of withdrawal of solicitor on the receiver and the senior secured creditor, Pillar Capital Corp. [secured creditor]. At the same time, Harmon's former counsel also served an application for leave to appeal and a draft notice of appeal on the same parties. These latter documents were, however, not filed with the Court of Appeal until July 9, 2020, thus placing Harmon beyond the 10-day time limit for appealing orders made under the rules established for the *BIA* (see s. 31 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368 [the *General Rules*]).

[4] In addition to its application for leave to appeal, Harmon applies

(a) to adduce fresh evidence in the form of an appraisal attesting to the value of its assets as being in excess of the listing price contained in the Order;

(b) to extend the time to appeal under s. 31 of the *General Rules*; and

(c) for an order imposing a stay of the Order pending the hearing of the appeal.

[5] In support of its position, in addition to filing a fresh evidence application, Harmon has filed two briefs of law. Harmon's first position is that, contrary to its application for leave to appeal, it has an appeal as of right under s. 193(c) of the *BIA* such that leave is not required, and that, in light of this, it should not be deprived of exercising that right by virtue of the confusion surrounding the serving and filing of the application for leave to appeal. In the alternative, Harmon submits that leave to appeal should be granted under s. 193(e) of the *BIA* as its appeal is sufficiently meritorious and sufficiently important to justify such orders and leave to extend the time to appeal should be granted for the same reasons. It did not pursue its application for a stay because if the appeal were permitted to proceed, an automatic stay would be imposed.

[6] Both the receiver and the secured party oppose all applications. They assert that (a) leave is required under s. 193(e) of the *BIA*, and (b) the appeal is neither sufficiently meritorious nor sufficiently important to the practice of law or to this specific receivership to warrant leave being granted. Indeed, they submit that the appeal is destined to fail, which, in their submissions, disposes of both the application for leave to appeal and the application to extend the time to appeal. They resist the application to adduce the fresh evidence as not meeting the *Palmer* criteria for the admission of same (*R v Palmer*, [1980] 1 SCR 759). Finally, as a means of demonstrating prejudice to the receivership and the secured party, the receiver has filed a second report indicating all that has been done to date to proceed with the sale of the property. The receiver indicated that if the appeal is permitted to proceed, it would be filing a subsequent application in order to lift the stay so as to allow the sales process to continue.

[7] The various applications and submissions give rise to these issues:

(a) Should the fresh evidence be received?

(b) Is Harmon required to apply for leave to appeal under s. 193(e) of the *BIA*, or does it have an appeal as of right under s. 193(c) of the *BIA*?

(c) If Harmon is required to apply for leave to appeal, should leave be granted?

(d) Should the time to appeal be extended?

[8] For the reasons that follow, I have concluded the following:

(a) the fresh evidence should not be admitted;

(b) Harmon requires leave to appeal as it does not have an appeal as of right; and

(c) leave to appeal should not be granted.

[9] In light of my conclusions in relation to (b) and (c), it would not be strictly necessary to consider whether to extend the time to appeal. In the interest of completeness, however, I have gone on to consider that question and have concluded that, in any event, I would not grant leave extending the time to appeal.

II. Background to the Order

[10] In July of 2018, Harmon obtained a credit facility to the maximum principal amount of $3,300,000 from the secured creditor. To secure the loan, Harmon granted a general security agreement over all present and after-acquired property, a collateral mortgage on certain real property, a general assignment of rents and a promissory note to the value of $3,300,000, plus interest and other amounts owing from time to time. The real property comprises an approximately 18,000 square foot commercial building [the 821 Building], and an approximately 62,000 square foot commercial building [Millar Avenue Building].

[11] Harmon defaulted on the loan. On September 30, 2019, the secured creditor applied to the Court of Queen's Bench for an order appointing Hardie and Kelly Inc. as the receiver of all of the assets, undertakings and properties of Harmon. The application was adjourned on several occasions. On January 17, 2020, Elson J., who had been the Queen's Bench judge supervising the Harmon receivership, granted the requested order. As of May 21, 2020, Harmon owed the secured creditor approximately $4,501,644, with interest accruing at approximately $3,616 per day.

[12] On May 29, 2020, the receiver served Harmon with an application proposing that the receiver enter into two listing agreements naming ICR as the listing agent. The first listing agreement sets the list price of the Millar Avenue Building at $3.8 million and the second listing agreement sets the list price of the 821 Building at $740,000. Harmon did not object to either property being sold but submitted that Coldwell Banker Signature Commercial [Coldwell

Banker] should be substituted as the listing agent rather than ICR and that the initial listing price for the Millar Avenue Building should be $4.95 million. It does not appear that any serious objection was made regarding the list price for the 821 Building.

[13] In support of a listing price of $4.95 million for the Millar Avenue Building, Harmon relied on these pieces of evidence:

(a) Colliers McClocklin Real Estate Corp. had previously listed it for $5,250,000 in 2018;

(b) Ken Kreutzwieser of ICR had initially valued it at $5,125,000;

(c) ICR had listed it for $5,295,000 in 2019;

(d) Coldwell Banker had offered to list the property for $4,950,000 in 2020; and

(e) William R. I. Brunsdon, a partner of the firm Brunsdon Lawrek & Associates, had appraised the Millar Avenue Building at $5,500,000 in 2017 [Brunsdon Appraisal].

[14] Justice Elson granted the Order in substantially the form requested, with ICR as the listing agent and fixing a list price of $3.8 million for the Millar Avenue Building and $740,000 for the 821 Building. In a brief oral fiat, Elson J. stated as follows:

> The principals of Harmon International Industries Inc. have been granted indulgences in the past, not only by the court but also by the patience of the receiver, since the receivership order was put in place.
>
> Those indulgences must now come to an end.

[15] As I have indicated, it is from this decision that Harmon seeks to appeal. In its amended form, the draft notice of appeal contains one ground of appeal only:

> (b) That the Learned Chambers Judge erred in fact and/or in law in failing to conclude that ICR Commercial Real Estate was intending to list the Harmon Lands, as described in the Sales Process Order, at a value significantly less than fair market value … .

III. Fresh Evidence

A. Nature of the evidence and positions of the parties

[16] Harmon's proposed fresh evidence is composed of two affidavits. The first affidavit is of Calvin Moneo, who is a director, officer and shareholder of Harmon. He states that, prior to being served with the receiver's notice of application on May 29, 2020, he had no knowledge that the suggested listing price would be so low. In his opinion, there had been insufficient time between the date of service and the date of the hearing for him to obtain an updated appraisal. He states further that almost immediately after the Order issued on June 5, 2020, i.e., on June 8, 2020, he contacted Mr. Brunsdon to order an updated appraisal of Harmon's real property, including the Millar Avenue Building.

[17] The second affidavit is from Mr. Brunsdon. He indicates he conducted an inspection of the Millar Avenue Building and the 821 Building. He determined that the former had a market value of $6 million and the latter had a market value of $930,000 both as of June 15, 2020. He attached his appraisal as an exhibit to his affidavit.

[18] Harmon submits that its proposed fresh evidence meets the *Palmer* test for the admission of fresh evidence as recently stated in *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9 at para 19, [2019] 2 WWR 452 [*Risseeuw*]. In *Risseeuw*, this Court affirmed the four-part test for accepting fresh evidence: (a) the evidence will not be admitted, if by due diligence it could have been admitted at trial; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the action; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[19] The receiver opposes the fresh evidence application. The receiver submits that, on this appeal from an interlocutory order, Court of Appeal Chambers is not the place to assess evidence of this nature, saying, if it is truly fresh evidence, the proper place to assess its cogency is the Court of Queen's Bench. If this evidence were placed before that Court, the receiver states that it would seek to cross-examine Mr. Brunsdon. The receiver submits further that this updated

appraisal is hardly more current than some of the other evidence that Elson J. rejected and could not have been expected to have affected the result in any event.

[20] The secured party takes the view that the four-part test for the admission of fresh evidence has not been met and suggests that I should be highly sceptical of Mr. Moneo's statement that he was taken by surprise given all that had transpired since the appointment of the receiver in January of 2020. The secured party points out that if Harmon had been taken by surprise, it must be noted that its counsel did not seek an adjournment of the receiver's application to obtain the Order.

B. Analysis

[21] While Harmon's application is framed as an application to adduce fresh evidence, this Court has held that a single judge of the Court does not have the authority "to grant leave pertaining to the reception of further evidence" (*Turbo Resources Ltd v Gibson* (1987), 60 Sask R 221 (CA) at para 19 [*Turbo*]). As the Court indicated in *Turbo*, and as Rule 59 of *The Court of Appeal Rules* provides, a fresh evidence application must be made in the context of an appeal to the Court itself. For a recent statement of this principle, see *C.L.B. v J.A.B.*, 2016 SKCA 18 at para 24, 476 Sask R 1, and *Haug v Dorchester Institution*, 2016 SKCA 55 at para 3, [2016] 10 WWR 484.

[22] In light of this, I have treated the application to adduce this evidence as "material upon which the applicant relies to support" Harmon's application that leave to appeal should be granted and its application to extend the time to appeal (see Rule 48(1)(b) of *The Court of Appeal Rules*). But, even with this approach, I still have some difficulty with this proposed fresh evidence. This is so because, even if I agreed to accept this evidence for the purposes of this Chambers application, and, as a result of it, I were to grant leave to appeal, there is no guarantee that the panel of the Court ultimately hearing the appeal would admit the evidence on the appeal proper. In other words, my acceptance of the fresh evidence would not bind the Court in any event.

[23] If this evidence were taken *on its own*, and at face value, the receiver would have granted an improvident listing agreement, but on what basis can I, as the Chambers judge, assess this

untested evidence? Confronted by this issue, if the Court were satisfied with the credibility and reliability of the evidence and Harmon's due diligence, the Court would have the authority to remit the matter to Elson J. to assess the evidence. In my view, I, as a single judge, do not have that authority as I would then be disposing of the appeal. It seems to me that the better place to assess this evidence is the Court of Queen's Bench.

[24] All parties agree that the Order is interlocutory. A further order of the Court of Queen's Bench will be needed to confirm any sale of Harmon's properties. Further, I also note that s. 187(5) of the *BIA* provides that "[e]very court may review, rescind or vary any order made by it under its bankruptcy jurisdiction". *Court* in s. 187(5) means a court that has been vested with jurisdiction by the *BIA* (i.e., by s. 2 and s. 183(1) working in tandem), which means the Court of Queen's Bench in this province (see s. 183(1)(f)). Subsection 187(5) permits a judge to deal with continuing matters if new evidence comes to light. The court's discretion must be exercised judicially, having regard for a wide range of factors, including if it is just and expedient in the control of its own process: see, generally, L.W. Houlden, C.H. Morawetz and J. Sarra, "Power of Court to Review, Rescind or Vary an Order", *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2012-07) 4th ed, vol 3 (Toronto: Thomson Reuters, 2009) at I§24 [*Houlden, Morawetz & Sarra*].

[25] I would not want to be taken as saying there can be no instance when a Chambers judge hearing an application under s. 193 of the *BIA* or s. 31 of the *General Rules* could receive such material under Rule 48(1)(b). However, in this case, the proper place to assess this new evidence is the Court of Queen's Bench, either on the basis of a s. 187(5) application or as part of the application to approve any sale of the property that might ensue.

[26] Thus, I would dismiss the application to adduce fresh evidence and have not considered it for any other purpose.

IV. Leave to Appeal is Required to Advance the Appeal

A. Introduction to the leave issue

[27] The primary provisions under consideration in this application are s. 193(c) and (e) of the *BIA*. They read as follows:

Appeals **Court of Appeal** **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: **(c)** if the property involved in the appeal exceeds in value ten thousand dollars; **(e)** in any other case by leave of a judge of the Court of Appeal. RS, 1985, c B-3, s 193 1992, c 27, s 68.	**Appels** **Cour d'appel** **193** Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants : **c)** les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars; **e)** dans tout autre cas, avec la permission d'un juge de la Cour d'appel. LR (1985), ch B-3, art 193 1992, ch 27, art 68.

[28] Harmon initially applied for leave to appeal under s. 193(e) of the *BIA*. However, when Harmon's application was heard, its first position was that it had an appeal as of right under s. 193(c) such that its application for leave to appeal should be dismissed. But, if I determined that Harmon did not have an appeal as of right, it was submitted that leave to appeal should be granted. In describing the process in this manner, Harmon relied on *Patel*. In *Patel*, Leurer J.A. held that where an application for leave to appeal is made when leave to appeal is not required, the proper procedure is to dismiss the application. If the party applying for leave is out of time, the next step is to consider whether leave to file late should be granted. Thus, following *Patel*, I will determine whether Harmon has a right of appeal as a preliminary issue.

[29] In asserting a right of appeal under s. 193(c) of the *BIA*, Harmon relies on *Wilkes*. In *Wilkes*, this Court, on an application to strike an appeal on the basis that leave to appeal was required and had not been obtained, opted to follow a line of authority stemming from *Orpen v Roberts*, [1925] 1 SCR 364 [*Orpen*], and *Fallis v United Fuel Investments Limited*, [1962] SCR 771 [*Fallis*], i.e., the *Orpen–Fallis* line.

[30] In *Wilkes*, I wrote for the Court and drew these principles from the *Orpen–Fallis* line:

[61] While it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*, courts should not start with that question. The primary task is to answer the question raised by s. 193(c) and determine whether the property involved in the appeal exceeds $10,000. Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake …" (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

[62] In answering any of those questions, an appeal court may determine that there is no property involved in the appeal exceeding in value $10,000 but rather that the question in issue is procedural only. But merely because the question in issue is procedural, does not necessarily mean there is not property involved in the appeal that exceeds in value $10,000. An issue can be procedural while also having more than $10,000 at stake. In examining this principle further, it is helpful to look again at the three leading cases that put forward the proposition that the property involved in the appeal did not exceed $10,000 because the question in issue was procedural:

> (a) *Coast* [[1926] 2 WWR 536 (BCCA)] – the issue was whether the Chambers judge had erred by permitting the bringing of an action rather than requiring the matter to be heard in Chambers;
>
> (b) *Dominion Foundry* [(1965), 52 DLR (2d) 79 (Man CA)] – the issue pertained to the manner of sale; and
>
> (c) *Pine Tree* [2013 ONCA 282] – the issue was whether a receiver should have been appointed or not.

It should be noted that the reported decisions do not show that the proponent of a right of appeal in these cases put forward evidence to show that the procedural issue in question had resulted in or could result in a loss.

[63] It is one thing to say there is no appeal as of right under s. 193(c) from an order that directs a receiver as to the *manner* of sale because the "property involved in the appeal [does not exceed] in value ten thousand dollars" where no claim of loss is alleged. Classifying such an order as procedural appears to have no consequence because the complaint is about the *choice* of procedure that the trustee or receiver made rather than about the value of the property (*Dominion Foundry*). It is quite another matter to say there is no *right* of appeal under s. 193(c) from any order that is procedural in nature when there is a claim of loss in excess of $10,000. In short, courts must be careful not to extrapolate from decided cases to reduce every choice that a trustee or a receiver makes to a question of procedure so as to deny a proposed appellant a right of appeal. The issue in s. 193(c) is whether based on the evidence there is at least $10,000 at stake, not whether the order is procedural.

[64] According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by

> s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction.
>
> (Italic emphasis in original, underline emphasis added)

B. Analysis

[31] In the receiver's Chambers application before Elson J., Harmon submitted that the Millar Avenue Building should have been listed at $4,950,000 rather than $3,800,000. The issue is whether the difference between these two numbers represents a claim of loss sufficient to ground a right of appeal in s. 193(c) of the *BIA*.

[32] As the *Orpen–Fallis* line of authority indicates, the question is, "What is the loss which the granting or refusing of the right claimed will entail?" In answering this question, recovery of the claimed amount need not "be guaranteed or immediate", but the claim must be "sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal" (*Wilkes* at para 64). As I review Harmon's claim, I am not satisfied that Harmon's proposed claim of loss is sufficiently grounded in the evidence.

[33] It must be understood that Harmon does not contest that the Millar Avenue Building must be sold, and that it is going to be sold through the receivership process. It also must be understood that any sale of the property must be confirmed by further order of the Court of Queen's Bench. The interlocutory nature of the Order is made clear by its paragraph 2, which provides as follows:

> 2. Any proposed sale of any Harmon Lands Property by the Receiver which is identified as a result of the Sale Process shall be conditional upon the Receiver obtaining a further Order of this Court approving such proposed sale and vesting title to such Harmon Lands Property in the name of the proposed purchaser.

[34] Thus, what the Court has before it is an Order that authorizes a *list price* of $3.8 million for the Millar Avenue Building. It does not propose a sale price of $3.8 million. All that the Order does is establish a process for the sale of the property. Any proposed sale must still be confirmed.

[35] At this point, the claim of loss is without any foundation at all. It is, as such, entirely speculative. It assumes that the listing agent will not market the property to its fullest potential or that the receiver will place an improvident sale before the Court of Queen's Bench to be confirmed and the Court will confirm it. It is possible that Harmon will apply to Elson J. under s. 185(7) of the *BIA* or wait until it is determined that the property is proposed to be sold for less than what Harmon believes it is worth and place the Brunsdon Appraisal before Elson J. at that time. It is also possible that Harmon will obtain other financing so as to permit it to buy the property at the list price or the property will sell for an amount acceptable to Harmon. In my view, the Order does not directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss at this time. It concerns a matter of procedure only. It is merely an order as to *manner of sale*, as was the case in *Dominion Foundry Co. (Re)* (1965), 52 DLR (2d) 79 (Man CA). No value is in jeopardy, and no party can claim a loss as a result. In my view, the property involved in the proposed appeal does not exceed in value $10,000 as those words are used in s. 193(c) of the *BIA*. Thus, I conclude it was necessary for *Harmon* to apply for leave to appeal.

V. Leave to Appeal should not be Granted

[36] That brings me to Harmon's initial application for leave to appeal under s. 193(c). *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121 [*Rothmans*], sets the test for leave to appeal as follows:

> [6] The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier* v. *University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A., *per* Tallis J.A. in chambers). The governing criteria may be reduced to two – each of which features a subset of considerations – provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of *merit* and *importance*, as follows:
>
> > *First*: Is the proposed appeal of *sufficient merit* to warrant the attention of the Court of Appeal?
> >
> > - Is it prima facie frivolous or vexatious?
> > - Is it prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?

> - Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> - Is it apt to add unduly or disproportionately to the cost of the proceedings?
>
> *Second*: Is the proposed appeal of *sufficient importance* to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
>
> - does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
> - does it raise a new or controversial or unusual issue of practice?
> - does it raise a new or uncertain or unsettled point of law?
> - does it transcend the particular in its implications?
>
> (Emphasis in original)

[37] In *Paulsen & Son Excavating Ltd v Royal Bank*, 2012 SKCA 101 at para 12, 399 Sask R 283, Richards J.A. (as he then was) confirmed that the test for leave to appeal, set out in *Rothmans*, applies with equal force to applications for leave to appeal in bankruptcy and insolvency matters.

[38] Harmon's appeal, as amplified by its submissions on this application, can be summarized as an assertion of two points:

(a) the Chambers judge erred by admitting as evidence an appraisal by Suncorp Valuations [Suncorp Appraisal]; and

(b) the Chambers judge erred by weighing the evidence as he did so as to set a list price of $3.8 million.

[39] The first question is a question of law. Harmon submits that the Chambers judge should have rejected the Suncorp Appraisal because it was exhibited to the affidavit of Kevin Hoy, who is counsel to the secured creditor. According to this argument, the Chambers judge should have applied the authorities, prohibiting the filing of evidence on substantive or contentious matters by way of a lawyer's affidavit. Harmon relies on the following: *Crouser v 493485 Alberta Ltd*., [1996] AJ No 967 (QL) (Alta QB); *Owen v White Bear Lake Development Corp.*, [1997] 7 WWR 296 (Sask QB) at para 7; and *Pavao v Ferreira*, 2018 ONSC 1573, 36 E.T.R. (4th) 307. The problem with this argument is that no objection was taken to the admission of this evidence

before the Chambers judge. In my view, that is the complete answer to this aspect of the appeal, making it destined to fail.

[40] With respect to the second aspect of the appeal, in my view, it too is destined to fail. I say this because of the nature of the matter at stake and the discretionary nature of the order. Bankruptcy and insolvency matters stand apart from other forms of secured debt collection and are governed by their own standard of review, which accords considerable deference to the Chambers judge. In *9354-9186 Québec inc. v Callidus Capital Corp*., 2020 SCC 10, the Supreme Court commented upon the standard of review to apply to the exercise of discretion by a supervising judge in proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]:

> [53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).
>
> [54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:
>
> > [O]ne of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. … *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[41] While this was said in the context of the *CCAA*, the same principle applies when an appellate court is reviewing the exercise of discretion by a supervising judge in the bankruptcy context. According to the current practice of the Court of Queen's Bench, one judge has carriage of receiverships under the *BIA*.

[42] Thus, the issue becomes whether Harmon's claim that the Chambers judge erred in principle or exercised his discretion unreasonably when he decided to grant the Order setting the list price of the Millar Avenue Property at $3.8 million rather than the amount suggested by Harmon, i.e., $4.95 million. This is a clear discretionary decision. It is a decision made by a judge who has had the carriage of this receivership from the outset and who has heard two previous applications. It is also, as I have indicated, an interlocutory decision that may or may not have an impact on the final sale price. The application of the standard of review to this decision, made in this context, creates a significant hurdle for Harmon that would not be surmounted if this appeal were permitted to proceed. In my view, such an appeal is destined to fail. It is for these reasons that I have concluded that leave to appeal should not be granted.

VI. Leave to File Late should not be Granted

[43] The applicable provisions from the *General Rules* are as follows:

Appeal to Court of Appeal	**Appels devant la cour d'appel**
31(1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.	**31(1)** Un appel est formé devant une cour d'appel visée au paragraphe 183(2) de la Loi par le dépôt d'un avis d'appel au bureau du registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel, dans les 10 jours qui suivent le jour de l'ordonnance ou de la décision, ou dans tel autre délai fixé par un juge de la cour d'appel.
(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.	**(2)** En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.
SOR/98-240, s 1 SOR/2007-61, s 63(E)	DORS/98-240, art 1DORS/2007-61, art 63(A)

[44] Without an order from a judge of the Court extending the time to appeal under s. 31(1) of the *General Rules*, the Court hearing an appeal under s. 193 of the *BIA* has no jurisdiction to hear a late-filed appeal. In this case, the Order issued on June 5, 2020. Harmon served its notice of appeal on June 11, 2020, but did not file it until July 9, 2020. Thus, Harmon was 24 days late in filing the motion and, without an order extending the time to appeal, there is no appeal. Harmon applied under s. 31(1) of the *General Rules* to extend the time for filing.

[45] As previously indicated, it would not be necessary to address this issue in light of my conclusion in relation to the leave issue, but, if I am in error as to whether Harmon has an appeal as of right or whether leave should be granted, I would, nonetheless, dismiss Harmon's application for an extension of the time to file late.

[46] An applicant seeking to extend the time to appeal must meet a more stringent test than the *Rothmans* test. Often an appeal is neither frivolous nor vexatious, but it is not possible to say that it is destined to fail. However, when an applicant for leave must seek an order extending the time to appeal, an appellate Chambers judge is permitted to delve more deeply into the merits and determine whether the appeal is arguable (see *Wilkes* at para 75 and *Houlden, Morawetz & Sarra*, generally, at vol 3, M§24). However, in this case, I am satisfied that the appeal is destined to fail, which conclusion also satisfies the question as to whether leave should be granted to file late under s. 31(1) of the *General Rules*. An appeal that is destined to fail cannot be considered to be an arguable appeal.

[47] As with all applications, the governing principle in determining whether to grant an extension of time is whether the justice of the case requires that an order should be made (see, generally, *Houlden, Morawetz & Sarra* at M-24 and the reference to *Re Braich*, 2007 BCCA 641 at para 10, 250 BCAC 53). However, it would avail no one if leave to file late were granted in relation to an appeal that is not arguable.

VII. Costs

[48] At one point during these proceedings, when Harmon was unrepresented by counsel, the receiver applied for the appointment of an *amicus curiae* for Harmon and filed a brief by a lawyer from another law firm. When Harmon successfully obtained counsel, I dismissed the receiver's *amicus* application with brief oral reasons. I made no order as to costs.

[49] That brings me to the question of the costs of the applications before me. As the above reasons indicate, I have dismissed the following applications:

(a) Harmon's application to adduce fresh evidence;

(b) Harmon's application for a determination that it has an appeal as of right;

(c) Harmon's application for leave to appeal; and

(d) Harmon's application to file late.

[50] It seems to me, with respect to the above four applications, that the receiver is entitled to its fees according to the receivership order and therefore costs should not be awarded to it on these applications. Similarly, while the secured creditor was represented on this appeal, and made oral submissions through its counsel, it is not clear to me that the secured creditor is entitled to any costs over and above what its credit facility allows. If the secured creditor is of the contrary view, it may make written submissions to me.

VIII. Conclusion

[51] Order to issue in accordance with these reasons.

"Jackson J.A."

Jackson J.A.

TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization, 2018 ONCA 713
DATE: 20180831
DOCKET: C65109

Hoy A.C.J.O., van Rensburg and Pardu JJ.A.

BETWEEN

Reciprocal Opportunities Incorporated

Plaintiff (Respondent)

and

Sikh Lehar International Organization, Narinderjit Singh Mattu, Rajwant Kaur Nijjar, Manjit Singh Mangat, Kamaljit Kaur Mangat, Suchet Singh Saini, Kamaljit Kaur Saini, Gurdev Singh Gill, Kanwaljit Kaur Gill, Inderjeet Singh Saini, Jatinder Kaur Saini, Harjeet Singh Thabal, Jaswinder Thabal, Hardeep Singh Dhoot, Raminder Dhoot, Daljit Singh Jammu, Parnpal Jammu, Harkanwal Singh, Kanwaljit Singh, Ramandeep Singh Athwal, Harnish Mangat, Sikanderjit Singh Dhaliwal, Sukhinder Dhaliwal, Gurdish Singh Mangat, Satinderjit Kaur Mangat and Guru Nanak Property Management Ltd.

Defendants (Respondent)

Paul J. Pape, for the appellant Sukhinder Sandhu

Dennis Touesnard, for the receiver JP Graci & Associates Ltd.

Ted R. Laan, for the respondent Sikh Lehar International Organization

Jonathan Piccin, for the respondent Community Trust Company and 2283435 Ontario Inc.

Heard: July 18, 2018

On appeal from the order of Justice R.J. Harper of the Superior Court of Justice, dated February 28, 2018.

Hoy A.C.J.O.:

[1] The appellant, Sukhinder Sandhu, appeals the February 28, 2018 order of the motion judge, declining to approve the sale by a court-appointed receiver of the property known as 79 Bramsteele Road, Brampton, Ontario (the "Property") to him.

[2] For the following reasons, I would allow the appeal, set aside the order of the motion judge, and direct a new hearing.

Background

[3] Sikh Lehar International Organization ("SLIO") was established as a religious, private charitable organization to buy the Property and establish, manage and operate a Gurdwara (a Sikh temple). The Gurdwara is a tenant, but not the sole tenant, of the Property.

[4] By 2014, SLIO was insolvent.

[5] The Property has been the subject of litigation. The trustees of SLIO all wanted to sell the Property, and purported to sell it to different purchasers. Disagreements about selling the Property led to the departure of some of the trustees and litigation about the amounts owing to the departing trustees: see *Sikh Lehar International Organization v. Saini*, 2018 ONSC 2839. It also gave rise to litigation between SLIO, its two remaining trustees, Manjit Mangat and Harkanwal Singh, and the appellant, who had sought to purchase the Property:

see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680.[1] Further, Canadian Convention Centre Inc. ("CCC"), a tenant of the Property, is seeking damages for alleged breaches of its lease in the amount of $2 million.[2]

[6] On September 1, 2017, at the instance of the first mortgagee of the Property,[3] Reciprocal Opportunities Incorporated ("ROI"), the motion judge granted an order appointing J.P. Graci and Associates Ltd. (the "Receiver") as receiver of all the assets, undertakings and property of SLIO. The order authorized the Receiver to sell the Property, subject to the approval of the court.

[7] The Receiver proceeded to have the Property appraised on September 15, 2017 and contacted persons who had expressed an interest in purchasing the Property.

[8] However, in an email on October 4, 2017, SLIO advised the Receiver that it had a firm commitment from a lender to take an assignment of "your mortgage" (presumably referring to the first mortgage), with the transaction to close in the next two weeks. The Receiver responded by email on October 5, 2017. It advised that the payout on the first mortgage was $4,092,745.31, the per diem rate was $1,114.51, and the Receiver's fees and legal fees were $80,000. The

[1] In that action, the trial judge found that neither party was ready, willing and able to close the transaction, as at the contemplated closing date, and ordered SLIO and its two remaining trustees to pay a total of $2,206,729.07 to the appellant. An appeal of the decision is pending to this court.
[2] CCC's action has been stayed by the receivership order in these proceedings.
[3] While at the instance of the first mortgagee, ROI, the appointment ultimately proceeded with the consent of SLIO and CCC.

Receiver further advised that if the mortgage amount and outstanding expenses were paid, it would apply to the court to approve the assignment of the mortgage and to be discharged. The Receiver also stated it anticipated having the information necessary to begin marketing the Property by November 1, 2017. The Receiver copied its counsel and SLIO's real estate counsel with its response, and separately forwarded its response (together with SLIO's October 4, 2017 email) to, among others, counsel for the appellant.

[9] There is no indication in the record that SLIO – or the proposed assignee – was in funds and prepared to close within two weeks of its October 4, 2017 email to the Receiver.

[10] The Receiver retained the services of a commercial real estate broker, who listed the Property for sale and put it on MLS as of October 31, 2017. The real estate broker also opined that the current value of the Property was significantly less than the appraised value, as the appraisal obtained by the Receiver assumed that the Property's roof structures were in good working order, but in fact a significant portion of the roof required immediate replacement.

[11] By letter dated October 31, 2017 to real estate counsel for SLIO, counsel for the Receiver confirmed that "provided [SLIO] buys out the first mortgage on the property on or before November 14, 2017, then the Receiver will move for an Order having itself discharged." He advised that, as of that date, the payout of

the first mortgage was in the amount of $4,121,722.50, with a per diem rate of $1,114.51. He further advised that provided payment was made before November 14, 2017, the Receiver's fees and legal fees would be capped at $80,000 plus HST.

[12] The Receiver received three offers to purchase the Property. It entered into an agreement (the "Agreement") to sell the Property to the appellant on November 2, 2017.[4]

[13] Under the Agreement, the appellant agrees to purchase the Property on an "as is where is" basis, and to complete the transaction 15 business days after the Receiver obtains an approval and vesting order. With the exception of the requirement for an approval and vesting order, the appellant's obligation to complete the purchase is essentially unconditional. The Agreement provides for a purchase price that exceeds the current value of the Property as assessed by the commercial real estate broker retained by the Receiver, and that approximates the appraised value of the Property.

[14] In an affidavit sworn December 22, 2017, Mr. Mangat, one of the remaining trustees of SLIO, deposed that the appellant was "aware of the

[4] The Receiver received offers from: (1) the appellant; (2) 2207190 Ontario Inc.; and (3) Sukhmeet S. Sandhu. 2207190 Ontario Inc. is controlled by the appellant and is a judgment creditor in the action relating to the appellant's prior attempt to purchase the Property: see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680. In his affidavit dated December 22, 2017, Mr. Mangat deposes that Sukhmeet S. Sandhu is the appellant's son.

Receiver's intention to assign the first mortgage upon payment of the amounts owing." Mr. Mangat was not cross-examined on his affidavit.

[15] The "buy out" of the first mortgage did not proceed by November 14, 2017.

[16] In an email to the Receiver on November 23, 2017, real estate counsel for SLIO confirmed that SLIO had secured financing from a lender that was prepared to pay out all amounts owed to the Receiver in exchange for an assignment of the first mortgage. He advised that, among other items, the lender required a corporate resolution of ROI authorizing the assignment, the consent of the Receiver to the discharge of the certificate of pending litigation ("CPL") registered on title to the Property by the appellant, and the Receiver's undertaking to obtain a court order discharging the receivership upon payment of all amounts owing, in order to complete the assignment.

[17] In an email later the same day, counsel for the Receiver clarified that while the Receiver could undertake to move for an order discharging the Receiver, the court would have discretion to grant the relief. He asked that counsel for the lender confirm that the lender was in funds. He indicated that the Receiver and its counsel could confirm their fees, and the Receiver could prepare a summary of its receipts and disbursements. He stated he trusted that the information he had previously provided regarding the amount owing on the first mortgage was satisfactory. He inquired as to the closing date.

[18] In an email from counsel for the Receiver to real estate counsel for SLIO dated November 24, 2017, counsel for the Receiver seems to suggest the proposed lender would have to work out the discharge of the CPL and, if it could not, would have to decide whether or not to take the assignment without the CPL being discharged.[5] Counsel for the Receiver cautioned that, "[i]f we cannot move forward with your proposal, I will be moving on January 5, 2018 for an order approving a sale agreement signed by the Receiver."

[19] In an email later that day to SLIO's litigation counsel, counsel for the Receiver indicated that, "[i]f your client can get financing and the CPL issue can be dealt with, we will deal with you as per [SLIO's real estate counsel's] original email to the receiver." (This presumably refers to the November 23, 2017 email, which is the earliest email in the record from SLIO's real estate counsel). He cautioned, "[t]hat said, we will keep moving towards the sale of the property and I intend to bring the motion on January 5, 2018 for approval if the mortgage is not assigned beforehand."

[20] In an email on November 29, 2017 to both SLIO's real estate and litigation counsel, counsel for the Receiver characterized their prior exchanges as "without prejudice settlement discussions." He indicated that, as an officer of the court, the Receiver must have its actions approved by the court. He explained that the

[5] In his affidavit sworn December 21, 2017, real estate counsel to SLIO advised that the CPL was discharged before the hearing date on the motion below.

Receiver could not assign ROI's mortgage, but SLIO has a right to redeem the mortgage.

[21] He further outlined the Receiver's position on the proposed assignment of the first mortgage:

> As you also know, prior to receipt of [the November 23 proposal] the receiver signed an agreement to sell the property to a third party. A motion will be served returnable January 5, 2017 [sic] for approval of that sale.
>
> If your client wishes to redeem the mortgage and have the receiver discharged, it can bring a motion for [sic] in my action on notice to all affected parties for an order allowing it to redeem, and, on redemption, an order that the receiver be discharged. The Receiver will consent to leave to bring the motion and will not oppose that relief if sought.

[22] In an email to counsel for the Receiver on November 30, 2017, litigation counsel for SLIO asked who ROI's representative was for the purpose of assigning the first mortgage.

[23] Counsel for the Receiver provided the identity of ROI's counsel in a responding email on the same date. ROI's counsel is with the same law firm as Receiver's counsel.

[24] By email dated December 5, 2017, counsel for the Receiver provided his fees and those of the Receiver to date to real estate counsel for SLIO.

[25] Real estate counsel for SLIO contacted counsel for ROI by email dated December 5, 2017. He advised of the documents the proposed assignee was requesting from ROI, including an accounting of all monies owed to ROI under the mortgage. He asked counsel for ROI to confirm that ROI was prepared to deliver the assignment and the other requested documents. He stated that "[t]he solicitor for the proposed assignor [sic] confirms he is in funds."

[26] The First Report of the Receiver is dated December 6, 2017. The Receiver prepared it in support of its motion for court approval of the Agreement and sale of the Property. The Report details the sales process the Receiver undertook with respect to the Property, leading it to seek court approval of the Agreement. The Report makes no reference to SLIO's attempts to arrange an assignment of the first mortgage held by ROI.

[27] In his affidavit of December 6, 2017, real estate counsel for SLIO deposed that SLIO was concerned that if counsel for ROI did not respond quickly to the requisitions referred to in his email of December 5, 2017, the Property would be lost to a third-party purchaser in January 2018.

[28] In his supplementary affidavit of December 21, 2017, filed in response to the Receiver's motion for approval of the Agreement, real estate counsel for SLIO further deposed that:

> - On December 8, 2017, counsel for ROI delivered a draft mortgage statement to counsel for SLIO.

- He advised counsel for ROI that counsel for the proposed lender took the position that the default interest rate charged by ROI was contrary to s. 8 of the *Interest Act*, R.S.C 1985, c. I-15 and the proposed lender would not pay it. Counsel for ROI suggested that some amount in excess of the rate charged on the principal balance of the mortgage may have been the result of extension agreements entered into by SLIO and ROI.

- On December 19, 2017, counsel for ROI delivered various documents setting out revised amounts required for the payout of the first mortgage. These amounts differed from those set out in the original Notice of Sale, dated May 17, 2017, and from other amounts provided by ROI in the interim.

- The delay in effecting the assignment of the first mortgage was entirely the responsibility of ROI because of its failure to provide appropriate calculations of the amount owing.

- The requisitions required by the proposed assignee from the Receiver or ROI had otherwise been substantially complied with.

[29] In his affidavit sworn December 22, 2017, Mr. Mangat deposed that the emails of October 5, November 23 and 24, 2017 and the letter of October 31, 2017, referred to above, led SLIO to believe that "upon payment of the proper amounts owing under the First Mortgage, the Receiver would arrange the assignment of the First Mortgage. As a result [SLIO] took steps to secure the proper financing of that assignment and incurred substantial costs in the process." Mr. Mangat then detailed borrowings from five individuals totaling approximately $396,268.87 incurred since the beginning of September 2017,

which he says are or "will be" debts of SLIO. He deposed that of those borrowings:

> - $207,000 was paid to the broker who had been trying to arrange financing for SLIO since September 2017, in part payment of his brokerage fee;
>
> - $24,518 was paid to the second mortgagee on October 14, 2017 to bring that mortgage into good standing, as required by the proposed assignee of the first mortgage;[6]
>
> - $ 91,617.36 was paid to the City of Brampton on November 24, 2017 on account of tax arrears, again a condition of the proposed assignee of the first mortgage; and
>
> - $73,133.51 was paid on or after November 21, 2017 to obtain the discharge of a CRA lien for HST arrears, again a condition of the proposed assignee of the first mortgage.

[30] Mr. Mangat further deposed that SLIO was unaware of the Agreement until the Receiver delivered its motion materials. The Receiver's motion materials are dated December 6, 2017.

[31] Neither Mr. Mangat nor SLIO's real estate counsel deposed that all the proposed assignee's conditions of closing had been satisfied and that, but for the determination of the payout amount, the proposed assignee was prepared to close the assignment transaction.

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[6] Counsel for the second mortgagee (who is also counsel for the proposed assignee of the first mortgage) advised at the hearing of the appeal that, as of that date, the second mortgage was in arrears.

The January 5, 2018 attendance before the motion judge

[32] In its notice of motion dated December 6, 2017, filed in connection with the January 5, 2018 attendance before the motion judge, the Receiver sought an order approving the sale of the Property to the appellant.

[33] SLIO opposed the Receiver's motion. In response, SLIO brought its own motion seeking: (1) an order requiring ROI to assign the first mortgage, upon payment of all amounts owed to the Receiver or ROI; and (2) an order discharging the Receiver upon payment of such amounts.

[34] In its factum filed on the motion, the Receiver indicated that it was prepared to be discharged – but only on the condition that the court be satisfied that it had discharged its duties, and on approval of the activities and accounts of the Receiver and its counsel. It stated that it entered into the Agreement prior to the "conditional request to take an assignment of the first mortgage of ROI." It noted that the effect of the discharge sought by SLIO, as a condition of the assignment of the first mortgage, was that the sale transaction would not be approved and that the Receiver would seek, as part of the discharge order, a release from any potential liability to the appellant. The Receiver noted that the appellant and CCC opposed its discharge. In the event that the court was unwilling to exercise its discretion to discharge the Receiver, it sought an order approving the sale of the Property to the appellant.

[35] The appellant appeared and filed a factum. Among other arguments, the appellant submitted that SLIO had not said how it would make future payments to its mortgagees or creditors if the assignment transaction proceeded, or even that it would. The appellant argued that the sale to him should be approved and a vesting order issued.

[36] CCC filed a responding motion record opposing the form of vesting order sought because that order purported to vest the Property in the appellant free and clear of all encumbrances, including CCC's lease.

The motion judge's reasons

[37] The motion judge declined to approve the sale of the Property to the appellant and, instead, established a process that would permit the assignment of the first mortgage: *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization et al.*, 2018 ONSC 227.

[38] In his reasons, the motion judge briefly reviewed SLIO's financial position. He noted that the first, second and third mortgages on the Property remained in default; a construction lien was registered in the amount of $406,500; the Ministry of Revenue had a tax lien in the amount of $108,156; the City of Brantford [sic] was in a position to put the Property up for sale for tax arrears in the amount of $433,818.59; CCC was seeking damages in the amount of $2 million for breach

of its lease; there was a judgment in favour of the appellant in the amount of $2,206,729.01; and that there were numerous other debts.

[39] At para. 18, the motion judge instructed himself on the four duties which *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.) directs a court must perform when deciding whether to approve a sale of a property by a receiver:

> 1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. The court should consider the interests of all parties.
>
> 3. The court should consider the efficacy and integrity of the process by which the offers are obtained.
>
> 4. The court should consider whether there has been unfairness in the working out of the process.

[40] The motion judge found that the Receiver took reasonable steps to obtain the best price for the Property. The motion judge noted, at para. 22, that interest was accruing rapidly on both the first mortgage and SLIO's other debts:

> The [first] mortgage has been in arrears since September 2, 2016. There are substantial other debts that have also been in arrears for lengthy periods of time. Interest on the first mortgage and other debts has been accruing and escalating at a rate that the receiver must consider when acting in a manner that is efficient and fair to all interested parties.

[41] Then, at para. 23, the motion judge stated he would not approve the sale, explaining: “[e]xcept for the conduct of the Receiver/Plaintiff relative to the Defendant SLIO, I would have approved the sale.”

[42] At para. 26, the motion judge found that central to the communications from October 5, 2017 to the end of December 2017 between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee “were inconsistent representations of what the pay-out amount would be in order to effect the proposed assignment of the first mortgage.”

[43] He found, at para. 30:

> It is clear that as of the end of December, 2017, the Receiver/Plaintiff was prepared to accept payment of the outstanding balance of the first mortgage and assign the mortgage to a third party. The only thing that had not been established was the proper payout.

[44] He concluded, at para. 32:

> Having regard to the final consideration of *Royal Bank of Canada v. Soundair Corp*, I find the manner in which the process was conducted resulted in an unfairness to the Defendant SLIO and the prospective assignee of the first mortgage.

[45] In his order dated February 28, 2018, the motion judge ordered that the proposed sale was not approved. He ordered ROI and the Receiver to provide a statement that they intend to rely on for purposes of the payout of the first mortgage and adjourned the matter to a further hearing before him, in order to fix

the payout and set the terms of closing the payout and assignment of the first mortgage. He specifically ordered that the Receiver was not discharged.

The parties' submissions on appeal

(a) The appellant's submissions

[46] The appellant does not challenge the motion judge's finding that the manner in which the process was conducted resulted in an unfairness to SLIO and the prospective assignee of the first mortgage. Rather, the appellant argues that the motion judge provided insufficient reasons because he did not explain why the unfairness to SLIO and the prospective assignee of the first mortgage should trump the unfairness to the appellant of not having the sale approved.

[47] Further, the appellant argues that the motion judge erred in his application of the second *Soundair* duty by failing to consider the interests of creditors and the interests of the appellant, *qua* purchaser. He submits that this court should set aside the order of the motion judge and approve the sale of the Property to him. Alternatively, he asks that the order be set aside and new hearing ordered.

[48] The appellant does not argue that that SLIO's right of redemption or assignment terminated when the Receiver entered into the Agreement.

(b) The Receiver's submissions

[49] On appeal, the Receiver supports the position of the appellant. It argues that the motion judge erred in his application of the second *Soundair* duty by

failing to consider the interests of all parties and by focusing solely on the interests of SLIO. It says that not approving the sale leaves SLIO's creditors in limbo as to when and by what means the Property will be sold to satisfy their debts.

[50] It also argues that the motion judge failed to consider the third *Soundair* factor – namely, the efficacy and integrity of the process by which offers were obtained. It argues that this factor weighs in favour of approving the sale.

[51] Finally, the Receiver argues that the fourth *Soundair* duty only requires an inquiry into the fairness of the sale process, and does not contemplate an inquiry into the fairness of other aspects of the receivership. In its submission, any unfairness resulting from the Receiver's conduct in relation to SLIO and the proposed assignment is unrelated to the sale process undertaken with respect to the Property. Its position is that unfairness in the broader receivership is relevant only to an analysis of the interests of the parties under the second *Soundair* duty.

(c) SLIO's submissions

[52] SLIO argues that the motion judge correctly identified the test in *Soundair*, identified the appellant as a creditor, and considered the creditors' interests. It states that there is sufficient equity in the Property such that the appellant's position as a creditor is not at risk.

[53] SLIO argues that it was treated unfairly because the Receiver breached its written consent to permit the redemption/assignment of the first mortgage and to obtain an order for discharge. In SLIO's submission, it is implicit in the motion judge's reasons that he found that the unfairness to SLIO was the most important factor in the circumstances and the motion judge's reasons were sufficient in this regard. SLIO notes that, in any event, insufficiency of reasons is not automatically fatal to a decision.

Analysis

(a) The motion judge erred in his performance of the second *Soundair* duty

[54] The motion judge's order was discretionary in nature. An appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations: see *HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of)* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.), at para 22.

[55] I agree with the appellant and the Receiver that the motion judge erred in performing the second *Soundair* duty: first, by failing to properly consider and give sufficient weight to the interests of the creditors; and second, by failing to consider the interests of the appellant, *qua* purchaser.

[56] I begin by acknowledging that while the primary interest is that of the creditors of the debtor, the interests of the creditors is not the only or overriding consideration. The interests of a person who has negotiated an agreement with a court-appointed receiver ought also to be taken into account. And in appropriate cases, the interests of the debtor must also be taken into account: see *Soundair*, at paras. 39-40.

[57] Although the motion judge noted that there were substantial debts in arrears and interest was accruing on those debts, he did not consider how declining to approve the sale, so that the assignment of the first mortgage might proceed, would affect the creditors' interests.

[58] If the sale proceeded, the creditors could be repaid. On the other hand, the assignment of the first mortgage would simply replace one creditor with another. It would not permit SLIO to repay the other substantial debts which the motion judge indicated were in arrears. It is also not clear that SLIO would be in a position to service the first mortgage, if assigned to a new mortgagee.

[59] Further, according to Mr. Mangat's evidence, if the assignment proceeds SLIO will assume additional debt in respect of the brokerage fees payable for arranging the assignment, thus worsening SLIO's financial position. While Mr. Mangat deposed that certain debts had been repaid (at least in part) to satisfy the prospective assignee's conditions of closing, it is intended that SLIO will

assume debts incurred to facilitate those repayments. It also appears that the Property is deteriorating and urgently requires repair. There is no indication as to how those repairs will be funded.[7]

[60] The receivership was triggered by SLIO's insolvency. The motion judge did not engage in any analysis of the continued viability of SLIO and SLIO's ability to pay the creditors if the sale did not proceed. He did not consider whether declining to approve the sale transaction would merely delay the inevitable. Given that *Soundair* directs the primary interest to be considered is that of the creditors of the debtor, this was an error.

[61] Moreover, the motion judge did not give any consideration to the interests of the appellant, *qua* purchaser. He did not consider the potential prejudice that would result to the appellant's interests if the sale was not approved. Significantly, while the motion judge declined to approve the sale based on the conduct of the Receiver and first mortgagee vis-à-vis SLIO, he did not find that the appellant was implicated in this conduct.

[62] As a result, I conclude that the motion judge erred in his application of the second *Soundair* duty. In light of this conclusion, it is unnecessary to address the appellant's argument that the motion judge provided insufficient reasons or the

[7] In a letter dated October 31, 2017, the commercial real estate broker retained by the Receiver notes that there are visible roof leaks and a portion of the tar-gravel roof needs to be replaced immediately. The broker estimated that half of the HVAC units and a portion of the parking lot will need to be replaced. The broker also indicated that the exterior of the building requires immediate attention.

Receiver's arguments regarding the application of the third and fourth *Soundair* factors.

(b) The appropriate remedy is to set aside the order below and direct a new hearing

[63] As I have concluded that the motion judge erred in principle, the next question is whether this court should consider whether to approve the sale transaction *de novo* or set aside the order below and order a new hearing. For several reasons, I would set aside the order below and order a new hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[64] First, the circumstances are unusual. Contrary to what is suggested by the Receiver's notice of motion filed below, and to what I had understood at the hearing of the appeal, this is not a case where the Receiver unequivocally recommended that the sale be approved. Rather, its factum below indicates that it did not oppose the assignment, provided it was discharged and released from any potential liability to the appellant. It recommended the sale only in the event that the motion judge was unwilling to insulate it from liability to the appellant. A re-hearing would permit the motion judge to obtain clarity on the Receiver's position.

[65] Second, the First Report of the Receiver does not provide an update on SLIO's financial position, indicate how the assignment option would affect creditors other than ROI, explain what it told the appellant about the proposed assignment before entering into the Agreement and what it told SLIO about the proposed sale, or describe what role it took in determining the amount outstanding under the first mortgage. A re-hearing would permit the Receiver to provide a further report and assist the motion judge in balancing the interests of the creditors, the appellant, SLIO, and the proposed assignee. If the motion judge were inclined to discharge the Receiver, an updated report would also assist the motion judge in determining the terms of its discharge.

[66] Third, it is not clear that the proposed assignee is ready, willing and able to close the assignment upon determination by the motion judge of the payout amount under the first mortgage. Among other things, the discharge of the Receiver, which the motion judge declined to grant, at least at this juncture, appears to be a condition of the proposed assignment.

[67] Mr. Mangat deposed that SLIO has borrowed money to discharge certain debts, as required by the proposed assignee of the first mortgage. But, based on the amounts owing to those creditors as set out in the motion judge's reasons, the amounts Mr. Mangat says have been repaid are less than the amounts owing to those creditors. Moreover, despite Mr. Mangat's evidence that the arrears on the second mortgage had been repaid, the motion judge's reasons indicate, and

counsel for the second mortgagee advised this court in oral argument, that the second mortgage is in arrears. SLIO's overture to the Receiver also followed on the heels of unsuccessful attempts by SLIO to refinance the first mortgage before the Receiver was appointed. A re-hearing should permit the motion judge to determine whether the assignment transaction could proceed without delay.

[68] Fourth, a number of factual determinations may need to be made in order to permit the balancing of the interests of the creditors, the appellant, SLIO and the proposed assignee, to determine whether or not the sale should be approved and, if the motion judge is inclined to order the discharge of the Receiver, the terms of its discharge.

[69] For example, as indicated above, Mr. Mangat deposed that the appellant was aware of the Receiver's intention to assign the first mortgage upon payment of the amounts owing. I understand that his allegation is based on the fact that counsel for the Receiver forwarded its October 5, 2017 email, and SLIO's email of October 4, 2017, to counsel for the appellant. However, as I have stated, the motion judge made no finding as to what the appellant knew, and when. The emails of October 4 and 5, 2017 seemed to contemplate that the assignment would close by October 18, 2017 (i.e. "in the next two weeks"). It is unclear what the appellant knew about the proposed assignment transaction thereafter. There may also be credibility issues at play, as Mr. Mangat has been previously censured for his serious failure to disclose material facts to the court on a motion

for an injunction involving the Property: *Sikh Lehar International Organization v. Suchet Saini et al.*, (28 January 2016), Brampton, CV-15-1855-00 (Ont. S.C.).

[70] Nor did the motion judge make any findings about what SLIO knew, and when. In his affidavit of December 22, 2017, Mr. Mangat deposes SLIO did not know of the Agreement until the delivery of the Receiver's motion materials on the motion to approve the sale of the Property. The Receiver's motion materials are dated December 6, 2017. However, counsel for the Receiver advised both SLIO's litigation counsel and real estate counsel by emails dated November 24, 2017 that he intended to bring a motion to approve the sale of the property returnable January 5, 2018 if the assignment did not proceed. Counsel for the Receiver repeated this caution in his email of November 29, 2017. Indeed, as early as October 5, 2017, the Receiver had told SLIO that it would likely be in a position to market the Property by November 1, 2017. It may be that Mr. Mangat incurred at least some – and perhaps most – of the costs he did, purportedly on behalf of SLIO, with "fair warning" that, in the appellant's words, the Receiver was "riding two horses."

[71] Also, in terms of the unfairness to SLIO, the motion judge made no findings about what the Receiver knew about Mr. Mangat incurring indebtedness in connection with the assignment, purportedly on behalf of SLIO. The motion judge also did not make any finding as to whether Mr. Mangat incurred these debts contrary to the receivership order, which empowers and authorizes the

Receiver, to the exclusion of SLIO and all other persons, to manage SLIO's business and incur obligations.

[72] Similarly, while the motion judge referred to what he described as inconsistent representations about the payout amount between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee as creating the unfairness to SLIO and the prospective assignee of the first mortgage, the evidence of SLIO's real estate counsel was that the delay was "entirely the responsibility of ROI because of its failure to provide appropriate payout calculations of the amount owing" [emphasis added]. More detailed findings may be required about the cause of the delay in settling the payout amount.

[73] To be clear, I do not purport to make any of these factual findings; that is a matter for the motion judge on the new hearing, to the extent necessary to resolve the motion.

[74] Fifth and finally, the issue raised by CCC regarding the form of the vesting order contemplated by the Agreement remains to be resolved.

Disposition

[75] For these reasons, I would allow the appeal, set aside the order below, and order a re-hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[76] Subject to any further directions that the motion judge may provide, I would also direct that, for the re-hearing: (1) the Receiver provide a further report, detailing SLIO's current financial position, indicating how the sale and assignment options would affect SLIO's creditors, explaining what it told the appellant about the proposed assignment before entering into the Agreement, explaining what it told SLIO about the proposed sale, explaining what role it took in determining the amount outstanding under the first mortgage, and clarifying its position; (2) ROI provide a statement of the amounts owing under the first mortgage, indicating the extent to which interest on arrears has been calculated at a rate greater than the pre-default interest rate; and (3) SLIO provide a copy of its agreement with the proposed assignee of the first mortgage and evidence from the prospective assignee of the first mortgage, confirming what (if any) conditions to closing remain outstanding and that it is in funds and willing and able to close upon satisfaction of those conditions.

[77] I would order that the appellant be entitled to his costs of the appeal, fixed in the amount of $19,100, inclusive of HST and disbursements.

Released: "AH" "AUG 31 2018"

"Alexandra Hoy A.C.J.O."
"I agree K.M. van Rensburg J.A."
"I agree G. Pardu J.A."

TAB 6

CAMERON v. BANK OF NOVA SCOTIA, THOMPSON
AND SUTHERLAND LTD., PEAT MARWICK LTD. (Receiver)
and TREBY (Intervenor)
(S.C.A. No. 00773)

Nova Scotia Supreme Court, Appeal Division
Hart, Macdonald and Pace, JJ.A.
March 30, 1981.

COUNSEL:
J.G. LANGLEY, for the appellant;
R.G. MacKEIGAN, for The Bank of Nova Scotia and Peat Marwick Ltd.;
A.G. HAYMAN, for B.A. Treby.

This appeal was heard by HART, MACDONALD and PACE, JJ.A., of the Appeal Division of the Nova Scotia Supreme Court at Halifax, Nova Scotia, on March 19, 1981.

The judgment of the Appeal Division was delivered on March 30, 1981, and the following opinions were filed:

HART, J.A. - see paragraphs 1 to 32,
MACDONALD, J.A. - see paragraphs 33 to 39.

PACE, J.A., concurred with HART, J.A.

1 HART, J.A.: On July 10, 1980 Peat Marwick Limited was confirmed by order of the court as receiver and manager of Thompson and Sutherland Limited pursuant to a debenture then in default in favour of the Bank of Nova Scotia, and was given power under clause 4(b) of the order "To enter into agreements for the sale, conveyance, transfer, assignment, leasing or other disposition of the real and personal property of the defendant in such manner and at such price as the Receiver and Manager in its discretion may determine".

2 Thompson and Sutherland Limited owned a large property on MacLean Street, in the town of New Glasgow, for which the receiver obtained an appraised value of $515,000.00 with a quick sale value of $386,000.00.

3 The receiver advertised for tenders for this property and received one offer of $72,000.00 and another of $216,000.-00. Both of these offers were rejected.

4 During the summer of 1980 an offer of $240,000.00 was received from the appellant, but this was also rejected.

5 In the fall of 1980 the property was listed with H. L. P. McNeil Agencies Limited, realtors of New Glasgow, for sale. It was placed on multiple listing, but remained inactive until

January of 1981 when the receiver received a written offer from Bruce Allan Treby in the amount of $270,000.00, followed by a second written offer from Scott W. Weeks on January 12, 1981 in the amount of $275,000.00. Both of these offers had various conditions attached and in each case were subject to the ability of the purchasers to arrange financing.

6 Between January 12, 1981 and January 16, 1981 the realtor was in regular contact with the appellant and obtained an offer of $290,000.00 for the property.

7 On January 16, 1981 Joseph Tucker, who was employed by the receiver to supervise the affairs of Thompson and Sutherland Limited had in his possession three written offers for the property; one from Mr. Treby in the amount of $270,000.-00, one from Mr. Weeks in the amount of $275,000.00 and one from the appellant Mr. Cameron in the amount of $290,000.00. He was anxious to finalize the sale and advised each party of the three offers and asked them, either directly or through the realtor, that if they wished to acquire the property to make their final offer that day.

8 Both Mr. Cameron and Mr. Treby increased their previous offers to $300,000.00. The only difference being that Mr. Cameron was prepared to make his offer for cash, and Mr. Treby retained some conditions as to financing. They were both asked to put their final offer in writing and when this was done the receiver, after gaining approval from the Bank of Nova Scotia, indicated to Mr. Cameron that his offer would be accepted.

9 Before signing the written offer on behalf of the receiver Mr. Tucker insisted that a clause which had been contained in the original listing agreement be inserted in the sales contract, which read: "The obligations of the vendor shall be subject, at the option of the vendor, to the approval of the Supreme Court of Nova Scotia". This insertion was agreed to by the appellant and the contract initialled accordingly. The sales contract was dated July 20, 1980.

10 Mr. Treby testified that he understood that he would still be able to make a higher offer and that the sale would not be completed in favour of anyone else until he had been given a further opportunity to increase his bid. Before the written document of sale in favour of Mr. Cameron was completed Mr. Treby had advised Mr. Tucker that he would be prepared to bid $375,000.00 for the property. Mr. Tucker acknowledged

that there was talk of a higher price being offered, but felt that he had given all parties an opportunity to make their final bid on July 16, and that he had properly accepted the better bid of Mr. Cameron on that day. He had been trying to sell the property for some time and did not wish to lose the sale, but took the precaution to see that the contract was made subject to the approval of the court. He said in his evidence:

Q. So, it is fair to say that when you signed the agreement of purchase and sale on the 20th, you realized that this matter could be reviewed by the court, and if in fact the higher offer could be received, you would be relieved of any obligations you had under the agreement?
A. Perhaps.

Q. Right.
A. Allen, throughout this thing . . . I mean, I am trying to get the best deal for the property, obviously. I am trying to maximize the dollars for the creditors. There is no doubt in my mind. O.K. But on Friday, the 16th, when I asked Mr. Treby to give me his best and final offer, he gave me a $300,000.00 conditional offer and I got a $300,000.00 cash offer from someone else, and that to me is where it's at, whether I was right or wrong in thinking I had a verbal contract or obligation or whatever. Subsequent events, yes, made me put that in there in the offer, which I'm saying was there from the outset, that it would be subject to the approval of the court; and basically that was, to present the situation that we have today, where your client has the ability to say his piece.

Q. It's fair to say . . .
A. Now, I'm not trying to, the point is, I'm not trying to lean towards the $300,000.00 offer of Mr. Cameron. I really couldn't care. I want to maximize the dollars in the situation and to me it has been an unfortunate set of events which I basically put down to Mr. Treby not coming through with his best and final offer on Friday. If he was willing to pay $400,000.00, why didn't he say it then?

Q. Is it fair to say then that if the sale was . . . your application to have the sale approved is not granted, then you are relieved of any liability and responsibility under the agreement? Do you under-

stand?
A. I assume so, yes.

11 When Mr. Tucker was pressed on cross-examination about Mr. Treby having wanted to be called back by him if his offer was not the best, he said:

> So, he advised me of that, or apparently did. I did not . . . in the same sense, I came back and said, 'Make me your final and best offer'. That's my response, to advise me . . . Basically, I think, Mr. Treby was trying to get the property, and I don't blame him, in the commercially . . . manner or whatever, for the best buck he could - the lowest, right? On being the purchaser, he'd try to get the best deal or whatever, and you don't want to volunteer more dollars than you have to. But, I think I made it perfectly clear to him that it wasn't an auction, that I wasn't going to go back to him to raise his offer by another dollar and a half or something so that his would be the superior offer. That was the point I was trying to make.
>
> BY MR. HAYMAN
> Q. But you do not categorically deny that he may have said to you that he wanted to be called back if this wasn't the best offer?
> A. I don't deny that he may have said that.

12 Having decided to accept the offer of Mr. Cameron, the receiver made arrangements to apply to the Supreme Court for approval of the sale, and an arrangement was made to appear before Burchell, J., in Chambers, on February 20, 1981. Both Mr. Weeks and Mr. Treby were given notice of the application since they had been competing bidders, and Mr. Treby applied to be joined as an intervenor to oppose the approval of the sale to the appellant. Permission was granted.

13 At the hearing before Burchell, J., the affidavits of the parties were presented, and the oral testimony of Mr. Tucker and Mr. Treby was heard, and Burchell, J., said in his decision:

> The evidence of Mr. Treby is that he was prepared to make a higher bid and, although Mr. Tucker denied having agreed to go back to Mr. Treby if his offer was not the highest, he was unable to deny that Mr. Treby had stipulated that he should be given the opportunity to make

> a further offer. My conclusion is that Mr. Treby was misled although I do not suggest intentionally. Prior to execution of the Agreement for Sale placed before me for approval, Mr. Treby, on January 19, 1981 advised Mr. Tucker that he had authority to make further offers up to Four Hundred Thousand ($400,000.00) dollars and he asked Mr. Tucker if he would accept Three Hundred and Seventy-Five Thousand ($375,000.00) dollars. Believing himself to be bound by the oral undertaking he had given to Mr. Cameron on January 16, 1981, Mr. Tucker refused to negotiate further and he and Mr. Cameron later signed the Agreement of Sale which was entered into subject to approval of the court.

The Chambers judge continued:

> In view of the fact that the Receiver was no longer urging approval of the sale, having regard for the appraised value of the property, the manner in which the negotiations were conducted, the fact that Mr. Tucker mistakenly assumed he was bound to execute the Cameron offer when he was not, and the misunderstanding between Mr. Tucker and Mr. Treby as to the finality of the Treby offer, I concluded that there was no legal basis upon which Mr. Langley could insist on approval of the Cameron sale and that I could not exercise my discretion to approve it without improperly disregarding the interest of the creditors.

Mr. Justice Burchell then directed that the three bidders be given an opportunity to make further bids by way of sealed tender addressed to the office of the counsel for the receiver and to be opened at 11 a.m. on February 25, 1981. Any bids so received were then to be brought before him on the afternoon of that day when he would make the final decision as to the sale.

14 On February 25, 1981 bids were received from Scott W. Weeks in the amount of $326,000.00 and from Bruce Allan Treby in the amount of $331,000.00, but no new offer was made by the appellant. The appellant claimed that the original agreement was final and that it should have been approved by the Chambers judge. A notice of appeal from the decision of Burchell, J., was filed, and when the parties returned before the Chambers judge that afternoon the agreement entered into between the receiver and the appellant was not approved, but the receiver was authorized to accept the offer submitted by Bruce Allan Treby in the amount of $331,000.00.

15 When the parties appeared before Mr. Justice Burchell on February 25, 1981, there was much discussion as to what the court should do since an appeal from the Chambers judge's decision had been filed. Counsel for Mr. Cameron had assumed that there would be an adjournment of the matter until after he had had an opportunity to apply to the Appeal Division for leave to appeal and obtain a stay and that this would permit his client to submit a further bid should the appeal be unsuccessful. Counsel for the other parties felt that the sale to the highest bidder should be approved and that its completion would be delayed because of the cloud on the title brought about by the appeal. Counsel for Mr. Treby felt that the appellant had had his opportunity to make a further bid and should have done so if he wished to participate in the new tender call rather than open the matter for further bids should the appeal be unsuccessful.

16 After this discussion the order was granted and although no stay of proceedings was sought by the appellant, the completion of the sale to Mr. Treby has been delayed until after the result of the appeal is known.

17 It has further been agreed that the notice of appeal be amended so as to appeal not only the decision of Burchell, J., delivered verbally on February 20, 1981, but also the order following the hearing of February 25 which was issued on February 26, 1981, so that the appeal is not only from the refusal of Burchell, J., to approve the original sale to the appellant but also from his decision to approve the sale based upon the new tenders to Mr. Treby. Counsel for Mr. Treby, Mr. Cameron and the receiver appeared on the appeal.

18 A preliminary question was raised as to whether Mr. Treby or Mr. Cameron had any right to appear at the original hearing before Burchell, J., or any status which would enable them to appeal from his decision, but, in my opinion, there is no merit in such a suggestion. Both parties were persons to be affected directly by the decision of the court and, in my opinion, were proper parties to the proceeding.

19 Another question raised was as to whether leave to appeal should be granted since the appeal was taken from an interlocutory decision and order of the Chambers judge.

20 I am satisfied, however, that the decision and order of Burchell, J., were not interlocutory but were final in their nature. Although it was a proceeding during the course of

the foreclosure action between the Bank of Nova Scotia and Thompson and Sutherland Limited and may be considered as interlocutory in that proceeding, the decision and order amounted to a final determination of the rights of the appellant and Mr. Treby in connection with a proposed receiver's sale of an asset of the estate of Thompson and Sutherland Limited.

21 Matters are considered to be interlocutory only when they are for the purpose of advancing the real matter in issue between the parties to a point where a conclusion on the main issue can be reached or for the purpose of enabling that conclusion to be enforced. This appears to be the ratio of the many decisions to be found in the courts which have considered the difference between interlocutory and final orders. These cases usually arose when determining whether or not an appeal could be advanced at all or with leave if the relevant legislation permitted an appeal with leave from an interlocutory order. A summary of these cases may be found in the *Supreme Court Practice 1976*, Part 1, starting at p. 853 and of the Canadian decisions in *Words and Phrases*, (3rd Ed.), vol. 2, starting at p. 332.

22 The difference between an interlocutory and final order has also been considered in the Supreme Court of Canada in *Hovey v. Whiting* (1886), 14 S.C.R. 515. In that case a company that was unable to pay its ordinary obligations purported to make an assignment to trustees for the benefit of its creditors. A group of judgment creditors who felt that the property and assets of the company had been improperly transferred to the trustees seized the property under execution and an interpleader order was sought to test the validity of the deed and ascertain the title to the property. Ferguson, J., of the Chancery Division set aside the transfer as being void against the judgment creditors, but the Court of Appeal of Ontario reversed this decision and held that although the description of the property in the deed was not sufficient there had been such an actual and continued change of possession as would vest the property in the trustees. The Court of Appeal also held that the directors had power to make the assignment.

23 On appeal to the Supreme Court of Canada the first issue was that no appeal lay from the decision of Mr. Justice Ferguson to the Ontario Court of Appeal because it was an interlocutory judgment. Most of the judges dismissed this point rather abruptly as being without merit, but Gwynne, J., explored the difference between orders of an interlocutory and final nature. At p. 525, he said:

> The judgment of the court upon an interpleader issue tried on the application of a sheriff for protection from claims made to property seized in execution, affirming the validity of the seizure in execution and determining conclusively, until reversed by some court of competent jurisdiction, the rights of the execution creditors to the fruits of the seizure as against the claimants, is, in my opinion, of a different character from a judgment on an interpleader issue ordered in the progress of a suit for the purpose of determining a point necessary, in the opinion of the court, to be determined before judgment should be pronounced on the matters in contestation in the suit, during the progress of which the interpleader had been ordered.

24 There can be no doubt that the decision and order of Burchell, J., is final in its nature as between the parties involved and the issues determined and that an appeal therefore lies to this court without leave under the rules.

25 The main ground of appeal advanced on behalf of the appellant is that the Chambers judge improperly exercised his discretion in refusing to approve the sale arranged between the receiver and the appellant on January 16, 1981. Counsel for the appellant argues that since the receiver had exercised his discretion to enter into the sales agreement with Mr. Cameron under the authority vested in the receiver by the original order of the court, there was no right in the Chambers judge to substitute his discretion for that of the receiver and upset the sale which had already been validly made. This argument in fact places the trial judge in the position of having to rubber stamp the action of the receiver.

26 It is obvious that the receiver did in fact have power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval. When this in fact happened the appellant appealed, claiming that the judge's

discretion was not properly exercised, and in support of this proposition has cited the case of *Re Pachal's Beverages Ltd.* (1969), 7 D.L.R.(3d) 113, a decision of the Saskatchewan Court of Appeal. In that case the trustee of a bankrupt company with the approval of the inspectors approved the sale of the company assets to one of three bidders. One of the creditors of the company then applied to the court to set aside the completed sale on the ground that there had not been proper advertising to enable the best bids to be obtained. The trial judge accepted this argument and ordered new tenders, but the Court of Appeal decided that decisions of this sort should be made by the inspectors rather than the court unless there is some evidence that they had acted fraudulently or not in good faith in the carrying out of their duties. Culliton, C.J.S., speaking for the court said at p. 118:

> In the present appeal all parties admit that the trustee and the inspectors acted with the utmost good faith. There was no evidence upon which the court could find that the consummated sale was unreasonable or contrary to the interests of the creditors in general. Under these circumstances, in my respectful view, the learned Chambers judge erred in revoking both the decision of the inspectors and the completed agreement. The judgment of the learned Chambers judge is therefore set aside.

27 The situation in this appeal is quite different from that in the *Pachal* case. There the affairs of the bankrupt were being supervised by a trustee and several inspectors elected by the over all creditors of the company. 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.

28 Burchell, J., considered not only the immediate prospect of a better bid for the property but also the appraised value of the property and the fact that one of the bidders had been misled. He decided to give them all an opportunity to compete fairly in the purchase and, in my opinion, he properly exercised his discretion in accordance with known principles of law. I would not therefore disturb the decision which he reached.

29 Finally, I must consider whether the appellant was justified in failing to forward a new bid for the property on February 25 and if he should be given another opportunity to bid.

30 There were several options open to the appellant after the decision of Burchell, J., on February 20, 1981 and for some reason he failed to take advantage of any of them. He could have immediately filed his notice of appeal and applied for a stay of execution. He could have submitted another bid if he wished to bid higher on the property and still have been free to file his appeal and maintain the original price if he were successful in upsetting the exercise of the judge's discretion. By not following either of these routes he has placed the other two bidders in a position where they have revealed their final bids when they would have expected the matter to be treated on a sealed tender basis under the order of the court.

31 From the very beginning the appellant knew that his contract was subject to the approval of the court and must have known that this meant such approval could be refused. When it was denied he was given a further opportunity to submit bids in fair competition with the other bidders and he failed to do so. He cannot now be heard to say that the order granted by Burchell, J., on February 20, 1981 was unfair to him.

32 In the result I would dismiss this appeal with costs.

33 MACDONALD, J.A.: I have had the opportunity of reading the reasons for judgment of my brother Hart. I agree with him that the appeal should be dismissed but come to such conclusion for somewhat different reasons.

34 A receiver, generally speaking, is an officer of the court put in to discharge certain duties prescribed by the order appointing him. Such order here empowered the receiver

and manager *inter alia:*

> 4(b) To enter into agreements for the sale, conveyance, transfer, assignment, leasing or other disposition of the real and personal property of the defendant in such manner and at such price as the Receiver and Manager in its discretion may determine.

35 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 a 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. Once a receiver puts a deadline on bids then he and other interested parties are entitled to assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval as above mentioned should not be refused simply because some person after the close of bids makes a higher offer.

36 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. It is for such reason that I hold the view that court approval should not be withheld simply because a higher bid has been received after the expiration of the deadline for submitting bids.

37 In this case, however, the trial judge found that one of the bidders was, before the deadline for the receipt of bids expires, unintentionally misled. Such circumstance was detailed by the trial judge as follows:

> . . . On January 16, 1981, Mr. Tucker, an employee of

the Receiver, without calling for sealed tenders, informally invited Mr. Treby and Mr. Cameron to make their best offers for the subject property. Both Mr. Cameron and Mr. Treby made offers of Three Hundred Thousand ($300,000.00) dollars but as there were financing conditions attached to the offer of Mr. Treby and additional lands were involved, Mr. Tucker advised Mr. Cameron that he would accept his offer. The evidence of Mr. Treby is that he was prepared to make a higher bid and, although Mr. Tucker denied having agreed to go back to Mr. Treby if his offer was not the highest, he was unable to deny that Mr. Treby had stipulated that he should be given the opportunity to make a further offer. My conclusion is that Mr. Treby was misled although I do not suggest intentionally. Prior to the execution of the Agreement for Sale placed before me for approval, Mr. Treby, on January 19, 1981 advised Mr. Tucker that he had authority to make further offers up to Four Hundred Thousand ($400,000.00) dollars and he asked Mr. Tucker if he would accept Three Hundred and Seventy-Five Thousand ($375,000.00) dollars. Believing himself to be bound by the oral undertaking he had given to Mr. Cameron on January 16, 1981, Mr. Tucker refused to negotiate further . . . .

38 In refusing to approve the sale to Mr. Cameron the trial judge said:

> In view of the fact that the Receiver was no longer urging approval of the sale, having regard for the appraised value of the property, the manner in which the negotiations were conducted, the fact that Mr. Tucker mistakenly assumed he was bound to execute the Cameron offer when he was not, and the misunderstanding between Mr. Tucker and Mr. Treby as to the finality of the Treby offer, I concluded that there was no legal basis upon which Mr. Langley could insist on approval of the Cameron sale and that I could not exercise my discretion to approve it without improperly disregarding the interest of the creditors . . . .

39 My view is that if it were not for the finding that Mr. Treby was misled I would have strong reservations about the correctness of the trial judge's conclusion. Misleading a bidder, even unintentionally, by a receiver must always be a sufficient ground for a court to refuse to approve an agreement of purchase and sale. For such reason I am in agreement

with the disposition of this appeal as proposed by my brother Hart.

Appeal dismissed.

TAB 7

In the Court of Appeal of Alberta

Citation: Salima Investments Ltd. v. Bank of Montreal, 1985 ABCA 191

Date: 19850826
Docket: 17697, 17696
Registry: Calgary

Between:

Salima Investments Ltd.

Appellant

- and -

Bank of Montreal

Respondent
(Plaintiff)

- and -

Mammoth Developments Ltd. and Bolero Management Ltd.

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Laycraft
The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Kerans

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

Rajko Dodic, Esq., for the Appellant

Grant McKibben, Esq., for the Respondent (Plaintiff)

Quincy Smith, Esq., for the Respondent (Defendants)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

KERANS, J.A. (for the Court):

[1] This is an appeal from an order approving the sale of property in receivership.

[2] A Queen's Bench order made April 16, 1985 named the respondent Coopers-Lybrand as receiver-manager of the property of Mammoth Developments Ltd. and Bolero Management Ltd. on the application of a secured creditor, the Bank of Montreal. The order granted to the receiver the power, among other things, to "sell … any … property" including a 168-room hotel complex and a 76-unit motel.

[3] The receiver advertised the property widely, and called for tenders. The tender notice indicated that the receiver considered the tenders as only a first step and that it was prepared to negotiate the sale.

[4] Seven tenders were received. The highest was from the appellant Salima Investments Ltd., at $4,400,000.00. The others were much lower. The tender of 304987 Alberta Ltd. also involved $300,000.00 less cash. The appraised value of the property for forced sale on terms was $4,593,000.00.

[5] The receiver decided to negotiate further with Salima and opened negotiations on July 24, six days after tenders were opened. A bargain was made the next day, and the receiver at once notified the other tenderers that their tenders were rejected and that the receiver was dealing with somebody else. When asked before us why the receiver did not approach other tenderers for further negotiations, counsel for the receiver replied that the receiver was of the view that the Salima tender was substantially better than all of the others and, in any event, that it was not appropriate to negotiate with more than one prospective purchaser at the same time.

[6] The bargain with Salima involved an increase of $50,000.00 from the tendered price, and an increase in the deposit from $150,000.00 to $400,000.00. Further, the negotiated sale was made subject to Court approval.

[7] The receiver then issued a motion on August 1, returnable August 8 for an order approving the sale. On the morning of August 8, before Court opened, 304987 Alberta Ltd. made a new offer of $4,533,000.00 through the clerk. We infer that this offer was made with knowledge of the Salima bargain, because that information was in the materials filed in support of the application.

[8] Apprised of this development, and of the fact that seasonal market fluctuations made an immediate sale of great importance, the learned chambers judge adjourned the matter for one day and said that he would consider new bids. Three were received: The highest was from 2884701 Alberta Ltd., at $4,800,000.00. The next highest was from 304987 Alberta Ltd. in the amount of $4,756,000.00 and the third, for $4,700,000.00 was from Salima. The learned chambers judge decided that, because it had the earliest completion date and offered the prospect of unbroken chain of management, the bid of 304987 Alberta Ltd. was the best offer. He directed the receiver to complete a sale. Salima appeals.

[9] The first ground raises the question of jurisdiction. It is said that the learned chambers judge had no application before him to approve the sale to 304987 Alberta Ltd. It is also said that he improperly considered the other offers and other materials. The existence of the other offers was relevant on the question whether to approve the Salima sale and we see no merit to that argument. Further, we understand the events before him in this way: he first refused to approve the sale to Salima; then he decided, on his own motion and because of the urgency of the matter, to conduct summarily a Court sale. He dispensed with notice of motion or other formalities. He had jurisdiction to do that which he did and there is no merit to this ground of appeal.

[10] The second ground of appeal raised for Salima is that the decision of the learned chambers judge gave an unfair advantage to 304987 Alberta Ltd. over Salima. Salima has no complaint. It agreed to buy the property subject to Court approval, and its contract left it exposed to the risk of something like this happening. I agree with what was said by Hart, J.A. in this respect in Cameron v. The Bank of Nova Scotia 38 Can. Bank Rep. 1 at p.9:

> It is obvious that the receiver did in fact have the power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval.
>
> . . .
>
> 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.

[11] The real issue, in our view, is the appropriate exercise of the admitted discretion of the Court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the Court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In Canada Permanent Trust Co. v. King Art Developments (June 20, 1984) [1984] 4 W.W.R. 587, we said that receivers (and Masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an on-going business. The receiver here accepted the challenge offered by this Court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the Court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

[12] We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an enquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the Court may consider. As Macdonald, J.A. said in the Cameron case at p. 11:

> 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.

[13] This is not a total catalogue of those factors which might lead a Court to refuse to approve a sale.

[14] The principal argument before us turned on the question why the receiver did not approach 304987 Alberta Ltd. to negotiate at the same time as it approached Salima.

[15] We do not have the benefit of the recorded Reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver - while

always in good faith - had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

[16] We dismiss the appeal.

TAB 8

Crown Trust Co. et al. v. Rosenberg et al.

60 O.R. (2d) 87

ONTARIO
HIGH COURT OF JUSTICE
ANDERSON J.
6TH NOVEMBER 1986.

Civil procedure -- Parties -- Intervention -- Receiver not recommending highest offer for court approval -- Offeror seeking to be added as intervenor on motion for approval -- No right to be added on motion -- No interest in matter -- Not adversely affected -- Considerations -- Rules 1.03, paras. 15, 22, 13.01.

Courts -- Jurisdiction -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Moving for approval of offers -- Duties of court on motion.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Receiver acted reasonably, properly and fairly -- Offers to be approved.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Highest offeror submitting

new offer after commencement of hearing -- New offer not to be considered.

In 1983, C Inc. was appointed by court order as interim receiver and manager of the defendants' properties. Subsequently in 1983, an order was made with respect to the marketing of the properties pursuant to a disposition strategy. That strategy involved first, a negotiation stage which included meetings between C Inc. and prospective offerors. This stage ended on September 3, 1986, with offers from prospective purchasers to the receiver wherein all terms and conditions of the transaction except the final offering price were settled. The second stage required prospective purchasers wishing to bid on individual properties, groups of properties, or all of the properties to submit sealed bids by September 10th. The third stage called for the receiver to notify the bidders of the acceptance or rejection of their offers within 15 days of September 10th. Pursuant to the disposition strategy, C Inc. received approximately 200 offers on September 3, 1986. Also pursuant to the strategy, C Inc. received approximately 230 sealed bids on September 10th. The receiver selected 26 offers by 14 offerors and brought a motion recommending approval of those offers by the court.

L Inc. submitted four draft offers on September 3rd and four sealed bids on September 10th. The receiver rejected three of them and held the fourth open pending the disposition of this motion, but did not recommend it. L Inc. was the highest bidder. The reason the receiver did not recommend the L Inc. fourth offer was because the receiver was concerned to maintain the integrity and fairness of the tender process and because it believed that the offer, as supplemented by letters, was not in acceptable form, nor in accordance with the rules of the process. Among other things, L Inc. proposed to finance the purchase in a novel fashion by the use of a promissory note, which caused problems with the discount rate and the sale and purchase of the note; inserted a financing condition in the sealed bid which was not in its offer; failed to identify the mortgages to be discharged; and waived the financing condition on September 18th by letter from its solicitors. Further, the terms and conditions of the offer were unclear and were not

clarified by L Inc. to the satisfaction of the receiver. In addition, the receiver was concerned, in view of the history of the properties and the attention they attracted in political circles, among the tenants of the properties, in the media and from the public, that L Inc.'s inflated nominal purchase price might be regarded as intended to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. If so, this might cause intervention in the transaction which would imperil a successful closing.

On the return of the motion, L Inc. moved to be added as an intervenor and several days later presented an entirely new offer for a still higher amount.

Held, the offers recommended by the receiver should be approved; L Inc.'s motion to be added as an intervenor should be dismissed, and L Inc.'s newest offer should not be considered.

(1) The court has jurisdiction under rule 13.01 to add a person as an intervenor to a proceeding where the person claims an interest in the subject-matter of the proceeding and that he or she may be adversely affected by a judgment in it. L Inc.'s motion to be added should be dismissed, because the rule applies only to a proceeding, defined in rule 1.03, para. 22, as an action or application. Further, para. 15 defines "judgment" as a decision that finally disposes of an application or action. Hence, rule 13.01 does not apply to a motion. In any event, L Inc. had no interest in the question whether approval of the offers recommended by the receiver was in the best interests of the parties to the action, but only in seeking to have its offer accepted. Nor would L Inc. be adversely affected by any "judgment" in the proceedings in respect of any legal or proprietary right, since it had no such right. Furthermore, the consequences of making the orders sought would likely cause delay and complication in the completion of the transactions.

(2) The late offer by L Inc. should not be considered even though it was approximately $15 million higher than those the

receiver recommended for approval, that is, approximately 3% of the aggregate of the purchase price of all the properties. To consider the offer at this date in the proceedings would make a mockery of the elaborate process devised and followed in the marketing of the property. Further, it would cause inevitable confusion and delay. There was no issue of unfairness towards L Inc. Rather, its belated offer was a blatant effort to circumvent the bidding process and to acquire the properties over those who had abided by the rules.

(3) On a motion by a receiver for approval of offers to purchase, the court must consider: (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (b) the interests of all parties; (c) the efficacy and integrity of the process by which the offers were obtained, and (d) whether there has been unfairness in the working out of the process.

(4) The concerns that the receiver had about L Inc.'s fourth offer and the questions the receiver raised about the offer were reasonable and were not answered promptly, frankly or fully. Among other things, the financing condition should have been contained in the offer in accordance with the invitation to tender, and not inserted in the sealed bid. Moreover, in a transaction of this importance and magnitude, the receiver was properly concerned about the fact that waiver of the condition came from L Inc.'s solicitors and not from L Inc. All of these factors taken together, were reasonably considered by the receiver as adverse to and to weigh against approval of the L Inc. offer. Further, throughout the process, it was clear that L Inc. was not misled by the receiver about the disposition process.

(5) Although the L Inc. fourth offer was substantially higher than the others in absolute amount, it was not so much higher relative to the over-all amounts involved in the transactions. Hence, in view of the receiver's concerns about the L Inc. fourth offer, the receiver acted properly and reasonably in not recommending it for approval and instead recommended the other offers, about which it had no such concerns. For those reasons, the court should not intervene in the process, but approve the

receiver's recommendations.

Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242; Re Selkirk (1986), 58 C.B.R. (N.S.) 245; Bank of Montreal v. Maitland Seafoods Ltd. et al. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20; Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1; Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237, folld

The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72, 35 N.R. 40, distd

Other cases referred to

Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5

Rules and regulations referred to

Rules of Civil Procedure, rules 1.03, paras. 15, 22, 1.04(1), 1.05, 13.01 (am. O. Reg. 221/86, s. 1)

MOTION by a court-appointed receiver and manager approving the sale of certain property; MOTION to add an offeror as an intervenor; RULING on disposition of a new offer to purchase.

P.S.A. Lamek, Q.C., and I.V.B. Nordheimer, for interim receiver, Clarkson Gordon Inc.

W.G. Horton, for plaintiffs.

H.T. Strosberg, Q.C., and R.E. Carr, for defendant, Leonard Rosenberg.

B.P. Bellmore, Q.C., for defendant, Maysfield Property

Management Inc.

D. Stockwood, Q.C., and N.J. Spies, for defendant, Victor Prousky.

C.L. Campbell, Q.C., G.D. Lemon and M.M. Thomson, for applicant, Larco Enterprises Inc.

R.L. Falby, Q.C., F.T. Richmond and L. Walton, for defendant, Green Door Investments Ltd.

J.B. Laskin, for Canada Deposit Insurance.

ANDERSON J. (orally):-- This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has

been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them during the course of my reasons, although they will form part of the reasons should they be transcribed.

On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest bidder. The extent of the difference I will discuss in a moment and I will also discuss the reasons advanced by Clarkson for not recommending it.

On the return of the motion Larco moved to be added as an

intervenor under rule 13.01. I dismissed that application on the following day. The reasons for that ruling are an appendix to these reasons. (See App. I [not reproduced]).

On Wednesday, October 27th, Larco presented during the hearing of the motion an entirely new offer in a still higher amount. On Thursday, October 23rd, I made a ruling that I would not consider that offer. My reasons for that ruling are likewise an appendix to these reasons. (See App. II [not reproduced]). On the argument of the motion no criticism was advanced of any of the offers recommended by the Receiver. The only criticism that was advanced on behalf of some defendants was that the Larco bid should have been recommended and in any event should be approved by the court. The plaintiffs in the action supported the recommendation of the Receiver.

Before dealing with the elements of the ensuing dispute, I turn to a consideration of the nature of the motion which is before me and of the duty of the court in the disposition of such a motion. The duties of the court I conceive to be the following, and I do not put them in any order of priority:

I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently. Authority for that proposition is to be found in a judgment of the Alberta Court of Appeal, Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58. The [D.L.R.] headnote is of assistance, as is the judgment delivered by Kerans J.A. and particularly that portion which appears at p. 476. The questions with which the court was dealing were similar to those with which I am now concerned.

> The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court in an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In Canada Permanent Trust Co. v. King Art Developments Ltd. et al. (1984), 12 D.L.R. (4th)

161, [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an on-going business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.

II. The court should consider the interests of all parties, plaintiffs and defendants alike.

That is made apparent by the judgment of this court in Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5, although the conclusion appears rather by indirection and as a statement obiter to judgment.

III. The court must consider the efficacy and integrity of the process by which the offers are obtained.

The first authority which is of assistance in that regard is the judgment of Saunders J. in Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C. Bkcy.). There, in dealing with the question of approval, he has this to say in his reasons at p. 246:

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 consideration 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 Nova Scotia et al. (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1 at p. 11 (C.A.), where he said:

"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.

The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

A further authority for that proposition is to be found in Bank of Montreal v. Maitland Seafoods Ltd. et al. (1983), 57 N.S.R. (2d) 20 at p. 23, 46 C.B.R. (N.S.) 75 (N.S.S.C.):

> If any efficacy is to be given to the tender system, then it requires that ... a person, whether insider or guarantor, who obtains full information of the amounts of the tender ought not, at the last moment, be entitled to make a somewhat higher offer and obtain the property. To permit this would create "chaos in the commercial world". Not only would there be uncertainty ... but it could lead to the situation where there might be no bidders.

IV. The court should consider whether there has been unfairness in the working out of the process.

The authority for that is the case to which reference was made by Saunders J., Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1. The [C.B.R.] headnote again is useful as is, in this connection, the language at the concluding portion of the judgment where this is said:

> Misleading a bidder, even unintentionally, by a receiver must always be a sufficient ground for a court to refuse to approve an agreement of purchase and sale.

That case is also authority, if authority were needed for the proposition that in a proper case the court has the power to disregard the recommendation of the Receiver and to approve another offer.

It is with those areas of responsibility in mind that I proceed to deal with the motion. I have already said that no criticism is made of the offers which are recommended. Likewise

no criticism has been made of the process by which the offers were obtained. Attention has focused on the different economic returns which it is anticipated would flow from the recommended offers on the one hand and the Larco offer on the other. Depending upon whose data and calculations are accepted, that difference may be as high as $7 million odd, or as low as $1 million odd. I do not propose to analyze the data or the calculations which have been advanced, because in the view which I take of the matter they are not material.

The central issue is whether the court should disregard the recommendations of the Receiver and approve the higher bid. Indeed at the end of the day that is the only real issue. This requires first some review of the reasons advanced by the Receiver for rejecting or at any rate not recommending the Larco bid. This is dealt with in the motion record in the Receiver's report in para. 38, at pp. 51-67 of the record:

> 38. Clarkson did not accept Enterprises'Enterprises was the initial name used for Larco Enterprises Inc. Offer, and does not recommend its acceptance and approval by this Court, for the following reasons:
>
> (a) Clarkson's concern to maintain the integrity and fairness of the tender process embodied in the Invitation to Tender, and Clarkson's conviction that the evident success of the marketing and tender process as reflected both in the quantity and quality of the offers which were received was due in large measure to the faith and trust of prospective purchasers that they would each be afforded a fair and equal opportunity to purchase, have been discussed at length above. Clarkson and Cogan were advised on August 14, 1986 by representatives of Enterprises that Enterprises shared those concerns as a result of an unsuccessful tender recently made by Enterprises in respect of certain other properties, and particular emphasis was placed by the said representatives of Enterprises on their need to understand the tender rules, that the rules not be changed, and that they expected everyone to adhere to such rules.
>
> Nevertheless, Clarkson does not believe that Enterprises'

Offer as supplemented by the letters delivered after the Bid Deadline was in acceptable form or in accordance with the rules of the tender process established by and embodied in the Invitation to Tender in that, inter alia,

(i) the above-mentioned mechanism for determining the price at which Clarkson would be required to sell the Note might be said to have afforded Enterprises the opportunity to change the cash purchase price offered for the subject Properties, after the Bid Deadline, although no objection could be raised to a change in such cash purchase price if the percentage to be stipulated by one of the designated financial institutions was determined by such financial institution solely on the basis of objective market interest rate criteria; Clarkson and Fraser & Beatty, following the Bid Deadline, therefore repeatedly requested confirmation from The Royal Bank of Canada that the percentage set out in its said letter dated September 15, 1986 was determined by such bank based upon objective market interest rate criteria alone, but no such confirmation was received by Clarkson;

(ii) Enterprises or persons acting on its behalf changed or attempted to change or might have changed, after the Bid Deadline, material terms and conditions of Enterprises' Offer; namely

(A) price by means of the Note purchase mechanism;

(B) the financing condition in Enterprises' Sealed Bid referred to in paragraph 34 above was included in such sealed bid despite repeated statements by Clarkson, Cogan and Fraser & Beatty to representatives of and to the solicitors for Enterprises prior to the Bid Deadline that this would represent a serious negative feature of any offer submitted; by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson (a copy of which is annexed hereto as Schedule H (Appendix III [not reproduced]) and received by Clarkson the following day, nine days after the Bid Deadline, this condition was purportedly waived;

(C) as mentioned in paragraph 36 above, Clarkson did not

receive, on or before September 17, 1986, the purchase undertaking from one of the designated financial institutions in accordance with Enterprises' Sealed Bid, and in lieu thereof the solicitors for Enterprises, by means of the aforesaid letter dated September 18, 1986, a copy of which is annexed hereto as Schedule H, purported to amend Enterprises' Offer to provide that Enterprises would cause the Note to be purchased on closing "on the same terms and conditions as contemplated in [Sealed Bid Schedule 3] paragraph 8";

(D) Clarkson and Fraser & Beatty had indicated to Enterprises and its solicitors following the Bid Deadline that Clarkson had difficulty in properly evaluating Enterprises' Offer until it knew what mortgages Enterprises intended to require be discharged. While the amount payable by Enterprises would increase dollar for dollar for each dollar spent to obtain a mortgage discharge, the effect of the aforesaid Note purchase mechanism would be to satisfy such amount (including dollars expended to obtain mortgage discharges) at 81.2 cents per dollar. Fraser & Beatty therefore asked Enterprises' solicitors to confirm in writing to Clarkson what mortgages Enterprises' solicitors believed Enterprises was entitled to request a discharge of under the terms of Enterprises' Offer, it being a fair assumption that a request for a discharge of as many mortgages as possible would be received by Clarkson given the aforesaid discount achieved by means of the Note purchase mechanism. Instead, by letter dated September 21, 1986, a copy of which is annexed hereto as Schedule I, (Appendix IV [not reproduced]) Enterprises' solicitors purported to further amend Enterprises' Offer in this regard; and

(E) notwithstanding the clear provisions of the Invitation to Tender, as late as September 17, 1986 and again on September 18, 1986 a representative of Enterprises requested that Clarkson agree to negotiate a reduction in the amount of the required deposits, which request was denied, and then requested that Clarkson agree to a reduction in the amount of the further deposit to be provided within 5 days of acceptance of any offer, which further request was also denied by Clarkson;

(b) despite repeated requests by Clarkson and Fraser & Beatty for an explanation of the commercial reason for the use of the Note purchase mechanism (which on its face only serves to reduce the purchase price for the subject Properties from a high nominal value to a lower real value), in the view of Clarkson and Fraser & Beatty no clear and consistent reasons were given. Accordingly, a written explanation was requested and a reason was cited in the letter annexed hereto as Schedule I, but Clarkson did not and does not regard the explanations received as satisfactory;

(c) Clarkson was concerned and remains concerned, particularly given the history of the subject Properties and the attention they have attracted in federal, provincial and municipal political circles and with the tenants thereof and those representing such tenants, with the appearance of the proposed transaction in the minds of the tenants, the media, the politicians and the public at large, some of whom might be expected to question seriously whether the inflated nominal purchase price was being used to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. In the absence of definitive evidence to the contrary, Clarkson believes that this aspect raises perceptible risks of intervention of some kind which might imperil a successful closing of the proposed transaction with Enterprises;

(d) as was mentioned above, Enterprises failed to cause the Note purchase undertaking from Citibank to be delivered to Clarkson on or before September 17, 1986 as provided in Enterprises' Sealed Bid, and Clarkson was concerned and remains concerned with the acceptance of any offer in respect of which the offeror, before Clarkson has even had a reasonable opportunity to accept the same, has already failed to perform a material term thereof; and

(e) Clarkson was not satisfied, notwithstanding all of the foregoing, that Enterprises' Offer was capable of acceptance, and believed that certain aspects thereof would have to be successfully negotiated prior to any such acceptance,

including in particular:

(i) the waiver of the financing condition which, as noted above, was purportedly effected by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson despite the relevant provisions of Enterprises' Offer in respect of amendments and despite the statement of Enterprises' solicitors, with which Fraser & Beatty agreed, in a telephone conversation between such solicitors that this and any other matter pertaining to the terms of Enterprises' Offer should be in the name of and executed by Enterprises;

(ii) the substitution of Enterprises' agreement to cause the Note to be purchased on closing "on the same terms and conditions as contemplated in paragraph 8", which again was purportedly effected by the letter dated September 18, 1986 and therefore suffered from the same difficulties as the purported waiver plus the additional difficulty that it is unclear what such "same terms and conditions" are; in Clarkson's view, it is totally unsatisfactory for a transaction of this magnitude, which contemplates an unsecured note in the order of $375,000,000, to hinge on such vague and uncertain wording;

(iii) in connection with the aforesaid purchase of the Note on closing, reference was made in paragraph 34 above to the provision in Enterprises' Sealed Bid that the Note was to be purchased "at the closing at the said [price] as part of the escrow arrangements herein provided", but in view of the uncertainty as to the intent and effect of these words, clarification would be required to ensure that there was no misunderstanding in this respect; and

(iv) the amendment to Enterprises' Offer purportedly effected by the aforesaid letter dated September 21, 1986 from Enterprises' solicitors addressed to Clarkson in respect of the mortgages to be discharged on closing and the effect thereof on the ultimate purchase price realized by Clarkson, which at the very least suffers from the same difficulties as the aforesaid purported waiver.

> Apart altogether from its concern to maintain the integrity and fairness of the tender process, Clarkson concluded that, even if it were prepared to attempt such negotiations in an effort to put Enterprises' Offer into acceptable form, the time constraints imposed by the tender rules and the fact that all offers would expire on September 25, 1986 and the difficulties encountered in resolving outstanding questions to date raised a serious question as to the successful outcome of such negotiations. In view of the risks to the entire sales process if that had happened, Clarkson decided not to attempt such negotiations but to accept the offers in hand that were capable of acceptance as they stood.

The motion was brought on in the usual way on a written report of the Receiver signed by Mr. S.R. Shaver, a vice-president of Clarkson, and unsworn.

Counsel for the Receiver submitted at the opening of the motion that for reasons pertaining to the importance of the matter and its public interest, he proposed to lead the evidence of Mr. Shaver viva voce although it is something of an exception in the disposition of a motion of this kind. I acceded to that submission. I confess to having had moments during the subsequent proceedings when I doubted the wisdom of that decision. The inevitable result was that evidence was called by the defendants who were advancing a different position, and a considerable amount of time was spent. Notwithstanding my doubts, I think that for the reasons advanced by the Receiver, and because an element of catharsis is involved, perhaps the hearing of viva voce evidence was appropriate in all the circumstances.

I have made references to the Disposition Strategy Report which lay behind the negotiations which produced the offers which are now before the court for consideration. It is a voluminous and detailed document comprising, without its various appendices and schedules, some 98 pages. It was pursuant to that strategy report that the order of Catzman J. in July of this year set in motion the sequence of events leading to the report and motion which are now before me.

Throughout that sequence of events, the Receiver has had the benefit and assistance of the advice of eminent solicitors and counsel and of an eminent real estate consultant appointed for the purpose.

In the motion which is before me some 15 counsel appeared at various times, eight for most of the time, representing various interests. The evidence consumed seven full days and final argument a further day. Most of the principal participants in the sequence of events made their appearance in the witness-box. The ponderous chain of happenings which followed the order of Catzman J. and culminating in the motion and the nature and extent of that motion are both matters of consequence to which I will refer subsequently.

Events were set in train by a letter written by Clarkson to potential purchasers which is dated July 28, 1986. It is found in the motion record at p. 124:

> On July 25, 1986 Mr. Justice Catzman approved the final stages of the disposition process which include the following:
>
> 1. A negotiation stage culminating on September 3, 1986 with an offer as between the Interim Receiver and Manager and prospective purchasers wherein all terms and conditions respecting the transaction, exclusive of the final offering price, are settled ("Approved Offers").
>
> 2. After the Approved Offers are settled prospective purchasers wishing to bid on individual Properties, groups of Properties or all of the Properties are directed to forward Sealed Bids to the Office of the Registrar of the Supreme Court of Ontario addressed to the Interim Receiver and Manager. The Sealed Bids must be submitted to the Registrar on or by 3:00 p.m. September 10, 1986 (Bid Deadline Date).
>
> 3. After reviewing and analyzing the Sealed Bids, in context with the Approved Offers, bidders will be notified whether or not their offers are accepted within 15 days of the Bid Deadline Date.

4. The Standard Form of Offer and the Invitation to Tender stipulate that offerors must submit with their Sealed Bids deposits amounting to the greater of $100,000 or 21/2% of the price offered in the Sealed Bid in the form of a certified cheque or bank draft.

For greater certainty and clarity we request that you carefully review the Invitation to Tender, Sealed Bid form and Standard Form of Offer in order that all aspects of the above outlined disposition process are understood and, more importantly, closely adhered to so that no one is disadvantaged throughout this process.

We urge each of you to convene meetings with us at the earliest possible date to ensure that all of your queries and concerns are adequately addressed. These meetings should assist you in preparing and submitting an Approved Offer on or by September 3, 1986. To this end, we have prepared all of the schedule for each Property to be affixed to the offer(s) including financial information and rent rolls as of June 30 and July 1, 1986 respectively.

There will be one and only one opportunity to bid. Because of the nature of the process, prospective purchasers will be automatically encouraged to submit their highest and best offers. Please be cognizant of the fact that all offers will be evaluated on a "cash equivalent" basis to ensure a fair and equitable evaluation process.

A prospective purchaser's chance to be the successful bidder will be enhanced relative to another purchaser, assuming equal "cash equivalent" offers are received, if:

1. the Approved Offer contains fewer onerous and time consuming conditions.

2. the prospective purchaser establishes his "credit worthiness". This aspect can best be established if conclusive third party evidence of the purchaser's ability to arrange the necessary financing to close the transaction is

provided; and

3. Property inspections are completed in advance of the final Bid Deadline Date, September 10, 1986.

The invitation to tender is an exhibit on these proceedings. Again, its contents are material. I do not intend to read them but they will be included in the reasons. (See App. V [not reproduced])

I said when referring to the portion of the report which set out the reasons by the Receiver for not recommending the Larco offer that I did not propose to deal in detail with each of the points raised. The objections upon which emphasis was particularly placed were the following:

1. the use of the promissory note and the related problems of the discount rate and the sale and purchase of that note;

2. the inclusion in the sealed bid of a financing condition which had not been provided in Larco's formal offer;

3. the identification and amount of the mortgages which Larco would require to be discharged upon closing, and

4. relating to the financing condition, the ultimate waiver of that condition.

The uncontentious history of the Larco offer is that prior to its being made there was a meeting in August of 1986 attended by representatives of Larco and representatives of Clarkson when the prospective offering and bidding procedure were discussed.

On September 3rd offers were submitted. On September 8th Clarkson replied in writing with certain comments. Between September 3rd and September 9th there were meetings and telephone conversations between the representatives of Larco and representatives of the Receiver. On September 10th there were consultations and there was a subsequent exchange of correspondence. When the final decision of the Receiver was

announced September 25th the Larco offers were not recommended.

I have already indicated that the difference between the competing offers figured largely in the hearing and blow-by-blow accounts were given by the various participants of the exchanges between representatives of Larco and representatives of the Receiver. These exchanges must be explored to some extent, though not with the attention to detail which they received during the hearing.

I do not intend to deal seriatim with each of the Receiver's objections as was done by counsel for the defendants, Green Door and Walton, and I trust that he will not feel that his argument was slighted or not considered because I do not do so. I do intend to mention some of the major points.

The first of those was the note mechanism. In the preliminary discussions between representatives of Larco and the Receiver there had been some mention of the use of a note or debenture to finance a portion of the price. I think nothing turns on the contents of those precise discussions. The actual mechanism was not fully disclosed until the bid deadline and the submission of the sealed bid.

It is appropriate I think to consider that, in the offer which was submitted on September 3rd, para. 3 dealing with payment, after setting out provisions with respect to deposit and the taking back of mortgages, concluded with the following subparagraph:

> And the balance of the price for the Properties shall be paid subject to adjustments to the Interim Receiver on the Escrow Closing by certified cheque or bank draft payable to the Interim Receiver drawn on or by a Canadian chartered bank or by another Canadian financial institution acceptable to the Interim Receiver.

When the sealed bid was submitted the note mechanism, a phrase which I shall adopt although it is not in all respects a happy one, was in the form which appears at p. 136 of the record, this by way of amendment to the offer to which I have

just referred:

8. Paragraph 3 of the Form of Offer shall be amended by adding thereto the following paragraphs:

"The balance of the price referred to in paragraph 3 of the Form of Offer shall be paid by Offeror to the Interim Receiver by Offeror's delivering to the Interim Receiver a promissory note ("Citibank Guaranteed Note") in that amount, which note shall be unsecured by any charge against the Properties, but which shall be absolutely and unconditionally guaranteed by one of Citibank Canada, Royal Bank of Canada or another financial institution reasonably acceptable to the Interim Receiver (which financial institution is herein referred to as "Citibank"). The said promissory note shall require equal monthly payments of principal and interest sufficient to fully amortize the said sum at the rate of 8.222% per annum over a term of thirty (30) years. Offeror shall arrange a conventional mortgage loan with Citibank or its designee (which party is herein called ("Lender") which shall be secured by a charge against the Properties which shall be subject and subordinate in all respects to the existing loans which are assumed by Offeror on the date of Closing."

The Interim Receiver shall sell the Citibank Guaranteed Note on the date of Closing to Lender for cash purchase price determined as follows:

"on or before Monday, September 15th Citibank shall report in writing to the Interim Receiver stating the cash price (the "Cash Purchase Price") for the Citibank Guaranteed Note as of Wednesday, September 10, 1986. On or before Wednesday, September 17, 1986 the Interim Receiver shall have received in form satisfactory to Interim Receiver acting reasonably an undertaking from Citibank to purchase or cause to be purchased the Citibank Guaranteed Note at the Closing at the said Cash Purchase Price as part of the escrow arrangements herein provided, subject only to the acceptance of this Offer and such reasonable warranties and representations from the Interim Receiver that he has not

encumbered or accepted payment on the said note as Citibank may require. Any such sale of the Citibank Guaranteed Note by the Interim Receiver will be on a non-recourse basis."

Any Court approval of this Agreement to be effective and acceptable to the Offeror shall also include approval of the sale by the Interim Receiver of the Citibank Guaranteed Note as herein provided.

The concerns of the Receiver to which this aspect of the transaction gave rise are set out, as I have indicated, in para. 38 of the report. It was, I think it is fair to say, a complicated mechanism and had some elements of novelty. In its very nature it gave rise to questions, particularly perhaps having regard for the history of these properties in the recent past. It gave rise to questions as to the reasons for its use and also as to its possible effect on the price. In my view, the questions raised by the Receiver were reasonable questions and they were not answered promptly, frankly or fully.

The position of Larco, in part made explicit and in part to be inferred from conduct and from the evidence, was that this was largely none of the Receiver's business. Larco was perfectly entitled to take that position. I should say by way of digression that if in any previous ruling or in these reasons I appear to be critical of what was done by Larco, it is within the limited framework of the process with which I am concerned and not otherwise. Larco is not a charitable organization. It is a commercial corporation entitled, within the limits of the law, to carry on its commercial affairs as those having the charge of those affairs deem appropriate. But if in some respects it produced adverse reactions in the Receiver, and adverse consequences for the reception of its offer, it cannot be heard to complain.

The next contentious item to which I propose to make reference was what has been called in the evidence the "Financing Condition". This was not part of the draft offer but was contained in the sealed bid and was set out in the following terms by way of amendment to that offer:

> Notwithstanding any other provision of this Offer, the obligation of the Offeror to proceed with this transaction shall be conditional upon the Offeror's obtaining written commitments, reasonably acceptable to Offeror, for the Citibank Guaranteed Note and the conventional mortgage loan from the Lender no later than twenty (20) days after Acceptance of this Offer. If Offeror does not obtain the written commitments from Citibank and the Lender within the time period of twenty (20) days, Offeror may terminate this Agreement, in which case, the Interim Receiver shall return the deposits and interest thereon to Offeror promptly following demand.

In my view, such a provision given the mechanism and procedure, the process which was being followed, ought to have been part of the Larco offer and subject to negotiation at the proper time and not at the 11th hour.

The evidence of Mr. Shiraz Lalji was to the effect that he considered the offer as merely a format for the transaction and that the real substance was to be in the sealed bid. He also testified that he had been led to believe that conditional offers would be at no disadvantage. I find it difficult to accept that evidence. The financing condition was a provision so material and of such obvious advantage to the purchaser and a commensurate disadvantage to the vendor that it went to the very root of the transaction. Indeed, as the apprehension of the Receiver indicated, it converted what purported to be an offer into what was in substance an option. I shall have to discuss further in a moment the reasons that I cannot accept Mr. Lalji's evidence in that regard. I can only say for the present that if he entertained the view which he expressed with respect to the form of offer it was a mistaken view and should have been recognized as mistaken having regard particularly for the form of the invitation to tender and of the converting letter with which that invitation went out. Whether this deferral of a term so critical was deliberate or inadvertent, I need express no conclusion. It operated, however, to the detriment of Larco in the consideration of its offer by the Receiver.

Eventually it was recognized by Larco that the financing condition was likely to be seriously prejudicial, if not fatal. Steps were set in train to address its removal. That removal entailed a financial cost and risk to Larco which it had sought to avoid. Approval of its board of directors was required and that approval was obtained early on the morning of September 18th, 10 days after the bid deadline. Written confirmation of that waiver is found in sch. 8 to the report, at p. 179, in a letter from Messrs. Weir & Foulds, Solicitors to Clarkson Gordon Inc. which says after some reference of a preliminary nature to the sealed bids: "Our client has instructed us to waive, and we hereby waive, the benefit of paragraph 10 to Schedule 3."

The evidence indicated that Mr. Carthy apparently wanted some assurances from Larco before writing that letter; an apprehension which is not difficult to understand. The Receiver has taken the position that the waiver should have come direct from Larco and not from its solicitors. I do not propose to determine as a matter of law whether the purported waiver was effectual or not, although invited in argument to do so. I do not consider it any necessary part of my function on this motion. What is to be considered is the reaction of the Receiver.

In a transaction of such magnitude and pertaining to a condition so material, I do not consider it in any way unreasonable that the Receiver looked upon it as one of the unfavourable elements which ultimately tipped the scales against the Larco bid. Solicitors, of course, have certain general and accepted authority to bind their clients. But the annals of law are not wanting in cases where the authority and its exercise have become a topic of litigation. And there is a maxim well-known among businessmen that no one wants to buy a lawsuit. All of this dealing with the form of the waiver I say, without any reflection upon or lack of respect for the eminently capable and reliable firm of solicitors who offered it.

I turn now to the question of the mortgages to be discharged which proved to be a bone of contention. In view of the

mechanism of the promissory note, which was to be sold at a discount, it was essential for the Receiver to know the mortgages to be discharged in order to know the real price. The final position of Larco in this regard is contained in a letter dated September 21st from Weir & Foulds which is contained at p. 181 of the record:

4. Assumed Mortgages

By letter dated September 16, 1986, provided you with a letter explaining the "Estimated Assumed Loans" in connection with 's bids. As you may know, we have not had the opportunity to fully review all of the existing mortgages which affect the properties and make a final decision as to which existing mortgages will be assumed at closing by . hereby agrees that the "Reconciled Contract Price" set forth in 's letter for each of 's bids shall be the exact cash equivalent price which the Receiver shall receive at closing from . For example, if the actual assumed mortgages are less than the amount stated by in his letter, the shortfall shall be paid by in cash at closing in order to maintain the "Reconciled Contract Price" as stated in 's letter. On the other hand, if the actual assumed mortgages are more than the amount stated by in his letter, the "Face Value of Vendor Note at Closing" will be adjusted downward in such a manner as to maintain the stated "Reconciled Contract Price" as stated by in his letter.

If further clarifications of the offers are required, please advise the undersigned.

It does not respond in exactly the terms in which the Receiver had put its inquiries but instead provided a mechanism for possible adjustment with respect to the mortgages assumed. Again, I do not propose to consider whether this was a satisfactory response or not. It was another complication, another blemish on the Larco offer, another factor which the Receiver not unreasonably considered to be adverse and to weigh against approval.

There is a further matter dealing with the utilization of the note. As I have indicated, the precise mechanism made its appearance in the sealed bid and I have already read the relevant paragraph. I do not propose to review all of the evidence, which was considerable, bearing on this topic. It is sufficient to say that the final solution unilaterally proposed by Larco is as found in the record at p. 179 in the letter from Weir & Foulds of September 18th to which I have already referred in another context. The concluding paragraph of that letter reads:

> Enterprises Inc. hereby agrees to cause the Citibank Guaranteed Note to be purchased on closing on the same terms and conditions as contemplated in paragraph 8.

No reference is made to the Royal Bank who at one time had been proposed as a potential purchaser or to any other purchaser. The covenant of Larco has been substituted for that of Citibank, and as I have indicated, no purchaser has been provided or even proposed.

It is the position of Larco, as put in argument and in evidence, that from a commercial standpoint the purchase of the note became irrelevant once Larco had demonstrated credit capacity adequate for the transaction, as it did by a letter from Citibank dated September 9th. Larco was then, it is said, in the same position as other tenderers, obliged to pay on closing or otherwise make good. Ignoring any frailties which may be inherent in that argument, it is undeniable that it did not put the Receiver in the position which it had originally been proposed of having a bank liable to make good.

It has been submitted by counsel supporting the Larco offer that the requirement for a purchaser of the note had been waived by the Receiver. Again, I do not propose to dispose of waiver or estoppel as matters of law. I refer to the episode as yet another problem for the Receiver and its counsel and a problem which militated against the Larco offer.

In outlining initially the obligations of the court on a motion of this kind, I adverted to the question of whether the

Receiver has in any way misled a bidder. It is clear that if a bidder has been misled that may constitute a circumstance upon which the court will intervene upon the motion for approval. Though it was not passed in argument, there was clear indication in the evidence, particularly that of Mr. Shiraz Lalji, that Larco had been misled as to the acceptability of a conditional offer. This was relevant to the much discussed financing condition.

Any suggestion that Larco was misled in this respect must be approached with a measure of skepticism. Larco is apparently a large sophisticated enterprise and those charged with its affairs appear expert in matters of contract negotiation and finance. It was advised in and about this transaction not only by members of its own board of directors but by an attorney of Seattle, Washington, Mr. Thaddas Alston. Mr. Alston testified and was quite evidently an able and experienced lawyer with a connection of some duration with the affairs of Larco. Larco was also advised by eminently capable solicitors in Toronto. It had every advantage to review and consider every aspect of the transaction.

Mr. Lalji testified that early in the discussions Shaver indicated that conditional offers would be considered on a par with unconditional offers. This Shaver denies and says that all he ever said was to the effect that: "We will look at all offers." The evidence of other representatives of the Receiver was that Larco was repeatedly told that a condition would be to its disadvantage.

It is always difficult and distasteful to a judge to have to resolve a direct conflict of evidence between what are apparently respectable and reliable witnesses. But sometimes the duty is one which cannot be avoided, and in this instance I find myself compelled to accept the evidence of Shaver and to reject that of Lalji. I do so chiefly on what is most probable. The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it. Indeed it is a clear inference

from Mr. Lalji's evidence that he recognized that it was bizarre and had it been said I doubt very much that he would have taken it seriously.

It was also suggested that Larco was misled into concluding at the last stages that the Receiver was not insisting on the undertaking of the bank to purchase the note. I have already made brief reference to this. It was said that Mr. Cogan, a representative of the real estate consultant advising the Receiver, had either said so or had plainly inferred it. This Cogan denies. Cogan was responsible for the real estate aspects of the transaction and not for the legal or financial ones. If Larco received such an impression from Cogan, prudence would have dictated that the matter be verified either with Mr. Shaver or with the solicitors advising the Receiver. So much Mr. Alston conceded in his evidence. It would appear that Mr. Carthy of Weir & Foulds recognized that there was a deficiency in that regard.

The evidence of Mr. Zimmerman, a member of the firm of solicitors advising the Receiver, confirmed by the uncontradicted evidence of Shaver, was that on September 16th Carthy and Alson were advised during a telephone conversation that the note purchase undertaking was expected by the Receiver on the following day. It was never received.

Taking the evidence as a whole, I am not at all persuaded that Larco was misled in any material respect.

In criticism of the conduct of the Receiver, criticism which I may say has been very limited in extent, it was submitted that the Receiver negotiated with other parties after the bid deadline. Specifically reference was made to the Ivordale-Maisonettes property where a discrepancy had appeared between the words and the numerals in the offer. I am not persuaded that the resolution of the problem involved negotiation, nor that if it did it offended the process or was prejudicial to Larco.

There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made

during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

A special and somewhat peculiar position in the matter was put on behalf of the defendant Maysfield Property Management Inc. Maysfield is a corporation whose shares are effectively held by receivers appointed for two other corporations. Maysfield managed and operated the subject properties before Clarkson was appointed Receiver, and by arrangement with Clarkson continued to perform that function after the receivership commenced. It employs something over 200 persons. It has substantial worth and it has substantial revenues.

By letter dated October 16, 1986, Larco offered to purchase the outstanding shares in Maysfield for net book value, an offer conditional upon approval of the Larco offer by the court. If the offers recommended by the Receiver are approved, there appears to be no certainty and perhaps not even any probability of the continued viability of Maysfield.

In a secondary submission counsel for Maysfield asked that if an order were made as sought by the Receiver, that that order should be stayed for some period of time to enable Maysfield to negotiate with the purchaser.

I observe by looking at the clock that I have been going for something well over an hour at the moment, and I regret to tell everyone that I am not finished yet. I propose to take 10 minutes for my benefit and perhaps for yours as well.

[Court recessed 11.07 a.m. and resumed 11.19 a.m.]

I propose now to express some factual conclusions with respect to the matter.

The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and

its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

Mr. Zimmerman very fairly conceded in his evidence that probably none of those causes was in itself fatal. I think that probably is so. They were, however, considered cumulatively by the Receiver and it was in my view legitimate and reasonable to do so.

In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be

had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. 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. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. 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.

In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

Reference was made in argument to The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

The decision made by the Receiver was one to which it brought its experience and expertise for the position to which it was appointed. It was a decision upon which the Receiver had the advice of solicitors and counsel and of an expert real estate consultant retained for the purpose. It was a decision from which the Receiver did not resile at the conclusion of two weeks of hearing.

It is clear on the one hand that the court is not to apply an

automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

The court no doubt has power to enter into the process to any extent which appears proper in the circumstances. In Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, to which I have referred, the judge in chambers actually received bids.

In this case it was suggested by counsel for some of the objecting defendants that the court conduct a run-off or direct the Receiver to do so between the Larco and the recommended offerors. I have no doubt that I have the power to do so. To exercise it would, in my view, exhibit very little judgment. It would be to open a Pandora's box, the contents of which might be more unruly and unpredictable than the consequences which followed my decision to hear viva voce evidence in this case.

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.

Much was said during the hearing about the integrity of the process, that is, the process carried through by the Receiver pursuant to the July order made by Catzman J., and whether Larco had abused or evaded or sought to abuse or evade it. The Receiver perceived, not unreasonably in my view, that that was so. Certainly it must be said that Larco fell somewhat short of coming forward promptly, openly, forthrightly and unequivocally with its best offer, an objective at which the process was directed.

In the arguments of counsel for the objecting defendants, particularly for the defendant Prousky, the process was very narrowly defined; virtually confined to the precise provisions of the plan approved by the court. I do not consider it appropriate to view it so narrowly or that the ambit of the Receiver's discretion should be so narrowly limited.

In addition to the regard which must be had for the process in this case, there is another similar factor for which I must have regard. It was adverted to by Saunders J. in the two cases of Re Selkirk (1986), 58 C.B.R. (N.S.) 245, and Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237, which have been referred to in the argument. It was also reflected in the Nova Scotia Court of Appeal decision in Cameron. In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J. A. in Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, ''the delicate balance of competing interests", that is a relevant and material one.

In this case I am reviewing the recommendations of the Receiver. I have had the benefit of two weeks of hearing and the assistance of a dozen learned counsel, advantages which were denied to the Receiver.

If I were persuaded, and I am not, to conclude that as a result of this hearing the objections of the Receiver had been fully and satisfactorily met, I should still have much hesitation in rejecting the Receiver's recommendation.

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.

Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are, as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

During the time which I have spent considering this matter, I have asked myself many times what the situation would have been had we been dealing with hundreds of thousands of dollars, rather than hundreds of millions, and a potential difference in the result potentially reduced accordingly. I have asked myself whether I would have had any difficulty in arriving at a conclusion and have found myself forced to answer that question in the negative. It is a well-worn adage among lawyers and judges that hard cases make bad law. Perhaps there is a corollary proposition that large cases have a tendency to do the same sort of thing.

The actual difference between the offers under consideration, I am repeating myself, is substantial. It is that alone which has really created the issue before me. While the actual difference is a factor of much weight, it must also be viewed in its relative relation to the size of the transaction. 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.

The importance of this motion, and the measure of interest which it has for the parties and for the public, might have made desirable a period under reserve of sufficient duration to permit the writing of formal reasons for judgment. The circumstances related to the prospective sales were such that prompt disposition of the motion seemed more important than elegance of expression. The worst grammatical solecisms will be massaged out in the editorial process. As to the substance of

the reasons, I feel as much confidence as is possible when one is dealing with matters of difficulty, of importance and of some notoriety.

There will be orders as asked upon the motion approving the sales. I presume that there will be some mechanical matters to be dealt with before we all part and I invite counsel, I guess first of all Mr. Lamek, to suggest whether it would be appropriate that I adjourn for a few moments while those matters be considered and discussed, or whether I should proceed to deal with them immediately.

MR. LAMEK: I suggest a short adjournment might be useful, My Lord. On the possibility that your lordship would take the view of this matter that you have expressed this morning a revised draft order was prepared to take into account the matters that occurred during the course of the hearing. We have not been so bold as to distribute that to other counsel in advance. Having not seen the revised draft, and of course neither has your lordship, it might be helpful if we do and until your lordship has a good look at the draft.

HIS LORDSHIP: Does it make any disposition as to costs, Mr. Lamek.

MR. LAMEK: I did not, my lord.

HIS LORDSHIP: If you will be kind enough to send my copy of it through the Registrar, I will recess now for what, 15 minutes?

MR. LAMEK: I think that should be sufficient, my lord, yes. If it is not perhaps ...

HIS LORDSHIP: You can let me know?

MR. LAMEK: Thank you, my lord.

[Court recessed 11.45 a.m. and resumed 12.07 p.m. Counsel made submissions as to costs.]

HIS LORDSHIP: There will be no order as to costs. Mr. Strosberg's argument, as usual, makes good sense and I would be hard put to diagree that a measure of benefit has flowed from the proceedings.

At the same time, I think it fair to observe that the objecting defendants were not proceeding pro bono publico, and I see no sufficient reason that their participation should be other than at their own expense.

Before I depart from the matter I should, which I normally do at the outset before anybody knows whether they have won or lost, record my gratitude to counsel for their assistance in dealing with the matter and for the orderly conduct of the proceedings throughout.

Motion granted.

RULING ON MOTION BY LARCO ENTERPRISES INC.
TO BE ADDED AS AN INTERVENOR

HIS LORDSHIP: There is a motion before the court brought by the interim receiver and manager Clarkson Gordon Inc. to approve the sales of certain properties on the recommendation of Clarkson, and for direction as to details relating to the completion of the sales which are approved.

The motion comes on pursuant to leave reserved by the order of the Honourable the Associate Chief Justice of the High Court made on November 29, 1985. Service of notice of motion was effected in accordance with an order of the Honourable Mr. Justice Catzman made on July 25, 1986.

On the return of the Receiver's motion, a motion was made on behalf of Larco Enterprises Inc. That motion seeks an order adding Larco Enterprises Inc. as an intervenor in the action and allowing the intervenor access to the report of the Receiver dated October, 1986, with respect to the proposed purchase of properties as set out.

The properties affected by the Receiver's motion are numerous

and various in their quality. Details as to those matters are not necessary for present purposes. Because of the nature and number of the properties and the consequent difficulties in marketing them effectively, a complex and sophisticated plan was evolved and pursued under the authority of the order of the Honourable Mr. Justice Catzman to which I have referred. Again, details of that process are not necessary for present purposes. It is sufficient to say that a very large number of offers were made to and considered by the Receiver, of which some 26 are recommended for the approval of the court.

Among the offers received, but not recommended for approval, was one from Larco. As to its disposition of the Larco offer, it is useful to refer very briefly to two portions of the report of Clarkson which is filed in support of the substantive motion.

The first reference is to para. 33 of the report which is found at p. 52:

> Annexed hereto as Schedule E is a photocopy of one of the four sealed bids, (the "Enterprises' Sealed Bid") submitted by a particular offeror ("Enterprises") and a photocopy of Enterprises' form of offer in connection therewith, in each of which the name of Enterprises has been deleted and which together comprise one of the offers ("Enterprises' Offer") in respect of which Clarkson exercised its discretion to extend the date by which such offer may be accepted as aforesaid. Clarkson does not want the fact that this offer has been kept open to permit an inference that it in any way endorses the Enterprise Offer. Clarkson has chosen to extend such acceptance date in order that this court may effectively assess the rationale behind Clarkson's decision not to accept and recommend Enterprises's Offer. Clarkson has advised Enterprises that it has chosen not to accept any of the other three offers submitted by Enterprises.

And also for present purposes only a portion of para. 37 which is found at p. 56 of that report:

> It will be noted that if the value put by Enterprises on its

offer in its letter of September 15th, 1986 referred to in paragraph 35 hereof is accepted, and if that amount is coupled with the offers accepted in respect to the Bretton Place and Bay Charles Tower Properties, the value of these offers is approximately $422,000,000 which is estimated to be, at the most, about $9,900,000 or 2.4% in excess of the cash equivalent value of those offers which Clarkson has accepted. However, Clarkson, after considering the matter at length in conjunction with Fraser & Beatty and Cogan, decided not to accept Enterprises' Offer for the reasons set forth in paragraph 38 hereof.

I need not refer at present to those reasons. Fraser & Beatty are the solicitors advising the Receiver and Cogan is the real estate expert also advising the Receiver.

I turn now to the nature and relief sought in the Larco motion and the grounds upon which it is based. Reliance is placed on rule 13.01 of the Rules of Civil Procedure. That rule, in so far as it is germane for my purposes, reads as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;
>
> [then I miss a clause which is not material]
>
> the person may move for leave to intervene as an added party.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

In support of the Larco motion, it has filed the affidavit of

one John Hunt Nolan, and I propose to read briefly from that affidavit at p. 8 of the motion record commencing at para. 10 of the affidavit:

> 10. In the report, Clarkson has placed Bid 4 before this Court and has raised some concerns with respect to it.
>
> 11. It is clear from the report (paragraph 37) that the Larco bid is the highest value of all submitted bids.
>
> 12. In order to properly respond to Clarkson's concerns, I believe that it is necessary for Larco to be added as a party to these proceedings.
>
> 13. Larco, through its officers, was of the understanding that at all material times Clarkson had recognized the status of Larco herein and believed that Larco would be able to make representations to the Court with respect to Clarkson's report, insofar as it respected Larco's bid.
>
> 14. I believe that Larco has a valid commercial interest in these proceedings. I further believe that those interests may be adversely affected if Larco is not given standing in these proceedings and an opportunity to examine and reply to the Clarkson report. Indeed, I believe that the various defendants in these proceedings may be adversely affected if Larco is not given standing in light of its apparent highest value bid.

Larco's motion for intervention is opposed by counsel for Clarkson and by counsel for the trust companies, and is supported by counsel for the defendants Rosenberg and Prousky and for Green Door Investments Ltd. and Leonard Walton.

The first question to be addressed is whether Larco can be brought within the ambit of rule 13.01. In considering this, it is necessary to decide what is the "proceeding" to take that word from the rule.

The notice of motion says that an order is sought adding Larco "as an intervenor in the action". As the argument

proceeded I think it was common ground that the "proceeding" was the motion for approval of the sales.

Counsel for Clarkson submits that the rule does not apply to such a motion, indeed does not apply to an interlocutory motion at all. In that connection reference is made to rule 1.03 and in particular to para. 22 of that rule which defines "proceeding" in these terms:

22. "proceeding" means an action or application;

It is also useful to consider para. 15 of that subrule where "judgment" is defined in these terms:

15. "judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party;

There can be no doubt that the motion brought by Larco is neither an action nor an application as those terms are defined in the rules. It is, I think, questionable whether the result of the substantive motion can properly be designated as a judgment, and I do not consider it necessary to trace my way through the procedural maze which would be necessary in order to arrive at a reasonable conclusion as to whether it was or not.

I am referred by counsel for Larco to other provisions of the rules, in particular the opening words of rule 1.03 which contains the definitions to which I have referred and which says:

1.03 In these rules, unless the context requires otherwise ...

I am also referred to rule 1.04(1):

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

And, finally, reference is made to rule 1.05:

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

I find nothing in the context of rule 13.01 which requires me to give to the word "proceeding" any other meaning than as defined in rule 1.03, para. 22. Nor do I consider that rule 1.04(1) gives me any licence to do so.

Thus, on purely technical grounds I hold that the Larco motion is not a motion related to a "proceeding" within the meaning of rule 13.01 and should be dismissed.

The disposition by a judge of first instance of what is essentially a question of law may well prove to be ephemeral in its nature. For that reason, and because I would prefer that my decision not be perceived as resting on grounds so narrow as technical, I intend to explore some other aspects of the matter.

If the proceeding were one to which the rule applied, the next question to explore would be whether Larco has an "interest" in the subject-matter of the proceeding.

The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.

Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect

to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

When this offer was made it knew that the Receiver need not accept the highest or any bid. I see no force in the argument that Larco has some special right by reason of the decision of Clarkson to extend the date for acceptance having regard for the limited and special reason for which that extension was made.

While I would not give it substantial weight, I am not unmindful that the consequences of such an order, that is an order adding Larco, would be extremely difficult to predict in terms of delay and in terms of complications in the completion of the transactions under review, consequences which I have decided would not be satisfactorily resolved by any conditions which I could devise and attach.

In the course of argument I expressed the view that there would be some advantage for the court in having Larco's submissions on the Receiver's reasons for rejecting its offer. My concern on that score has been resolved by the realization that there are many counsel present in a position to extol such advantages as the Larco offer may have, and by the expressed position taken by counsel for the defendant Rosenberg that it was prepared to advance the advantages of that offer.

It has not escaped my attention that the Larco motion, however dealt with, has a potential for complication and delay of the proceedings. That is simply a fact of life and nothing within my power can alter it. Fully conscious of that I have arrived at the disposition I propose as being consistent with the law as I see it, and with, at least, no greater potential for adverse consequences.

The matter appears to be one of first impression. I would have preferred for that reason the opportunity to reserve and to deliver a written judgment. It seemed apparent, however,

that the circumstances were such that expedition in the result was to be preferred over elegance in its expression.

I was referred to several cases, none of which I considered to be sufficiently on point to make it useful or necessary to refer to them.

The motion of Larco to intervene is dismissed.

Motion dismissed.

ORAL RULING REGARDING LARCO ENTERPRISES INC.'S LATE OFFER

The ruling which I must make this morning involves what disposition is to be made of a new offer by Larco Enterprises Inc., an offer delivered by counsel for the defendant Rosenberg to the counsel for the Receiver during the luncheon recess on Wednesday, October 22, 1986.

Before proceeding to the substance of my ruling, I wish to review briefly the progress of this motion to date. The notice of motion, the substantive motion that is to approve sales, is dated October 10, 1986, and it was on that date served on agents for the solicitors for the defendant Rosenberg. It was made returnable on Monday, October 20th, and according to its return date came before me.

Also made returnable on that date was a motion by Larco for status as an intervenor in the application for approval. The supporting material filed upon that motion indicates that it was prepared not later than October 17th when the affidavit of Nolan was sworn. It is an inescapable inference that Larco knew by that time at least that the Receiver was not recommending its offer and knew the bases advanced by the Receiver for refusing to do so. It would not be unfair to surmise that Larco knew some time before that.

In the affidavit of Nolan filed in support of that motion to intervene there is no reference made to any new offer, or to the possibility of any new offer, but only an intention to

address the concerns of the liquidator about the offer which was then under consideration.

The disposition of that motion to intervene was not without difficulty. It came before me as a matter of first impression. It had obvious implications whatever its disposition was and for that reason I reserved my judgment and made my ruling on the following morning at 10:00 a.m. on Tuesday, October 21, 1986.

At the request of counsel, I adjourned to chambers to discuss what method of proceeding with the substantive motion should be followed in light of that ruling, and in light of the possibility that an appeal would be taken from that ruling. After considerable discussion and the submissions of counsel, I decided not to resume the argument that day but to do so on the morning of Wednesday, October 22nd.

At the opening of court on Wednesday, October 22nd, Mr. Lamek, as counsel for the Receiver, requested leave to adduce viva voce evidence of an officer of the Receiver company, the vice-president of Clarkson and Gordon Inc. and such leave was granted.

Mr. Shaver was examined in-chief during the forenoon, and it was after the luncheon recess, as I have indicated, that the new offer of Larco was tendered by counsel for Rosenberg. The precise time of its tendering I do not know, but it was first drawn to my attention when the court resumed in the afternoon.

I am urged by counsel for Rosenberg and for some other defendants to receive this offer in evidence and to consider it upon the disposition of this motion. The new offer, the details of which I have not reviewed, is said to be some $15 million higher than that which is proposed by the trustee for acceptance. This amounts to something in excess of 3% of the aggregate amount of the purchase price of all of the properties.

It is the submission of counsel for the defendant Rosenberg and some other defendants that I should receive the offer in

evidence, permit the representative of the Receiver to be cross-examined with respect to it, and, at the conclusion of the motion, decide whether it should be accepted in place of that recommended by the Receiver.

I do not intend to do either. The conclusion I may say I have reached without hesitation or doubt, the reasons I am now expressing are expressed only because there is some public interest in the question, and it should be made manifest that I am deciding what I am deciding and, of course, it should be available to a reviewing court should such a court review the discretion which I have now exercised.

The sale procedure in this case was carefully devised and carefully applied. I need not review either the details of the plan or its application. They are matters of record.

Larco knew early in the procedure that its offer was perceived by the Receiver to present difficulties. Various efforts were made to resolve those difficulties. They were not successful. Larco moved to intervene in these proceedings and failed.

On the third day of the motion an entirely new offer was tendered. My reasons for refusing to admit or consider that offer are simple and basic. To do so would make a farce and a mockery of the elaborate process devised and followed in the marketing of these properties. Indeed, it would make completion of a sale such as this potentially impossible as it would deprive the process of any finality.

A judge is not equipped by training nor required in the nature of his office to assess immediately the merits or demerits of an offer so complex as this without previous analysis and advice. Inevitably, therefore, when such an offer is presented at this stage, the judge is either required to do that which he is not properly able to do, or must direct the Receiver to do so. The latter, of course, is the only rational manner of proceeding if it is to be dealt with at all.

The potential for confusion and delay, if that were done in

this case, is so obvious as not to require elaboration. The dilemma with which I am presented is not new, although it has not perhaps been presented before in circumstances so adverse and so complex as those which are before me.

It was dealt with by the Honourable Mr. Justice Saunders of this court in two judgments to which I was referred in argument, the first being the judgment in Re Selkirk (1986), a report of which is in 58 C.B.R. (N.S.) 245. There the circumstances under consideration involved the sale by the sheriff and the appearance after the sheriff had accepted an offer of a new and higher offer.

Mr. Justice Saunders in dealing with the matter says at p. 246 of his reasons the following:

> 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 consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

He then quotes a judgment of the Nova Scotia Court of Appeal [Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1, per Macdonald J.A.] in the following terms:

> "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."

Continuing with Mr. Justice Saunders' judgment [at pp.

246-7]:

> 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.
>
> The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

The second judgment of Mr. Justice Saunders is one in Re Beauty Counsellors of Canada Ltd., again in 58 C.B.R. (N.S.) at p. 237. There the facts were very similar to those in the Selkirk case. At p. 242 Mr. Justice Saunders makes the following observation:

> I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:
>
> 1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or

2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

At p. 243 he says:

> Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

I consider that the concluding observation made by Mr. Justice Saunders in that context was something of an understatement:

> 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. 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.
>
> In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

I consider that these cases should be followed in this case. I refer especially to what I just read from the judgment of Mr. Justice Saunders. The logic is, in my view, impeccable and, in application to this case, unanswerable. The processes discussed there apply with even greater force in a case such as this where the process of sale has been so complex, so demanding and so exhausting.

No question of fairness as raised by Mr. Justice Saunders arises in respect to Larko. If there is a want of fairness involved it has been exhibited by Larko. The present offer is a belated and blatant effort to circumvent the bidding process and to acquire the property over the heads of those who have dealt according to the rules prescribed. Only most extraordinary circumstances would justify the court in putting its approval on such conduct. No such circumstances exist here.

Counsel for the defendant Rosenberg submits with his customary vigour that $15 million is a lot of money; that the court must have regard for commercial reality; that this last offer represents the current state of a buoyant real estate market; and, that it is notorious that court-conducted sales always realize less than the full potential value of the subject property.

Let me deal with those submissions in order. $15 million is a lot of money in absolute terms even in the debased currency of 1986, but in relative terms it is something over 3% of the aggregate value of the properties. There is no such shortfall or disproportion as to call in question the fundamental soundness of the sale procedure ordered by the court, or the application of that procedure by the Receiver.

The court must, of course, have regard for commercial reality. One aspect of commercial reality is that there are certain inherent limitations in a court sale, limitations which are unavoidable. The court has not the capacity to wheel and deal as an individual entrepreneur is able to do, and the court must have regard not only for commercial reality but for commercial morality, a conditioning factor which is not always apparent in private deals.

This last offer may represent the current market. It may also represent simply the desire of the offeror to acquire an advantage over other bidders. It is customary that court sales and sales in foreclosure or liquidation or under other constraint, tend to obtain less advantageous prices than those which might be obtained by a skilful and unfettered vendor free to manoeuvre in an open market. But it must not be forgotten that court sales or other liquidation or forced sales are symptoms of a commercial collapse or dispute or disease of some kind, and the sale cannot wholely escape the consequences of the disease.

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.

Some suggestion was made by counsel for the defendant Rosenberg that the extra recovery which this new offer purports to make available might significantly reduce the ambit of the litigation of which this motion is an offshoot. That would be a consummation much to be desired. But in my view, this prospect is too indefinite, too amorphous, and too remote to be given weight in the disposition of the matter which is now before me.

When the offer was produced I said to Mr. Lamek with what may have been an unfortunate air of flippancy that it would not go away, nor will it. But it will have no role in the conduct of this motion so long as I am seized with the motion.

The offer or a copy will be marked ex. A to these proceedings for the purpose of identification only and so that it may be available to any other court in any review of the discretion which I have exercised in excluding it from present consideration. It will not be the subject of examination or

cross-examination of any witness.

Ruling accordingly.

TAB 9

CITATION: Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247
COURT FILE NO.: CV-12-9566-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **Pamela Huff, Marc Flynn and Kristina Desimini, for the Applicant, Terrace Bay Pulp Inc.**

Alec Zimmerman and James Szumski, for Birchwood Trading, Inc.

M. Starnino, for the United Steelworkers

Alan Merksey, for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko, for Ernst & Young Inc, Monitor

Jacqueline L. Wall, for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg, for Skyway Canada Ltd.

Fred Myers, for the Township of Terrace Bay

Peter Forestell, Q.C., for Aditya Birla Group and AV Terrace Bay Inc.

HEARD: **JULY 16, 2012**

ENDORSED: **JULY 19, 2012**

REASONS: **JULY 27, 2012**

ENDORSEMENT

[1] Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

[2] The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

[3] Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

[4] Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

[5] Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

[6] On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

[7] With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

[8] The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

[9] Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

[10] The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

[11] Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

[12] Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

[13] Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

(a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;

(b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;

(c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;

(d) employment of approximately 75 additional employees, plus the existing management of the mill;

(e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

[14] Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991) 7 C.B.R. (3d) 1 (C.A.) has not been met.

[15] Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

[16] For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

FACTS

[17] The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

[18] On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

[19] The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

[20] The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

[21] The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

[22] After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

[23] Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

[24] Four parties expressed an interest in Terrace Bay after the Bid Deadline.

[25] The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

[26] The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

[27] It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

[28] As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

[29] The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

[30] In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

(a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;

(c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;

(d) the Sales Process Terms provide no bid protections for the potential Purchaser;

(e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;

(f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;

(g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;

(h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

[31] As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

[32] The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

[33] The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

[34] The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

[35] The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

[36] The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

[37] In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

[38] The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

[39] The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

[40] The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

[41] The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

[42] The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

LAW AND ANALYSIS

[43] Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[44] I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

> (a) whether the court-appointed officer has 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 are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[45] In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> When deciding whether a receiver has 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 Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
> > 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.

[46] In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan

appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

[47] The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

[48] Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

[49] I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

[50] It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

[51] Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 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.

[52] In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

[53] It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

[54] I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

[55] I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

[56] The second point in the *Soundair* analysis is to consider the interests of all parties.

[57] On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

[58] The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

[59] I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

> 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 the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.

[60] At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trustco*, at p. 109:

> 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.

[61] In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

[62] The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

[63] There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

[64] I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

[65] In all respects, I am satisfied that there has been no unfairness in the working out of the process.

[66] In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

[67] In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

[68] I have concluded that the Approval and Vesting Order should be granted.

[69] I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

[70] The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

[71] The authorities cited, *Lama v. Coltsman* (1978) 20 O.R. (2d) 98 (CO.CT.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp*., (2005) O.J. No. 4832 (S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

[72] For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to

issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

[73] The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

DISPOSITION

[74] In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

MORAWETZ J.

Date: July 27, 2012

TAB 10

Court of Appeal for Saskatchewan

Docket: CACV3548

Citation: *Smith Street Lands Ltd. v KEB Hana Bank of Canada*, 2020 SKCA 41

Date: 2020-04-13

Between:

Smith Street Lands Ltd.

Appellant/Non-Party (Non-Party)

And

KEB Hana Bank of Canada (formerly Korea Exchange Bank of Canada)

Respondent/Applicant (Plaintiff)

And

JYR Investment Management Inc.

Respondent/Non-Party (Defendant)

And

The City of Regina

Respondent/Non-Party (Non-Party)

And

Westgate Properties Ltd., Nexera Law Group Professional Corporation, Olympia Trust Company, Fortress Capital Pointe 2013 Inc., Double Star Drilling (1998) Ltd., and Computershare Trust Company of Canada

Non-Party/Non-Party (Defendants)

Before:	Ottenbreit, Ryan-Froslie and Leurer JJ.A.
Disposition:	Appeal dismissed Application granted

Written reasons by:	The Honourable Mr. Justice Leurer
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Madam Justice Ryan-Froslie
On appeal from:	QBG 2952/18, Regina
Appeal heard:	March 18, 2020
Counsel:	E.F. Anthony Merchant, Q.C. and Karolee Zawislak for the Appellant Grant Richards for the Respondent, KEB Hana Bank of Canada David Brundige, Q.C. for the Respondent, JYR Investment Management Inc. Christine Clifford for the Non-Party, City of Regina

Leurer J.A.

I. INTRODUCTION

[1] This appeal relates to the judicially-ordered sale of land located at the corner of Albert Street and Victoria Avenue in Regina [Land]. On December 18, 2019, a Court of Queen's Bench judge made an order confirming the sale of the Land [Sale Confirmation Order]. The reasons for the grant of the Sale Confirmation Order are set out in a fiat dated January 13, 2020: *KEB Hana Bank of Canada v Westgate Properties Ltd.*, Regina, QBG 2952 of 2018 (Sask) [*Chambers Decision*].

[2] An offer to purchase the Land presented by the appellant, Smith Street Lands Ltd. [Smith Street], was not approved by the Chambers judge. Underpinning most issues in this appeal is the proper role of an unhappy prospective purchaser, which has no interest in the equity of redemption, in the process for judicial approval of the sale of land.

[3] For the reasons that follow, I would dismiss Smith Street's appeal.

II. BACKGROUND

A. The mortgage and Order *Nisi*

[4] A hotel had formerly stood on the Land. The Land's owner, Westgate Properties Ltd. [Westgate], borrowed money from KEB Hana Bank of Canada [KEB] and granted a mortgage over the Land to secure repayment. The hotel was torn down and the Land was excavated in preparation for the construction of a new building.

[5] By 2018, the mortgage had matured and the full amount owing had become due. KEB sued on its mortgage. As is proper, KEB named Westgate and other persons who appeared from the land titles records to be interested in the equity of redemption as defendants to its action. JYR Investment Management Inc. [JYR] is among the defendants.

[6] On March 4, 2019, a judge of the Court of Queen's Bench granted an Order *Nisi* for Sale by Real Estate Listing [Order *Nisi*]. The Order *Nisi* fixed the amount owing under KEB's

mortgage and prescribed the manner and certain terms of the sale of the Land, including that the sale was to be conducted by a court-appointed selling officer [Selling Officer] using the services of a realtor. In the latter regard, paragraph 5 of the Order *Nisi* stated:

> 5. The Land shall be sold if the Defendant(s) fails, within 30 days after the date of service of this Order on them:
>
> > a. to redeem the Land by paying the amounts described in paragraph 3 above;
> >
> > b. The Land shall be sold under the direction of … a licensed real estate salesperson in Saskatchewan (*the "Selling Officer"*) pursuant to the terms of an offer;
> >
> > c. that the Selling Officer accepts; and
> >
> > d. that is confirmed by the Court, on application.

[7] Among its other terms, the Order *Nisi* also provided that "[i]f no offers are made by the expiration of the listing period, or should any sale be abortive or not confirmed, [KEB] may apply … to amend the terms of [the Order *Nisi*]; or … for foreclosure absolute".

B. Accepted offer to purchase the Land (Royalty Offer)

[8] On April 10, 2019, the Selling Officer listed the property for sale with a listing agent in accordance with the Order *Nisi* for $8,500,000. At that point in time, the Land was still excavated.

[9] On April 30, 2019, the listing agent received a letter from the City of Regina [City] advising that it was proceeding to backfill the excavation to eliminate safety concerns. The City subsequently completed the backfill and added the cost of doing so to the taxes owed against the Land. The Selling Officer is of the opinion that the backfilling of the excavation "had a significant negative impact on the value" of the Land.

[10] No offers to purchase the Land were received by the Selling Officer for several months. As a result, in August 2019, the Selling Officer lowered the listing price to $2,000,000.

[11] On November 7, 2019, the Selling Officer received an offer from Royalty Developments Ltd. [Royalty] to purchase the property for $2,205,065 [Royalty Offer]. The Royalty Offer stated that it was open for acceptance until 5:00 p.m. on November 8, 2019. Among its other terms, the Royalty Offer dealt with the issue of unpaid property taxes as follows:

> Property Taxes and Adjustments: The Vendor shall pay the outstanding property tax arrears of $57,442.19 and the current year levy of $47,456.10, together with any interest or penalties owing in relation to the property taxes. The Buyer shall be credited with a property tax adjustment of $1,705,065.00 related to the site remediation charge levied or to be levied by the City of Regina. All other amounts owing to the City of Regina in relation to the Property shall be the responsibility of the Buyer. There shall be no other adjustments.

[12] The next day, on November 8, 2019, the Selling Officer received a second offer to purchase the Land from JYR and Magnetic Capital Group Inc. [JYR Offer]. The JYR Offer was for $25,000 more than the Royalty Offer but contained no signature on behalf of Magnetic Capital Group Inc. The Selling Officer was advised that the issue of this missing signature could not be remedied until the following week.

[13] The Selling Officer contacted Royalty to seek an extension of time to accept the Royalty Offer but was advised that an extension would not be granted. Accordingly, on November 8, 2019, the Selling Officer accepted the Royalty Offer.

C. Application for approval of the Royalty Offer

[14] On November 15, 2019, KEB applied for an order confirming the sale of the Land pursuant to the Royalty Offer. In an affidavit, the Selling Officer explained his reasons for accepting the Royalty Offer and recommending court approval:

> 8. … I considered the following factors:
>
> > a. I believed the Royalty Offer would net slightly higher net proceeds than the JYR Offer;
> >
> > b. I was familiar with Royalty Developments Ltd. in the Regina commercial real estate market and believed that it likely had the ability to satisfy the zoning condition in its offer and the financial ability to close the transaction. I was not familiar with the buyers of the JYR Offer;
> >
> > c. The JYR Offer was not fully signed prior to the deadline for acceptance in the Royalty Offer and I was unsuccessful in my attempt to extend the time for acceptance of the Royalty Offer;
> >
> > d. I considered the Royalty Offer in my professional opinion to be at or near the fair market value of the Property given current market conditions;
> >
> > e. No offers to purchase the Property had been received by me in the approximately 7 months that the Property had been listed for sale prior to me receiving the Royalty Offer;

> f. The JYR Offer (paragraphs 6 and 10(c)) was not clear as to what portion of the outstanding property taxes owing to the City of Regina were to be paid by the seller and what, if any, portion of same were to be paid by the purchaser.

[15] JYR opposed confirmation of the sale to Royalty. It asserted that the JYR Offer was better than the Royalty Offer and it should be approved.

[16] On November 26, 2019, the City applied to be joined as a defendant to the action, based on the existence of $2,278,388 in unpaid property taxes. (Most of this amount was comprised of the costs of filling in the excavation.) The City also opposed confirmation of any judicial sale on the terms of either the Royalty Offer or the JYR Offer because the Order *Nisi* required the property taxes to be paid before any other distribution was made. The City's position was that the Royalty Offer and the JYR Offer both contemplated the transfer of the Land before payment of the unpaid tax bill.

D. Smith Street's intervention in the approval process

[17] Up to this point, Smith Street had not been involved in these matters. On or around December 7, 2019, it learned that the Selling Officer would be in court on December 12, 2019, to seek court approval for the sale of the Land pursuant to the Royalty Offer.

[18] On December 10, 2019, Smith Street made an offer to the Selling Officer to purchase the Land for $2,800,000 [Smith Street Offer]. The Smith Street Offer also contained some terms and conditions that differed from both the Royalty Offer and the JYR Offer. It is a contentious issue which of the three offers is commercially superior.

[19] On the same day that Smith Street presented its offer to the Selling Officer, it filed an application without notice seeking leave to abridge the time for service of a notice of application to be heard at the same time as the application made by KEB for approval of the Royalty Offer. The intent of all this was to invite the Court to approve the Smith Street Offer in preference to either the Royalty Offer or the JYR Offer.

E. The Sale Confirmation Order

[20] On December 18, 2019, the Chambers judge granted the Sale Confirmation Order, confirming the sale of the Land pursuant to the Royalty Offer and with "more formal, and detailed, reasons to follow".

[21] In her written reasons, the Chambers judge determined that the decision to confirm or refuse an order for the judicial sale of property "involves the exercise of discretion". She explained that this "is not an unlimited discretion" (at para 15) and that, "[a]lthough the nature of the judicial sale is one of listing by real estate agent … the principles of integrity [of the sale process] remain a 'constant imperative'" (at para 20).

[22] The Chambers judge found that "JYR was keeping a watchful eye on the property" but had "made no effort to put in an offer until it learned that Royalty Developments had done so". JYR was waiting until it knew "the precise details of [the Royalty Offer]". This "allowed them to offer a price that was only marginally higher than that of Royalty Developments". All of this led the Chambers judge to conclude that "a reasonable observer would question the probity of this process" (at para 20). The Chambers judge also concluded that the "difference between the offers of Royalty Developments and JYR is insignificant" and she was "not prepared to second-guess the assessment and decision of the selling agent in accepting Royalty Developments' offer" (at para 21).

[23] The Chambers judge also stated that she "reject[ed] Smith Street Lands [*sic*] last minute bid to have their [*sic*] offer considered to be the best one" (at para 24).

[24] Finally, the Chambers judge dismissed the City's application to be added as a defendant because no party had questioned the City's priority as an encumbrancer for unpaid taxes and the Royalty Offer "clearly states that the tax levies will be paid from the sale proceeds" (at para 25).

F. The fresh evidence application

[25] KEB applied to adduce evidence to this Court to show that: (a) Royalty was not able to meet the condition in its offer relating to a zoning change for the Land and it was unwilling to waive that condition, with the result that the sale of the Land to it had been aborted; and (b) the

Selling Officer had received, and accepted, a new offer to purchase the Land for the sum of $2,937,116 from Magnetic Capital Group Inc.

[26] At the hearing of this appeal, the evidence tendered to establish the first of these points was admitted. The evidence relating to the second was not admitted because it was not relevant to the issues raised by Smith Street's appeal.

G. Parties' positions

[27] Initially, each of JYR, the City, and Smith Street appealed the Sale Confirmation Order. However, because the Royalty Offer has since been aborted, the City and JYR have abandoned their appeals.

[28] Smith Street asks this Court to set aside the Sale Confirmation Order and make the order it says should have been made in first instance: that is, that it be "substituted as the purchaser" of the Land pursuant to the Smith Street Offer.

[29] KEB says that Smith Street had no standing in the Court of Queen's Bench to seek approval of its offer and also should be found to have no standing in this Court. It further argues, based on the fresh evidence, that Smith Street's appeal from the Sale Confirmation Order is moot.

III. ISSUES

[30] In my respectful view, the outcome of Smith Street's appeal is dictated by the answer to a single question: Did the Chambers judge err in principle by refusing to consider the Smith Street Offer?

IV. ANALYSIS

A. Did the Chambers judge err in principle by refusing to consider the Smith Street Offer?

[31] Smith Street took the position before the Chambers judge that its offer bested both the JYR Offer and the Royalty Offer and, on that basis, should be approved. KEB took the position that, when closely examined, the Royalty Offer was better. In any event, KEB contended that the Smith Street Offer should not be approved by the Chambers judge because it was presented at the last minute, only after KEB had sought approval of the Royalty Offer. KEB represented in this Court that, before the Chambers judge, it had also objected to Smith Street's standing to seek any relief in its action, although that argument was not directly referred to in the *Chambers Decision.*

[32] The *Chambers Decision* is somewhat ambiguous as to the basis for the Chambers judge's reasons for refusing to "consider" the Smith Street Offer. One interpretation is that the Chambers judge gave effect to KEB's argument that Smith Street had no status or standing in connection to the application to approve the sale of the Land. A second interpretation is that the Chambers judge determined that Smith Street's request to have its offer approved fell within the scope of her discretion but she declined to approve it by applying the principles set out by this Court in *D & H Farms Ltd. v Farm Credit Canada*, 2002 SKCA 88, 214 DLR (4th) 589 [*D & H*], because of concerns that she had to maintain the integrity of the sales process.

[33] In my respectful view, the second interpretation best comports with the Chambers judge's reasons. Early in the *Chambers Decision*, the Chambers judge recognized that her discretion was not unlimited. She oriented herself with reference to *D & H*, as well as several decisions from the Court of Queen's Bench. She then rooted her reasons for accepting the Selling Officer's recommendation in her concern over the damage that might be done to the integrity of the sales process established in the Order *Nisi* were she not to follow the Selling Officer's recommendation:

> [22] The selling agent derives his or her authority from the court by virtue of the order *nisi*. The selling agent is vested with the responsibility of ensuring that the property is listed and sold in accordance with the terms of the order *nisi*. [The Selling Officer] has extensive experience in commercial real estate transactions and there is nothing to suggest that he did not conduct the sale process in accordance with the order *nisi*. He

> drew on his experience and knowledge of Royalty Developments in the commercial property industry in Regina in concluding that this was the best offer in all the circumstances. I am not persuaded that [the Selling Officer] erred in assessing the value of either offer. He determined that even though the JYR offer was for a 1% higher price, it did not represent the better offer given the tax implications that might result given the particular clauses in the offer. If [the Selling Officer] erred in this, the error resulted in a miniscule difference in value and there were other considerations. He knew Royalty Developments and knew there would be few, if any, impediments to closing the deal.
>
> [23] Prospective purchasers must be able to have confidence in the fairness and integrity of the judicial process relating to a sale in accordance with an order *nisi*. The selling agent, as a court-appointed officer, must also have confidence that absent some irregularity or non-compliance with the order *nisi*, an offer that he or she accepts will not be lightly interfered with.

[34] All of this provides context for how the Chambers judge dealt with Smith Street's application:

> [24] For the same reasons, I reject Smith Street Lands [*sic*] last minute bid to have their [*sic*] offer considered to be the best one. While it is a higher offer, it came long after Royalty Developments' offer and only after learning of it through the news reports. Granting Smith Street Lands' offer would turn the court-directed sale process on its head. I have no hesitation in saying it would turn into a waiting game and few prospective purchasers would feel confident that their offer could not be bested, and therefore unseated, by a subsequent offer.

[35] All parties agree that the decision by the Chambers judge to approve the sale pursuant to the Order *Nisi* involved the exercise of discretion. The standard of review to be applied by this Court is one of deference. As stated by Schwann J.A. in *Saskatchewan Crop Insurance Corporation v McVeigh*, 2018 SKCA 76 at para 27, 428 DLR (4th) 122, "an appellate court should only interfere if a chambers judge erred in principle, misapprehended or overlooked material evidence, took irrelevant factors into consideration, failed to act judicially or reached a decision that was so clearly wrong that the decision will result in an injustice".

[36] The error in principle alleged by Smith Street is that the Chambers judge was required to accept the offer that resulted in the highest economic return from the sale of the Land. I cannot agree. In my respectful view, the Chambers judge did not err in principle when she oriented her exercise of discretion with reference to the principles of *D & H*.

[37] The principal objective of a court-ordered sale of an asset pursuant to an order *nisi* is to secure the best economic return to those interested in the equity of redemption. Generally, the

measure of this is price, although other terms may impact the net economic value to be obtained from a sale.

[38] The decision of this Court in *D & H* ties the goal of obtaining the best economic return to the maintenance of the integrity of the judicially-approved and supervised sales processes. In *D & H*, the order *nisi* provided for a sale by tender with the sale to be subject to court approval. This Court held that the approving court had erred in principle when it accepted a late, second, bid from a prospective purchaser whose first tender was lower than the one that was presented to the court for approval. The principal concern this Court had was that the acceptance of the late bid would damage the integrity of court-mandated sales processes and this would have an impact on the ability to secure the highest possible price in other cases. Justice Jackson explained this point as follows:

> [37] If we come back to the appeal before us, the *order nisi* for sale set in motion a detailed process which required the sale to be conducted by sealed tenders within a specific time frame. The *order nisi* was by consent. From this, I conclude that the parties agreed that this was the best means by which "the best purchaser can be got" within the wording of Queen's Bench Rule 431. The *order nisi* conferred a discretion on a selling officer to set the sale rules. That selling officer prescribed as one rule that "[t]ender bids received after the close of the tenders ... shall not be accepted and shall be returned unopened to the bidder." No one has taken issue with the selling officer's discretion to stipulate in this manner.
>
> [38] There is nothing in the facts up to the point at which the second offer is received which gives rise to a concern that would demand an exercise of a discretion which is broader than that described in the case authorities pertaining to judicial auction sales. While the chamber judge made reference to other creditors and the guarantor, as was mentioned in *Sparling* [*v 10 Nelson Street Ltd.* (1980), 118 DLR (3d) 182], there is no evidence of either. In essence, the chamber judge exercised her discretion to recognize or give effect to 101029873 Saskatchewan Ltd.'s second bid for no other reason than that it is approximately 3% greater than the prior bid made by D & H Farms Ltd. which had complied with the terms of the *order nisi*.
>
> [39] I recognize that s. 70 of *The Queen's Bench Act, 1998* and Rules 428 and 431 confer a discretion on the chamber judge, otherwise it would not be necessary to have the sale confirmed by the Court. Nonetheless, in my view, there have to be some limits on the exercise of that discretion, particularly in a commercial case where certainty of terms plays a greater role.
>
> [40] If the law were otherwise, over the long term, persons bidding at judicial sales could play a waiting game to determine what offers had been made and make subsequent bids. As Cory J. mentioned in *Sparling*, persons would lose faith in the process and may very well decline to bid. There must be something more than a late offer with this amount of increase to permit the confirming court to set aside the process agreed to by the parties and reject the highest compliant bid.
>
> (Footnotes omitted)

[39] It bears mentioning that the second bid in *D & H* – which Jackson J.A. held the approving court should not have entertained – was only three percent higher than the successful tender. A third bid was later submitted that was much higher than the previous two. Justice Jackson found it would have been improper to consider this third offer, as well:

> [47] The final matter which must be canvassed is the fact of a third offer from 101029873 Saskatchewan Ltd. in the amount of $700,000. While this offer, on anyone's scale, is significantly higher than the first bid of D & H Farms Ltd., it must be remembered that it is the product of the very activity which earlier authorities have said will have a deleterious effect upon the judicial sale process. The Court, by calling for further bids, embarked upon the conduct of a judicial auction, which was precisely the problem to be avoided by giving effect to a more limited discretion. In addition, by permitting both parties to submit further bids, the chamber judge, in purported reliance upon [*Sparling v 10 Nelson Street Ltd.*, 118 DLR (3d) 182] did what was not done in that case, which was to permit the late tenderer to bid yet again.

[40] Although the Order *Nisi* in this case did not involve tenders or bids, it did prescribe a specific process by which the Land would be sold. One aspect of this was that the process must, by necessity, have a conclusion. While the Order *Nisi* did not fix a date by which the Selling Officer had to submit an offer to the court for approval – an ambiguity that might, in some cases cause problems or difficulties – there was no question that the prescribed process called for a recommendation to the approving court. This fixed, at least until court approval was either granted or refused, an end point to the prescribed process.

[41] Based on all of this, I can find no error in principle on the part of the Chambers judge when she determined, in the circumstances of this case, that it would undermine the confidence of prospective purchasers in the fairness and integrity of the process of sale prescribed in the Order *Nisi* and judicial sales processes more generally if she were to have entertained the Smith Street Offer.

[42] There are two additional reasons why it was not open to the Chambers judge to have ordered the sale of the Land to Smith Street.

[43] The first reason is tied to the limits of the Chambers judge's discretion created by the terms of the Order *Nisi*. The basis for the consideration by the Chambers judge of any application to approve the sale of the Land was the Order *Nisi*, which determined the process to be followed by KEB to enforce its security, including what must be done to sell the Land. As stated by Jackson J.A. in *D & H*, a Chambers judge's "discretion on an application to confirm a

land sale of this sort is not unfettered. It is governed by the terms of the *order nisi* and the general law" (at para 44).

[44] One essential term of the Order *Nisi* is that the Land "shall" be sold under the direction of the Selling Officer pursuant to the terms of an offer that (a) has been accepted by the Selling Officer, and (b) is confirmed by the Court. The Smith Street Offer had not been accepted by the Selling Officer; it would have been an error of law for the Chambers judge to have approved it.

[45] To be certain, it would have been possible for a party to the KEB action to have made application to amend the Order *Nisi*. No application was made to the Chambers judge to do so. As a result, at the time matters came before the Chambers judge, the terms of the Order *Nisi* stood undisturbed and no order could be made by her that was inconsistent with its terms.

[46] The second reason that it was not open to the Chambers judge to have ordered the sale of the Land pursuant to the Smith Street Offer is that the request for the order was made by a party with no status in the action or rights in connection with the Land. As I have mentioned, KEB represented in this Court that it had objected to Smith Street's standing to even present its offer for consideration by the Chambers judge. Unless I have misunderstood the *Chambers Decision*, the Chambers judge did not deal with this argument. However, in my respectful view, KEB's objection, if made, was sound.

[47] In accordance with Rule 10-40(4) of *The Queen's Bench Rules*, the parties to KEB's action, as well as its subsequent applications for both the Order *Nisi* and the Sale Confirmation Order, were those interested in the equity of redemption in the Land. Smith Street is not now, nor has it ever been, a party to the action or any of KEB's applications, including the application leading to the Sale Confirmation Order. Smith Street made no application to be added as a party to these proceedings.

[48] Smith Street argued that it was added as a party by implication. I find this proposition unconvincing.

[49] The idea that the Chambers judge impliedly added Smith Street as a party is built from the observation that counsel for Smith Street was listed among counsel at the beginning of the *Chambers Decision*, and the paragraph of the *Chambers Decision* that addresses Smith Street's

application for approval of its offer. However, when an application is made to a court and counsel is heard, counsel *should* be recognized as representing the person whose interests were put in issue. In this regard, whatever its legal merits, it was necessary for the Chambers judge to make a ruling on Smith Street's application. However, neither the fact that Smith Street *made* an application that it styled as having been brought in the context of the KEB action, nor the further fact that its counsel was recognized as representing it in its own application, make Smith Street a party to KEB's application for approval of the Royalty Offer or to the action more generally.

[50] Here, the Chambers judge quite properly heard the Smith Street's notice of application at the same time as the KEB application and rendered a single decision with respect to both matters. In hindsight, it perhaps would have been better if the Chambers judge had been clear that she, in fact, was making two orders – one dismissing Smith Street's application and the other granting the application brought by KEB seeking the Sale Confirmation Order. However, in the overall context, I have no doubt that she granted KEB's application and dismissed Smith Street's application, all without making any order in relation to Smith Street's status as a party to the action itself, for the simple reason that no application to grant it that status was before her. This understanding of the *Chambers Decision* is, in my view, placed beyond doubt by the fact that the City *did* make an application to be added as a party to the action and its application was dismissed by the Chambers judge.

[51] Smith Street argues that *Wallace v Canadian Pacific Railway*, 2011 SKCA 108, 340 DLR (4th) 402 [*Wallace*], stands for the proposition that, although there was no express ruling made by the Chambers judge designating Smith Street a party to the KEB application, it is nonetheless a party to the application based on how it was treated by the Chambers judge. *Wallace* involved an application by a defendant to remove the plaintiff's law firm of choice because that firm had previously represented it. The law firm was, however, named as a respondent to the application to remove it from the record. It was entitled to respond in its own right to the removal motion. Its status as a respondent to that application said nothing about its status in relation to the action as a whole.

[52] I would also observe that the courts have generally refused to grant standing – as a party or otherwise – to a disappointed prospective purchaser in similar circumstances to those here.

The fundamental underlying reason for this is that a prospective purchaser has no stake in the property being sold and its legal interests are, therefore, unaffected by whether the sales process was proper or the best price was achieved.

[53] In *British Columbia Development Corporation v Spun Cast Industries Ltd.* (1977), 5 BCLR 94 (CanLII) (SC), the receiver applied for an order to approve the sale of assets. A third party made an offer and sought to be added as a party to the action as "a person … whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon" (at para 2, quoting Rule 15(5)(a)(ii) of the *British Columbia Supreme Court Rules*). The Court held that the third party had no legal interest in the litigation and that, by virtue of its offer, only had a commercial interest insufficient to satisfy the rule to be added as a party to the action. In the Court's own words, "simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party" (at para 3).

[54] The Ontario Court of Appeal applied the general idea that a disappointed prospective purchaser has no role in the approval process in *Skyepharma PLC v Hyal Pharmaceutical Corp.* (2000), 47 OR (3d) 234 (CanLII) [*Skyepharma*]. In *Skyepharma*, a disappointed purchaser appealed the approval of an offer to purchase that it maintained was inferior to the one that it had presented. The appeal was struck. The Ontario Court of Appeal noted that the court in first instance had heard the submissions of the unhappy prospective purchaser in its capacity as a creditor of the company whose assets were being sold, and not in its role as an unsuccessful bidder. The court went on to explain why the prospective purchaser had no standing as such, either in the court of first instance or on appeal:

> [25] There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg* [(1986), 60 OR (2d) 87 (Ont HC)].
>
> [26] Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this

> fundamental purpose by including in the motion other issues with the potential for delay and additional expense.
>
> [27] In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg*, *supra*; *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.
>
> [28] In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg*. Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

[55] The court in *Skyepharma* added a further policy reason for refusing to allow a prospective purchaser a role in a sale approval application based on the practical effect this may have in the process for approval:

> [30] There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

[56] I would add to the concerns of delay and uncertainty the idea that allowing dissatisfied purchasers to become involved will also contribute unnecessarily to the costs of the matter. All of this can only work to the disadvantage – often serious disadvantage – of the persons whose interests are directly at stake in the enforcement proceedings.

[57] *Skyepharma* has been followed in analogous circumstances in this province in *PricewaterhouseCoopers Inc. v Poultry 2.0 Farms Ltd.*, 2011 SKQB 422 at para 24, 386 Sask R 16 [*Poultry 2.0 Farms*], *Toronto Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289 at para 22, 401 Sask R 203, and *9286594 Canada Inc. v Advance Engineering Products Ltd*., 2015 SKQB 196 at para 15, 478 Sask R 196. See also: *Consumers Packaging Inc. (Re)* (2001), 150 OAC 384 (CA) at para 7; *BDC Venture Capital Inc. v Natural Convergence Inc*., 2009 ONCA 665 at para 8, 256 OAC 372; and *Cobrico Developments Inc. v Tucker Industries Inc*., 2000 ABQB 766 at paras 32 and 53, 273 AR 297.

[58] Smith Street sought to distinguish *Skyepharma*, and the line of cases following it, on the basis they are receivership cases. However, the rationale for denying what might be called "bitter bidders" a role in applications for court approval in a receivership situation is equally applicable when the approval is being requested pursuant to an order *nisi*. In neither situation does the dissatisfied prospective purchaser have a stake in the property being sold. In both circumstances, allowing a party that has no stake in the outcome to interject themselves will cause delay, create uncertainty, and drive up costs – all to the disadvantage of persons who have a real stake in the proceedings.

[59] In receivership contexts, there may be circumstances where a prospective purchaser can show an entitlement to participate in the sale approval process. This was recognized in *Skyepharma*, as follows:

> [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.

[60] Later cases have provided further definition to this type of exception in receivership contexts.

[61] I would not want to foreclose the possibility that in some circumstances a prospective purchaser may be able to claim a role in connection with an application for approval of the sale of land pursuant to an order *nisi*. Without attempting to define the circumstances which might be *sufficient* to claim a role in the approval process, I would say that, as a general rule, a person's interest is *insufficient* to intervene in the approval process where that person's only claim or

interest is as an offeror who has appeared after the recommended offer has been presented to the court for approval and who has no support from any party with an interest in the equity of redemption.

[62] Smith Street, therefore, had no status to make its application. It was, and remains, simply a disappointed prospective purchaser of the property whose offer to purchase remains unsupported by any party having an interest in the equity of redemption in the Land.

[63] For these reasons, I would dismiss Smith Street's appeal from the decision of the Chambers judge not to order that its offer be approved.

B. Other matters

[64] Given my conclusion that the Chambers judge did not err in dismissing the application to approve the Smith Street Offer, the only possible outcome from an appeal from the part of the Sale Confirmation Order approving the Royalty Offer would be a judgment of this Court remitting the matter back to the Court of Queen's Bench to continue KEB's mortgage enforcement action. Since this must occur because the sale pursuant to that offer has been aborted, any remaining issue in this appeal is moot.

[65] The City reiterated in this Court the position it had taken before the Chambers judge, namely, that the Royalty Offer should not have been approved because it was inconsistent with the terms of the Order *Nisi*. KEB did not object to the City making submissions to this Court, notwithstanding that the City had abandoned its appeal from the order denying it party status. I will, therefore, offer comment on this issue because it was raised and argued and because it may have practical implications as to how the parties conduct themselves in the continuing proceeding.

[66] The Order *Nisi* required the proceeds from the sale of the Land to be applied first in payment of property taxes before any other distribution. The Royalty Offer contemplates that a portion of the sales proceeds would go to persons other than the City without payment in full of the property taxes. Instead of paying out the taxes in full, a portion of the remaining taxes were to be left to be paid by the prospective purchaser. While there may have been practical reasons

why the taxes would likely be paid by the prospective purchaser, without amendment to the Order *Nisi* or an amendment to the terms of the Royalty Offer, that offer should not have been approved.

V. CONCLUSION

[67] For the reasons I have given, I would dismiss Smith Street's appeal. KEB is entitled to costs as against Smith Street taxed on Column 4. All other parties shall bear their own costs.

"Leurer J.A."

Leurer J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Ryan-Froslie J.A."

Ryan-Froslie J.A.

TAB 11

Skyepharma plc v. Hyal Pharmaceutical Corporation

[Indexed as: Skyepharma plc v. Hyal Pharmaceutical Corp.]

47 O.R. (3d) 234
[2000] O.J. No. 467
Docket Nos. M24061 and C33086

Court of Appeal for Ontario
Carthy, Goudge and O'Connor JJ.A.
February 18, 2000

Bankruptcy -- Receivers -- Sale of assets -- Receiver obtaining several offers to purchase assets -- Receiver seeking court approval for sale of assets to one of competing offerors -- Potential purchaser not having legal or proprietary interest affected by order approving sale -- Potential purchaser not having standing on motion for court approval.

Debtor and creditor -- Sale of assets -- Receiver obtaining several offers to purchase assets -- Receiver seeking court approval for sale of assets to one of competing offerors -- Potential purchaser not having legal or proprietary interest affected by order approving sale -- Potential purchaser not having standing on motion for court approval.

In August 1999, PC Inc. was appointed the receiver and manager of the assets of HP Corp. Subsequently, S plc, C Corp. and BP plc, who were all creditors of HP Corp., submitted offers to purchase the assets of HP Corp. On September 28, 1999, the receiver was given approval to enter into exclusive negotiations with S plc and C Corp. with respect to their offers, and the court order directed that no party was entitled to withdraw any outstanding offer until October 29, 1999.

In October 1999, the receiver reported to the court and also

brought a motion for approval of an agreement to sell the assets to S plc. On the return of the motion, S plc, C Corp. and BP plc were permitted to make submissions in their capacity as creditors of HP Corp. C Corp. and BP plc opposed approval of the sale; however, the sale was approved and BP plc then appealed to the Court of Appeal.

The receiver moved to have the appeal quashed on the ground that the court did not have jurisdiction. The receiver submitted that a potential purchaser does not have any legal or proprietary right that is affected by the court's approval of a sale and accordingly the potential purchaser does not have standing to challenge the order approving the sale.

Held, the appeal should be quashed.

Under s. 6(1) of the Courts of Justice Act, there is an appeal from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties. Thus, the question raised by the receiver's motion to quash was whether BP plc had a right that was finally disposed of by the sale approval order. The answer to that question was negative for two reasons. First, a prospective purchaser has no legal or proprietary right in the property being sold. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court. Second, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors, and an unsuccessful purchaser has no interest in that issue. The involvement of unsuccessful prospective purchasers could seriously distract from the fundamental purpose of the approval motion. That BP plc had an offer to purchase did not give it a right or interest that was affected by the sale approval order. In its capacity as a potential purchaser, it was not entitled to standing on the motion nor was it entitled to appeal the approval order.

Cases referred to

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320, 22 C.P.C. (2d) 131 (H.C.J.); Halbert v. Netherlands Investment Co., [1945] S.C.R. 329, [1945] 2 D.L.R. 418; Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1, 46 O.A.C. 321, 83 D.L.R. (4th) 76, 7 C.B.R. (3d) 1 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1)(b)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rule 13.01 -- now R.R.O. 1990, Reg. 194

MOTION to quash an appeal to the Court of Appeal for Ontario.

James W.E. Doris, for appellant, Skypharm plc.
Alan H. Mark, for appellant, Bioglan Pharma plc.
Joseph M. Steiner and Steven G. Golick, for respondent, Pricewaterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corporation.

The judgment of the court was delivered by

[1] O'CONNOR J.A.: -- This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to Skyepharma plc. Bioglan Pharma plc, a disappointed would-be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

[2] The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

[3] Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding $100,000) and to hold the proceeds of any sales pending further order of the court.

[4] On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

[5] The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realization was likely to result from negotiations with Skyepharma and Cangene.

[6] In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were increasing in the amount of approximately $70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

[7] On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable

to the receiver and that realized the superior value inherent in the offers made by Skyepharma and Cangene. [See Note 1 at end of document] The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

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

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

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

> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate.

> They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

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

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

[12] The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

[13] This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

[14] Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised

judicial sale or, alternatively, that the receiver be required to re-open the bidding relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

[15] In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy".

Analysis

[16] The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

[17] Section 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: Halbert v. Netherlands Investment Co., [1945] S.C.R. 329, [1945] 2 D.L.R. 418.

[18] The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale approval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

[19] First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan maintains, was finally disposed of by the order approving the sale to

Skyepharma.

[20] A similar issue was considered by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the Rules of Civil Procedure, O. Reg. 560/84. The relevant portion of that rule, at the time, read as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;
>
> . . . . .
>
> the person may move for leave to intervene as an added party. [See Note 2 at end of document]

[21] Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

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

> The motion brought by Clarkson to approve the sales is one

upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.

Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

[23] The British Columbia Supreme Court reached a similar conclusion in 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.). In that case the receiver in a debenture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon . . .". Berger J. dismissed this motion. At p. 30, he said:

The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in Gurtner v. Circuit [cite omitted] goes so far. No order made in this action will result in any legal liability

being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

[24] Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

[25] There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: Crown Trust v. Rosenberg, supra.

[26] Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

[27] In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process: Crown Trust v. Rosenberg, supra; Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1,

83 D.L.R. (4th) 76 (C.A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

[28] In Soundair, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in Soundair conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in Crown Trust v. Rosenberg. Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in Soundair were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The orde r appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

[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.

[30] There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

[31] In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.). In that case, the receiver invited tenders to purchase lands of the debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervenor. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision re-opening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that Cameron stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does,

I would, with respect, disagree.

[32] In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

[33] As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court. First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to October 29 1999".

[34] Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

[35] I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

[36] Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

No party shall be entitled to retract, withdraw, vary or

countermand its offer prior to acceptance or rejection thereof by the vendor (receiver).

(Emphasis added)

[37] The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of cl. 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that Bioglan had assumed when it made its offer.

[38] Accordingly I would not give effect to this argument.

[39] Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharma agreement.

[40] I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

[41] Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument

solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

[42] The motions judge approved the sale based on the recommendation of the receiver that it was in the best interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

[43] In the result, I would allow the motion and quash the appeal with costs to the moving party.

Order accordingly.

Notes

Note 1: These offers were superior in that they were the only two that attempted to provide value for the tax loss positions of Hyal.

Note 2: The rule as presently worded is not.

CAMERON STEPHENS MORTGAGE CAPITAL LTD. Applicant/Respondent in Appeal	-and-	CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC Respondent/Respondent in Appeal

Court of Appeal File No. COA-24-CV-1328

Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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Parties served:
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