Action No. S-1-CV-2024-000381

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Plaintiff

- and -

5925 N.W.T. LTD. operating as HAY RIVER SUITES and D. COOKE HOLDINGS LTD.

Defendants

BOOK OF AUTHORITIES

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TAB	Citation
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205
3.	*River Rentals Group Ltd. v Hutterian Brethren Church of Codesa*, 2010 ABCA 16
4.	*Carlson v Carlson*, 2012 ABCA 173
5.	*PricewaterhouseCoopers Inc. v. 1905393 Alberta Ltd.*, 2019 ABCA 433
6.	*Uti Energy Corp. v Fracmaster Ltd.*, 1999 ABCA 178
7.	*Bennett on Receiverships*, Frank Bennett, 4th ed. (Toronto, ON: Thomson Reuters)
8.	*Fantasy Construction Ltd., Re*, 2006 ABQB 357

CanLII

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

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.
1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
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.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

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.

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

In the Court of Appeal of Alberta

Citation: Carlson v. Carlson, 2012 ABCA 173

Date: 20120613
Docket: 1101-0092-AC
Registry: Calgary

Between:

Jack Carlson

Appellant (Applicant)
Cross Respondent

- and -

Jane Carlson

Respondent (Respondent)
Cross Appellant

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment of The Honourable Mr. Justice Berger
Concurred in by The Honourable Mr. Justice Martin
Concurred in by The Honourable Madam Justice Rowbotham

Appeal from the Decision by
The Honourable Madam Justice C.A. Kent
Dated the 10th day of November, 2010 and the 4th day of April, 2011
Filed on the 4th day of April, 2011
(2010 ABQB 701, Docket: BK01-085684)

Reasons for Judgment of
The Honourable Mr. Justice Berger

[1] This appeal concerns the ownership of a 44 acre parcel of land located near Elko, British Columbia, valued in excess of $1 million. The Appellant, Jack Carlson, who acquired the property in the early 1980's, maintains that he is the present beneficial owner. The Respondent, Jane Carlson, was married to the Appellant's late brother and became the registered legal owner of the property when her husband passed away on December 17, 2003.

[2] Around September 1990, Ernie and Jane Carlson moved onto the property. On December 24, 1997, the Appellant transferred the property to them. The terms of that agreement are disputed. The Appellant claims the property was sold for $1 and that the transfer was designed to give the Respondent and her husband a tax advantage. The Appellant maintains that it was understood that a reverse transfer of land would be executed for use at a later date. That never happened. It is conceded that no money has ever been paid for the property.

[3] In June 2000, the Respondent drafted a Promissory Note in the Appellant's favour for the sum of $72,000. At the same time, she drafted a "Security Agreement" signed January 7, 2001 which provided that the BC property was security for the Promissory Note. The Appellant maintains that the Promissory Note was intended to secure an indebtedness for unauthorized logging operations and the resulting revenue the Respondent gleaned. On the other hand, the Respondent says that the $72,000 Promissory Note evidences the agreement made when she and her late husband acquired the legal title in 1997 to purchase the property for $70,000.

[4] On April 11, 2003, the Appellant made an assignment in bankruptcy. He claimed assets of $17,000 in his statement of affairs and made no mention of the BC property. He disclosed a debt of $90,000 to the Canada Customs and Revenue Agency. The Appellant was discharged on May 2, 2004 and the trustee was discharged on March 2, 2005.

[5] The Appellant's failure to disclose his claimed beneficial interest in the property was not the subject of consistent explanation. First he said he had forgotten, and later maintained that he had disclosed the beneficial interest in the property to the trustee who, he asserts, advised him that there was no need to disclose it.

[6] In June 2007, the Appellant approached the Respondent to discuss compensation for the BC property. Originally, the Respondent offered to pay $200,000. The parties dispute whether this offer was accepted. In any event, a written agreement was later signed in which the Respondent agreed to pay $600,000 for the property - $200,000 due immediately, and the other $400,000 to be paid at the Respondent's death out of the eventual sale of the property. Again, no monies were paid.

[7] On August 23, 2007, the Appellant commenced an action in British Columbia to enforce the alleged $600,000 agreement. On December 5, 2007, the Respondent countersued to enforce the alleged $200,000 oral agreement.

[8] In the course of discoveries in these lawsuits, the Appellant's bankruptcy came to light. On August 18, 2008, the Respondent brought an application for summary judgment arguing that because the Appellant's property had vested in the bankruptcy trustee, it was only the trustee that could enforce rights attached to the BC property.

[9] After some negotiations between the Appellant and the trustee, it was agreed that, subject to Court approval and provided that the Appellant advance sufficient funds from the litigation to ensure that all creditors would be paid, the Appellant would receive an assignment of the right to pursue the BC claim in exchange for $140,000. On December 8, 2008, the Respondent offered to pay the same amount to the trustee in exchange for a release.

[10] Applications were then brought by both the Appellant and the Respondent for an order reappointing the trustee. The Appellant sought an assignment of the right to the BC action in exchange for a sum equal to the full amount owing to his creditors. The Respondent in turn sought a release in exchange for the same sum. The matter came before the chambers judge sitting in bankruptcy. The Respondent argued that the Appellant should not be allowed to have the right to sue assigned to him because of his failure to disclose his claim to the BC property during the bankruptcy proceedings. She argued that the American doctrine of judicial estoppel should be adopted and applied. The Appellant in turn argued that the doctrine should not be adopted in Canada and that he should be allowed to proceed with his claim provided the creditors were made whole.

[11] The chambers judge determined that there were two issues before her: first, whether the doctrine of judicial estoppel applied in Canada, and second, whether she could make a decision about the Appellant's failure to disclose his interest in the BC property to the trustee on the basis of affidavit evidence. With regard to the first question, she determined that in certain circumstances the doctrine of judicial estoppel might apply in Canadian law, but it was incompatible with the law of bankruptcy. In particular, she found that because the property of the bankrupt vested in the trustee, and the trustee was not taking an inconsistent position with respect to a previous claim, the doctrine could not apply. She found, however, that she could apply the law relating to abuse of process to achieve the same result. She held, at para. 25 of her reasons:

> "... The notion of abuse of process permits a judge to take steps which will ensure the proper administration of justice. It avoids the perversion of the judicial machinery which would result if the Court permitted a litigant to take a position in one proceeding which is inconsistent with that taken in a previous piece of litigation. In the context of a bankruptcy, it permits the judge to supervise the activities of a bankrupt who has failed to disclose property in his bankruptcy proceedings and then attempts to reap the benefits of that property subsequent to his discharge."

[12] She then turned to the issue of whether she could make a finding that the Appellant's failure to disclose his interest in the BC property was deliberate on the basis of the affidavit evidence before

her. She found that the Appellant had given three contradictory statements under oath about the disclosure of his interest. She found that the third statement – that he had told the trustee about his interest, and that the trustee had told him it did not need to be disclosed – was contradicted by the trustee's evidence. She found that there was enough evidence before her without the benefit of a *viva voce* hearing to enable her to make a decision about the Appellant's intentions at the time of the bankruptcy. She went on to conclude that the Appellant knew about his now asserted beneficial interest at the time of the bankruptcy proceedings and deliberately chose not to disclose it.

[13] The chambers judge acknowledged the role of the trustee in sanctioning the assignment to the Appellant provided the creditors were paid. While she found that the trustee was an officer of the Court whose opinion was entitled to deference, she also noted that whereas he was appointed to serve the interests of the creditors, the Court had a broader supervisory role in ensuring the proper administration of justice. She concluded that the Appellant abused "[the] Court's process and he ought not now to be rewarded by having the B.C. proceedings assigned to him." (para. 27). She denied the Appellant's application and granted the relief sought by the Respondent. Thus, she reappointed the trustee and ordered him to provide the Respondent with a release upon the payment of a sum equal to the amount owed to the Appellant's creditors.

GROUNDS OF APPEAL

[14] The Appellant advances the following grounds of appeal:

1. The chambers judge erred in disregarding the trustee's recommendation.

2. The chambers judged erred in finding that the Appellant intentionally failed to disclose his interest in the property to the trustee.

3. The chambers judge erred in finding there was an abuse of process.

4. The remedy granted by the chambers judge was inappropriate in all of the circumstances.

The Respondent has cross-appealed the chambers judge's failure to apply the doctrine of judicial estoppel.

ANALYSIS

[15] The main issue on this appeal is whether the chambers judge sitting in bankruptcy properly exercised her discretion to refuse to approve the recommendation of the trustee in bankruptcy to assign the cause of action to the discharged bankrupt, and in ordering the settlement of the claim

with the Respondent. (For reasons that will emerge apparent, judicial estoppel need not be considered).

[16] The following principles of law apply:

1. Upon bankruptcy, all the property of the bankrupt vests in the trustee in bankruptcy and the bankrupt ceases to have any capacity to deal with the property (***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (the "***Act***"), s. 71)

2. The ***Act*** places a duty on the bankrupt to disclose all property in order to allow the trustee to realize against these assets for the benefit of the bankrupt estate (s. 158 of the ***Act***).

3. A trustee can be re-appointed to realize against previously undisclosed assets for the benefit of the bankrupt estate.

[17] Mindful of the findings of fact of the chambers judge, the relevant inquiry is whether, in the light of the intentional non-disclosure of assets, this Court can properly prevent the bankrupt from benefiting from an assignment of the claim by the trustee. Inspectors were not appointed in respect of this bankruptcy in April 2003 and, accordingly, Court approval of the assignment of the claim is a prerequisite: ***Re Delaney*** (1995), 36 C.B.R. (3d) 27 at para. 26.

[18] The trustee has a duty to act with integrity and in a reasonable and competent manner as an officer of the Court: ***Re Hoque*** (1996), 148 N.S.R. (2d) 142 at para. 34. The trustee must exercise reasonable business judgment in realizing the assets of the bankrupt. This responsibility includes not only getting the best possible price for the benefit of the creditors of the estate, but also a duty to defend the integrity of the bankruptcy process (***Re Hoque*** at para. 45, citing with approval an article by Al Lando entitled *Sale of Assets by a Trustee; The Fundamental Pragmatics* (1991), 3 C.B.R. (3d) 179 at 181).

[19] The failure to disclose a significant asset without a specific finding of fraud has been held to be sufficient to prevent a discharged bankrupt from reacquiring the asset from the trustee as property not capable of realization under s. 40 of the ***Act***. Houlden et al. in *The 2011 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2011), explain at p. 121:

> "Where a trustee was discharged and the bankrupt had not disclosed an interest in litigation, and the discharged trustee became aware of the civil action, it obtained an order in the bankruptcy action reappointing it as trustee pursuant to s. 41(11) of the *BIA* and subsequently reached a settlement in the civil action. The court dismissed the bankrupt's claim to the proceeds on the basis that the civil action claim existed prior to the bankruptcy, had vested in the trustee, and had never been returned to the bankrupt; hence, the bankrupt had no further right or entitlement to deal with the asset:

> *MLA Northern Contracting Ltd. v. LeBrun* (2007), 2007 CarswellOnt 6594, 39 C.B.R. (5th) 95; additional reasons at (2008), 2008 CarswellOnt 2727, 42 C.B.R. (5th) 238 (Ont. S.C.J.); affirmed (2008), 2008 CarswellOnt 2453, 41 C.B.R. (5th) 168 (Ont. C.A.)"

[20] Sections 40(1) and (2) of the ***Act*** read as follows:

> "40(1) Any property of a bankrupt that is listed in the statement of affairs referred to in paragraph 158(d) or otherwise disclosed to the trustee before the bankrupt's discharge and that is found incapable of realization must be returned to the bankrupt before the trustee's application for discharge, but if inspectors have been appointed, the trustee may do so only with their permission.
>
> (2) Where a trustee is unable to dispose of any property as provided in this section, the court may make such order as it may consider necessary."

[21] In ***MLA Northern Contracting Ltd. v. LeBrun*** (2007), 39 C.B.R. (5th) 95 at paras. 65 and 67, the Court, mindful of these provisions, added this important qualification:

> "65. A discharged bankrupt has no right or entitlement to deal with his or her prior assets. The discharge of the Trustee and of the bankrupt does not have the automatic effect of reverting proprietary rights to the bankrupt. ... There is no question that the claimed interest in question existed prior to the bankruptcy and that it was not claimed as part of the bankruptcy. ...
>
> 67 ... It is in the normal course of business for trustees to determine whether an asset is realizable and obviously to do so the trustee must have knowledge of it. This property cannot be determined to be 'property incapable of realization' such as to require it revert to the bankrupt in accordance with s. 40(1) of the *BIA*."

[22] The duties of the Court in reviewing a proposed sale or settlement of assets by a receiver that is opposed by other interested parties have been described and applied generally as follows: ***Royal Bank of Canada v. Soundair Corp.*** (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.) at para. 16; ***River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*** (2010), 18 Alta. L.R. (5th) 201, 63 C.B.R. (5th) 26 (C.A.) at para. 12:

> (i) it should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;

> (ii) it should consider the interests of all parties;
>
> (iii) it should consider the efficacy and integrity of the process by which offers have been obtained; and
>
> (iv) it should consider whether there has been unfairness in the working out of the process.

[23] The Ontario Court of Appeal recently affirmed the decision of a chambers judge to stay the civil claim of a bankrupt plaintiff who had failed to disclose the cause of action in bankruptcy (***D'Alimonte v. Porretta***, 2010 ONSC 2510, aff'd ***D'Alimonte v. Porretta***, 2011 ONCA 307). In ***D'Alimonte v. Porretta***, Ms. D'Alimonte brought an action in 2002, one year after her discharge from bankruptcy, alleging a joint venture or equitable trust claim in a dental clinic operated by the defendants. In her Statement of Affairs, she did not disclose any interest in her wholly owned corporate plaintiff, the corporate defendant or the alleged joint venture. Nevertheless, upon becoming aware of the action and concluding that it would likely have been an unrealizable asset of the estate, the trustee consented to allow Ms. D'Alimonte to bring the claim. While the chambers judge noted that deference is generally accorded to the business decisions of the trustee, judicial discretion must also ensure that positions taken by trustees are in accordance with the law (paras. 29-30). In concluding that the civil action was a "nullity" from the outset, the chambers judge explained (at para. 10):

> "Ms. D'Alimonte should not be able to benefit from her own wrong. She should not be able to rely upon her false statements to the trustee in bankruptcy to pursue her claim now, with an effective date for commencement of the proceedings back in 2002."

[24] In dismissing an appeal by Ms. D'Alimonte, the Ontario Court of Appeal held that even if the claim had not been a "nullity from the outset", the chambers judge properly exercised his discretion under the ***Bankruptcy and Insolvency Act*** or the Ontario *Rules of Civil Procedure* to refuse to regularize the civil proceedings (para. 19). Further, the Court held that it was open to the chambers judge to find that Ms. D'Alimonte had knowingly failed to disclose her purported interest in the joint venture, as the largest potential asset of her estate, on the basis of the circumstantial evidence in the case (paras. 20-21).

[25] The result of refusing to approve the application of Jack Carlson in the case at bar was to prevent the bankrupt from taking carriage of the BC action (which had been brought by the Appellant before bankruptcy proceedings were initiated and which, accordingly, was not a nullity). That conclusion failed to take account of the express provisions of the ***Act*** and, in particular, s. 144 which reads as follows:

> "The bankrupt, or the legal personal representative or heirs of a deceased bankrupt, is entitled to any surplus remaining after payment in full of the bankrupt's creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings."

It follows that it was also an error to approve the Respondent's competing bid.

[26] The decision of the chambers judge was predicated on her concern that the bankrupt should not be allowed to take the benefit of an asset that was not properly disclosed in the bankruptcy process. In my view, the failure to disclose constitutes an "abuse" of the bankruptcy process and runs afoul of the policy concern that the integrity of bankruptcy proceedings be jealously guarded. A cause of action that had been concealed should not, without more, be assigned to a defalcating bankrupt notwithstanding s. 144.

[27] The Appellant submits that the remedy sought and obtained by the Respondent in the Court below results in a windfall to her. However, duplicitous conduct in the course of bankruptcy proceedings must not be condoned. Were the Appellant permitted to reap the benefits of the undisclosed asset beyond the amount required to pay outstanding debts, he would profit from his delict. Preservation of the integrity of the bankruptcy proceedings is the paramount consideration in such circumstances.

[28] It follows that in the case at bar, upon payment of the sum of $139,973,49, Jack Carlson, subject to the approval of the Court, would be entitled to an assignment of the cause of action in British Columbia. That said, the Court, in keeping with its duty to maintain the integrity of the bankruptcy process, must be mindful of the duties of a bankrupt as set out in s. 158 of the *Act* and is bound to consider whether the bankrupt has complied with those duties. They include:

> "(a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;
>
> ...
>
> (f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

> (g) make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;"

[29] Indeed, pursuant to s. 198 of the ***Act***, any bankrupt who makes a false entry or knowingly makes a material omission in a statement or accounting is guilty of an offence and is liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year, or to both. (If proceeding by indictment the fine and term of imprisonment is greater). Moreover, pursuant to s. 198(2) of the ***Act***, a bankrupt who, without reasonable cause, fails to do any of the things required of him under s. 158, is also guilty of an offence and is liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year, or to both. (If proceeding by indictment the fine is greater and the term of imprisonment is greater). There is no indication in the record that any such proceedings have been brought against the Appellant.

[30] The Court, however, enjoys the broad discretion and may, in some circumstances, annul the bankrupt's discharge. Cases in which the Registrar has acted to annul a discharge include ***Re LeBlanc*** (2007), 27 C.B.R. (5th) 299 (N.S.S.C.) and ***Re Lannigan*** (2008), 49 C.B.R. (5th) 183 (N.S.S.C.); and ***Re De Grandpré*** (1969), 15 C.B.R. (N.S.) 262 (Que. S.C.).

[31] In ***Re De Grandpré***, a bankrupt knowingly and willfully failed to disclose all his assets to the trustee. The Court found that if the Court hearing the application for discharge had been aware of all the facts, a completely differently discharge order would have been made. In such circumstances, the Court held that the conduct of the bankrupt came within s. 180(2) and annulled the discharge.

[32] Section 180 of the ***Act*** reads as follows:

> "180(1) Where a bankrupt after his discharge fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge.
>
> (2) Where it appears to the court that the discharge of a bankrupt was obtained by fraud, the court may, on application, annul his discharge.
>
> (3) An order revoking or annulling the discharge of a bankrupt does not prejudice the validity of a sale, disposition of property, payment made or thing duly done before the revocation or annulment of the discharge."

[33] Houlden et al. explain that (at p. 800):

> "Fraud is usually the result of a fraudulent misrepresentation. A fraudulent misrepresentation is proved when it is shown that a false representation has been made by the bankrupt knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false. ..."

[34] In the case at bar, that test is made out. Moreover, the Appellant's intent was that the Registrar would act upon Mr. Carlson's false representations and grant a discharge, notwithstanding his failure to disclose the asset in question. There can be no question that the Registrar, in the result, proceeded under a misapprehension to the detriment of the administration of justice.

[35] Section 187(5) of the ***Act*** confers upon the Court an even broader jurisdiction. It reads:

> "Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

[36] Houlden, et al. explain that the jurisdiction given by s. 187(5) should be sparingly exercised; it must be carefully guarded and invoked only in appropriate circumstances: ***Elias v. Hutchison*** (1980), 12 Alta. L.R. (2d) 241. See also ***Fackler v. Patterson*** (1948), 14 C.B.R. (N.S.) 152 (Ont. Reg.) confirming the jurisdiction of the Registrar to rescind on the authority of s. 187(5).

[37] In the light of the uncontradicted factual underpinnings, mindful of the aforementioned provisions of the ***Act***, and the applicable principles set out in this judgment, it seems to me that the order made in the Court below should be set aside. It does not follow, however, that Jack Carlson is entitled, given his malfeasance, to unconditionally benefit were the recommendation of the trustee implemented. Jack Carlson is entitled to an assignment of the action in British Columbia where the competing claim of Jane Carlson will concurrently be considered upon payment to the trustee by Jack Carlson of the sum of $139,973.49, the amount required to make existing creditors whole. The trustee is authorized to pay out existing creditors forthwith upon receipt of those funds.

[38] Mindful of the factual underpinnings, it is likely that the British Columbia litigation will be of some duration and complexity and will be quite expensive. Should Jack Carlson be unsuccessful, he may face an award of costs of some magnitude.

[39] In my opinion, should that occur, keeping in mind that the disputed asset was not disclosed by Jack Carlson when it should have been, his discharge as a bankrupt should now be annulled and in the event that Mr. Carlson's litigation is unsuccessful and he is subject to an award of costs in British Columbia, the Registrar, upon an application by Mr. Carlson for a discharge, would then properly take account of whether Mr. Carlson had paid those costs.

[40] The appeal is allowed. The order of the chambers judge is set aside. In the result, the order of this Court, pursuant to s. 180(2) or, in the alternative, s. 187(5) of the ***Act***, is that the discharge granted to Jack Carlson be annulled. An order shall go assigning the British Columbia cause of action to Jack Carlson subject to the conditions set out in paras. 37 and 39 above.

[41] In the light of the failure of the Appellant to disclose the disputed asset in the bankruptcy proceedings, the Respondent, whose cross-appeal is also dismissed, shall be entitled to one set of costs to be taxed. The assignment of the British Columbia action shall not be perfected until Jack Carlson has paid those costs.

Appeal heard on November 10, 2011

Reasons filed at Calgary, Alberta
this 13th day of June, 2012

Berger J.A.

I concur:

Martin J.A.

I concur:

Rowbotham J.A.

Appearances:

P.R. Leveque
for the Appellant

G.N. Kent
for the Respondent

In the Court of Appeal of Alberta

Citation: Pricewaterhousecoopers Inc v 1905393 Alberta Ltd, 2019 ABCA 433

Date: 20191114
Docket: 1903-0134-AC
Registry: Edmonton

Between:

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd.

Respondent/Cross-Appellants
(Applicant)

- and -

1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd.

Appellants/Cross-Respondents
(Respondents)

- and -

Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd.

Respondents
(Interested Parties)

The Court:

The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Dawn Pentelechuk
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 21st day of May, 2019
Filed on the 22nd day of May, 2019
(Docket: 1803 13229)

Memorandum of Judgment

The Court:

[1] The appellants appeal an Approval and Vesting Order granted on May 21, 2019 which approved a sale proposed in the May 3, 2019 Asset Purchase Agreement between the Receiver, PriceWaterhouseCoopers, and the respondent, Ducor Properties Ltd ("Ducor"). The assets consist primarily of lands and buildings in Grande Prairie, Alberta described as a partially constructed 169 room full service hotel not currently open for business (the "Development Hotel") and a 63 room extended stay hotel ("Extended Stay Hotel") currently operating on the same parcel of land (collectively the "Hotels"). The Hotels are owned by the appellant, 1905393 Alberta Ltd. ("190") whose shareholder is the appellant, Stellar One Holdings Ltd, and whose president and sole director is the appellant, David Podollan.

[2] The respondent, Servus Credit Union Ltd ("Servus"), is 190's largest secured creditor. Servus provided financing to 190 for construction of the Hotels. On May 16, 2018, Servus issued a demand for payment of its outstanding debt. As of June 29, 2018, 190 owed Servus approximately $23.9 million. That debt remains outstanding and, in fact, continues to increase because of interest, property taxes and ongoing carrying costs for the Hotels incurred by the Receiver.

[3] On July 20, 2018, the Receiver was appointed over all of 190's current and future assets, undertakings and properties. The appellants opposed the Receiver's appointment primarily on the basis that 190 was seeking to re-finance the Hotels. That re-financing has never materialized.

[4] As a result, the Receiver sought in October 2018 to liquidate the Hotels. In typical fashion, the Receiver obtained an appraisal of the Hotels, as did the respondents. After consulting with three national real estate brokers, the Receiver engaged the services of Colliers International ("Colliers"), which recommended a structured sales process with no listing price and a fixed bid submission date. While the sales process contemplated an exposure period of approximately six weeks between market launch and offer submission deadline, Colliers had contacted over 1,290 prospective purchasers and agents using a variety of mediums in the months prior to market launch, exposing the Hotels to national hotel groups and individuals in the industry, and conducted site visits and answered inquiries posed by prospective buyers. Prospective purchasers provided feedback to Colliers but that included concerns about the quality of construction on the Development Hotel.

[5] The Receiver also engaged the services of an independent construction consultant, Entuitive Corporation, to provide an estimate of the cost to complete construction on the Development Hotel and to assist in decision-making on whether to complete the Development Hotel. In addition, the Receiver contacted a major international hotel franchise brand to obtain input on prospective franchisees' views of the design and fixturing of the Development Hotel. The ability to brand the Hotels is a significant factor affecting their marketability. Moreover, some of

the feedback confirmed that energy exploration and development in Grande Prairie is down, resulting in downward pressure on hotel-room demand.

[6] Parties that requested further information in response to the listing were asked to execute a confidentiality agreement whereupon they were granted access to a "data-room" containing information on the Hotels and offering related documents and photos. Colliers provided confidential information regarding 190's assets to 27 interested parties.

[7] The deadline for offer submission yielded only four offers, each of which was far below the appraised valued of the Hotels. Three of the four offers were extremely close in respect of their stated price; the fourth offer was significantly lower than the others. As a result, the Receiver went back to the three prospective purchasers that had similar offers and asked them to re-submit better offers. None, however, varied their respective purchase prices in a meaningful manner when invited to do so. The Receiver ultimately accepted and obtained approval for Ducor's offer to purchase which, as the appellants correctly point out, is substantially less than the appraised value of the Hotels.

[8] The primary thrust of the appellants' argument is that an abbreviated sale process resulted in an offer which is unreasonably low having regard to the appraisals. They argue that the Receiver was improvident in accepting such an offer and the chambers judge erred by approving it. Approving the sale, they argue, would eliminate the substantial equity in the property evidenced by the appraised value and that the "massive prejudice" caused to them as a result materially outweighs any further time and cost associated with requiring the Receiver to re-market the Hotels with a longer exposure time. Mr. Podollan joins in this argument as he is potentially liable for any shortfall under personal guarantees to Servus for all amounts owed to Servus by 190. The other respondents, Fancy Doors & Mouldings Ltd and Northern Electric Ltd, similarly echo the appellants' arguments as the shortfall may deprive them both from collecting on their builders' liens which, collectively, total approximately $340,000.

[9] The appellants obtained both a stay of the Approval and Vesting Order and leave to appeal pursuant to s 193 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3: ***1905393 Alberta Ltd v 1905393 Alberta Ltd (Receiver of),*** [2019] AJ No 895, 2019 ABCA 269. The issues around which leave was granted generally coalesce around two questions. First, whether the chambers judge applied the correct test in deciding whether to approve of the Receiver recommended sale; and second, whether the chambers judge erred in her application of the legal test to the facts in deciding whether to approve the sale and, in particular, erred in her exercise of discretion by failing to consider or provide sufficient weight to a relevant factor. The standard of review is correctness on the first question and palpable and overriding error on the second: ***Northstone Power Corp v RJK Power Systems Ltd***, 2002 ABCA 201 at para 4, 317 AR 192.

[10] As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in ***Royal Bank of Canada v Soundair Corporation***, [1991] OJ No 1137 at para 16, 46 OAC 321 ("***Soundair***"). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

[11] The appellants suggest that ***Soundair*** has been modified by our Court in ***Bank of Montreal v River Rentals Group Ltd,*** 2010 ABCA 16 at para 13, 469 AR 333, to require an additional four factors in assessing whether a receiver has complied with its duties: (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; and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner. The appellants argue that, although the chambers judge considered the ***Soundair*** factors, she erred by failing to consider the additional ***River Rentals*** factors and, in so doing, in effect applied the "wrong law".

[12] We disagree. The chambers judge expressly referred to the ***River Rentals*** case. ***River Rentals***, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the ***Soundair*** test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: ***Salima Investments Ltd v Bank of Montreal*** (1985), 65 AR 372 at paras 12-13. At its core, ***River Rentals*** highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the ***Soundair*** test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

[13] At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: ***Skypepharma PLC v Hyal Pharmaceutical Corp*** (1999), 12 CBR (4^{th}) 84 at para 4, [1999] OJ No 4300, aff'd on appeal 15 CBR (4^{th}) 298 (ONCA).

[14] Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not

the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: ***Soundair*** at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": ***Soundair*** at para 22.

[15] The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers – of which there is absolutely none – the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 at para 13.

[16] Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": ***Romspen Mortgage Corp v Lantzville Foothills Estates Inc***, 2013 BCSC 222 at para 20.

[17] The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.

[18] We see no reviewable error. This ground of appeal is also dismissed.

[19] Finally, leave to appeal was also granted on whether s 193 of the *Bankruptcy and Insolvency Act*, and specifically s 193(a) or (c) of the Act, creates a leave to appeal as of right in these circumstances or whether leave to appeal is required pursuant to s 193(e). As the appeal was also authorized under s 193(e), we find it unnecessary to address whether this case meets the criteria for leave as of right in s 193(a)-(d) of the Act.

Appeal heard on September 3, 2019

Memorandum filed at Edmonton, Alberta
this 14th day of November, 2019

Wakeling J.A.

Pentelechuk J.A.

Authorized to sign for Antonio J.A.

Appearances:

D.M. Nowak/J.M. Lee, Q.C.
for the Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393 Alberta Ltd.

D.R. Peskett/C.M. Young
for the Appellants

C.P. Russell, Q.C./R.T. Trainer
for the Respondent, Servus Credit Union Ltd.

S.A. Wanke
for the Respondent, Ducor Properties Ltd.

S.T. Fitzgerald (no appearance)
for the Respondent, Northern Electric Ltd.

H.S. Kandola
for the Respondent, Fancy Doors & Mouldings Ltd.

Uti Energy Corp. v. Fracmaster Ltd., 1999 ABCA 178

Date: 19990609
Docket: 99-18326
99-18327
99-18331
99-18335

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MADAM JUSTICE FRUMAN

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

AND IN THE MATTER OF FRACMASTER LTD.

BETWEEN:

UTI ENERGY CORP.

Respondent
(Plaintiff)

- and -

FRACMASTER LTD.

Respondent
(Defendant)

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 17, 1999 AND ENTERED ON MAY 19, 1999

AND BETWEEN:

ROYAL BANK OF CANADA, and
ROYAL BANK OF CANADA, as agent for ROYAL BANK OF CANADA,
CANADIAN IMPERIAL BANK OF COMMERCE, BANK OF NOVA SCOTIA,
HONG KONG BANK OF CANADA, BANQUE NATIONALE DE PARIS
(CANADA) and CREDIT SUISSE FIRST BOSTON CANADA

Respondents
(Plaintiffs)

- and -

FRACMASTER LTD.

Respondent
(Defendant)

- and -

UTI ENERGY CORP.

Appellant

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 21, 1999 AND ENTERED ON MAY 25, 1999

AND BETWEEN:

THE JANUS CORPORATION

Appellant
(Plaintiff)

- and -

FRACMASTER LTD.

Respondent
(Defendant)

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 17, 1999 AND ENTERED ON MAY 19, 1999

AND BETWEEN:

ROYAL BANK OF CANADA, and ROYAL BANK OF CANADA, as agent for ROYAL BANK OF CANADA, CANADIAN IMPERIAL BANK OF COMMERCE, BANK OF NOVA SCOTIA, HONG KONG BANK OF CANADA, BANQUE NATIONALE DE PARIS (CANADA) and CREDIT SUISSE FIRST BOSTON CANADA

Respondents
(Plaintiffs)

- and -

FRACMASTER LTD.

Respondent
(Defendant)

- and -

UTI ENERGY CORP.

Appellant

- and -

CALFRAC LIMITED

Appellant

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 21, 1999 AND ENTERED ON MAY 25, 1999

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

H.A. Gorman
For UTI Energy Corp.

V.P. Lalonde
For The Janus Corporation & Alfred H. Balm

E.W. Halt
L. Berner
For Calfrac Limited

T.J. Mallett
A.D. Little
For BJ Services Company

B.P. O'Leary
A.Z.A. Campbell
For Arthur Andersen Inc. (The Receiver)

F.R. Dearlove
For Royal Bank et al. (The Lending Syndicate)

R. Dudelzak, Q.C.
For Global Securities Ltd.

W.E.B. Code
For BNPI

G.B. Davison
For Fracmaster (For the Corporation)

S.T. Fitzgerald
For TD Asset Finance

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

CONRAD, J.A. (For the Court):

[1] The decision of the Court is unanimous and will be delivered by Madam Justice Fruman.

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

[2] Fracmaster Ltd., an oil and gas services company with world-wide operations, encountered serious financial difficulties. With liabilities that greatly exceeded its assets, its inevitable insolvency gave rise to hurried attempts to restructure the company. A series of court proceedings and a court-authorized tender process, all conducted at break neck speed, resulted in a court order approving the sale of Fracmaster's assets to BJ Services Company for $80 million. That order, and the events which led up to it, are the subject of four appeals by prospective purchasers whose bids for Fracmaster were unsuccessful.

[3] We make two preliminary observations. First, this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

[4] Our second observation is that events unfolded rapidly, with short time periods and offers arriving, literally, at the last minute. Parties did not always have time to prepare and file affidavits. On occasion representations of fact were mixed with submissions of law made by counsel to the chambers judge. As a result, our record is not as complete as we might have wished. We imply no criticism. We understand Fracmaster's serious financial jeopardy, the need for haste, and the accommodation by the parties and the court to conclude matters quickly. However, the frailties of the record require that we give considerable deference to fact findings made by the chambers judge and further illustrate why leave is and should be required to appeal proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (section 13). I will refer to that statute as the "CCAA".

FACTS

[5] Fracmaster is an Alberta company. Beginning in the fall of 1998, when its financial condition was precarious, it unsuccessfully attempted to restructure its financial affairs. With the indulgence of a lending syndicate to whom Fracmaster owed $96 million, and whose debt was registered as a first charge on its assets, it subsequently filed a petition under the CCAA. On March 18, 1999, Fracmaster was granted an order imposing a stay of proceedings and appointing Arthur Andersen Inc. as the monitor. Fracmaster then conducted another sale process, in order to

restructure the company, inject equity or sell its assets. The sale process was neither supervised nor controlled by the monitor. Several companies submitted offers or proposals, including UTI Energy Corp., Calfrac Limited and The Janus Corporation together with its principal, Alfred H. Balm.

[6] When the matter returned to court in May of 1999 four applications were heard:

> First, Fracmaster applied for approval of the sale of its assets to UTI. The members of the lending syndicate supported that application, in accordance with a contractual commitment they had made to UTI.
>
> Second, that same lending syndicate, as an alternative to Fracmaster's application, applied to lift the stay, appoint Arthur Andersen as receiver, direct the receiver to approve the UTI sale and permit the lending syndicate to begin to realize on its security.
>
> Third, Balm/Janus applied to continue the stay, adjourn the other applications, appoint an interim receiver and have the court direct the calling of meetings of secured creditors, unsecured creditors and shareholders, to consider the Balm/Janus plan of arrangement.
>
> Fourth, Calfrac applied for approval and acceptance of its proposal to purchase Fracmaster's assets.

[7] In reasons dated May 17, 1999, the chambers judge dismissed the Fracmaster, Balm/Janus and Calfrac applications. She appointed Arthur Andersen as the receiver/manager on certain terms and conditions, including the power to sell the assets of Fracmaster subject to court approval. She denied the lending syndicate's application to direct the receiver to sell the assets to UTI. Alive to concerns about delay, she asked the receiver to quickly report its recommendations about a sale of assets or other immediate action that the receiver considered appropriate for the benefit of all claimants, including the secured creditors (CCAA A.B. 333). The May 17 order in the CCAA proceedings is the subject of appeals by Balm/Janus and UTI.

[8] The next day, May 18, the receiver returned to court with a notice of motion seeking directions for approval of a sale process by way of sealed bids. The process was designed to respond to the principles and objectives established by the chambers judge for a sale of assets. As there had been no independent valuations, the proposed tender process would test the market to determine whether offers were available in excess of the amount of the lending syndicate's secured debt. The process was also designed to maximize the value to the creditors; respond to concerns about delay and the need for finality; provide a process for the benefit of all creditors; and be fundamentally fair by establishing a level playing field for all participants.

[9] The proposal was not greeted with unanimous approval by the prospective purchasers, and its terms were the subject of heated debate in court. At the conclusion of the May 18

proceedings, the chambers judge ordered a tender process. The order set out the terms and conditions of offers that would be considered, with final offers to be submitted by 2:00 p.m. on May 20, 1999, by way of sealed bids. The receiver would advise the interested parties of its recommendation by 8:00 p.m. on May 20, and make its recommendation to the court at 10:00 a.m. on May 21. The tender process established in the May 18 order has not been appealed.

[10] Offers were submitted by UTI, Calfrac and BJ Services, a company which had previously shown interest in acquiring Fracmaster, but had not participated in the CCAA company-conducted sale process. Balm/Janus did not submit an offer. The lending syndicate continued to support the UTI offer, in accordance with a contractual commitment its members had made to UTI. The receiver recommended acceptance of the BJ Services offer, for a number of reasons, including the fact that it provided the highest cash purchase price, exceeding the Calfrac offer by $13 million and the UTI offer by $19.3 million. The chambers judge, in reasons dated May 21, 1999, approved the BJ Services offer recommended by the receiver. UTI and Calfrac appeal that decision.

THE CCAA APPEALS

[11] Balm/Janus appeal the chambers judge's decision in the CCAA proceedings, declining to order a meeting of creditors and shareholders of Fracmaster to consider and implement Balm/Janus' proposed plan of arrangement. The appeal is supported by certain shareholders of Fracmaster and by Banque Nationale de Paris, a subordinated lender.

[12] The chambers judge acknowledged that the restructuring proposed by Balm/Janus was a true plan which fit within the CCAA, leaving an after-life for Fracmaster and its shareholders. However, she noted the commercial reality that there was no equity left in Fracmaster, and that the lending syndicate had the only realistic remaining financial interest (CCAA A.B. 329-330). Under the terms of the CCAA and the Balm/Janus proposal, the plan would require the approval of the lending syndicate, which had indicated that it would not support the proposal. The chambers judge found as a fact that the lending syndicate had valid commercial reasons for its refusal (CCAA A.B. 331). She decided that it would be pointless to order meetings of creditors and shareholders and dismissed the Balm/Janus application.

[13] There is no requirement under the CCAA that all proposed plans of arrangement be put to meetings of creditors and shareholders for their consideration. Sections 4 and 5 specifically employ the word "may", giving the court discretion. In exercising its discretion, the court must consider whether the proposed plan of arrangement has a reasonable chance of success: ***Bargain Harold's Discount Ltd. v. Paribas Bank of Canada*** (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.), or instead, is doomed to failure: ***Re Inducon Development Corp.*** (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.). Here it was clear that the lending syndicate did not support the plan. They would be entitled to vote as a class at the meeting and defeat the plan. It was also clear that the Fracmaster situation was urgent, requiring rapid resolution, and that the delays that would be occasioned by calling the meetings would further jeopardize Fracmaster's financial condition and the value of

its assets. The chambers judge did not err in concluding that the Balm/Janus plan was doomed to failure. We grant leave to appeal to Balm/Janus, but dismiss their appeal.

[14] We wish to make a further observation. Under the CCAA the court has no discretion to sanction a plan unless it has been approved by a vote of a 2/3 majority in value of each class of creditors (section 6). To that extent, each class of creditors has a veto. This procedure is quite different from a court-appointed receivership. In a receivership the desires of the creditors are a significant factor, but the approval by a specific majority of creditors is not a pre-condition to court sanction, and creditors do not have an absolute veto. The difference in the procedures gives rise to different tests and considerations to be applied in each type of proceeding. While in this case the lending syndicate's desires in the CCAA and receivership proceedings were consistent, the chambers judge was not required to give the same weight to their wishes in each proceeding.

[15] UTI also appeals the May 17, 1999 order denying Fracmaster's application to approve the sale of its assets to UTI under the CCAA. The chambers judge noted that the proposed sale of assets to UTI did not create any monetary return for the unsecured creditors or shareholders of Fracmaster, nor did it contemplate that they would receive any benefit. The transaction was effectively a sale of assets for the benefit of the lending syndicate, a transaction which she concluded could be accomplished in a manner that did not require the use of the CCAA (CCAA A.B. 331-332). Without deciding whether the UTI offer was commercially provident, she concluded that the sale should not be approved under the CCAA, and dismissed Fracmaster's application.

[16] Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: ***Re Lehndorff General Partner Ltd.*** (1993), 17 CBR (3d) 24 at 31 (Ont. Gen. Div.). There must be an ongoing business entity that will survive the asset sale. See, for example, ***Re Canadian Red Cross Society***, [1998] O.J. No. 3306 (Ont. Gen. Div.), online: QL (OJ); ***Re Solv-Ex Corporation and Solv-Ex Canada Limited***, (19 November, 1997), (Calgary), 9701-10022 (Alta. Q.B.). A sale of all or substantially all the assets of a company to an entirely different entity, with no continued involvement by former creditors and shareholders, does not meet this requirement. While we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella. The chambers judge did not err in concluding that the sale of assets to UTI would be an inappropriate use of the CCAA. We grant leave to appeal to UTI, but dismiss its appeal.

RECEIVERSHIP APPEALS

[17] Calfrac appeals the May 21 order which approved the sale of Fracmaster's assets to BJ Services. Its primary complaint is that the receiver failed to administer the sale process in strict compliance with the May 18 court ordered procedure. Calfrac's complaints about the process were considered by the chambers judge, and dealt with in her May 21 reasons (Receivership A.B. 119 to 122). She concluded that the terms of the May 18 order had to be read in light of the commercial realities of the business world and the bidding process. She viewed the variations as minor and not problematic and decided that the BJ Services offer was in substantially the same form as the offer proposed by the receiver.

[18] A review of Calfrac's offer indicates that it too was not in strict complaince with the terms of the May 18 order. This is not entirely unexpected as the order, tender process and submission of offers came about quickly, without time to contemplate all the intricacies of fine legal drafting. Amendments to the form of agreement were contemplated in paragraph 4. c of the May 18 order. The other paragraphs of section 4, setting out other terms and conditions, did not specifically mention amendments.

[19] The tender process in this case was not a distinct and final process designed to provide a complete set of bid documents to the bidders, with no possibility of negotiation or variation, as might be the case in a construction bid. See, for example, ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] S.C.J. No. 17 (S.C.C.), online: QL (SCJ). Time did not permit the creation of such definitive conditions. Instead the process was designed to be court supervised. The amendment provisions contained in paragraph 4. c illustrate the intent to build flexibility into the process, rather than requiring strict compliance with the order. All parties were entitled to be present and make representations at the court proceedings to approve an offer, with the court to have ultimate discretion to determine whether the principles and objectives of the sale process had been met. The chambers judge did not act unreasonably in considering the commercial realities and the nature of the variations, and in accepting the form of BJ Services offer. This ground of appeal fails.

[20] A second ground of appeal advanced by both Calfrac and UTI, is that the receiver and the chambers judge failed to properly consider the closing risks associated with the BJ Services offer. The chambers judge considered the closing risks in her reasons (Receivership A.B. 112 to 113) and accepted the receiver's conclusion that the closing risks associated with the BJ Services offer were more than the Calfrac offer, no greater than the UTI offer, and more than offset by the BJ Services purchase price.

[21] Calfrac is critical of the summary manner in which the receiver communicated its risk assessment, and the lack of detail to back up its analysis. The receiver had 6 hours in which to analyze the offers and indicate its recommendation to the parties. The expedited procedure was set out in the May 18 order which has not been appealed. With the benefit of more time, the receiver undoubtedly would have proffered a more detailed analysis. But one cannot be overly critical of the receiver's work product, given the time constraints.

[22] Both UTI and Calfrac contend that the chambers judge erred in her assessment of the closing risks. UTI suggests that she erred in concluding that the closing risks of the BJ Services offer were no greater than the UTI offer. Even if that were so, the chambers judge also concluded that the BJ Services closing risks were more than offset by the greater purchase price. If that was the case for the Calfrac offer, which involved fewer closing risks and a higher purchase price than the UTI offer, it would certainly be the case for the UTI offer, which involved greater closing risks and the lowest purchase price. We are not satisfied that the chambers judge's conclusions on risks were unreasonable. We defer to her findings and dismiss this ground of appeal.

THE LENDING SYNDICATE'S WISHES

[23] UTI's principal ground of appeal is that the chambers judge erred in acting upon the receiver's recommendation and approving the sale of Fracmaster's assets to BJ Services. UTI submits that the prevailing consideration for the receiver should have been the wishes and business decision of the lending syndicate, which supported the UTI offer. UTI's appeal is supported by the lending syndicate and, if the Balm/Janus appeal does not succeed, by Banque Nationale de Paris, the subordinated lender.

[24] The facts in this case are unique. After the preliminary stay and CCAA order, Fracmaster conducted a company supervised sale process, which resulted in offers or proposals from several companies, including Balm/Janus, Calfrac and UTI. The lending syndicate considered the proposals, preferred the UTI offer and contractually agreed to support it. An acknowledgment to the April 26 UTI offer, signed by the lending syndicate, stated: "The above Offer is hereby acknowledged by each of the undersigned and each of them agree to support the Offer at the CCAA Proceedings."

[25] On April 27, 1999 the lending syndicate signed a side letter which contemplated that the sale of assets might not be completed under the CCAA, but under an alternate transaction, such as the appointment of a receiver and conveyance of assets by the receiver to UTI. The letter stated: "It is agreed that the Term Lenders and the Operating Lender will use their reasonable best efforts to conclude any such alternate transaction so long as they receive the same consideration as they would have received under the Offer."

[26] Fracmaster applied for an order approving the sale of its assets to UTI under the provisions of the CCAA. Although the lending syndicate supported that application, in the same proceeding the lending syndicate applied for an alternate order appointing a receiver and directing the receiver to sell the assets to UTI. The chambers judge dismissed Fracmaster's application under the CCAA. She appointed a receiver but refused to direct the receiver to transfer the assets to UTI, concluding that this would fetter the receiver's discretion and largely defeat the purposes of its appointment (CCAA A.B. 333). Although the chambers judge noted that the receiver could have recommended a sale to UTI if it felt comfortable doing so, the receiver instead recommended a new sale process, involving sealed tenders. Both UTI and

Calfrac participated in the sealed tender process, repeating their earlier offers. BJ Services, which had not made an offer in the CCAA proceedings, put in a new bid. It offered cash consideration to the lending syndicate of $80 million for Fracmaster's assets, compared to $60.7 million plus warrants offered by UTI and $66 million plus warrants offered by Calfrac. The lending syndicate, which had agreed to support the UTI offer before the BJ Services offer was made, stuck by their commitment and continued to support the UTI offer.

[27] In accordance with the May 18 order, the receiver was required to make a recommendation to the court, bearing in mind the interests of all claimants, including the secured creditors. The bid process confirmed that the lending syndicate had the only remaining financial stake in the company. The amount of its secured debt was $96 million, which exceeded the bids. The receiver was aware that the lending syndicate supported UTI's offer, and was also aware of the letter agreement. Nevertheless, the receiver concluded that the BJ Services offer was the best offer, and recommended its acceptance.

[28] The chambers judge followed that recommendation and approved the BJ Services offer. There is no suggestion that the BJ Services offer was prejudicial to the lending syndicate. The chambers judge considered the case law and concluded that although the creditors' interests were an important consideration, they were not the only consideration (Receivership A.B. 117). Accepting the principle that the creditors' views should be very seriously considered, she indicated that if she were satisfied that the receiver acted properly and providently, she would be reluctant to withhold approval of a transaction recommended by the receiver. (Receivership A.B. 118)

[29] UTI concedes that had the bid process resulted in a bid which exceeded the lending syndicate's secured claim of $96 million, parties other than the lending syndicate would have had a financial interest in the outcome, and different considerations would apply. Because none of the bids exceeded $96 million, only the lending syndicate had a financial interest in the proceeds of sale of assets. UTI submits that the lending syndicate made a bargain with UTI, and that bargain should be the paramount consideration. The thrust of UTI's argument is that its offer should be accepted so long as no one else offered more than $96 million. In effect, it would have a reserve bid.

[30] The narrow issue raised in the appeal is the weight to be given to the lending syndicate's wishes to accept the UTI offer. But this appeal raises a competing issue, the integrity of the bid process.

[31] Lenders have the ability to appoint private receivers and deal with assets without court approval. In the circumstances of this case, where Fracmaster has many offshore assets, we are told that a private receivership without court involvement would not be expedient. Once a creditor embarks upon a court appointed receivership, the creditor loses an element of control, including the power to dictate the terms of the disposition of assets. Although the lending syndicate's preferences are an important factor to be considered by the court, its preferences do not fetter the court's discretion and are not necessarily determinative.

[32] The receiver's role in a liquidation of assets is clear and well defined. Its obligation is to make a sufficient effort to obtain the highest possible sale price for the assets: ***Salima Investments Ltd. v. Bank of Montreal*** (1985), 21 D.L.R. (4th) 473 at 476 (Alta. C.A.). In ***Royal Bank of Canada v. Soundair Corp.*** (1991), 83 D.L.R. (4th) 76 at 93 (Ont. C.A.), Galligan J.A. set out the principles which govern the function of the court and the exercise of its discretion when considering an application by a receiver for court approval of a sale:

> 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 have been obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.
>
> The chambers judge considered each of these principles in turn, then accepted the receiver's recommendation.

[33] Only in rare cases will the receiver's recommendation diverge from the wishes of the only stakeholder, and those cases must be carefully scrutinized by a judge who is asked to approve that recommendation. But we cannot say that the chambers judge acted unreasonably by following the recommendation of the receiver in this case, because of the unique facts and manner in which events unfolded.

[34] After the court learned of the existence of the lending syndicate's contractual commitment to support the UTI offer in a receivership, it nevertheless ordered a sealed tender process. The receiver asked for the sale process in order to determine whether offers might be made which would exceed the amount of the lending syndicate's debt. The receiver also submitted that only a sale process would satisfy the court that it had fulfilled its mandate to maximize recovery and "give everyone a fair and reasonable attempt at bidding on the assets of the company" (Receivership A.B. 56). Once the sale process was engaged, it had to be fundamentally fair, with a level playing field for all participants.

[35] The receiver contacted all parties who had previously made an offer for Fracmaster's assets or expressed an interest in making an offer. The receiver also issued a press release outlining the terms of the sale. It was therefore clearly contemplated that the bidding process would not be confined to previous bidders.

[36] Some reference to a reserve bid could have been incorporated into the May 18 order indicating, for example, that UTI's offer was to be accepted unless a bid exceeded $96 million.

The order was silent. Under the order, UTI was not required to repeat its earlier offer and could have changed the consideration. In fact, it could have made no offer at all. Anyone entering the bidding process might well know, as BJ Services did, that the lending syndicate supported UTI's offer and that this could create some impediments. But they could not know that UTI's offer would have the effect of a reserve bid up to $96 million. To default to the UTI bid without prior notice to the other bidders would undermine the integrity of the independent bidding process.

[37] UTI chose to resubmit its earlier offer, but must have been mindful of the risks. Clause 6. (b) of UTI's offer specifically stated that the offer was conditional on court approval.

[38] While neither the receiver nor the court had an obligation to sweeten the lending syndicate's negotiated deal, the fact that the effect of the recommended bid was to increase the lending syndicate's cash consideration was not itself a reason to dismiss the receiver's recommendation. Once the court embarked upon a sealed tender process other interests were engaged. The chambers judge considered the interests and desires of the lending syndicate. She also considered the other factors set out in ***Soundair***, including fairness and the efficacy and integrity of the process. She balanced the competing interests, as she was required to do, and we cannot say that her conclusion was unreasonable or that she erred in principle. This ground of appeal fails.

SUMMARY

[39] We grant leave to appeal the CCAA orders to Balm/Janus and UTI. The Balm/Janus appeal, Calfrac appeal and two appeals by UTI are dismissed.

(DISCUSSION AS TO COSTS)

CONRAD, J.A. (For the Court):

[40] We have concluded that there is no reason to depart from the normal rule that costs follow the success of the appeal. Accordingly, we will order one set of costs to BJ Services to be payable in equal amounts by UTI, Calfrac and Balm/Janus. The costs are to be assessed on Column 5.

APPEAL HEARD on June 4th and 7th, 1999

MEMORANDUM FILED at Calgary, Alberta,
this 9th day of June, 1999

In assessing whether the receiver's market plan or sales process is reasonable, the court reviews:

(a) is a sale transaction warranted at this time?
(b) will the sale benefit the whole "economic community"?
(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
(d) is there a better viable alternative?[182]

With respect to the second aspect, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. The time to assess whether the receiver acted providently is the time that the receiver enters into an agreement of purchase and sale. 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.[183] The market place is the best evidence of the fair market value of the debtor's property.[184]

See also *Jeannette B.B.Q. Ltée v. Caisse Populaire Tracadie Ltée* (1989), 100 N.B.R. (2d) 374, 77 C.B.R. (N.S.) 319, 1989 CarswellNB 570 (N.B. Q.B.) where the court suggested that the receiver should ordinarily obtain an appraisal of the property or engage trained professionals to assist in the sale. In this case, the court considered that the receiver failed to take reasonable care to obtain true market value. The court considered the amount realized compared to an appraised value of one year earlier, the limited market of advertisements, the number of advertisements, the receiver's inexperience, and the failure to obtain a current appraisal and other expert assistance. Damages were reduced on appeal: *Jeannette B.B.Q. Ltée v. Caisse populaire de Tracadie Ltée* (1991), 117 N.B.R. (2d) 129, 82 D.L.R. (4th) 548, 1991 CarswellNB 389 (N.B. C.A.), leave to appeal refused [1992] 1 S.C.R. viii (note), 86 D.L.R. (4th) viii (note) (S.C.C.).

To avoid criticism of the method and manner of sale in larger receiverships, the receiver should first obtain an order authorizing the marketing plan: *Yukon v. United Keno Hill Mines Ltd.* (2004), 6 C.B.R. (6th) 153, 2004 CarswellYukon 101, 2004 YKSC 59 (Y.T. S.C.).

In *Azura Management (Hemlock) Corp. v. Hemlock Valley Resorts Inc.* (2006), 22 C.B.R. (5th) 60, 2006 CarswellBC 1264, 2006 BCSC 824 (B.C. Master), the court concluded on a motion to approve the sale of a ski resort that the receiver did not give sufficient time to the marketing of the assets and that the proposed sale price was only in the best interests of the purchaser and not in the best interests of the creditors.

See *Bank of Montreal v. Calgary West Hospitality Inc.* (2011), 2011 ABQB 293 at para. 35, 2011 CarswellAlta 698 (Alta. Q.B.): "Where, as here, the asset is an unusual one [a cause of action against a third party], the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern (as on an application to approve a sale completed by a receiver) should be whether the process is reliable, transparent, efficient, fair and one which guards the parties' interests".

182 *Nortel Networks Corp.* (2009), 2009 ONSC 39492, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]); followed in *Schembri v. Way*, 2011 ONSC 4021 (Ont. S.C.J.) at para. 36. For related proceedings on the appointment of a receiver and an order requiring the defendants to produce all financial documents, see *Schembri v. Way*, 2010 ONSC 5176 (Ont. S.C.J.)

183 *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at p. 7, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.).

184 *Bancorp Income Mortgage Fund Ltd. v. Central Manor Holdings Ltd.*, 2011 BCSC 126 (B.C. S.C.).

The court reviews the length of time a property has been on the market. This factor often indicates whether the receiver has received an appropriate offer to purchase. If the property has been exposed to the market place for a significant time, the receiver can rely less on appraisals as the market place is in the end the best test for the sale price.[185]

In determining whether the receiver acted improvidently or failed to get the best price, the court reviews the following additional factors:

> (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; and
> (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner.[186]

If the receiver's recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver's recommendation on the motion for court approval and reject the receiver's recommendation only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.[187] As stated in *Crown Trust Co. v. Rosenberg*:

> ...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

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185 *Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.* 2013 BCSC 2222, (2013), 12 C.B.R. (6th) 282 where the court approved a sale despite the fact that the receiver had a substantially higher but conditional offer.

186 *Bank of Montreal v River Rentals Group Ltd.* 2010 ABCA 16 at para 13, 469 AR 333 (Alta. C.A.), also reported as *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, citing both the *Salima* case and *Cameron v. Bank of Nova Scotia* (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 1981 CarswellNS 47 (N.S. C.A.).

187 *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112, 39 D.L.R. (4th) 526, 1986 CarswellOnt 235 (Ont. H.C.); *Integrated Bldg. Corp. v. Bank of Nova Scotia* (1989), 71 Alta. L.R. (2d) 320, 75 C.B.R. (N.S.) 158, 1989 CarswellAlta 347 (Alta. C.A.); *Re Anvil Range Mining Corp.* (1998), 7 C.B.R. (4th) 51, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]); *Re Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J.) paras 4 and 7 — the test is that the court's function is not to consider whether a receiver has failed to get the best price, but rather a receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: affirmed on appeal *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).

Court of Queen's Bench of Alberta

Citation: Re Fantasy Construction Ltd. and Madison Development Corporation 1984 Ltd. (Bankrupts), 2006 ABQB 357

Date: 20060516
Docket: BK03 109703, BK03 109704
Registry: Edmonton

In the Matter of The Bankruptcies of
Fantasy Construction Ltd. and
Madison Development Corporation 1984 Ltd.

Reasons for Judgment
of the
Honourable Mr. Justice Brian R. Burrows

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[1] PricewaterhouseCoopers Inc. is the Trustee of the bankrupt estates of Fantasy Construction Ltd. and Madison Development Corporation 1984 Ltd. It applies for an order approving the sale of certain assets of the bankrupt estates, in particular 15 units in Sunrise Park, a condominium development in Sherwood Park, Alberta. Strathcona County and the Sunrise Park Condominium Association oppose the proposed sale of 13 of the units.

[2] The bankrupt corporations and their principal, John Van Leenen, were the developers of Sunrise Park. A significant amount of litigation arose out of the development both before and after Fantasy and Madison filed in bankruptcy. There has been case management of most of that litigation for the last several years. I was assigned as case management judge around the time that Fantasy and Madison filed in bankruptcy in the fall of 2004. Reasons for Judgment filed in previous applications reveal something of the context in which this application is made. (2005 ABQB 559; 2005 ABQB 794.)

[3] The Trustee proposes to sell Unit 44 to Mrs. Bernice Tomkinson for $192,300 and Unit 45 to Gerald and Selma Richter for $196,519. The Trustee's representative has sworn that he believes those sales are in the best interests of all concerned. No one has taken a contrary position.

[4] The Trustee also proposes to sell nine other units, Units 42, 43, 48, 49, 50, 53, 54, 55, and 56 to Capital Homes 2000 Ltd. The total purchase price for the nine units would be $551,800. I understand that seven of these units have no building on them and that the buildings on the remaining two are incomplete. Capital Homes also has two options to purchase four other

units, Units 46 and 47 in one option and Units 25 and 26 in the other. The total purchase price if these options are exercised would be $140,000.

[5] As I understand it, the 15 condominium units which are the subject of this application are all the units still owned by the bankrupt corporations in Sunrise Park. The Inspectors in the two bankrupt estates have instructed the Trustee to conclude the proposed sales and have authorized the Trustee to bring this application.

[6] In opposing the sales to Capital Homes, the Condominium Association takes the position that the Trustee's efforts to find a buyer have been insufficient and that the possibility that a purchaser willing to pay more might be found has not therefore been eliminated. The steps taken by the Trustee to find a buyer for these assets have been described in the affidavit of C. Thomas Klaray, the officer of PricewaterhouseCoopers Inc. who has had conduct of these bankruptcies. Mr. Klaray has been cross-examined on his affidavit. I am satisfied that the Trustee's efforts to find purchasers have been sufficiently extensive, that the price proposed to be paid by Capital Homes is a fair price, and that it is in the interests of the bankrupt estates to complete the sales as proposed by the Trustee.

[7] Both the County and the Condominium Association also oppose the sales to Capital Homes because they suspect there is a relationship between Capital Homes and John Van Leenen and that the sales therefore will not end the involvement of Mr. Van Leenen in this project. The evidence on the application indicates that this suspicion is not totally unfounded. The history of the litigation surrounding this development provides ample justification for the County and Condominium Association's concerns about the continued involvement of Mr. Van Leenen in this development.

[8] Counsel for the Condominium Association and County suggest, and at the same time, acknowledge, that they have found no authority to support the suggestion that the Court's equitable jurisdiction conferred by *BIA* s. 183(1) extends to relieving the County and Condominium Association from the prospect of having to deal further with Mr. Van Leenen in their efforts to ensure that the construction of Sunrise Park is completed in a satisfactory manner.

[9] I must reject this submission. *BIA* s. 30(1)(a) provides:

> 30(1) The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> (a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, . . . by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

[10] It does not appear that a sale requires court approval. Yet where a Trustee anticipates that some of the parties interested in the bankrupt estate may oppose the proposed sale it may be

prudent for the Trustee to apply for directions under *BIA* s. 34(1). I understand this application is made for such reason.

[11] *BIA* s. 30(1)(a) authorizes the Trustee with the permission of the Inspectors to sell assets of the estate "to any person or company". There is no restriction as to who may qualify as a purchaser. The Trustee's obligation is to act in the interests of all the creditors of the bankrupt estate. If a proposed sale of an asset is otherwise in the best financial interests of the creditors, the Trustee would be acting contrary to its obligation to reject the sale in order to accommodate individual creditors with concerns beyond their interests as creditor, and to relieve them from the prospect of future dealings with someone whom they suspect to have a connection to, and perhaps influence over, the proposed purchaser.

[12] The obligations of the Trustee in relation to the sale of estate assets and the approach the Court should take to an application of the type before me was helpfully described by Hallett J.A. of the Nova Scotia Court of Appeal in ***Re Hoque*** (1996), 38 C.B.R. (3d) 133 at para. 35:

> When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the Act to make such decisions.

[13] In my view the filed materials show that the Trustee has exercised reasonable business judgment and has acted with honesty and integrity in relation to the proposed sales. In my view the sales should proceed as proposed by the Trustee and I so direct.

[14] The materials filed by the Trustee also outline how the Trustee proposes to administer the proceeds of the sales. Subject to the following comments, I direct that the Trustee proceed as it has proposed.

[15] In the previous decisions in this matter cited above, I held that the cost of certain drainage work required to be done under the development permits issued by Strathcona County would have to be paid out of the assets of Fantasy in priority to the claims of secured and unsecured creditors. The Trustee filed an appeal of my decision in that regard to the Alberta Court of Appeal but in January 2006 abandoned the appeal. The Trustee now proposes to hold back $125,000 from the proceeds of the sales to cover the cost of the remaining drainage work. The County agrees that $125,000 is sufficient hold back and is concerned only that the Trustee confirm that the held back funds are an asset of Fantasy. Fantasy is the only entity whose assets I have held to be available to the County for enforcement of the outstanding development permit

obligations. Counsel for the Trustee provided this confirmation at the hearing of this application. The Trustee's confirmation should also be recorded in the formal order.

[16] Further, the County seeks to have the Trustee confirm that it will pay from the proceeds of the sales, the amount the County expended for drainage work the County itself performed after November 25, 2004. The Trustee has agreed to do so. As was the case at the time of my decision in October 2005, there is some uncertainty as to whether a portion of the work in question was done before or after November 25, 2004. Counsel indicated that the amount in question could not exceed $57,000 and the Trustee has undertaken to hold that amount from the proceeds of the proposed sale to ensure that funds are available to pay the County's full entitlement. Counsel for the County indicated that it will be in a position to establish the amount to which it is entitled very shortly. In the meantime $57,000 should be held back from the proceeds of the sales.

[17] I understand further that there is an outstanding appeal by the County from aspects of my October 26, 2005 decision which went against the County. Counsel indicated that there would be a further hold back from the sale proceeds to cover what could become payable to the County if it is successful in its appeal. I do not know the amount to be held back but I understand counsel have an agreement in that regard. If I have misunderstood and further direction is required in this regard, counsel will no doubt advise.

[18] Finally, I wish to note that counsel for the County advised at the hearing of this application that if the sale of the condominium units upon which there has been no construction were completed, the purchaser would require a new development permit. The County's position is that the permit issued to Fantasy is not transferable to a new purchaser. Counsel for Capital Homes was present at the hearing of the application and advised that his client was aware of the County's position in that regard.

[19] There will be no costs of this application to any party.

Heard on the 11th day of May 2006.
Dated at the City of Edmonton, Alberta this 15th day of May 2006.

Brian R. Burrows
J.C.Q.B.A.

Appearances:

Michael J. McCabe, Q.C.
Reynolds, Mirth, Richards & Farmer
for PricewaterhouseCoopers Inc.
Trustees in Bankruptcy

Daniel R. Peskett and Jeneane S. Grundberg
Brownlee
for Strathcona County

Jeremy H. Hockin
Parlee McLaws
for Sunrise Park Condominium Corporation

John H. Hope, Q.C.
Duncan & Craig
for John Van Leenen

Stephen Livingstone
McLennan Ross
for Canadian Western Bank

R. H. Haggett
Kennedy Agrios
for CareVest Capital Inc.

Brian E. Koehli
Durocher Simpson
for Capital Homes 2000 Ltd.

Andrew Geisterfer
River City Law Group
for Gerald and Selma Richter

Marie T. Strauss
Bishop & McKenzie
for Nick and Kay Palamarek

Lorne F. Penner
Ahlstrom Wright Oliver & Cooper
for Ronald and Kathleen Dyck

ACTION NO. S-1-CV-2024-000381

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Plaintiff

- and –

5925 N.W.T. LTD. operating as HAY RIVER SUITES and D. COOKE HOLDINGS LTD.

Defendants

BOOK OF AUTHORITIES

WITTEN LLP
Barristers & Solicitors
2500 Canadian Western Bank Place
10303 Jasper Ave
Edmonton, AB T5J 3N6
Solicitor: BREN R. CARGILL
Phone: (780) 428-0501
Fax: (780) 425-0769

FILE NO. 135976.1 BRC/ne

Address for service:
Office Compliments Ltd
5204 Franklin Ave
Yellowknife, NT X1A 1E2