**CITATION:** 1112396 Ontario Limited, et al. v. Z. Desjardins, et al. 2024 ONSC 3868
**COURT FILE NO.:** CV-23-00002144-0000
**DATE:** 20240705
**RELEASE DATE**: 20240708

**SUPERIOR COURT OF JUSTICE – ONTARIO**
**APPLICATION UNDER s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.**

**RE:** 1112396 Ontario Limited, Blueberry Records Inc., Stanart Holdings Inc. and Falvo Holdings Ltd., Applicants

**AND**

Z. Desjardins Holdings Inc. and Zachary Desjardins, Respondents

**BEFORE:** Justice Spencer Nicholson

**APPEARANCES:** J. Wuthmann for the Court Appointed Receiver, TDB Restructuring Ltd.

S. Turk for the Applicant, 1112396 Ontario Limited

W. Chapman for the Respondent and possible purchaser (identity undisclosed)

**HEARD:** July 5, 2024

## REASONS ON MOTION FOR COURT APPROVAL OF SALE UNDER RECEIVERSHIP ORDER

**NICHOLSON J.**:

[1] The Applicants are creditors of the Respondent Z. Desjardins Holdings Inc. (the "Debtor"). Zachary Desjardins is the principal of Z. Desjardins Holdings Inc..

[2] By order dated October 25, 2023, (the "Receivership Order") Tranquilli J. granted the creditors' application to appoint TDB Restructuring Limited ("TDB") as Receiver of Z. Desjardins Holdings and its property.

[3] The Debtor's property includes three mixed use and commercial real estate properties, one in Clinton, one in Exeter and one in Grand Bend. The creditors have differing priorities on each of those three properties.

[4] The within motion is in respect of the Grand Bend property. That property contains a gas station, convenience store, commercial plaza and residential apartment.

[5] Pursuant to the Receivership Order, TDB was empowered to market and solicit offers for the sale of any of the Debtor's properties. Court approval was required in respect of a property with an aggregate purchase price exceeding $600,000.

[6] The Exeter property was sold with the approval of the court in May of 2024, with a closing date of June 11, 2024.

[7] In respect of the Grand Bend property, the Receiver initially retained Colliers Macaulay Nicolis Inc. ("Colliers") to market the property. Colliers began efforts to market the property on January 5, 2024. The property was listed on the MLS, marketing materials were distributed to approximately 5600 potentially interested parties and a virtual data room was established for those wishing to conduct due diligence.

[8] Eighteen potential purchasers and brokers executed confidentiality agreements permitting them to have access to the data room and perform due diligence. No offers were received in respect of the Grand Bend property while it was listed with Colliers.

[9] The listing agreement with Colliers expired at the end of April 2024.

[10] A new listing agreement was entered into on May 14, 2024 with Homelife Maple Leaf Realty Ltd. ("Homelife"). Homelife proceeded to re-list and market the Grand Bend property. Thirty-three prospective purchasers and brokers engaged with Homelife in respect of that listing.

[11] On June 6, 2024, a purchaser submitted an offer for the Grand Bend property and other assets. The Receiver determined that the purchaser's offer was reasonable in the circumstances. A Sales Agreement was entered into on June 10, 2024 subject to court approval.

[12] The Sales Agreement is appended in a Temporarily Sealed Exhibit. This is to protect the integrity of the process, including the future sale of the Clinton property. I have reviewed that Agreement. The only condition attached to the Sales Agreement is approval of the court.

[13] The Receiver's material sets out the priority ranking of the various stakeholders and their proposed allocation of the proceeds from the sale.

[14] Today, Mr. Chapman attends on behalf of Z. Desjardins Holdings and requests an adjournment of the motion. First, he reports that there is a prospective buyer who has just made a better offer with respect to the Grand Bend property. Secondly, he argues that the confirmation of motion was filed late, and it was presumed that the motion would not be proceeding today.

[15] The Receiver and 1112396 Ontario Limited oppose the adjournment request. They point out that this offer is not materially different than a prior offer that was made by the same group and rejected. There is a real concern that any delay risks losing the firm buyer who is in hand.

[16] During the hearing today, I was provided with an email chain involving the creditors. Those emails were from the day of the hearing (July 5, 2024). The applicants who were not in attendance make it clear that they "are not interested in this offer nor will they entertain the same."

*Preliminary Issue--Timing of the Motion:*

[17] The motion was served on June 21, 2024, within the time frame set out in the Rules. Counsel for the Receiver admits that the confirmation of motion was not filed on time, by one day. She suggests that the "real time nature of insolvency litigation" required a little more time to finalize their court materials.

[18] Rule 3 permits the court to extend or abridge any time prescribed by the rules on such terms as are just.

[19] In this case, I am satisfied that the Debtor and unknown prospective purchaser had ample notice of the motion as it was served in a timely fashion. Further, it is clear that neither the Receiver nor the applicant creditors have any interest in entertaining any new offers that emanate from Z. Desjardins Holdings Ltd.. Adjourning this motion one week, as requested, is not going to change that.

[20] The creditors obviously believe that this is a stalling tactic, or as is described in the email "Same stunt as last time. All BS".

[21] As will be described below, the Receiver is given considerable leeway in determining what offers are acceptable in cases such as this. The Receiver has a binding offer in hand with an arm's length purchaser, negotiated in good faith. There is an element of unfairness to that purchaser by permitting an 11th hour offer to nix this deal.

[22] I choose to abridge the time for service of the confirmation of hearing. All parties were in court and made their positions known. The request for the adjournment is denied.

***Legal Principles***:

*Court Approval:*

[23] The leading case is *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ON CA). Galligan J.A., noted therein that the sale of the airline in that case was a very complex process and the best method of selling an airline at the best price was "something far removed from the expertise of a court". Thus:

> "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 viewed in the light of the specific mandate given to him by the court."

[24] Galligan J.A., then set out the duties of the court in deciding whether a receiver is acting properly when selling a property, as follows:

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

[25] I will address each in turn.

*Sufficient Effort and Improvident Sale:*

[26] The material describes the marketing efforts with respect to the Grand Bend property. I am satisfied that the Receiver exposed the Grand Bend property to the market at large and that while there was some interest, only one offer emerged.

[27] In *Soundair*, Galligan J.A. quoted from *Cameron v. Bank of Nova Scotia* (1981), 1981 CanLII 4762 (NS CA), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11, per MacDonald J.A., as follows:

> 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.

[28] In *Soundair* the Court of Appeal noted that the subsequent offer for the airline in that case, at a higher price, "is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one". Accordingly, unless the disparity between offers is so great as to call into question the adequacy of the mechanism which

had produced the offer, the 11th hour offer by this new prospective purchaser adds little to the issue before me.

[29] In the case at bar, there is no indication that the purchase price is anything less than fair and reasonable, given Homelife's advice on the state of market conditions.

[30] Accordingly, I do not find the proposed purchase price, to be improvident. The price of real estate is what an open and free market will bear. Here, the Receiver received no competing offer that suggests that the proposed purchase price is improvident, including the 11th hour offer. The Receiver is justified in being skeptical that this last minute offer will not fall through. As noted in *Soundair*, to allow an 11th hour offer to thwart a good faith bargain entered into between a firm purchaser and the Receiver after the expense and time expended on negotiations would be unfair to that purchaser.

*Interests of All Parties*:

[31] In considering the interests of the various parties, *Soundair* makes it clear that while the primary interest is that of the creditors, "it is not the only or overriding consideration".

[32] Suffice it to say that the creditors in this case are all content with the proposed purchase price. The sale allows an allocation and distribution of proceeds to creditors in accordance with their priorities. The sale will also permit the purchaser to continue to operate the gas station, which benefits the community generally.

[33] Equally clear, the creditors make it clear that they are not prepared to entertain any further offers that involves Z. Desjardins Holdings Inc.. They have a lengthy, unsatisfactory history with the Debtor and clearly a complete lack of trust in the Debtor.

[34] *Soundair* indicates that the interests of the debtor should also be considered. The Debtor has had ample opportunity, since January 5, 2024 to put together a proposal that was acceptable to the Receiver and the creditors. The timing of its most recent offer, which the Receiver feels is no improvement from its prior offer, is simply too late.

[35] *Soundair* also stated that the interests of the purchaser should also be considered. The purchaser bargained at some length and expense with the Receiver and should not be required to engage in a last-minute bidding war for the Grand Bend Property. Given the presentation of the new offer at the 11th hour, I find that the purchaser should not be required to reopen the bidding. Commercial certainty requires that the Court respect good faith negotiations entered into between court appointed receivers and arms-length purchasers.

[36] The interests of the parties favours approving the sale.

*The Efficacy and Integrity of the Process*:

[37] I am satisfied from the material submitted that Colliers and then Homelife exposed the property to the market in a commercially feasible and reasonable fashion. More than 50 prospective purchasers were given an opportunity to participate in the process. The purchaser was not given any unfair advantage by the Receiver.

*Was there Unfairness in the Process?:*

[38] There is no indication that there was any unfairness in the process. Indeed, the prospective purchaser who has made the last-minute offer made a prior similar offer that was rejected in May. It had its opportunity to obtain the property as did any other interested party.

[39] I conclude under the *Soundair* analysis that the decision of the Receiver to sell the Grand Bend property is within the discretion that was given to it by the Receivership Order and ought to be respected by this court. I approve the proposed transaction.

***Sealing Order:***

[40] I recognize the importance of the "open court principle", as discussed, for example, in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 SCR 75.

[41] Court proceedings are presumptively open to the public and court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy (*Sherman*, at para. 1). However, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. In order to infringe on the open court principle, for example, by granting a sealing order, the court must be satisfied that openness presents a serious risk to a competing interest of public importance.

[42] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, the Supreme Court of Canada recognized that a commercial interest can be sufficient to justify a confidentiality order.

[43] It is my view that a sealing order, limited in temporal scope, is appropriate in the context of the circumstances before me, with respect to the Receiver's Confidential Appendix.

[44] To permit the court to examine the propriety of the proposed sale, the court must be privy to the offers that have been made on the real property, including the offer under consideration. However, disclosure of that offer carries a risk of tainting the market in respect of the real property in the event that the court does not approve the sale, or the

sale falls through. Further, disclosure of the offer can have an impact on the future sale of the Clinton Property.

[45] I note that, like *Sierra Club*, the prospective purchasers treated the information as confidential, and were asked to sign a confidentiality agreement with respect to the sale of the properties.

[46] A sealing order is proportionate, in my view, if it expires at the earlier of the Receiver's discharge or further order of the court. Further, there are no reasonably alternative measures to granting this order that insulates the terms of the Sale Agreement.

[47] Accordingly, I grant a temporary sealing order in respect of the Confidential Appendix to the First Report of the Receiver, which expires upon further order of the Court, or the discharge of the Receiver, whichever occurs first.

**Disposition:**

[48] For the foregoing reasons, I approve the sale of the Grand Bend property on the terms as set out in the Sale Agreement entered into by the Receiver.

[49] I have reviewed the reports of the Receiver. I am satisfied that the Reports and the conduct and activities of the Receiver are appropriate, are reasonable and are consistent with the duties imposed by the Receivership Order. I therefore approve the reports.

[50] I have also reviewed the fees proposed by the Receiver. I received no objections during the hearing with respect to those fees. The Receiver's fees, including legal fees incurred, are hereby approved, including the estimate of future fees.

[51] I have executed the Draft Approval and Vesting Order and Draft Ancillary Relief Order, accordingly.

**Justice Spencer Nicholson**

Date: July 5, 2024