

COURT FILE NUMBER Q.B.G. 399 of 2020

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

PLAINTIFF CANADIAN MORTGAGE SERVICING CORPORATION

DEFENDANT 101118672 SASKATCHEWAN LTD. (formerly Korf Properties Ltd.)

**IN THE MATTER OF THE RECEIVERSHIP OF 101118672 SASKATCHEWAN LTD.
(formerly Korf Properties Ltd.)**

**BRIEF OF LAW
OF THE RECEIVER, MNP LTD.**

I. INTRODUCTION

1. MNP Ltd. (the "**Receiver**") was appointed as the Receiver of all of the assets, undertakings and properties of 101118672 Saskatchewan Ltd. (formerly Korf Properties Ltd.) (the "**Debtor**"), by an Order of the Honourable Mr. Justice B.J. Scherman granted March 17, 2020 (the "**Receivership Order**").

2. The Receivership Order authorizes and empowers the Receiver to market, advertise and solicit offers for the Debtor's property and to negotiate terms and conditions in its discretion. In addition, the Receivership Order empowers the Receiver to apply for any vesting order(s) necessary to convey the same to a purchaser free and clear of any liens or encumbrances affecting such property.

(a) The Proposed Sales

3. This application by the Receiver concerns the approval of proposed sales of certain industrial and apartment properties found below and located in Estevan, Saskatchewan (the "**Proposed Sales**") following a marketing and auction process conducted by Grasswood Auctioneers ("**Grasswood**").

4. The below properties are those which the Receiver proposed to sell (collectively, the “**Properties**”); particulars including the names of the proposed purchasers (collectively, the “**Proposed Purchasers**”) and the location of the Asset Purchase Agreements (the “**Agreements**”) in the Fourth Report of the Receiver dated June 29, 2021 (the “**Fourth Report**”):

Property (Estevan, SK)	Proposed Purchaser	Proposed Purchase Price	Attached as Appendix ¹
The “Small Estevan Apartments”			
1210 Second Street	Paul Rowe and Nataliya Filipovych	\$191,000.00	II
1321 Second Street	Iurii Akinchets	\$208,000.00	III
The “Estevan Industrial” Properties			
118 and 122 Highway 47 South	102128911 Saskatchewan Ltd.	\$421,000.00	IV
126-130 Perkins St.	Candea Leasing Ltd.	\$173,000.00	V
77-79 Devonian Street and 353 Imperial Avenue	Candea Leasing Ltd.	\$250,000.00	VI
260-270 Kensington Avenue	<i>No purchase agreement has been finalized for this bare land. No relief is therefore sought at this time. It is excluded both from the definition of “Properties” used herein as well as the Proposed Sales</i>	N/A	N/A

5. As outlined in the Fourth Report at paragraphs 11 to 18, the Receiver has engaged in extensive marketing for the real properties of the Debtor including the subject Properties.

(b) Previous Marketing Efforts by Colliers

6. On June 18, 2020, the Receiver listed the Properties with Colliers International (“**Colliers**”) on an “Invitation for Offers” (no price specified) basis. Colliers’ and the Receiver’s own listing efforts (as the case may be) included the following:

¹ To the Fourth Report.

- Placing signage on each of the Properties;
- Listing the Properties on SpaceList (one of Canada's leading online commercial real estate websites);
- Listing the Properties on the Receiver's own website (mnpdebt.ca) and Colliers website;
- Emailing every commercial real estate agent in Saskatchewan; and
- Emailing 97 previous commercial property buyers who used Colliers.

7. As a result of Colliers' efforts in respect of the Properties:

- 22 parties signed confidentiality agreements with respect to the Small Estevan Apartments with an additional two (2) parties expressing interest; and
- 17 parties signed confidentiality agreements with respect to the Estevan Industrial properties.

8. Ultimately, Colliers' listings for the Subject Properties for nearly six (6) months resulted in little interest from buyers and no actual visits to the Subject Properties. The Receiver has advised that Colliers told it in December, 2020 that their traditional listing efforts were unlikely to generate sales and other options should be considered and released the Receiver from the listing agreement. As such, the Receiver then applied to this Court to approve an auction proposal through Grasswood which was approved by the Marketing Process, Distribution and Approval Order granted by the Honourable Mr. Justice R.W. Elson and issued December 30, 2020 (the "**Marketing Process Order**").

(c) Sale by Auction through Grasswood

9. The auction sales of the Small Estevan Apartments and the Estevan Industrial properties finally took place on May 27-28, 2021 following delays of approximately two (2) months.

10. In advance of the auction, Grasswood conducted the following marketing efforts in respect of the Subject Properties starting in January, 2021 and running to May 27, 2021:

- Multiple media sources including several online platforms and in print;
- Direct email advertisements to rural and commercial businesses locally, in Canada and in the northern United States;
- Email marketing; and
- Physical signs placed on the properties and digital billboards placed in the Estevan, Saskatchewan area.

11. In total, the results of Grasswood marketing efforts resulted in:

- 123,000 potential bidders exposed to advertisements or listings in the estimation of Grasswood;
- 93 individual bidders registered for the online bidding process and they included persons from across Canada and the United States;
- Page views of the properties listed on the Grasswood website, as well as the Hibid.Com network utilized totalled approximately 20,895 total views and the following online bids:

Property	Page Views	Unique Bidders	Unique Bids	Total Bids
Small Estevan Apartments	5685	15	23	112
118 and 122 Highway 47 South	5338	9	14	92
126-130 Perkins St.	3257	5	5	7
77-79 Devonian Street and 353 Imperial Avenue	6615	13	17	45
Total²	20,895	42	59	256

12. In addition to the above marketing efforts, Grasswood arranged to show the Subject Properties to multiple prospective bidders.

13. The Receiver therefore applies for the following relief:

- (a) Approving the Agreements and authorizing the Receiver to complete the transactions with the Proposed Purchasers contemplated therein;

² Statistics for the Kensington Avenue bare land were not available.

- (b) Approving, authorizing and directing the Receiver to enter into a sale of the assets for the purchase prices in the Agreements and subject to the terms and conditions thereof;
- (c) Vesting the Proposed Purchasers with all right, title, and interest in and to, the assets described in the Agreements, free and clear of all liens, charges, and encumbrances except as provided in the Agreements;
- (d) Authorizing the Receiver to distribute the sales proceeds as outlined in the proposed Approval and Distribution Order filed in these proceedings;
- (e) Approving the Receiver's activities as described within the Fourth Report; and
- (f) Such further and other relief as counsel may request and this Honourable Court may allow.

II. FACTS

14. The Receiver refers this Honourable Court to the First Report and the Fourth Report and the Appendices thereto which outline the facts underlying this application in detail, and further describes the Receiver's activities to date.

III. ISSUES

15. The following issues are raised on this application:

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

IV. ARGUMENT

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

16. Section 243 of the *Bankruptcy and Insolvency Act* [the **BIA**] permits the court to appoint a Receiver to do any of the following:

- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;

- (b) exercise any control that the court considers advisable over the property and over the insolvent person's business; and
- (c) take any other action that the court considers advisable.

17. Section 247(b) of the *BIA* provides that a Receiver shall “act honestly and in good faith” and “deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner”.

18. The decision of *Royal Bank v Soundair Corp.* (1991), 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA) [**Soundair**] enumerates the well-known criteria to be applied when considering the approval of a sale or the sales process of a Receiver. When considering whether a proposed sale should be approved and ratified by the court, the court is to consider and determine:

- (a) Whether the Receiver made sufficient effort to get the best price and has not acted improvidently;
- (b) The interests of all parties;
- (c) The efficacy and integrity of the process by which offers were obtained; and
- (d) Whether there has been unfairness in the working out of the process.

19. *Soundair* has been cited with approval by the Saskatchewan Court of Queen's Bench in the relatively recent published decision of *Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203 [**TD Bank**] at para 24.³

20. It should also be noted that a court-appointed Receiver is afforded a high degree of deference in running such an asset sale within a receivership, provided that its course of action and recommendation is appropriate and nothing to the contrary is shown in the evidence. To order otherwise calls into question the Receiver's expertise and authority in the receivership process, thereby compromising both the integrity of the sales process, and undermining commercial certainty.

21. To that end, Galligan J.A. stated at paras 46-47 of *Soundair*:

³ See also *Atrium Mortgage Investment Corp. v King Edward Apartments Inc.*, 2018 SKQB 296, 65 CBR (6th) 15 at para 13

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, *supra*, at p. 109 [O.R.]:

The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

22. Therefore, applying the test in *Soundair*, the Receiver submits the following.

Factor 1: Whether the Receiver made sufficient effort to get the best price and has not acted improvidently

23. With regard to the first factor, the Receiver submits that its efforts to sell the Properties have been more than sufficient to get the best possible price in the circumstances. The overarching circumstance, in the Receiver's opinion, is the now trite fact that the City of Estevan has been hit very hard by the years-long downturn in the oil patch.

24. It should be noted that the proposed purchase prices in relation to the April, 2020 appraisals commissioned by the Receiver⁴ range from approximately 19.6% on the low end to 81.6% on the high end. However, the Receiver still recommends the Proposed Sales be approved. None of the Proposed Purchasers were interested in assuming the back taxes.

(i) Colliers' Efforts

25. In the Receiver's view, the Proposed Sales and the purchase prices thereof represent the best possible outcome in the circumstances. As noted above, all of the real properties of the Debtor were listed with Colliers in June, 2018. All of them received significant market exposure through Colliers efforts. Ultimately, Colliers advised the Receiver that interest was low and regular sales for the Properties unlikely. The Receiver views Colliers as an extremely

⁴ Found in the Confidential Appendix II to the First Report.

experienced commercial brokerage with extensive market penetration and a wide network assisting to find potential purchasers. The Receiver submits that Colliers' efforts found at para 12 of the Fourth Report in traditional and online marketing have been both very typical and commercially reasonable.

(ii) Grasswood's Efforts

26. When Colliers was making progress with the larger properties of the Debtor, but little progress was being made with the Small Estevan Apartments and the Estevan Industrial Properties (beyond the 39 confidentiality agreements and two (2) expressions of interest), they were removed from that listing process and given to Grasswood for marketing and auction.

27. Grasswood then marketed the Properties from January, 2021 and running to May 27, 2021 using both traditional and online marketing. The reach of Grasswood was very broad—it netted exposure to approximately 123,000 potential bidders, with 93 individual bidders actually registering to participate in the online auction. Overall, 42 unique bidders actually participated, with a total of 256 bids during the May 27-28 auctions.

(iii) Sufficient Overall Efforts To Get The Best Price

28. Overall, the Properties were exposed to the market for nearly one (1) year by Colliers (six (6) months) and Grasswood (five (5) months). Originally, pursuant to the Marketing Process Order, this court approved the auction proposal with a lead time of approximately three (3) months from listing to auction by Grasswood. Inclement weather and pestilence then exerted their influence and an additional two (2) months were added to the listing and marketing time at no additional cost from Grasswood which further exposed the Properties to market and to inspection by prospective purchasers.

29. The Receiver therefore submits that the eleven (11) months spent marketing and attempting to sell the Properties has been a most provident effort and that the Receiver has made more than sufficient effort to get the best price possible. Ultimately, it is the market that sets the value of property and quoting the Alberta Court of Appeal in *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433, 98 Alta LR (6th) 1 [**PWC**] at para 16, "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 Corporation v Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (BCSC) at para 20.

30. Even considering the additional possible factors for this first part of the *Soundair* test as set out in *River Rentals Group Ltd. v Hutterian Brethren Church of Codesa*, 2010 ABCA 16, 18 Alta LR (5th) 201 [***River Rentals***] at para 13:

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.

the Receiver submits that this first branch has been easily satisfied, given the long marketing periods (for a sale on an invitation for offers basis and for auction), the lengthy notice period of the auction, and the interest of all parties as detailed in the next section of this Brief.

Factor 2: The interests of all parties

31. With regard to the second factor, the Receiver submits that approving the Proposed Sales is in the interests of the parties with an economic stake in the outcome.

32. First, the Properties have now been on the market for eleven (11) months. The Receiver submits that trying to market the Properties for longer would be prejudicial to all parties. The sales now recommended by the Receiver help to avoid additional carrying costs chargeable to the Debtor's estate from the Receiver and property managers (as well as legal counsel involved).

33. Secondly, no evidence exists that spending additional time and money attempting to re-market the Properties after so long on the market will yield any additional money for the estate, particularly when given the additional costs which would certainly be incurred.

34. Third, even with the distribution to CMSC of \$5,524,511.00 following the sales which have closed so far, the debt to the secured creditor remains extremely significant. As detailed

in the Affidavit of Marianne Dobslaw sworn March 8, 2020, the debt owing to the secured creditor stood at \$23,103,873.95 as at February 13, 2020 with per diem interest of \$4,843.18. Overall, the debt owing is still in the range of \$20,000,000.00 and even if appraised values could somehow be squeezed from the market (no evidence exists that this would even be possible), the debt would still range between \$15,000,000.00-20,000,000.00. Such figures are still a significant obligation for any debtor or any guarantors in most cases and are so large as to be almost academic. As such, at this stage CMSC is really the only party with a financial interest in the Proposed Sales.

35. The Receiver therefore submits that approval of the Proposed Sales serves the interests of all parties involved.

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

36. With respect to the third factor, the Receiver submits that the sales efforts to date were fair, efficient, targeted a wide audience, and commercially reasonable. The process clearly provided an efficient and open mechanism for any interested party to make an offer for the purchase of the Debtor's assets.

37. The Receiver, Colliers and Grasswood were at all times responsive to the inquiries of all interested parties and worked diligently to market and show the Properties to prospective purchasers over the span of eleven (11) months.

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

38. In respect of this final factor, is important to note that, as of the date of the Brief, no party with an economic interest in the Debtor's assets or any other party has challenged or provided evidence of any unfairness or irregularity in the sales efforts to date for the Debtor's assets.

39. As such, the Receiver therefore submits that this Honourable Court should, in 'balancing' of the above *Soundair* factors⁵, approve the Proposed Sales and the Receiver's activities to date.

⁵ PWC at para 12.

V. DISTRIBUTION & OTHER MATTERS

40. The Receiver therefore proposes to distribute the funds in its hands now and from the sale of the Properties to the secured creditor, CMSC, after closing. Given this receivership engagement is nearing its end stages, the Receiver will retain a holdback of up to \$50,000.00 to address ongoing costs as the last piece of vacant land is dealt with.

41. Finally, the Receiver seeks approval of its activities as described within the Fourth Report.

VI. CONCLUSION

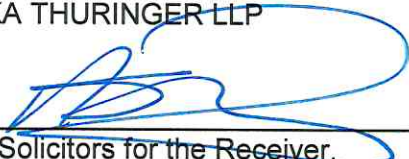
42. The Receiver respectfully requests that this Honourable Court grant the relief sought in this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of June, 2021.

KANUKA THURINGER LLP

Per: _____


Solicitors for the Receiver,
MNP Ltd.

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AUTHORITIES**Cases**

Name & Citation	Paragraph	Principle
<i>Atrium Mortgage Investment Corp. v King Edward Apartments Inc.</i> , 2018 SKQB 296, 65 CBR (6th) 15	13	Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test
<i>Pricewaterhousecoopers Inc v 1905393 Alberta Ltd</i> , 2019 ABCA 433, 98 Alta LR (6th) 1	12	River Rentals additional factors may be used for the first branch of the <i>Soundair</i> test in a balancing act and did not fundamentally modify such test.
	16	Appraisals are of limited value after time given to the market to set the real value for property
<i>River Rentals Group Ltd. v Hutterian Brethren Church of Codesa</i> , 2010 ABCA 16, 18 Alta LR (5th) 201	13	Additional factors to potentially consider in the first branch of the <i>Soundair</i> test
<i>Romspen Mortgage Corporation v Lantzville Foothills Estates Inc.</i> , 2013 BCSC 2222	20	Appraisals are of limited value after time given to the market to set the real value for property
<i>Royal Bank v Soundair Corp.</i> (1991), 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA)	16	Of-cited test for asset sales in receiverships.
	46-47	Receivers afforded a high degree of discretion in recommending a sale. Courts should not lightly interfere with recommendation of receivers.
<i>Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.</i> , 2012 SKQB 289, 401 Sask R 203	24	Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test.

Statutes

Name	Section	Principle
<i>The Bankruptcy and Insolvency Act</i>	243	Authority of Receiver to take possession of a Debtor's assets and to deal with them as approved by the Court
	247(b)	

		Duty of Receiver to act honestly, in good faith and in a commercially reasonable manner.
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