COURT FILE NUMBER	1601-03126
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CALLIDUS CAPITAL CORPORATION
DEFENDANTS	ALKEN BASIN DRILLING LTD.
DOCUMENT	**BRIEF OF THE DEFENDANT KEVIN BAUMANN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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INTRODUCTION

1. This is the brief of the Defendant, Kevin Baumann, opposing the application for discharge of the Receiver, MNP Ltd. ("MNP").

I. STATEMENT OF FACTS

2. The within action is an action by Callidus Corporation against Alken Basin, and is concurrent with a personal guarantee action by Callidus, Action 1501-05314 against Kevin Baumann, guarantor of the Alken indebtedness.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para.1

3. The proceedings from which the instant application stems relate to the receivership of Alken Basin Drilling Ltd. ("Alken Basin"), a company of which the Defendant is 60% shareholder. Alken Basin was placed into receivership by its secured creditor, the plaintiff, Callidus Capital Corporation ("Callidus"), on April 1, 2016.. MNP is the court-appointed Receiver pursuant to a Receiving Order.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 6

4. The full history of the commercial relationship between the parties and its deterioration is set out in the affidavit of Kevin Baumann sworn on July 11, 2017, and in the Defence and Counterclaim filed by Baumann in the foreclosure action, Action 1501-05314 in this court. The Defendant refers the Court to those materials for a comprehensive understanding of the factual background.

5. In summary, however, the most pertinent facts are as follows:

   a. Callidus and Alken Basin entered into a Loan Agreement on our about March 31, 2014, which established three credit facilities, as described in the Loan Agreement.

   Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 3 and Exhibit "A" to Baumann Affidavit

b. Almost from the inception of the Credit Agreement, Callidus, without justification, withheld funds that were critical for Alken Basin's operations, despite the fact that Alken Basin was satisfying financial ratios and requirements set out in the Credit Agreement. This conduct had the effect of choking Alken Basin, which was up until that point in good financial health

Affidavit of Kevin Baumann, sworn July 11, 2017, at paras. 11-14

c. Callidus used its financial leverage to insist on appointment of Scott Sinclair, a business consultant with whom Callidus had a historical relationship, to oversee operations of Alken Basin. Ultimately, Callidus threatened to withhold funds unless the Defendant resigned his position as officer and director and Sinclair took over operations.

Affidavit of Kevin Baumann, sworn July 11, 2017, at paras. 14 and 18

d. Following his resignation, the Defendant was barred from having any involvement in Alken Basin or even setting foot on the premises. His requests for information about the operations of the company were ignored and went unanswered, despite the fact that Baumann continued to be a 60% shareholder and guarantor of the company's debts to Callidus.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 22

e. In May 2015, the Defendant advised Sinclair that he had been contacted by individuals interested in purchasing Alken Basin. Sinclair made no attempt to pursue that opportunity, but instead continued to operate the company until April 2016, when Callidus applied to the Court for appointment of the Receiver.

Affidavit of Kevin Baumann, swornJuly 11, 2017, at para. 23

f. During the period Sinclair was operating Alken Basin, the Alken Basin debt to Callidus increased by in excess of $10,000,000. An analysis of these obligations suggest that the funds loaned by Callidus, or charged to the Alken Basin account were above and beyond the terms of the Credit Agreement between the parties, and contrary to sound financial logic or wisdom.

Affidavit of Kevin Baumann, sworn July 11, 2017 at paras. 26-29

g. The Receiver was appointed with the limited mandate to facilitate the sale of Alken Basin's assets. Sinclair and Callidus continued to operate Alken Basin, and also controlled the marketing and sales efforts.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 28
Receiver's Reports 1, 2, and 3

h. The sale period was extremely short, lasting approximately 6 weeks from the time of appointment of the Receiver to the date of the Vesting Order. No bids were received.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 23

i. Alken Basin's assets were ultimately purchased by a company - AltairWater and Drilling Services Inc. ("Altair") - which was incorporated a week before the sale and is owned by Callidus. Scott Sinclair is the President and COO. The sale was a credit bid for the entire amount of Alken Basin's debt to Callidus, less $4 million.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 33

j. It appears that, a mere week before the closing date, a Memorandum of Understanding ("MOU") related to a potential contract for well drilling in Egypt, to which Alken Basin was a party, was disclosed to the Receiver. It also appears that negotiations related to this potential contract, whose precise value is unknown but may be as high as $1 billion, were actively being conducted by Sinclair and other individuals at Alken Basin during the period of the receivership and the marketing process, but were not disclosed to the Receiver, nor to potential bidders.

Affidavit of Kevin Baumann, sworn July 11, 2017, at para. 28
Affidavit of Kevin Baumann, sworn July 11, 2017, Exhibit "H"

k. Baumann remains a guarantor of the indebtedness of Alken Basin, and is sued by Callidus on the basis of that guarantee for the outstanding balance owing after the credit bid. Baumann contests that suit on a number of grounds, the whole as more fully appears from the pleading in the guarantee action.

l. The actions of Sinclair and the non-disclosure of the MOU and its potential value, together with the substantially increased losses incurred by Sinclair for the period of May 2015 to the Receivership 2016 are matters which ought to have concerned the Receiver in relation to the sale and valuation of these assets. Parties familiar with the Alken Basin operation are concerned that full disclosure was not made to

the Receiver during the course of the process. For the purposes of pursuing his defence, the Defendant requires full and complete disclosure of documents related to matters surrounding the MOU as well as other actions and decisions taken by Sinclair and other parties operating Alken Basin in the period leading up to the receivership, and during the receivership itself. The Defendant will require the assistance of the Receiver to collect that information, and to conduct any necessary investigations.

Affidavit of Kevin Baumann, sworn July 11, 2017, at paras. 49-50

m. Baumann has hired Forensic Restitution and David Oswald, experts in forensic analysis in these scenarios to review the increased loan amounts claimed by Callidus, and analyze the impact of the non-disclosure of the MOU and its potential value on the assets which were ultimately bought by a Callidus subsidiary. Further information is required, but the conclusion is that the disclosure of the MOU may have impacted potential bidders on the Alken assets.The Defendant's expert has sworn that he is unable to complete a forensic analysis of the affairs of the company or assess potential defenses available in the guarantee action with the information that is currently available, and that he will require additional information related to the MOU and other matters from Alken Basin, the Receiver, and other parties. He further indicates that his preliminary analysis suggests a possibility that the amounts claimed by Callidus to be outstanding are not accurately calculated, having regard to the terms and conditions of the Callidus security documents executed by Alken.

Affidavit of Kevin Baumann, sworn July 11, 2017, at paras. 26-33

II. ISSUE

6. Should the Receiver's application for discharge be refused, on the grounds that its mandate has not been completed, or on any other ground?

III. ARGUMENT

7. The duties of a Court-appointed receiver were described in ***Re Ravelston Corp.***:

> 60 A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. [...].

> [...]
>
> 62 It is well established that **a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings.** This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. [...].
>
> 63 A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. [Emphasis added]

Ravelston Corp.(Re), [2007], 29 C.B.R. (5th) 1 at paras. 60 and 62-63, 2007 CarswellOnt 661 [Tab 1]; affirmed 2007 ONCA 135, 85 O.R. (3d) 175 [Tab 2]

8. As observed in ***Royal Bank of Canada v. Soundair Corp.***, the "conduct of a receiver must be reviewed in light of the specific mandate given to him by the court".

Royal Bank of Canada v. Soundair Corp., 4 O.R. (3d) 1 at p. 4 (QL), [1991] O.J. No. 1137 (per Galligan JA) [Tab 3]

9. Case law identifies four criteria that should be assessed by a Court to determine whether a receiver has properly executed its mandate to sell property of the debtor:

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.

River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, 2010 ABCA 16 at para. 12, 469 A.R. 333 [Tab 4]
Royal Bank of Canada v. Soundair Corp., supra at p. 5 (QL) (per Galligan JA) [Tab 3]

10. In evaluating whether the Receiver has acted improvidently or failed to get the best price, the following factors are relevant:

    (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.

River Rentals Group Ltd., supra at para. 13 [Tab 4]

11. Courts must carefully scrutinize the procedure followed by the receiver to ensure that public confidence in the integrity of receivership proceedings is not undermined:

> [...] 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 [...].

Royal Bank of Canada v. Soundair Corp., supra at p. 13 (QL)
(per McKinley JA, concurring) [Tab 3]
River Rentals Group Ltd., supra at para. 18 [Tab 4]

12. In *Bennett on Receiverships*, the author notes the typical circumstances in which a receiver will be discharged:

> The appointment of the receiver is usually terminated when the estate has been fully administered or the appointment no longer serves any purpose. [...]

Frank Bennett, *Bennett on Receiverships*, 3rd ed.
(Toronto: Carswell, 2011) at p. 601 [Tab 5]

13. Case law indicates that discharge may not be appropriate where there is dispute about the propriety of the sale process, dispute among interested parties over proceeds or other issues, or allegations of conspiracy or wrongdoing.

14. For example, in ***Bison Properties Ltd. (Re)***, although sale of the debtor's property was approved, discharge was refused and the receiver was ordered to remain in place in order to assist with collection of documents required from the debtor in order to resolve a dispute related to priorities and title claims asserted by certain bondholders of the debtor:

> 172 I am, however, of the opinion that the Receiver should not be discharged at this time. I am persuaded by the Purchasing Bondholders' submissions that in order to determine their REDMA Trust claim **they will require documents from Bison, which they will need to obtain through the Receiver. I am also of the view that the Receiver should hold the trust funds and attempt to invest them appropriately**, with the consent of the Applicant Lenders and the Purchasing Bondholders, to realize greater returns than those that could be realized if the law firm representing Metro-Can and Rev placed them in the trust accounts available to them. [...] [Emphasis added]

Bison Properties Ltd. (Re), 2016 BCSC 793 at para. 172, 36 C.B.R. (6th) 66 [Tab 6]

15. Similarly, in ***Kotler v. Bayshore Investments Ltd.***, an order discharging the receiver was overturned on appeal, in a case where allegations of "mismanagement, breach of fiduciary duties, improper use of insider information, improper guarantees, pledges and payments and misappropriation and wasting of assets" had been brought against the directing mind behind the debtor company. Carrothers JA considered there was "overriding error in discharging the receiver" where matters related to those allegations remained unresolved, and held that "such overkill [...] works a substantial injustice and was clearly wrong."

Kotler v. Bayshore Investments Ltd., [1982] B.C.J. No. 2298 at paras. 14 and 24, 42 C.B.R. (N.S.) 127 [Tab 7]

16. The decision in ***Levy-Russell Ltd. v. Tecmotiv Inc.***, while not dealing with the issue of discharge, illustrates the importance of proper disclosure, and the injustice that is wrought when it is absent from the receivership process. In that case, directors of the debtor company were found to have breached their fiduciary duties and conspired with

the director of a third party company to arrange matters so that they together could purchase the debtor business from the receiver at far less than fair value. This decision is lengthy, and a portion of it is reproduced at tab 8.

The Court commented as follows concerning the impact of the failure to disclose relevant information to the receiver:

> 739 The directors also argue that there was in any event no loss because the receiver sold the assets at their fair market value or at least at a commercially reasonable price.
>
> 740 As is apparent from the earlier parts of these reasons, I do not accept many of the underlying assumptions on which these arguments rest. **The receiver's view of the reasonableness of the Tecmotiv bid was hopelessly skewed by the directors' breaches of their duty, owed to Levy-Russell, to brief him. The entire bargaining process between Hayeems and Godsall was likewise skewed by the directors' breaches** [...]. [Emphasis added]
>
> ***Levy-Russell Ltd. v. Tecmotiv Inc.***, [1994], 13 B.L.R. (2d) 1 at paras. 739-740, 54 C.P.R. (3d) 161 [Tab 8]

17. In the present case, it is submitted that discharge of the Receiver is not appropriate at this time, given the active litigation involving allegations of mismanagement, conspiracy, breach of contract and breach of fiduciary duty, among others, against Callidus, Sinclair and other individuals. This litigation impugns the process for marketing and sale of the assets of Alken Basin, and further raises a need for the Defendant to obtain additional information from Alken Basin in order to pursue those claims and mount a full and fair defence to the guarantee action.

18. In addition, the Defendant submits that the circumstances surrounding the failure to disclose the MOU, and it impact on the authenticity of the sale process, should be investigated by the Receiver, who is best placed as an officer of the Court to conduct that investigation, and that until such investigation has been conducted, the Receiver has not completed its mandate.

IV. RELIEF SOUGHT

19. The Defendant, Kevin Baumann, therefore respectfully requests that this Honourable Court:

(i) DISMISS the Receiver's Application for discharge;

(ii) ORDER the Receiver, MNP Ltd., to conduct an investigation of the circumstances surrounding the negotiation and signing of the MOU and its impact on the process for sale of the assets of Alken Basin;

(iii) Direct the Receiver to review the sale process to determine if it was properly conducted in the face of the information disclosed in this application; and

(iv) ORDER such further and other relief as the Court may consider appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF JULY, 2017.

MACDONALD HANLEY

Per: _____

James G. Hanley
Counsel for the Defendant
Kevin Baumann

JAMES G. HANLEY
Barrister & Solicitor
A Commissioner for Oaths
in and for Alberta

LIST OF AUTHORITIES

TAB

Ravelston Corp. (Re), [2007] O.J. No. 414

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

P.A. Cumming J.

Heard: January 15, 18, 25, 26 and 30, 2007.

Judgment: February 7, 2007.

Court File No. 05-CL-5863

[2007] O.J. No. 414 | 29 C.B.R. (5th) 1 | 155 A.C.W.S. (3d) 258 | 2007 CarswellOnt 661

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc. AND IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended

(157 paras.)

Case Summary

Insolvency law — Administration of estate — Application to court for directions — Report to court — Motion by the Receiver for approval of its report allowed — The company was a named defendant in criminal proceedings in the United States — The Receiver sought approval of a plea agreement and the associated guilty plea to wrongful diversion of a non-compete payment — The majority shareholder of the company objected — The court held that the Receiver followed a fair and proper process, and duly considered the interests of all stakeholders — The decision to enter the agreement was prudent, commercially reasonable and made with a view to the best interests of the company.

Insolvency law — Receivers, managers and monitors — Duties and powers — Motion by the Receiver for approval of its report allowed — The company was a named defendant in criminal proceedings in the United States — The Receiver sought approval of a plea agreement and the associated guilty plea to wrongful diversion of a non-compete payment — The majority shareholder of the company objected — The court held that the Receiver followed a fair and proper process, and duly considered the interests of all stakeholders — The decision to enter the agreement was prudent, commercially reasonable and made with a view to the best interests of the company.

Motion by the Receiver, RSM Richter, for approval of its report -- The report directed the Receiver, on behalf of Ravelston Corporation Limited (RCL), to enter into a plea agreement with the United States Attorney's Office (USAO), and subject to acceptance, enter a nolo contendere plea to a charge related to the wrongful diversion of a non-compete payment -- The Receiver submitted that the plea agreement accomplished its primary objective of extricating RCL from the morass of litigation in which it was a defendant -- The motion was opposed by, among others, the majority shareholder of RCL, the Conrad Black Capital Corporation (CBCC) -- Conrad Black was the CEO and Chairman of RCL, Hollinger and Hollinger International -- RCL was an investment holding company with its principal asset being its interests in Hollinger -- The principal asset of Hollinger was its interests in Hollinger International, a global newspaper publisher -- RCL and its subsidiary, Ravelston Management, provided management services to the Hollinger companies in exchange for compensation -- The termination of the management agreements, and certain non-compete payments, were the subject of litigation, and criminal

proceedings in the United States, the consequence of which resulted in the appointment of the receiver -- RCL was a named defendant with respect to the alleged wrongful diversion of non-compete payments from Hollinger International -- The Receiver sought approval of a plea agreement reached with the USAO -- CBCC brought a cross-motion for directions, challenging the process followed by the Receiver and the adequacy of its report.

HELD: Motion allowed.

The Receiver followed a fair and proper process, and duly considered the interests of all stakeholders in arriving at the plea agreement -- The decision to enter the agreement was prudent, commercially reasonable and made with a view to the best interests of RCL -- Steps were taken to minimize any impact of the plea upon the former directors and officers of RCL -- CBCC's cross-motion was dismissed -- Cross-examination of the Receiver was not warranted, as it acted in an objective and neutral manner in dealing with questions raised by CBCC, and the interests of its stakeholders -- There was no waiver of solicitor-client privilege on the part of the Receiver, and thus CBCC was not entitled to disclosure of legal opinions underlying the Receiver's report, or the contents of its communications with the USAO.

Statutes, Regulations and Rules Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47(1)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Courts of Justice Act, R.S.O. 1990 c. C.43, s. 101

Mutual Legal Assistance in Criminal Matters Act, S.C. 1988, c. 37, s. 9(1)

Counsel

Alex MacFarlane and Max Mendelson, for the Moving Party Receiver

Peter F.C. Howard and Danielle K. Royal, for Conrad Black Capital Corporation

Earl A. Cherniak, Q.C., Edward L. Greenspan, Q.C., George S. Glezos and Lisa Munro, for Conrad Black

Robyn Ryan Bell and Derek J. Bell, for Sun-Times Media Group (formerly Hollinger International Inc.)

M.P. Gottlieb and W. Brock, for Hollinger Inc.

David R. Wingfield and Paul D. Guy, for Peter G. White and Peter G. White Management Limited

David Moore, for Catalyst Fund General Partner I Inc.

Clifton Prophet, for Argus Corporation Limited

REASONS FOR DECISION

P.A. CUMMING J.

The Plea Agreement Motion

1 The Receiver of The Ravelston Corporation Limited ("RCL"), RSM Richter Inc. ("Richter"), brings a motion for an order approving its Eighteenth Report dated January 5, 2007, approving the activities of the Receiver, and in particular, for an order directing the Receiver to:

(1) enter into a Plea Agreement (as attached to the Eighteenth Report) with the United States Attorney's Office (Northern District of Illinois) ("USAO"), and

(2) subject to the acceptance by the U.S. District Court of the guilty plea by RCL, as represented by the Receiver, voluntarily enter a plea of guilty to Count Two of the Third Superceding Indictment dated August 17, 2006 on behalf of RCL.

2 The Receiver asserts that the Plea Agreement is fair and reasonable and entry into the Plea Agreement accomplishes the primary objective of the Receiver, being "to extricate RCL on a timely basis from the morass of litigation to which it is a defendant." The motion raises several novel issues. (This motion is referred to as the "Plea Agreement Motion" or simply as the "Motion".)

3 Conrad Black Capital Corporation ("CBCC"), the majority shareholder of RCL, Conrad M. Black, Peter G. White, and Peter G. White Management Corporation ("PWMC") (a shareholder of RCL), oppose the Motion. (The opposing parties are collectively referred to as the "Black group".)

4 CBCC brought what in effect was a cross-motion for directions on January 15, 2007, challenging the process followed by the Receiver in making its Eighteenth Report and the adequacy of such Report. (This cross-motion is referred to as the "CBCC Cross-Motion for Directions".)

Background to the Receivership

5 RCL is a privately held corporation, with 98.5% of its equity owned by officers and directors of Hollinger Inc. ("Hollinger") and Hollinger International Inc. ("International") at the relevant times and 1.5% owned by the estate of a former Hollinger director. Approximately 65.1% of RCL is owned by CBCC, which in turn is controlled by Conrad M. Black, who became a member of the House of Lords of the United Kingdom in 2000, becoming Lord Black of Crossharbour. Lord Black was the Chief Executive Officer and Chairman of the Board of Directors of RCL, Hollinger and International at the material times. Lord Black resigned as an officer of RCL on April 19, 2005.

6 Mr. F. David Radler was the President of RCL until the Receiver was appointed April 20, 2005. Between 1998 and 2003 Mr. Radler was the President and Chief Operating Officer of Hollinger and International. Mr. Radler holds a 14.2% ownership interest in RCL through his holding company, F.C. Radler Ltd.

7 Mr. Peter G. White, then a director and Executive Vice-President of RCL, swore an affidavit dated April 19, 2005 in support of the application of RCL and its subsidiary, Ravelston Management Inc. ("RMI") for an order staying all proceedings in respect of RCL pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") and appointing Richter as Receiver pursuant to s. 101 of the *Courts of Justice Act* R.S.O. 1990, c C.43 ("*CJA*") and s. 47(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*"), for the purpose of maintaining and maximizing value for all stakeholders. (These ongoing proceedings can be referred to as the "Canadian Insolvency Proceedings.")

8 Pursuant to an Order of Farley J. of this Court, dated April 20, 2005, Richter was appointed as receiver and

manager and interim manager with respect to the property, assets and undertaking of RCL, and RMI. RCL and RMI were granted protection under the *CCAA*. See *Ravelston Corporation Ltd. (Re),* [2005] O.J. No. 1643 (Super. Ct.).

9 The primary business purpose of RCL is an investment holding company, with its principal asset being its direct or indirect interest in Hollinger, a Canadian corporation and reporting issuer with retractable common shares and exchangeable non-voting preference shares Series II listed on the Toronto Stock Exchange. As of March 5, 2005 RCL and RMI owned directly or indirectly some 78.3% of the common shares of Hollinger.

10 The most significant asset of Hollinger is its interest in International, a Delaware and public corporation traded on the New York Stock Exchange, which through its operating subsidiaries has owned and published newspapers around the world, including the Chicago Sun-Times in the United States, The Daily Telegraph in the United Kingdom and the National Post in Canada. (International has since been re-named "Sun-Times Media Group, Inc." in 2006 and is referred to herein as either "International" or "Sun-Times.")

11 As of April 1, 2005 Hollinger owned directly or indirectly some 17.4% of the equity and 66.8% of the voting interest in International. As of May 18, 2004, there were cease trade orders made in respect of both Hollinger and International. As such, RCL, deemed an insider, cannot trade its shares in Hollinger.

12 RCL and its subsidiary RMI provided management and advisory services for compensation to each of Hollinger and International and other related entities pursuant to agreements until about late 2003. The termination of these agreements is the subject of litigation.

13 There is extensive litigation involving all the entities referred to and the principal individuals behind the entities, as set forth in Mr. White's affidavit of April 19, 2005.

14 Mr. White states in his April 19, 2005 affidavit that given the underlying value of Hollinger and International he believed the value of RCL exceeded the liabilities of the corporation. However, given the lawsuits faced by RCL, the absence of distributions from Hollinger, the non-payment of management fees and the inability of RCL to dispose of any shares of Hollinger, RCL and RMI were unable to pay amounts then owing to creditors as they became due. Hence, RCL and RMI were "facing severe financial difficulty" with its financial condition "eroding quickly." There was a need for the Receiver to be appointed to provide stability and to preserve the assets.

15 The receivership ultimately embraced RCL, RMI, and other subsidiary entities, those being Argus Corporation Limited ("Argus") and 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., and 509647 N.B. Inc. (collectively, the "N.B.Subs"). (All collectively being the "Companies").

16 As stated above, RCL, directly or indirectly through the Companies, owns about 78.3% of Hollinger, or some 27.4 million common shares. Hollinger has about 17.4% of the equity of International.

17 The United States Securities and Exchange Commission ("S.E.C.") commenced proceedings against Lord Black, Mr. Radler and Hollinger on November 15, 2004. Lord Black commenced a proceeding in Ontario (Court file 06-CL-6259) for contribution and indemnity in respect of certain ongoing proceedings (not including the S.E.C. action).

18 An Agreement was later made on November 13, 2006 to toll the limitation period in respect of Lord Black's claim for contribution and indemnity from RCL, RMI and Argus in respect of the S.E.C. action until the completion of the S.E.C. action.

Background to the Criminal Proceedings in the United States

19 On August 18, 2005 an indictment was returned in Chicago against RCL, Mr. Radler and Mark S. Kipnis (an officer of International) with each defendant charged with five counts of mail fraud and two counts of wire fraud.

20 Mr. Radler entered into a Plea Agreement on September 20, 2005 whereby he would plead guilty to Count One.

21 Mr. Radler has stated in his plea agreement that:

(i) He personally and on behalf of RCL participated in a scheme to divert non-compete payments from International to Hollinger, RCL and other individual defendants;

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors; and

(iii) It was not in International's interest to have monies diverted to Hollinger or RCL from International in respect of non-compete payments.

22 The defendants allegedly benefited from having non-compete payments diverted to Hollinger from International because RCL had a greater direct interest in Hollinger than in International.

23 The Receiver engaged U.S. counsel to represent and defend RCL. The Ninth Report of the Receiver dated September 15, 2005, reviews and reports upon these events.

24 The Receiver in its Tenth Report dated September 15, 2005, stated that the Receiver would make a thorough analysis after its U.S. criminal counsel obtained discovery of the evidence accumulated by the USAO. The Receiver expressed the view RCL should voluntarily accept service of the indictment and "that it is appropriate for RCL to enter a plea of not guilty .... " An Order by Farley J. of this Court dated October 4, 2005, directed the Receiver to accept service of the Indictment and enter a plea of "not guilty". See *Ravelston Corp. (Re)* [2005] O.J. No. 4266 (Super. Ct.). On November 10, 2005, the Order of Justice Farley directing the Receiver to attorn was upheld by the Court of Appeal: *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 (C.A.). The plea of not guilty was entered on November 22, 2005.

25 On November 17, 2005, a First Superceding Indictment added Lord Black, John A. Boultbee and Peter Y. Atkinson as defendants. A Second Superceding Indictment was returned December 15, 2005. Messrs. Black, Boultbee, Atkinson and Kipnis have entered pleas of not guilty to the charges.

26 An 80 page Third Superceding Indictment was returned by the Grand Jury on August 17, 2006, pursuant to which RCL was added as a named defendant to Counts 8 and 9 in respect of the alleged diversion from International of non-compete payments paid by CanWest Global Communications Corp. ("CanWest") as part of the purchase of a 50% interest in the *National Post* and certain other newspaper related assets. (There are now seventeen Counts in the Third Superceding Indictment.)

27 The Receiver and its counsel entered into discussions with the USAO in April, 2006, in an attempt to negotiate a settlement of the criminal charges against RCL. On January 4, 2007, the USAO delivered a final version of a Plea Agreement relating to certain criminal charges to the Receiver's counsel.

28 The Plea Agreement is based upon a guilty plea by RCL to Count Two of the Third Superceding Indictment, dealing with a non-compete payment in the Forum Communications Inc. ("Forum") transaction.

29 On January 5, 2007, the Receiver served its notice of this Motion for an order approving RCL entering into the Plea Agreement and to change its plea from not guilty to guilty. The Receiver's Eighteenth Report sets forth the Receiver's position in support of the Motion.

30 On January 3, 2007, CBCC and Peter White Management Limited ("PWML") had served a notice of motion seeking directions with respect to the Receiver's obligation to prepare for the trial, given its not guilty plea. The Receiver had advance notice of this motion as of December 22, 2006. CBCC and PWML assert that the Receiver was obliged to not finalize the content of the Plea Agreement in the face of their outstanding motion.

31 On August 7, 2006, RCL had given notice to its co-defendants it would be withdrawing from the joint defence agreement (which the defendants had orally agreed to) for 60 days. RCL did not participate in the joint defence agreement thereafter.

32 Given this course of events, it would be apparent to the co-defendants that there was a real possibility that RCL might enter into a Plea Agreement. In my view, this is why CBCC and PWML gave notice to the U.S. District Court and to RCL on December 22, 2006 of the intent to bring a motion for directions in this Court. This motion became moot given the Receiver's Plea Agreement Motion, served January 5, 2007.

33 The trial of the defendants is scheduled to commence March 14, 2007, before Judge Amy J. St. Eve in the United States District Court, Northern District of Illinois, Eastern Division.

The CBCC Cross-Motion for Directions, heard January 15, 2007

34 On January 9, 2007, in response to the Plea Agreement Motion at hand, CBCC provided the Receiver with an initial set of questions with respect to the Eighteenth Report. The Receiver provided written responses ("Receiver's Answers") on January 10, 2007. On January 11, 2007, CBCC provided the Receiver with an additional set of questions. The Receiver provided answers ("Additional Answers") the same day. CBCC asserted that the Receiver had not properly considered the interests of all stakeholders in the Ravelston estate.

35 As mentioned above, on January 15, 2007 CBCC brought what was in effect a cross-motion for directions in respect of the Receiver's pending Motion. This Cross-Motion for Directions was dismissed orally at the conclusion of the hearing. I undertook to give written reasons for my decision in respect of the Cross-Motion for Directions. My reasons follow.

Issues arising from the CBCC Cross-Motion for Directions

36 There were three issues arising from the CBCC Cross-Motion for Directions.

(1) Was CBCC entitled to examine the Receiver on the information contained in the Eighteenth Report relating to the proposed Plea Agreement?

(2) Had the Receiver waived its right to claim solicitor-client privilege over communications regarding the Plea Agreement and issues related thereto by allegedly disclosing portions of such communications in the Eighteenth Report? and

(3) Should the Receiver be required to disclose the full contents of its communications with the USAO regarding the Plea Agreement including all relevant documentation?

Issue #1 Is an examination of the Receiver appropriate in the circumstances?

37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Re Bakemates International Inc* (alternate.: *Re Confectionately Yours, Inc.*) (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society,* [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilites v. Aboriginal Partners & Youth Society,* [2004] A.J. No. 710 at paras. 17-22 (Q.B.)

38 In *Bell Canada International Inc.*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:

> [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.,* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* [*Re Confectionately Yours*] clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination. [emphasis added.]

39 CBCC submits that the Receiver is not acting in an objective and neutral manner in dealing with CBCC's questions or the interests of its stakeholders.

40 In my view, the evidentiary record did not support the allegation that the Receiver was not acting in an objective and neutral manner. There was no good reason to depart from the norm that a court-appointed receiver is not subject to cross-examination on its reports.

Issue #2: Has there been a waiver of solicitor-client privilege on the part of the Receiver?

41 CBCC cites the reference by the Receiver in s. 4.1 of the Eighteenth Report that the Receiver worked closely with its counsel during May and June, 2006 "to formulate a position" relating to a proposed *nolo contendere* plea, taking into account certain factors. The USAO rejected RCL's offer to plead *nolo contendere.* Negotiations in respect of the Plea Agreement under present consideration were ultimately concluded January 5, 2007.

42 The Receiver has refused to provide access to CBCC to legal opinions underlying the Receiver's determining that the Plea Agreement should be executed. The Receiver claims that such information is subject to solicitor-client privilege.

43 Anyone considering a plea agreement in respect of a criminal charge is entitled to the confidential advice of the person's counsel, and solicitor-client privilege attaches to the communications between counsel and client. The principle that communications between a solicitor and his/her client are privileged is recognized as fundamental to the administration of justice. *Canada v. Solosky,* [1980] 1 S.C.R. 821.

44 There can be a waiver of privilege where it is shown the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive such privilege. There is no evidence in the situation at hand that the Receiver voluntarily intended to waive privilege.

45 There can also be a waiver of privilege even in the absence of an intention to waive, "where fairness and consistency so require". *S. & K. Processors Ltd. et al. v. Campbell Ave. Herring Producers Ltd. et al.,* [1983] 4 W.W.R. 762 at paras. 6-10 (B.C. S.C.).

46 CBCC asserts in its factum that the legal advice received by the Receiver "is critical" to this Court's assessment of the Plea Agreement

> and understanding of whether the Receiver independently and fairly assessed the risks associated with attempting to defend the U.S. Criminal Proceeding, the likelihood of conviction, the enforceability of a monetary penalty and its ranking in the estate, the impact of any restitution orders on distribution, the costs of maintaining a defence and the impact of the Plea Agreement on all of Ravelston's stakeholders.

47 Legal advice received in respect of a proposed plea agreement is by reason of its subject matter "critical"

advice. The evidentiary record does not establish any arguable unfairness such that it can be asserted that privilege should fall away. In my view, there is not any aspect of "fairness" in the situation at hand that comes into play such that the normative sanctity to solicitor-client privilege is to be overridden.

Issue #3 Must the Receiver disclose the full contents of its communications with the USAO regarding the Plea Agreement including all relevant documents?

48 CBCC requested an order that the Receiver provide copies of all documents, analyses and reports, including legal opinions and advice, with respect to the negotiation with the USAO in respect of the Plea Agreement.

49 To discharge its duties in the administration of an estate, a receiver necessarily enters into confidential discussions to resolve issues or disputes with specific stakeholders. A receiver must have the ability to conduct meaningful and candid negotiations in confidence with a view to achieving a resolution in the best interests of the estate. RCL itself could conduct such negotiations in confidence prior to the appointment of the Receiver. The Receiver steps into the shoes of RCL for administrative purposes of the RCL estate.

50 To require a receiver to disclose all the details of its discussions with a stakeholder, regardless of whether those details are relevant to the outcome of the discussions, would severely impede a receiver's ability to embark upon any negotiations. The USAO provided the Receiver and its counsel with witness statements. The confidentiality in respect of these statements is protected pursuant to a Protective Order granted by Judge St. Eve in the U.S. District Court. The record establishes the USAO entered into discussions April 10, 2006 with the Receiver on a confidential basis.

51 The USAO and Receiver understood the Receiver would be obliged, if the negotiations were successful, to provide to this Court the information necessary to enable the Court to reach an informed conclusion as to whether to approve the Plea Agreement. The implicit agreement as to confidentiality of the negotiations limits the disclosure needed to meet that standard.

52 In my view, the negotiation of the Plea Agreement was properly a matter dealt with in confidence between the Receiver and the USAO. Notice to the Receiver on December 22, 2006, of the intended CBCC/PWMC motion (served January 3, 2007), referred to above, was irrelevant to these negotiations.

The Motion for a "Payments Report"

53 The Receiver brought a motion (which can be referred to as the "Payments Report Motion") on January 12, 2007 seeking approval of its Nineteenth Report dated January 9, 2007 and, in particular, an order authorizing the Receiver to complete a report and analysis to be filed with this Court setting out the payments made by RCL and its subsidiaries between January, 1998 and January, 2004 to Messrs. Black, Radler, Boultbee and Atkinson.

54 At the return of the motion, the Receiver advised it has been engaged in this analysis as a necessary requirement in the ordinary administration of the estate. The Receiver advised it expected the analysis to be completed in some three or four weeks.

55 The Black group appeared at the return of the motion and gave notice that they were opposed to public dissemination of the analysis and report.

56 The so-called "Payments Report Motion" has been adjourned to February 12, 2007.

The Plea Agreement Motion

57 In formulating its position relating to a proposed *nolo contendere* plea, the Receiver states in its Eighteenth Report it took into account the following factors:

(a) The Receiver had no first-hand knowledge of RCL's activities which predated its appointment in April 2005;

(b) The Receiver's knowledge about the events underlying the criminal and civil claims was limited to what it was able to learn by reviewing the documents it had received to date;

(c) RCL's liabilities likely greatly exceeded the realizable value of its assets. The Receiver sought to extricate RCL from the U.S. Criminal Proceedings on a cost-effective basis provided that in doing so, the interests of RCL's estate were well served;

(d) As an indicted corporation, the Receiver understood that RCL's guilt at trial would be based, in large part, on the actions of its officers and other agents;

(e) The directors and officers of Hollinger, Sun-Times and RCL were overlapping, and the relationship amongst these entities was complicated (i.e. the same individuals alleged in the Second Superseding Indictment as "RCL's Agents" were also agents of Sun-Times and of Hollinger);

(f) The Receiver determined that notwithstanding that RCL had not yet been charged in respect of the CanWest non-compete payments, it would likely be charged with those counts if it did not pursue a plea arrangement. Furthermore, the Receiver was concerned that proceeding to trial would increase the quantum of the fine sought by the USAO if RCL was ultimately unsuccessful at trial;

(g) The Receiver was mindful that the manner in which it resolved the U.S. Criminal Proceedings should not adversely impact on its ability to defend the civil proceedings to which RCL was named as a defendant; and

(h) The uncertain status of any U.S. fine or restitution order in the Canadian Insolvency Proceedings (as defined below). It was important the Receiver establish that any fine or restitution order have no greater status (if any) in the Canadian Insolvency Proceedings than that of ordinary unsecured claims.

58 The Receiver in its Eighteenth Report then lists factors taken into account in deciding to propose entering a guilty plea to Count Two of the Third Superceding Indictment, being:

(a) In accordance with general corporate law, a corporation acts only through its officers, directors, employees or agents;

(b) A corporation is generally responsible for the acts or omissions of its officers, directors, employees or agents;

(c) Radler, the former president of and significant shareholder of RCL, president of Sun-Times and a director of Hollinger, has stated in his plea agreement and is likely to testify at trial that:

(i) He personally and on behalf of RCL, participated in a scheme to divert non-compete payments from Sun-Times to Hollinger, RCL and other individual defendants;

(ii) There was no legitimate reason for Hollinger, RCL and other individual defendants to be included as non-compete covenantors;

(iii) It was not in Sun-Times' interest to have monies diverted to Hollinger or RCL from Sun-Times in respect of non-compete payments; and

(iv) The defendants benefited from having non-compete payments diverted to Hollinger from Sun-Times because RCL had a greater direct interest in Hollinger than in Sun-Times, and Radler's company, F.D. Radler Ltd., held a 14.2% ownership interest in RCL;

(d) Radler's testimony, as the former president of RCL, is likely to bind RCL at trial;

(e) Hollinger, in its Cooperation Agreement (the "Hollinger Cooperation Agreement") with the USAO has acknowledged (i) the U.S. Government has developed evidence during its investigation that Hollinger is criminally liable because one or more of Hollinger's former officers, directors or

employees violated U.S. Federal criminal law with the intent, in part, to benefit Hollinger with the fraudulent diversion from Sun-Times to Hollinger of approximately US$16.55 million; (ii) that one or more of Hollinger's former officers, directors or employees acted illegally with respect to Hollinger's receipt of the said US$16.55 million in non-compete payments; and (iii) that it was inappropriate for Hollinger to receive those monies. The individuals whose acts are impugned were also officers or directors of RCL; and

(f) The USAO has a very high success rate in securing convictions.

59 The Receiver then states in its Eighteenth Report that it concludes there is "a strong rationale" to enter into the Plea Agreement, for the following reasons:

(a) The guilty plea of RCL's president, Radler, in conjunction with the factors set forth above;

(b) Prior to it's appointment in April, 2005, the Receiver had no first-hand knowledge of RCL's prior activities. Many of the events underlying the criminal and civil claims against RCL occurred as much as ten years ago. The Receiver is only able to discern what it knows about the events underlying the criminal and civil claims by reviewing documentation and witness statements made available to it.

(c) The RCL estate lacks liquidity - it is likely that the value of the valid claims against the RCL estate will significantly exceed the net realizable value of its assets. The Receiver is of the view that it should attempt to extricate RCL from any litigation on an economic basis provided that by doing so, RCL's interests are well served;

(d) The criminal litigation is complex; it will be costly to litigate. The Receiver estimates that the cost of preparing for and attending at trial could exceed US$3 million. As noted above, RCL's estate has limited financial resources;

(e) The implications to RCL of a guilty plea are strictly monetary. A guilty plea will only result in a fine and restitution order in favour of the U.S. government being levied against RCL. Pursuant to the Plea Agreement, the status of any such fine or restitution order in the Canadian Insolvency Proceedings will be determined in those proceedings and will have no higher priority (if any) than a general unsecured claim. The Plea Agreement eliminates the risk that the U.S. government may attempt to assert a property or similar claim ranking in priority to all other claims asserted against RCL;

(f) In practice, a receiver does not attest to matters that pre-date its appointment. The Receiver therefore considered the factors/evidence available to it that may put RCL at risk at trial. In this regard, the Receiver understood that RCL's guilt at trial would be based, in part, on the actions of its officers and other agents with the ability to bind RCL. Radler, RCL's president, pled guilty to one count of the Indictment. Hollinger also acknowledged the wrongdoings of certain of its former officers and directors (some of whom were also officers and directors of RCL) in the Hollinger Cooperation Agreement;

(g) Should RCL be found guilty of one or more counts as charged under the Third Superseding Indictment, there is a significant likelihood that a higher fine would be levied. The Fine is significantly less than stipulated by the *Guidelines* if RCL were to be found guilty. (Furthermore, the Receiver is of the view that the amount that is likely to be distributed by RCL in respect of the Fine (if a provable claim) will be considerably less than the agreed amount of the Fine);

(h) The Plea Agreement preserves the Receiver's right to challenge the validity of the Fine and/or any restitution order in the Canadian Insolvency Proceedings;

(i) Even if the restitution order results in a valid claim against the RCL estate, any monies paid to Sun-Times from the RCL estate in respect of the litigation detailed in Section 5.1(e)(v) of the Plea Agreement will be offset dollar-for-dollar against the amounts payable under the restitution order;

(j) The Plea Agreement preserves the Receiver's right to advance arguments at sentencing as to RCL's responsibility for any damages, including the argument that in determining the amount attributable to RCL, the damage caused by other parties and individuals must be considered, as well as the amount paid by those parties and individuals (i.e. at the present time it appears that the total amount paid in respect of criminal restitution cannot exceed US$83,950,000, of which US$32.8 million has already been paid);

(k) The Receiver is of the view that the civil proceedings in both the U.S. and Canada are the preferred forum in which to resolve the competing claims made against RCL, its affiliates and subsidiary companies, rather than the U.S. Criminal Proceedings. The Receiver determined that participating in the U.S. Criminal Proceedings would not be helpful, but might be detrimental, to the position of RCL in its civil proceedings. An unfavourable outcome in the U.S. Criminal Proceedings would adversely affect RCL's ability to defend itself in the civil proceedings; a favourable outcome would still require RCL to litigate the civil proceedings;

(l) By pleading guilty to the Forum transaction, which involved the least of the non-compete payments received by Hollinger, the Receiver structured the Plea Agreement in such a manner as to minimize any adverse ramifications that a guilty plea may have to the interests of RCL, including its interests as a defendant to the civil proceedings; and

(m) In the Receiver's view, the Plea Agreement incorporates many of the provisions and concepts of the *nolo* [*contendere*] plea (including the requirement to have the status of any fine and restitution order determined in the Canadian Insolvency Proceedings).

The role of the court-appointed Receiver

60 A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, [1913] A.C. 160 at 167 (J.C.P.C.).

61 When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.

62 It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].

63 A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

64 It is appropriate for a receiver to consider negative economic factors such as cost, time and risk. See generally *National Trust Company v. Massey Combines Corporation* (1988), 69 C.B.R. (N.S.) 171 at 179 dealing with the test to be employed in considering whether to approve a sale of assets.

65 There apparently has only been one previous analogous situation in Canada to the one at hand, where a receiver sought court approval to plead guilty to a criminal charge in the U.S.

66 In *Re the Matter of YBM Magnex International, Inc.*, (14 April, 1999), Calgary No. 9801-16691 (Alta. Q.B.) [*YBM*], Paperny J. of the Alberta Court of Queen's bench (as she then was) dealt with an unopposed motion by a receiver seeking court approval of a guilty plea agreement with the U.S. Attorney in respect of a one-count information for criminal conduct related to money-laundering and falsification of public financial statements. She

stated at p.17:

> This court must determine whether the plea agreement being entered into is fair and reasonable, considering the interests of all the stakeholders to the estate.
>
> I am satisfied that the receiver independently and fairly assessed the risks associated with attempting to defend these charges, the likelihood of conviction, the likelihood of pre-trial forfeiture, the size of the fine, the ranking in the estate, the impact of competing restitution orders on distribution and the costs of maintaining a defence, successful or not. I accept his risk assessment.
>
> In my view, this agreement is prudent and commercial reasonable in the circumstances, as well as being abundantly fair to all stakeholders. [emphasis added]

67 A court-appointed receiver under the *BIA* or *CJA*, as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. *Re YBM Magnex International Inc.*, [2000] A.J. No. 1118 (Q.B.) at paras. 34, 87; and *Re Confederation Treasury Services Ltd.*, [1995] O.J. No. 3993 at para. 8 (Gen. Div.), (citing Morawetz, *Bankruptcy and Insolvency Law of Canada*, (3d ed. 1995) at 1-61/2).

68 In *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 at para. 40 (C.A.) Doherty, J.A. stated:

> Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision in within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

69 In *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 5-6 (C.A.) Galligan J.A. made general observations as to how a receiver is to make business decisions in the administration and management of an estate. He emphasized that the court should be reluctant to second-guess the considered business decisions made by a receiver. As well, the conduct of the receiver is to be reviewed in the light of the specific mandate given to the receiver by the court. The duties of a receiver are to consider the interests of all parties or stakeholders. The court is to consider whether there was unfairness in the process leading to the receiver's recommendation to the court and whether the receiver acted reasonably and prudently in all the circumstances.

The risks in a guilty plea vs. the risks in pleading not guilty and proceeding to trial

70 There are two options for the Receiver in respect of the criminal charges facing RCL: plead guilty or continue a plea of not guilty and defend at trial.

71 The Receiver is faced with an imminent criminal trial. The Receiver must decide what is in the best interests of the estate of RCL in these unfortunate circumstances. This decision must be made, and be seen to be made, within the bounds of reasonableness. The Receiver must balance the interests of all the stakeholders in exercising its business judgment and in making its recommendation.

72 In his Endorsement dated October 4, 2005 (reported as *Ravelston Corp. (Re)* [2005] O.J. No. 4266 (Super. Ct.)) dealing with the Receiver's request for approval to voluntarily appear and enter a plea of not guilty on behalf of RCL to the Indictment returned August 18, 2005, Farley J. stated at para. 5:

> However, the Receiver also has to be mindful that a fundamental reason for its appointment was to extricate Ravelston from the morass of litigation in which it was involved (including litigation with International and [Hollinger] on the other side). The US Criminal Proceedings are not something as to which the Receiver was instrumental; as I understand it, the complaints involved there predate the Receiver's involvement. Acting responsibly, the Receiver must zealously safeguard the interests of legitimate stakeholders (including the DOJ and those for whom the DOJ is responsible for protecting); the Receiver thus has an umbrella responsibility and it would be helpful for the DOJ to recognize that responsibility of the Receiver. If the Receiver concludes that it would be wasteful for Ravelston's estate to engage in protracted, costly litigation, then it would be undesirable to adopt a "scorched earth" policy or anything approaching same. That approach would as well be unlikely to be fruitful in seeing if a resolution of the US Criminal Proceedings (including any further potential exposure) vis-à-vis Ravelston could be advantageously discussed with the DOJ.

73 Counsel for CBCC submits that the question that must be answered by the Receiver is -What are the comparative prejudices to the competing stakeholders in RCL by a changed plea and what is the appropriate balance in weighing such comparative prejudices? The Black group asserts that the Receiver has made erroneous assumptions in calculating possible prejudice, has followed an imperfect process lacking in due diligence, and that the Receiver ultimately brings its Motion to change the plea upon a false rationale.

74 The Receiver emphasizes that it seeks as much avoidance of risk and uncertainty as possible. The Receiver says that there is an issue of significant cost in RCL defending at trial. The Receiver argues that the liabilities of RCL exceed the realizable value of its assets. There are also three possible adverse consequences to RCL being convicted in the criminal proceedings: a fine, a restitution order, and collateral estoppel in respect of the civil proceedings. (I leave aside the possibility of forfeiture of assets as forfeiture does not seem to be sought by the USAO against RCL. RCL apparently has only some jewelry worth about US $100,000 situated in the United States and the USAO has reportedly advised the Receiver it is not interested in asserting any claim against the jewelry. There are Forfeiture Allegations against the individual defendants included within the Indictment.)

75 The three possible adverse consequences must be weighed in the plea consideration. These consequences are relevant to the determination by the Receiver of the balancing of interests as between the stakeholders in RCL and in the Receiver adopting a position in respect of the plea of RCL.

76 The Receiver's position is that after consultation with its counsel and after careful review of all the available evidence against RCL that there is sufficient evidence to justify a plea of guilty on behalf of RCL. The Receiver says that given such evidence, in conjunction with the economics and terms of the Plea Agreement, coupled with the precarious financial position of RCL, the Plea Agreement is in the best interests of RCL's stakeholders.

77 All defendants other than Mr. Radler have entered pleas of not guilty. None of the allegations have yet been proven in court.

78 With respect to a former director or officer innocent of any criminal wrongdoing, the stigma or association with the criminal proceedings exists at present and in all events. The stigma may be worsened by a corporate plea of guilty by RCL but, if so, it is only incremental and not such as to displace the greater interest of the estate. In any event, the failure of this Court to approve the plea would, of course, not mean the U.S. criminal proceedings would disappear.

79 Assuming the U.S. District Court is prepared to accept a guilty plea from RCL, based upon evidence that establishes the constituent elements of the offence, and certain former directors and officers are also criminal

defendants, the plea of the co-accused has no juridical impact upon the position of another defendant. Any one defendant has no say (*qua* a defendant) on whether a co-defendant can plead guilty. There is no prejudice of legal interest in the criminal proceedings potentially affected.

80 Lord Black and Mr. White as shareholders of RCL, and as unsecured creditor claimants of RCL, have an economic interest in the estate of RCL. It is their economic interests as stakeholders in RCL that must be considered by the Receiver in determining whether to enter into the Plea Agreement.

81 As stated above, Mr. Radler entered into a Plea Agreement with the USAO on September 20, 2005, wherein he agreed to enter a voluntary plea of guilty to Count One of the Indictment. Mr. Radler indirectly has an equity interest in both Hollinger and International through a 14.2% ownership in RCL through a holding company, FDR Ltd. Mr. Radler was President of RCL and President and Chief Operating Officer of Hollinger and International at the material times.

82 It is alleged in the Indictment that RCL and its agents fraudulently inserted themselves and Hollinger as recipients of non-compete fees from the sale of newspaper businesses by International that should have been paid exclusively to International.

83 The issue of guilt of RCL at trial is dependent in large part upon the actions of its officers and other agents. There is an overlapping of the directors and officers of RCL, Hollinger and International. The individuals alleged to be wrongdoers in the Indictment were agents of all three entities (other than Mr. Kipnis who was an officer of International and not of RCL).

84 A corporation can have criminal liability even though it is an artificial, juristic person. RCL is responsible for an act committed by an agent of RCL within the scope of his employment. Even if a jury finds that an act of an agent was not committed within the scope of his employment, RCL may be responsible because RCL later approved of the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act. A corporation is legally responsible for any act or omission approved by its agents.

85 Ravelston is a named defendant in Counts One through Nine. The Plea Agreement provides that RCL would plead guilty to Count Two, dealing with a single transaction, being the Forum transaction.

86 RCL acknowledges in the Plea Agreement that to its knowledge Forum had not requested that Hollinger be included as a non-compete covenanter in the sale to Forum of community newspaper assets by International for some U.S.$14 million. Hollinger received US $100,000 as the result of the insertion of it as a non-compete covenanter entitled to 25% of the total amount payable (US $400,000) for the non-compete covenants. The Plea Agreement states that RCL breached its fiduciary duty to International to refrain from acting to benefit itself or anyone else at International's expense and that it participated in a scheme to defraud International of money to which International was entitled under the Forum transaction. The Receiver is of the opinion, having examined the witness statements and documentation that Mr. Radler's testimony at trial, as the former President of RCL, is likely to bind RCL at trial.

87 The Black group claims the Receiver has not done due diligence before entering into the Plea Agreement. The Receiver says in fact that it has had significant pre-criminal trial disclosure, being that to which all defendants are entitled. The Receiver says it and its counsel have reviewed the sworn witness statement of Mr. Radler dated August 18, 2005 as provided to the Grand Jury. The Receiver says it has reviewed statements Mr. Radler has made to the Federal Bureau of Investigation and other US law enforcement agencies, and has reviewed the witness statements of each of the co-defendants, or agents of RCL, provided to the Special Committee of International and to the USAO.

88 Indeed, as a corporate defendant the Receiver says it has been entitled to even greater disclosure than that

afforded to the individual defendants, by reason of s. 16(a) (i) (C) of the U.S. Federal Rules of Criminal Procedure which has resulted in disclosure of the witness statements of the directors, officers, employees or agents of RCL. This disclosure was made under a Protective Order made by Judge St. Eve on January 6, 2006.

89 The Receiver says that it did not approach the other defendants because the Receiver was of the view that it had a duty to make certain public disclosures such that the individual defendants would have declined any attempt to be interviewed. However, as the Black group points out, a Receiver may be able to exert a protective "common interest privilege" in certain situations in respect of disclosures. *CC &L Dedicated Enterprises Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 637 (Super. Ct.).

90 In my view, although common interest privilege may perhaps have been available to meet the Receiver's concerns in talking to the defendants in the context of the Receiver's intent to possibly change RCL's plea, this is not fatal to the Receiver's Motion. The Receiver says it had ample disclosure as to the USAO's case against RCL such that the Receiver formed the view that there was a significant risk of conviction of RCL.

91 The Receiver has determined, with the advice of its U.S. criminal counsel, based upon the facts known to them, that there is a "substantial risk" that RCL would be found guilty at trial of one or more of the counts charged under the Third Superceding Indictment, based in part upon the guilty plea of Mr. Radler, the President of RCL over the relevant time period.

92 It is noted that in *Hollinger International Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004) at 11-12, 15-16, and 46-47, Vice Chancellor Strine of the Court of Chancery of Delaware considered a November, 2003 written agreement, signed by Lord Black, which constituted a "Restructuring Proposal" for International. The agreement included a statement that the non-compete payments "were not properly authorized on behalf" of International. Vice Chancellor Strine examined the findings of International's Special Committee in respect of the non-compete payments received by Messrs. Black, Radler, Atkinson and Boultbee. He concluded that the evidence did not support Lord Black's claim in the case before him that the non-compete payments were properly approved by International's independent directors. The Vice Chancellor found that the best evidence in the record suggested that the Restructuring Proposal was accurate in saying that there was not proper authorization for the non-compete payments.

The factor of a fine

93 RCL agrees to a fine of US $7 million through paragraph 12 of the Plea Agreement. The contemplated fine takes into account the United States *Sentencing Guidelines ("Guidelines")* which considers the relevant conduct of a defendant in respect of all related offences or possible charges beyond the count to which the defendant has been convicted. As such, the amount of pecuniary gain which RCL is alleged to have derived looks to all the non-compete payments (admitted to be US$83,950.000) in which RCL allegedly participated and not simply the relatively small non-compete payment received in respect of the Forum transaction.

94 The USAO gives the Receiver a two level reduction in the offence level because of the cooperation of the Receiver (Paragraph 6(d) of the Plea Agreement). Applying the sentencing minimum and maximum multipliers, the fine range would be US $67,160,000 to US $134,320,000 if RCL was convicted at trial, given that US $83,950,000 is the total pecuniary amount involved in all transactions underlying the offences.

95 The Receiver says that the US $7 million fine is some 90% less than the low end of the range for fines seen under the *Guidelines* for a total pecuniary loss of US $83,950,000. While advisory rather than directory, the *Guidelines* are to be consulted and considered together with the relevant statutory sentencing factors set forth in 18 U.S.C. s. 3553(a), when sentencing in Illinois. *U.S. v. Stitman*, 2007 WL 60421 (7th Cir. 2007); *United States v. Alburay*, 415 F.3d 1041 (7th Cir. 2005). The *Guidelines* fine range is expressly referred to in paragraph 6(f) of the Plea Agreement.

96 In my view, the Receiver is reasonable in contemplating the possibility of a fine, in the event of conviction, that is significantly higher than the US $7 million agreed upon in the Plea Agreement.

97 The *Mutual Legal Assistance in Criminal Matters Act*, S.C. 1988, c. 37 ("*MLACMA*") provides in s. 9(1) that when the Minister of Justice approves the enforcement of the payment of a fine imposed in respect of an offence by a court of criminal jurisdiction in the United States, the fine can be enforced in Canada.

98 The fine and any restitution order must ultimately be dealt with in the Canadian insolvency proceedings. The USAO may amend the claim already filed with the Receiver to reflect the fine and any restitution order. This Court would ultimately have to determine whether a claim for either or both the fine and restitution order constitute valid claims in the Canadian insolvency proceedings. The Receiver retains the right to argue that they do not give rise to a valid claim.

The assets and liabilities of RCL

99 The Receiver in its Eighteenth Report makes the somewhat cryptic statement that in 2006 "RCL's liabilities likely greatly exceeded the realizable value of its assets." The Receiver seeks to extricate RCL from the U.S. criminal proceeding on a cost-effective basis. At the conclusion of the hearing on the Cross-Motion for Directions on January 15, 2007, this Court suggested that a more detailed financial analysis of RCL would be appropriate for the return of the Plea Agreement Motion.

100 This resulted in a Supplement to the Eighteenth Report. In the Supplement's Appendix "A", the "Analysis of Estimated Funds Available for Distribution", the estimated range is from a negative of $27 million to a positive of $10 million after priority payments for ongoing restructuring proceedings costs (some $6-10 million), payments to the Argus preference shareholders (some $23-$24 million), payment of priority claims of the tax authorities (some $4.256 million) and payment of secured claims of Hollinger/Domgroup and payment of the Pension Administrator Claim (some $29 million-$66 million), before addressing the estimated unsecured and filed contingent claims of some $1.037 billion.

101 This Analysis suggests it is extremely unlikely that there will be any surplus available for shareholders in any and all events. However, the Black group submits that the Receiver's estimate of the present value of RCL lacks meaningful analysis.

102 The major asset of RCL is the value of its shares in Hollinger (and indirectly the value of Hollinger's shares in International). Taking the January 16, 2006 market value of Hollinger's thinly traded shares, the Receiver gives an estimated value to Hollinger's holding in International as being only $31 million. CBCC submits that with an acquittal of the defendants in the criminal proceedings the value of the shares would rise significantly. CBCC refers to the 2005 purchase by Catalyst Fund General Partner I ("Catalyst") of a sizeable bloc of some 883,000 common shares for over $7.00 per share (well above the listed value of $1.15 per share on January 16, 2007).

103 In Appendix "A" to its Third Supplemental Record the Receiver calculates the required realization per Hollinger share to fund claims *prior* to a consideration of contingent claims to be $7.12 per share. After a discounted estimate for the contingent claims, the Receiver estimates a realization of $8.95 to $12.60 per share in Hollinger would be required to settle all claims before any surplus would be available for shareholders.

104 Thus, the Receiver's view is that there cannot realistically be a recovery of share value such as to result in equity for RCL's shareholders. However, the Black group says that if the Receiver changes its plea to a guilty plea to Count Two, that the shareholders of RCL will lose any chance at all for a recovery of their equity notwithstanding an acquittal in the criminal proceedings.

105 If there is a conviction of all defendants in the criminal proceedings then it seems certain that with fines and

restitution orders, coupled with possible civil action awards, that the individual defendants would lose their equity in RCL and RCL would lose its equity in Hollinger.

106 However, if there is an acquittal then the Black group says there is a realistic chance of regaining equity on their part through a rise in value of the shares and restructuring under their leadership. They say that a change in plea by the Receiver dooms this possibility while in reality gaining nothing or relatively little for the Receiver. Hence, they argue, in balancing the economic interests of the various stakeholders, the balance should favour the Black group in not approving the change in plea.

The factor of costs in going to trial

107 The Receiver submits that there would be an estimated outlay of $3 million in legal fees to defend the criminal proceeding. As well, the Receiver points out that the legal fees would be a priority charge against the assets of the estate. The liquid and near-liquid assets of the estate are less than $7 million.

108 The estimate of legal fees for RCL to retain counsel and mount a proper defence in the criminal proceedings seems modest at $3 million, given the anticipated length (reportedly at least three months) and complexity of the trial.

109 The Black group says that RCL could have a relatively cost-free defence through an inactive, "coat-tail" defence following that of the other defendants. The Black group says that there are not truly diverging interests as between the defendants. The Black group says that there is an identical interest to the defence of all defendants in their central position that Mr. Radler is being untruthful in his expected evidence and that, accordingly, all defendants are to be acquitted.

110 The Receiver says that there is some divergency in the defendants' defences evidenced by Atkinson, Boultbee and Kipnis having filed severance motions. However, these motions were dismissed by Judge St. Eve on January 22, 2007 on the basis that the defendants had failed to demonstrate that their claimed mutually antagonistic defences would prejudice them in a joint trial.

111 In my view, the Receiver is reasonable in being of the opinion that a so-called coat-tail defence would be inappropriate and inadequate and hence, inadvisable. RCL's interests and fate are not necessarily tied to that of any one or more of the other defendants and their positions. RCL should properly have separate counsel prepared and present in all events to independently advise the Receiver and to ensure that RCL's interests are protected at all times at trial. This is particularly necessary as a divergency of interests as between defendants is seen to be a distinct possibility by the Receiver and RCL's counsel.

The factor of restitution

112 RCL agrees by paragraph 6(f) of the Plea Agreement that the total pecuniary loss involved in the transactions underlying all the offences set forth in the Third Superceding Indictment pertaining to the alleged diverted non-compete payments is US$83,950,000. Paragraph 9 states that RCL understands that the offence to which it pleads guilty carries "any restitution order ordered by the Court." U.S. Code s. 3663A requires that restitution for the loss is required in respect of an offence against property. Paragraph 20 of the Plea Agreement sets forth the agreement as to the determination of restitution.

113 Paragraph 20(a) of the Plea Agreement provides that the restitution order is to provide for restitution for the pecuniary loss attributable to the offense of conviction *and* the transactions underlying the offences charged in the Third Superceding Indictment. Thus, RCL is potentially liable for restitution of pecuniary loss up to about US $51,150,000 (ie. US$83,950,000 less US $32.8 million already repaid relating to non-compete payments). However, an apportionment of liability would be done to fairly determine RCL's actual contribution to the loss. If more than one convicted defendant contributed to the pecuniary loss, apportionment of liability is required pursuant to U.S.

Code s. 3664(h). RCL reserves the right to make representations as to allocation. RCL's "economic circumstances" can also be taken into account in determining restitution.

114 Article XVII.2 of the *MLACMA* states that the two Governments shall assist each other, *inter alia*, in proceedings related to restitution to the victims of crime and the collection of fines.

115 United States Code s. 3572(b) provides that the imposition of a fine in sentencing is not to impair the ability to make restitution to a victim such as International. Section 8C.3(a) of the *Guidelines* is to the same effect, saying that the court shall reduce the fine to the extent the imposition of the fine would impair the ability to make restitution. Sections 5E1.1 and 5E1.2 say that if a defendant is ordered to make restitution and to pay a fine, any money paid is first to be applied to satisfy the order of restitution. Thus, the Black group argues, if there is a conviction of the defendants, the quantum of the restitution order, even with an allocation, would overwhelm the possibility of a large fine being payable by RCL.

116 As stated above, in the event of the conviction of the individual defendants, the apportionment of liability and allocation of restitution would be made by the court as between the defendants. Indeed, with a conviction of all defendants, assuming enforceability in Canada of the restitution order, the defendants' indirectly held shares in RCL would be subject to seizure to satisfy the restitution requirement.

117 However, in the event of an acquittal of all defendants other than Mr. Radler, there is uncertainty as to how much of the US$ 83,950,000 RCL might be required to pay in restitution.

118 The Black group argues that the present Plea Agreement leaves the possibility that a large amount would be ordered payable by RCL as restitution upon the guilty plea, and potentially most of the restitution would be payable by RCL if the other defendants are acquitted.

119 The impact of paragraph 20(a) of the Plea Agreement upon RCL's liability to pay restitution is uncertain in the event of an acquittal of the individual defendants (other than Mr. Radler). The Receiver was apparently unable to obtain greater clarity, and hence greater certainty, in further discussions with the USAO during the course of the hearing of the Motion at hand. However, paragraph 20(a) states that restitution is for the pecuniary loss attributable to "the transactions underlying the offences charged in the Third Superceding Indictment *which* are *attributable to the defendant* [ie. RCL]" [emphasis added]. Thus, it would be arguable that in respect of non-compete payments made directly to an acquitted defendant, such loss could not be attributed to RCL.

120 There has already been restitution made by Hollinger and individual defendants (a total of US$32.8 million) in respect of non-compete payments relating to the sale of the U.S. community newspapers. Thus, RCL's potential exposure to a restitution requirement appears to be limited to the US$26.4 million allegedly paid directly to RCL by Can West as a non-compete payment (some US$26.4 million was also allegedly paid directly to the individual defendants) in connection with the purchase of a 50% interest in the *National Post* and several hundred Canadian newspapers for about US $2.1 billion.

121 However, any such restitution order following upon a guilty plea would probably have only limited impact upon RCL from a practical standpoint.

122 First, the Receiver reserves the right (by paragraph 20(c)(vi) of the Plea Agreement) to argue that any restitution order does not give rise to a valid claim by the U.S. Government in the Canadian insolvency proceedings.

123 Second, whether or not there are acquittals of the individual defendants in the criminal proceedings, there remains a significant risk of civil liability on the part of RCL in respect of the Illinois civil claims advanced by International for recovery of this $26.4 million received by RCL.

124 Paragraphs 20(e)(iii) and (iv) of the Plea Agreement provides that any amount to which International may become entitled to through its Illinois civil action is subject to an agreement of May 13, 2005 between the Receiver

and International whereby such amount is to be accepted as a claim for distribution purposes in the Canadian Claims Procedure in the *CCAA* proceeding. If the US Government's claim based upon any restitution order is recognized by the Ontario Court as a valid claim in the Canadian insolvency proceedings, such restitution to International will then be off-set and reduced dollar-for-dollar by the amount of the claims finally proven through a resolution of the civil actions by International. This removes the possibility of double recovery by International.

125 Third, it is agreed (by paragraph 20(e)(vi) of the Plea Agreement) that any U.S. Government claim based upon a restitution order, if accepted as a valid claim in the Canadian insolvency proceedings, is simply an unsecured claim without any priority. The unfortunate reality is that there is a probable significant excess of liabilities to assets in the winding-up of RCL. If so, the *pro rata* claim of the U.S. Government would impact adversely upon other unsecured creditors in respect of any monies available for the unsecured creditors, but have no practical impact upon RCL itself.

The risks of collateral or issue estoppel in the civil proceedings

126 In the United States, the doctrine of collateral estoppel or issue preclusion may be applied in civil proceedings in respect of issues which have been previously determined on a criminal conviction through a guilty plea. *Appley v. West* 832 F.2d 1021 at 1025-6 (7th Cir.) [*Appley*]. A criminal conviction based upon a guilty plea within Illinois and the ambit of the 7th Circuit seems to conclusively establish for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he or she was convicted. *Nathan v. Tenna Corp.*, 500 F.3d 761 at 763 (7th Cir. 1977).

127 In Canada, criminal convictions are admissible in subsequent civil proceedings. A criminal conviction ordinarily constitutes *prima facie* proof, "but in some cases, the person convicted may be precluded by the doctrine of abuse of process from contesting the underlying facts." *K.F. v. White* (2001), 53 O.R. (3d) 391 at para. 19 (C.A.) per Sharpe J.A.

128 The Plea Agreement proposes that RCL plead guilty to Count Two, which involved an alleged non-compete payment of $400,000 in the Forum transaction. It is alleged that $100,000 was wrongly diverted to Hollinger. The Receiver submits that collateral estoppel at most would apply only to the $100,000 in the Forum transaction.

129 The Receiver is faced with RCL being a defendant in the criminal proceedings. The Receiver is also faced with RCL being one defendant in a number of civil actions both in the U.S. and Canada, including: a class action, *Trudy Betthel et al v. Lord Conrad N. Black et al*, [2006] S.J. No. 267, in the Court of Queen's Bench Judicial Centre of Saskatoon, No. 1492 of 2004; a class action in Ontario, being *Steve Drover et al. v. Argus Corporation et al.* file no. 04-CV-028649; an Ontario action, *Hollinger Inc. v. The Ravelston Corporation et al.*,, [2006] O.J. No. 4620, file no. 06-CL-6261; an action in the U.S. District Court for the Northern District of Illinois, Eastern Division, *Hollinger International Inc. Hollinger Inc. et al,* No. 04C-0834; and a class action in the U.S. District Court for the Northern District of Illinois, *Teachers' Retirement System of Louisiana v. Conrad N. Black et al.*, No. 0C-0834 (collectively, referred to as the "civil proceedings"). These civil proceedings raise several alleged causes of action beyond allegations simply related to the non-compete payments. However, they include in part alleged wrongdoing because of the non-compete payments, including those referred to in Counts One and Two.

130 The Black group says that the Receiver failed to properly evaluate the risk that a guilty plea to Count Two of the Third Superceding Indictment will prejudice RCL's position in subsequent civil proceedings. The Black group submits that there is a real risk that plaintiffs in the civil proceedings would seek to use a guilty plea to prevent RCL from relitigating the facts and issues underlying Count Two, pursuant to the U.S. doctrine of collateral estoppel and the Canadian doctrine of abuse of process.

131 The Black group also asserts that Hollinger and International support the Receiver's Plea Agreement Motion at hand because collateral estoppel would likely result in their civil actions being successful.

132 The Black group submits that a plea of guilty to Count Two, given its wording, is an admission as to facts

beyond simply those relating to the Forum transaction. In Count Two the Grand Jury charges RCL as follows:

> The Grand Jury realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

133 Count Two then charges RCL with mail fraud "for the purpose of executing and attempting to execute the above-described scheme". The proof of the "scheme" is a pre-condition to a finding of guilt in respect of mail fraud. The "scheme" is that described in paras. 1 to 33 of Count One, set forth in the first 22 pages of the Third Superceding Indictment.

134 I turn then to a consideration of paras. 1-33 in Count One of the Third Superceding Indictment. Paragraph 1 sets forth as background the interests and inter-relationships of the defendants in respect of RCL, Hollinger and International. The accusation is made in paragraph 2 that from about January, 1999 to about May, 2001 at Chicago the defendants "intended to devise, and participated in a scheme to defraud International and International's public shareholders ... " The alleged general "scheme" as to the diversion of non-compete payments is then described at length and in detail in paras. 3 to 33, dealing with a number of sales of community newspapers and other publications by International, totaling about US $678 million in sale proceeds to International.

135 The Black group argues that by pleading guilty to Count Two, RCL would admit to the facts constituting alleged fraud in respect of all the transactions set forth in Count One. The particular non-compete payments referred to in Count One allegedly diverted to the defendants include US$2 million (American Trucker), US$12 million (CNHI 1), US$1.2 million (Horizon), and US $100,000 (Forum).

136 The U.S. doctrine of collateral estoppel is similar to issue estoppel in Canada. It may preclude the relitigation of issues in a subsequent proceeding when: (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical. Unlike issue estoppel in Canada, collateral estoppel does not require mutuality (see *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77 at 99 (*C.U.P.E.*)). Collateral estoppel may be applied in civil trials to issues decided in a prior criminal conviction: *Appley, supra* at 1025-6.

137 The Canadian doctrine of abuse of process provides courts with the discretion to prevent relitigation of issues decided in a previous proceeding. A previous criminal conviction is *prima facie* admissible in a civil proceeding under s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23. When determining whether or not the criminal conviction has preclusive effect in the civil proceeding, the Supreme Court in *C.U.P.E.* advises the courts to, "turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process". In that same case, the Supreme Court identified a non-exhaustive list of situations where relitigation enhances, rather than impeaches, the integrity of the judicial system: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; and (3) when fairness dictates that the original result should not be binding in the new context (e.g. where there was an inadequate incentive to defend a criminal prosecution): *C.U.P.E., supra* at 106, 110.

138 As I have already outlined above, the Black group points out that Count Two incorporates by reference paras. 1-33 of Count One, which describe in detail the alleged scheme to defraud International of non-compete payments received from the sale of its U.S. community newspapers to various entities, including Forum. The Black group referred the Court to the decision in *U.S. v. Belk*, 435 F.3d 817 at 819 (7th Cir. 2006) [*Belk*]. They submit that the *Belk* decision indicates that the crime to which the Receiver proposes to plead guilty is not limited to mail fraud in relation to the Forum transaction, but also includes the entire "scheme" to defraud International as set out in paras. 1-33 of Count One. In other words, by pleading guilty to Count Two, RCL would be admitting that it participated in a scheme to defraud International of non-compete payments for every transaction involving the sale of International's U.S. community newspapers. As mentioned above, according to the Black group, there is a real risk that plaintiffs would rely on the doctrines of collateral estoppel and abuse of process to prevent RCL from attempting to rebut these admissions in the pending civil proceedings in both the U.S. and Canada.

139 The Receiver asserts that the Plea Agreement reduces RCL's exposure to civil liability because the guilty plea to Count Two is restricted to mail fraud only in relation to the Forum Transaction.

140 By paragraph 5 of the Plea Agreement, RCL agrees to plead guilty "to the charge contained in Count Two". As stated above, Count Two necessarily incorporates by reference an admission to the facts of the alleged "scheme" set forth in Count One. However, paragraph 5 of the Plea Agreement goes on to say that "[I]n pleading guilty [RCL], by its Receiver, admits the following facts .... " Paragraph 5 then goes on to provide some background but refers only to a "scheme" to defraud International of money to which its was entitled under the Forum transaction. Paragraph 5 goes on to describe how RCL used interstate mail to execute that scheme. The Plea Agreement does not mention any other sale of U.S. community newspapers to any other entity. Paragraph 5 concludes with the statement that "[t]he factual summary contained in this paragraph is provided for the sole purpose of establishing a factual basis for [RCL's] plea of guilty."

141 In addition, both the Receiver and Hollinger submit that even if the Black Group is correct in its analysis of the consequences of a guilty plea to Count Two, the risk of actual prejudice to RCL in the civil proceedings is minimal, for two reasons. First, RCL faces a number of civil suits regarding the U.S. $2.1 billion CanWest transaction (the alleged scheme to defraud International of non-compete payments from this transaction is described in Counts Eight and Nine of the Third Superceding Indictment). According to paragraph 25 of the Plea Agreement, all other Counts against RCL (ie. other than Count Two) will be dismissed, which preserves RCL's ability to defend the CanWest aspect of the civil proceedings without raising concerns of collateral estoppel and abuse of process.

142 Second, restitution has already been paid for the approximate U.S. $32.8 million in non-compete payments allegedly improperly taken from International in relation to the sale of the U.S. community newspapers (*Hollinger International Inc. v. Black* 844 A.2d 1022 (Del. Ch. 2004). C.A. No. 183-N (Del. Ch. May 19, 2004) (Transcript), aff'd 872 A.2d 55 (Del. Supr. 2005). (Reportedly, Hollinger has made restitution of US$16.5 million, Lord Black US$7.1 million. Mr. Radler, U.S.$7.1 million and Mr. Atkinson, US$2.2 million.) Thus, the only outstanding issues in this aspect of the civil proceedings relating to these non-compete payments are compensatory and punitive damages.

143 I note that neither party put forward evidence from a U.S. attorney regarding the likely impact of the proposed Plea Agreement on RCL's position in the U.S. civil proceedings. There is no way for this Court, as a Canadian court of law, to objectively evaluate the risk that the U.S. doctrine of collateral estoppel will prejudice RCL in the U.S. civil proceedings if it pleads guilty to Count Two. In addition, it is not obvious whether it would be an abuse of process for RCL to rebut the facts set out in Count Two in a Canadian civil proceeding, given the significant discretion afforded the trial judge to assess whether relitigation would be detrimental to the adjudicative process. Suffice it to say that collateral estoppel and abuse of process are live issues.

144 Nevertheless, I am satisfied that the Receiver acted reasonably. The Receiver has retained experienced civil counsel in both Canada and the U.S. In consultation with its counsel over a number of months, the Receiver has concluded that the risk of prejudicing its position in the civil proceedings by pleading guilty to Count Two is lower than the risk of prejudice RCL faces in the civil proceedings if it is convicted on all Counts it faces.

145 In my view, it was reasonable for the Receiver to evaluate and compare the risks associated with the "worst case scenarios" - i.e. the risk of prejudice to RCL's position in the civil proceedings by (i) entering the Plea Agreement or (ii) being convicted on all of Counts One to Nine.

146 If there were to be an acquittal then, of course, there is no risk of prejudice through a continuing plea of not guilty. However, the prospect of acquittal is not relevant to evaluating the risk to RCL's position in the civil proceedings. This is because the Receiver has reasonably concluded that there is a significant risk of RCL being convicted of all Counts against RCL in the Third Superceding Indictment.

147 Given the conclusion RCL faces a significant risk of conviction, the Receiver is left with an evaluation of the

risks resulting from a guilty plea to Count Two under the Plea Agreement as compared with the risks arising from a continuing not guilty plea with an eventual conviction on all nine Counts it faces.

148 Were RCL convicted on all Counts, it would face the risk that collateral estoppel and abuse of process would preclude relitigation of the issues surrounding the sale of all the U.S. community newspapers *and the CanWest Transaction*. But if RCL enters into the Plea Agreement, there would be greater certainty for the estate because it would only face the much lesser risk that collateral estoppel and abuse of process would preclude, at most, relitigation of the issues surrounding the sale of the U.S. community newspapers.

Disposition

149 The major underlying premise to the Receiver's Motion to change its plea from not guilty and plead guilty to Count Two of the Third Superceding Indictment, is that the Receiver considers there is a significant risk of the conviction of RCL on all nine Counts it faces if it proceeds to a trial.

150 Having made that assessment, the Receiver entered into negotiations with the USAO with a view to determining whether the alternative of a change of plea was feasible and desirable. In doing so, the Receiver has acted with the realization that the RCL estate has limited assets and that the significant cost of defending at trial will have a very adverse impact upon the limited resources remaining available in the estate.

151 The Receiver submits that the Plea Agreement brings some greater certainty, inasmuch as the fine is fixed at US$7 million, the concern as to collateral estoppel arguably relates only to Count Two and a possible civil claim of US$100,000, and that an order of restitution would likely be less than that seen upon a conviction on all nine Counts.

152 The Plea Agreement achieved has reduced significantly the probable fine that would be otherwise imposed upon a conviction at trial. While there is certainly a risk of a significant restitution order upon sentencing through the Plea Agreement, the impact is lessened by other protective provisions. There is a risk as to a greater quantum of restitution being ordered if there is a conviction following upon a trial.

153 There is a concern of collateral or issue estoppel that may arise upon a plea of guilty to Count Two. However, this risk is modest in all the circumstances, and in any event, this risk would be significantly greater in the event of a conviction at trial upon all nine Counts faced by RCL.

154 In my view, the Receiver has made a reasonable and sufficient effort to determine the best course of action in all the circumstances, has considered the interests of all parties and has followed a fair and proper process in arriving at the Plea Agreement. The Receiver has assessed the risks of (1) the likelihood of conviction; (2) the size of the potential fine and ranking in the estate; (3) the impact of a competing restitution order on a receivership distribution and (4) the cost to the estate of maintaining a defence. I accept the Receiver's risk assessment. The Receiver has concluded that there is a greater probability of each of the risks coming to pass in the event the Receiver did not enter a guilty plea pursuant to the Plea Agreement. The Receiver's decision to enter into the Plea Agreement is well within the bounds of reasonableness. In my view, the Plea Agreement is prudent and commercially reasonable taking into account all the circumstances, as well as being fair to all stakeholders.

155 The Receiver has taken such reasonable steps as are possible in the circumstances to minimize any impact of a guilty plea by RCL upon former directors and officers. It has not named any former director or officer other than Mr. Radler and the fact of his Plea Agreement. Each of the individual defendants maintains all the defences and rights that he may have at present.

156 The Receiver has followed a fair and proper process in arriving at the Plea Agreement, determining upon a change of plea and in bringing forward the Motion at hand for approval. The interests of all stakeholders have been given due consideration. The Receiver has weighed carefully and fairly the pros and cons of entering into the Plea Agreement and in trying to balance responsibly the divergent interests of the various stakeholders. The Receiver,

facing an extremely serious criminal trial, has fairly, objectively and responsibly negotiated the Plea Agreement and brought forward same for approval by this Court, all with a view to acting in the best interests of the estate.

157 For the reasons given, the Motion is granted. An Order will issue in accordance with these Reasons for Decision.

P.A. CUMMING J.

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Ravelston Corp. (Re), [2007] O.J. No. 749

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

D.H. Doherty, R.J. Sharpe and R.A. Blair JJ.A.

Heard: February 26, 2007.

Judgment: March 1, 2007.

Dockets: C46649, C46680 and M34773

[2007] O.J. No. 749 | 2007 ONCA 135 | 85 O.R. (3d) 175 | 29 C.B.R. (5th) 45 | 155 A.C.W.S. (3d) 577 | 2007 CarswellOnt 1115

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan to compromise or arrangement of the Ravelston Corporation Limited and Ravelston Management Inc. AND IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

(10 paras.)

Case Summary

Corporations and associations law — Corporations — Legal personality — Criminal liability — Appeal by parties who formerly controlled bankrupt corporation from order granting receiver's motion to have bankrupt plead guilty to charge of mail fraud dismissed — Receiver made reasonable recommendation, in light of potential for conviction, possible civil liability of bankrupt if more than one conviction entered.

Criminal law — Offences — Fraud — Appeal by parties who formerly controlled bankrupt corporation from order granting receiver's motion to have bankrupt plead guilty to charge of mail fraud dismissed — Receiver made reasonable recommendation, in light of potential for conviction, possible civil liability of bankrupt if more than one conviction entered.

Criminal law — Procedure — Pleas — Plea bargains — Appeal by parties who formerly controlled bankrupt corporation from order granting receiver's motion to have bankrupt plead guilty to charge of mail fraud dismissed — Receiver made reasonable recommendation, in light of potential for conviction, possible civil liability of bankrupt if more than one conviction entered.

Insolvency law — Receivers, managers and monitors — Duties and powers — Appeal by parties who formerly controlled bankrupt corporation from order granting receiver's motion to have bankrupt plead guilty to charge of mail fraud dismissed — Receiver made reasonable recommendation, in light of potential for conviction, possible civil liability of bankrupt if more than one conviction entered.

Appeal by White, Black and his holding company from an order granting a motion by the receiver of Ravelston to have Ravelston enter a plea of guilty to a charge of mail fraud in a United States District Court. White, Black and his holding company formerly controlled Ravelston. The motions judge applied the standard of reasonableness to the receiver's recommendation in granting the motion. The judge considered the risk of conviction in coming to his decision. The judge rejected an argument by the appellants that the cost of Ravelston defending the charges

could be avoided without pleading guilty by adopting a coat-tail defence with other defendants. The judge accepted the receiver's assessment that the guilty plea to one count, and an acquittal on all other counts, carried less risk of exposure to civil liability than a conviction on all counts.

HELD: Appeal dismissed.

The motions judge applied the appropriate standard to the receiver's recommendation. The judge did not err in considering the risk of conviction and did not fail to consider the possibility of acquittal. The judge's decision regarding the cost of Ravelston defending the charges was not in error, as Ravelston had a separate identity and separate interests to that of the other defendants. It was open to the motions judge to conclude Ravelston benefited by entering the plea, by capping its fine and reducing its risk of exposure to a large restitution order, and to accept the receiver's assessment of civil liability.

<OTHER REFERENCES/> Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193(e)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13 Courts of Justice Act, R.S.O. 1985, c. C. 43,

Appeal from:

On appeal from the order of Justice Peter A. Cumming of the Superior Court of Justice dated February 7, 2007, with reasons reported at [2007] O.J. No. 414 (Q.L.).

Counsel

Earl A. Cherniak, Q.C., for the appellant, Conrad Black.

Peter Howard and Danielle Royal for the appellant, Conrad Black Capital Corporation.

Matthew Gottlieb and Elyse Korman for the respondent, Hollinger Inc.

Alexander MacFarlane, Daniel MacDonald and Max Mendelsohn for the respondent, RSM Richter Inc.

Robyn M. Ryan Bell for the respondent, Sun-Times Media.

David R. Wingfield and Paul D. Guy for the appellants, Peter G. White and Peter G. White Management Limited.

David Moore for the respondent, Catalyst Fund.

No one appearing for the respondent, Argus Corporation.

The following judgment was delivered by

THE COURT

1 This appeal concerns the recommendation of the respondent, RSM Richter Inc., ("Richter") the court-appointed receiver of The Ravelston Corporation Limited ("Ravelston"), that, pursuant to a plea agreement it negotiated with the United States Attorney's Office, Ravelston enter a plea of guilty on a charge of mail fraud in a United States District Court. The motion judge gave detailed and well-considered reasons finding, at para. 154, that the receiver's recommendation to enter the plea agreement was "well within the bounds of reasonableness" and granted the receiver's approval motion. The appellants, Conrad Black and his holding company that formerly controlled Ravelston, Conrad Black Capital Corporation, and Peter G. White Management Ltd. and Peter White, a former director of Ravelston, seek to appeal the order permitting Ravelston to plead guilty.

MOTION TO QUASH

2 The respondents move to quash this appeal on the ground that leave is required pursuant to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, s. 193(e), or the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13. The appellants brought a cross motion for leave to appeal if necessary. In the circumstances, without deciding the motion to quash, we heard argument on the question of leave and the merits and these reasons should not be read as deciding the question of whether the appellants are entitled to an appeal as of right.

STANDARD OF REVIEW

3 The motion judge applied the appropriate standard when considering Richter's recommendation: see *Re Ravelston Corp.* (2005) 24 C.B.R. (5th) 256 at para. 40 (Ont. C.A.): "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision." It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere.

MERITS

4 The appellants submit that the motion judge clearly erred by considering the risk of conviction and by failing to consider the possibility of the "acquittal contingency" in which all individual defendants are exonerated. The appellants further submit that the terms of the plea agreement fail to provide Ravelston with sufficient benefit to justify surrendering the possibility of an acquittal on all counts. For the following reasons we reject these submissions.

(a) Risk of conviction and possibility of acquittal

5 The submission that the receiver and the motion judge erred by basing their decision on an assessment of the risk of conviction is entirely without merit. As a matter of logic, professional responsibility and judgment, the risk of conviction was the first factor to consider. Nor do we agree with the suggestion that the receiver failed to take adequate steps to obtain the necessary information to assess the risk of conviction. The receiver was entitled to enter plea negotiations with the prosecutor and this almost inevitably interfered with the commonality of interest Ravelston had shared with the other defendants. As for the "acquittal contingency", the appellants put forth nothing but conjecture and their faith in their ability to destroy Radler's credibility on cross-examination to challenge the receiver's assessment that Ravelston faces a substantial risk of conviction. Without knowing the theory of the defence of the individual defendants, we cannot accept the submission that acquittal of the individual defendants would make Ravelston's acquittal "inevitable" in the face of the guilty plea and the evidence of Radler, its President and Chief Operating Officer.

(b) **Benefit of the plea agreement**

(c) Cost of defence

6 One of the principal benefits of the plea agreement is that Ravelston would avoid the costs of a defence in the criminal proceedings. We see no merit in the submission that the motion judge erred by rejecting the appellants' submission that the cost of a defence in the criminal proceedings could have been avoided without pleading guilty by adopting a "coat-tail" defence with the other defendants. This suggestion essentially ignores the separate identity and interests of Ravelston that both the receiver and the motion judge were required to consider.

(ii) Fine and restitution order

7 It was clearly open to the motion judge to conclude that the plea agreement benefited Ravelston by essentially capping the fine and reducing its risk of exposure to a large restitution order, particularly in relation to the $26 million in potential liability arising out of the Can-West transaction. By pleading guilty to one count only and agreeing to the fine to be imposed, Ravelston substantially reduced its monetary exposure. With respect to the restitution order, while Ravelston remains legally exposed to a significant order, a guilty plea would potentially assist Ravelston when the sentencing judge exercises his or her discretion in fixing the quantum of the restitution order. The terms of the plea agreement explicitly preserve Ravelston's rights to argue that any fine and restitution order are not enforceable in Ontario.

(iii) Impact on civil proceedings

8 While there may be some ambiguity in the terms of the plea agreement as to what facts Ravelston admits, we cannot say that the receiver's assessment that it significantly reduced Ravelston's risk of exposure to civil liability exceeded the bounds of reasonableness. This argument must be considered in the light of the receiver's assessment that Ravelston faced a substantial risk of conviction on all counts. In that scenario, Ravelston's position in the outstanding civil proceedings would be severely prejudiced. Even on the least favourable interpretation of the plea agreement, the guilty plea could not provide the basis for issue estoppel with respect to the Can-West transaction. Moreover, the appellants provided no evidence as to foreign law to support their contention that, for the purposes of issue estoppel, the plea agreement would be read more broadly than suggested by the receiver. In our view, it was clearly open to the motion judge to accept the receiver's assessment that a guilty plea to one count and an acquittal on all other counts under this plea agreement carried less risk of exposure to civil liability that a conviction on all counts.

9 Assuming without deciding that the Richter was bound to consider White's personal exposure to liability as a director, the degree of his exposure is at most no more than that of Ravelston. We agree with the submission that the issue for the motion judge was whether it was better to plead guilty under *this* plea agreement or proceed to trial, not whether some better plea agreement could be imagined.

CONCLUSION

10 We see no reason to interfere with the thorough and balanced decision of the motion judge. Accordingly, assuming that leave to appeal is required, we would grant leave to appeal but dismiss the appeal. The parties are at liberty to make brief written submissions as to the costs of the appeal, the respondents to file their submissions within ten days of the release of these reasons, and the appellants to file theirs within ten days thereafter.

D.H. DOHERTY J.A.
R.J. SHARPE J.A.
R.A. BLAIR J.A.

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

Ontario Reports

ONTARIO

Court of Appeal for Ontario

Goodman, McKinlay and Galligan JJ.A.

July 3, 1991

Action No. 318/91

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

Case Summary

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.

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River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, [2010] A.J. No. 12

Alberta Judgments

Alberta Court of Appeal

Edmonton, Alberta

R.L. Berger and P.A. Rowbotham JJ.A. and R.P. Belzil J. (ad hoc),

Heard: January 7, 2010.

Judgment: January 18, 2010.

Dockets: 0903-0191-AC, 0903-0236-AC

Registry: Edmonton

[2010] A.J. No. 12 | 2010 ABCA 16 | 63 C.B.R. (5th) 26 | 469 A.R. 333 | 18 Alta. L.R. (5th) 201 | 184 A.C.W.S. (3d) 686 | 2010 CarswellAlta 57

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)

(22 paras.)

Case Summary

Bankruptcy and insolvency law — Administration of estate — Sale of property — Administrative officials and appointees — Duties and powers — Sale of assets — Approval — Appeal by highest bidder in tender to purchase property from receiver, from order extending tender process — Appeal allowed — Another bidder had convinced court he misunderstood date on which he was to obtain possession of property, and therefore made lower bid than he would have otherwise — In extending process, court gave other bidder benefit of knowing what high bid was without justification, and failed to consider interests of high bidder and other participants in process.

Real property law — Sale of land — Tender — Appeal by highest bidder in tender to purchase property from receiver, from order extending tender process — Appeal allowed — Another bidder had convinced court he misunderstood date on which he was to obtain possession of property, and therefore made lower bid than he would have otherwise — In extending process, court gave other bidder benefit of knowing what high bid was without justification, and failed to consider interests of high bidder and other participants in process.

Appeal by the Hutterian Bretheren Church from an order extending the tendering process to purchase certain property from the receiver of a bankrupt. The receiver of the bankrupt had issued a call for offers to purchase the property. The Church made the highest offer at $2.2 million. The Receiver applied to have the Church's offer approved. Warkentin had also submitted a bid in the process. He argued it later became clear that he would be able to obtain possession of the property earlier than he had anticipated at the time he made his bid, and that, had he known this, he would have made a bid higher than that of the Church. The judge approved a re-tendering based on Warkentin's misunderstanding of the dates of occupation. Warkentin submitted a bid higher than the Church's bid in the new tendering process.

HELD: Appeal allowed.

The order was set aside and the bid of the Church was approved. Ordering a re-tendering effectively conveyed to Warkentin an advantage in that he knew what the Church was offering and was able to better it. There was no evidence of any unfairness to Warkentin in the initial tendering process. The judge erred in failing to consider the interests of the Church as the highest bidder in the initial tendering process, or the interests of the other bidders.

Appeal From:

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).

Counsel

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.

Memorandum of Judgment

The following judgment was delivered by

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.

R.L. BERGER J.A.
P.A. ROWBOTHAM J.A.
R.P. BELZIL J. (ad hoc)

BENNETT

on

RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL®

11

Discharge

1. GROUNDS

Once the receiver has achieved the goals of the receivership, principally the sale of the debtor's business or property and the distribution of the sale proceeds, the court in the case of a court appointment and the security holder in the case of a private appointment should terminate receiver's appointment and discharge the receiver.

The appointment of the receiver is usually terminated when the estate has been fully administered or the appointment no longer serves any purpose.[1] By that time, the receiver will have taken possession of and disposed of all the debtor's assets, property, and undertaking. Then, the receiver will have no other function, except in the case of a court appointment, to pass its accounts before being discharged. In a court appointment, the court terminates the appointment; it is not terminated automatically. The receiver then proceeds to pass its accounts and, if satisfactory, the court discharges the receiver. In a private appointment, the security holder may change or terminate the appointment of a receiver at will unless there is a prohibition in the security instrument.

There are many situations where a receiver may be discharged if the administration is not completed and another receiver appointed in its place to complete the receivership. In a court appointment, there is a heavier onus on the debtor or third party who seeks to discharge or replace a receiver in the course of the administration than there is upon a party opposing the court appointment in the first instance. The

1 See *Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.* (1993), 79 B.C.L.R. (2d) 169, 1993 CarswellBC 125 (B.C. Master), appeal dismissed (1993), 1993 CarswellBC 1998 (B.C. S.C.), where the court dismissed an application to discharge the receiver as the receiver had not completed the administration of the estate, and, in particular, the receiver had not resolved warranty issues, obtained tax refunds, and disposed of some of the remaining units of a condominium project at the time of the application.

Bison Properties Ltd. (Re), [2016] B.C.J. No. 888

British Columbia and Yukon Judgments

British Columbia Supreme Court

(In Bankruptcy and Insolvency)

Vancouver, British Columbia

P.W. Walker J.

Heard: April 1, 11-14, 18, 19, 26, 27 and 29, 2016.

Judgment: April 29, 2016.

Released: May 3, 2016.

Docket: S149327

Registry: Vancouver

[2016] B.C.J. No. 888 | 2016 BCSC 793 | 36 C.B.R. (6th) 66 | 2016 CarswellBC 1199

IN THE MATTER OF the Receivership of Bison Properties Ltd. AND IN THE MATTER OF the Receivership of Walker Hospitality Ltd. AND IN THE MATTER OF the Receivership of Kevin Bruce Walker

(179 paras.)

Case Summary

Bankruptcy and insolvency law — Administration of estate — Sale of property — Application by Receiver for approval of purchase offer allowed — Receiver was appointed in respect of entities that owned and managed Oak Bay Beach Hotel in Victoria — Construction lenders and bondholders were primary secured creditors, including bondholders who had purchased units within development but had yet to receive transfer of title — Offer, coupled with protections afforded to the purchasing bondholders, and placement of proceeds in trust, represented greatest overall value for stakeholders and appropriately balanced the interests of competing creditors — Offer provided certainty to hotel and employees and was not improvident from commercial perspective.

Application by the Receiver of Bison Properties and related entities for approval of a purchase offer. Bison Properties owned the Oak Bay Beach Hotel in Victoria. A group of secured creditors financed costs of construction and redevelopment. In addition, a public bond offering was used to finance the refurbishment. The equity in the hotel and property was insufficient to satisfy the debts owed by the hotel and its ownership group. Since the receivership appointment, the hotel operated at a small profit. The Receiver presented an offer to purchase the hotel and property for court approval. The construction lenders supported the sale and disbursement of the sale proceeds proposed by the offer. A group of claimants, defined as the purchasing bondholders, had agreements in place in respect of units within the development, though no transfer of title had occurred due to the security held by the construction lenders. The purchasing bondholders advanced competing priority claims and opposed the sale on several grounds.

HELD: Application allowed with amendments to offer.

The offer, coupled with protections afforded to the purchasing bondholders, and the placement of a portion of the proceeds in trust, represented the greatest overall value for stakeholders and appropriately balanced the interests of competing creditors. The offer promoted certainty with respect to the fate of the hotel and its

employees. The offer was not improvident from a commercial perspective. The offer was approved, subject to amendments that included placement of specified proceeds in trust and new occupancy agreements to conform to the offer. The Receiver was not discharged, but its activities and fees were approved.

Statutes, Regulations and Rules Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243

Business Corporations Act, SBC 2002, CHAPTER 57,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Law and Equity Act, RSBC 1996, CHAPTER 253,

Real Estate Development Marketing Act, SBC 2004, CHAPTER 41,

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Counsel for Metro-Can Construction Ltd. and REV Investments Ltd.: C. Dennis, Q.C., J. Sandrelli, T. Jeffries.

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Counsel for the claimants and certain bondholders of Bison Properties Ltd.: D. Gruber, T. Louman-Gardiner.

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Reasons for Judgment

P.W. WALKER J.

Introduction

1 Bison Properties Ltd. ("Bison") was placed into receivership on December 3, 2014 by the order of Madam Justice Brown ("Receivership Order"), following the application of a group of its secured creditors who financed a significant part of the cost of construction of the redevelopment of the famed Oak Bay Beach Hotel ("Hotel"). The Hotel is located in Oak Bay, near Victoria, British Columbia, at 1175 Beach Drive. That group of creditors is referred to by the parties as the "Construction Lenders". Ernst & Young was appointed the receiver ("Receiver") at the same time. Specifically, the Receiver was authorized to manage all of the assets, undertakings, and property of Bison (including the Hotel). The Receiver was separately appointed as the receiver and manager of all assets of Walker Hospitality Ltd. ("WHL") and of certain assets of Kevin Walker. WHL managed the Hotel per a management agreement with Bison. Kevin Walker is the principal of Bison and WHL. The receivership proceedings were consolidated by order of this Court on October 16, 2015.

2 The Receiver presented an offer to purchase the Hotel and the real property ("Property") on which is was located for court approval. The hearing of the Receiver's application ended on April 27, 2016. Due to a time requirement contained in an offer to purchase the Hotel and Property requiring court approval on or before April 30, 2016, if court approval was to be granted, I gave the parties my oral ruling on April 29, 2016 approving the offer subject to certain amendments and conditions, with reasons to follow. These are my reasons for judgment.

3 The facts set out in these reasons are my findings of fact. They are to be distinguished from my summaries of some of the parties' submissions concerning facts, which stand as submissions unless I state that I accept them as findings of fact.

4 Bison's primary asset is the Hotel and the Property. Bison owned both the Hotel and the Property on which it was located. Prior to the receivership, WHL's primary asset was its management agreement with Bison, which has since been terminated. As a result, WHL has no assets. The assets of Kevin Walker that are subject to the receivership order consist of shares that he legally and beneficially owns in Bison and WHL and all debts they owe to him. The Receiver sometimes refers to Bison, WHL, and Mr. Walker as a group, and when it does, it refers to them as the "OBBH Group". I will use that acronym as well.

5 Since its appointment, the Receiver has been operating the Hotel. Without taking into account the Receiver's fees and borrowings to date, the Hotel has been operating at a small profit. The Receiver has also been endeavouring to sell the Hotel and the Property since a sales process was ordered by this Court in October 2015. The Receiver now has in hand an offer to purchase the Hotel and the Property. It believes the offer is the highest and best one it has been able to obtain.

6 On this application, the Receiver seeks an order approving the sale of the Hotel and the Property. However, there is insufficient equity in both to satisfy all of the debts of the OBBH Group. The Construction Lenders assert their rights as secured creditors and support the sale and disbursement of the sale proceeds in accordance with the terms of the offer, which is explained in detail below in these reasons.

7 However, a group of claimants who have purchase agreements in place in respect of units in the development, defined as the "Purchasing Bondholders", advance competing priority claims and oppose the sale on several grounds, including that a term of the offer requires some of them who are currently in occupancy to deliver vacant possession.

8 Before I turn to the specifics of the offer itself, it is useful to set out some pertinent factual information and to describe the competing claims of the parties.

The Hotel

9 The Hotel includes 100 guest suites ("Suites") intended for part-time use by their owners, on the condition that they be available for rental by the Hotel in exchange for a fee paid to the owners, plus 20 individually titled residential units intended for full-time living ("Residences"). Prior to the receivership, Bison sold and transferred title for 12 of the Suites and six Residences. The Receiver advised that those purchasers were independent purchasers. They are not involved in the application. Bison remains the registered owner of 88 Suites and 14 of the Residences.

10 Bison financed the development primarily through loans from the Construction Lenders and cash realized from the sale of bonds to the public.

Bison's Debt to the Construction Lenders

11 Bison is indebted to the Construction Lenders, who hold security for their debt. Pursuant to an inter-lender agreement, Highland Park Financial Inc. and John & Bonnie Buhler Foundation (which on this application were collectively referred to as "Buhler") sit with first priority over the other Construction Lenders, Metro-Can Construction Ltd. ("Metro-Can") and REV Investments Ltd. ("Rev"). Metro-Can sits in second priority followed by Rev. Metro-Can was the general contractor for the Hotel development. Rev is related to Metro-Can and provides financing for property development. Another Construction Lender, Sterling Bridge Mortgage Corp. ("Sterling Bridge") follows in a subordinate position.

12 Sterling Bridge has no prospect of recovery of any of its debt. It is not a party to this application. Hence, when I refer to Buhler, Metro-Can, and Rev as a group, I will refer to them as the "Applicant Lenders"; otherwise, when necessary, I shall refer to them individually.

13 The total amount of debt owed to the Construction Lenders as of March 1, 2016, was approximately $79 million,

broken down as follows (all numbers are approximate): $43.2 million to Buhler (which includes the Receiver's borrowings of $3 million, which are chargeable to Buhler); $6.098 million to Metro-Can; $12.76 million to Rev; and $17.05 million to Sterling Bridge. Interest continues to accrue on those amounts at different rates of interest. For example, the interest on the Buhler debt is 11% per annum. Each of those Construction Lenders holds security for their debt in the form of mortgages registered against the Property and other forms of security (such as a general security agreement).

The Bondholders

14 As noted, Bison financed redevelopment of the original Oak Bay Beach Hotel through the sale of bonds. Commencing in 2009, Bison raised $37.3 million from approximately 50 parties through the issuance of mortgage-backed bonds. Different tranches of bonds were issued over time with different rates of return. All bondholders were offered the right to purchase Suites or Residences in the new development and to use their investment as a credit toward the purchase price. The purchase price was stated in the offering documents to be available to them at a discount from the selling prices that would be offered to the public; in addition, they would receive enhanced benefits to use the facilities at the Hotel plus meal credits at the Hotel restaurant. Those bondholders who entered into purchase agreements are the "Purchasing Bondholders" and are to be distinguished from the other bondholders who chose to purchase bonds solely as a means of investment.

15 The investments made by each of the bondholders, including the Purchasing Bondholders, were secured by a mortgage registered against the Property, which was executed by Bison in favour of Computershare, who acted as agent for all of the bondholders ("Bondholders' Mortgage"). The Bondholders' Mortgage was registered on title prior to the various mortgages executed in favour of the Construction Lenders. I will explain in a subsequent section that the Purchasing Bondholders would have stood in priority over the Construction Lenders, except that the transaction documents they signed specifically called for all of the bondholders' interests to be subordinated to those of the Construction Lenders per a subordination agreement ("Subordination Agreement"), which was executed.

16 None of the Purchasing Bondholders have taken title to any of the Suites or Residences. Legal title to their units was meant to be transferred to them by Bison on completion of the Hotel development. The written purchase agreements made between individual Purchasing Bondholders and Bison stipulated that completion would occur with occupancy, i.e., when the strata plan was registered in the Land Title Office. Nonetheless, completion was specified in the various agreements to occur on or before a certain outside date (e.g., in 2011, 2012, or 2013). Completion did not occur. Bison advised the Purchasing Bondholders that it lacked the funds sufficient to pay the Construction Lenders in order to obtain partial discharges of their mortgages sufficient to transfer title.

17 Well before the Receivership Order was made, Bison negotiated agreements with some of the Purchasing Bondholders granting them early occupancy ("Early Occupancy Agreements"), which allowed them to occupy their units prior to the completion date and transfer of title. The Purchasing Bondholders who signed Early Occupancy Agreements in respect of Suites have allowed their units to be used in the Hotel rental pool in the absence of holding title. Three Early Occupancy Agreements were signed in respect of the Residences (with three parties) and 24 in respect of the Suites (with 22 parties). The three Residences have been and are currently occupied by some of the Purchasing Bondholders, one of whom, Ms. Barbara Asser, lives in it as her permanent residence. Some occupants of the Residences have spent additional funds to pay for improvements to their units. None of the Purchasing Bondholders have sought rescission or specific performance.

18 At various points throughout this insolvency proceeding, the Receiver notified the Purchasing Bondholders who obtained early occupancy that the Early Occupancy Agreements would eventually be terminated either before or when the Hotel and Property were sold. Except for the rights of three groups of Purchasing Bondholders who obtained early occupancy to three of the Residences, the Receiver suspended all rights under the remaining Early Occupancy Agreements in January 2015. Those occupants who have been in occupation of the three Residences have, however, been allowed to remain in occupancy. The Receiver has not charged them rent but has been threatening to do so if court approval of the proposed sale that it recommends is not granted.

19 Bison's indebtedness to all of the bondholders is substantial. According to the Receiver, it was approximately $48 million as of March 31, 2015. Interest at different rates (depending on which bond subscription was made) continues to accrue. The current amount of the Purchasing Bondholders' claim is approximately $18.121 million.

20 It is appropriate at this juncture to set out my agreement with the Receiver's submission concerning improvements made by the Purchasing Bondholders. The Receiver's position is that it is unclear whether claims for improvements are being advanced by any of the Purchasing Bondholders in the insolvency, but if they are, there is insufficient proof at this time to distinguish between improvements constituting fixtures (for which compensation might be made) and chattels, and no evidence adduced to demonstrate any impact on property values of the units involved. The improvements that were made to the three Residences by those in occupation are, however, one of many factors to be considered in respect of the offer presented for court approval, as a term of the offer requires them to deliver vacant possession in due course.

The Dispute Between the Construction Lenders and the Purchasing Bondholders

21 As mentioned, there is insufficient equity in the Hotel and the Property to satisfy all of the debts of the OBBH Group. The debt load is so great that there is currently insufficient equity to satisfy the claims of the Construction Lenders and the Purchasing Bondholders.

22 The Applicant Lenders and the Purchasing Bondholders advance competing priority claims. Some, but not all of the Bondholders made their investments prior to the Construction Lenders registering their mortgages against the Property. Nonetheless, as a result of a group of transaction documents (including the Subordination Agreement) signed by all of the bondholders and Computershare, Bison, and the Construction Lenders, the Applicant Lenders claim that they sit in priority over all of the bondholders, including the Purchasing Bondholders.

23 The Purchasing Bondholders assert that the funds they paid, which were full price deposits used to acquire legal title to and ownership of Suites or Residences, are impressed with a statutory trust arising from the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*]. They claim that those funds were wrongfully released by the law firm of Fasken, Martineau, DuMoulin LLP ("Faskens") who authorized the release of the funds from trust to Bison, who in turn advanced them to pay pre-existing debt and expenses (including some charged by Metro-Can, who in addition to being a Construction Lender was the general contractor) in the absence of deposit insurance (which they assert was required by *REDMA*). The Purchasing Bondholders submit that the transaction documents cannot be construed so as to give any of the Construction Lenders priority over the funds they paid for their subscriptions because they were deposits (in many cases full payment deposits) to purchase units and are thus trust property protected by *REDMA*. Consequently, they claim that when those funds were disbursed, they became attached to the Property because they were used to pay for the development of the Hotel and for improvements to the Property. They submit that the Property is impressed with a constructive trust, proprietary in nature, per *REDMA*, that takes priority over any secured claims asserted by the Construction Lenders regardless of the manner in which the Subordination Agreement and other transaction documents are construed (which, I will add, is also in dispute between the parties on this application).

24 I will refer to the trust asserted by the Purchasing Bondholders as a "*REDMA* Trust" and their claims in the singular as the "*REDMA* Trust claim".

25 The Purchasing Bondholders have brought an action against Faskens in respect of the *REDMA* Trust claim ("Faskens Litigation").

26 The Applicant Lenders dispute the existence of a *REDMA* Trust. Their position is that the interests of all of the bondholders, including the Purchasing Bondholders, are subordinated to their own as a result of the clear terms of the Subordination Agreement that was an integral document required by the bond subscription and other transaction documents that the bondholders signed when they made their investments.

27 Further particulars of the dispute between the Purchasing Bondholders and the Applicant Lenders are set out in reasons for judgment that I issued in respect of an application brought by the Applicant Lenders for a declaration that their interests have priority to those of the Purchasing Bondholders. My reasons ("Reasons") are indexed at 2016 BCSC 507. In my Reasons, I explained the basis upon which I dismissed the Applicant Lenders' application because it was not suitable for summary determination at that time, based on the evidence tendered on the application.

The Marketing and Sales Process of the Hotel by the Receiver

28 Madam Justice Brown issued an order in this proceeding on October 16, 2015, approving a sales and solicitation procedure ("SISP Order") to be carried out by the Receiver to market and sell the Hotel and the Property. The SISP Order included deadlines for potential bidders to deliver non-binding letters of intent (December 15, 2015) and deadlines for qualified bidders to deliver bids or acquisition agreements (originally January 15, 2016, but extended to January 29).

29 The Receiver engaged in a thorough and comprehensive marketing process of the Hotel and Property as a singular entity for sale. It did not attempt to market the Suites and Residences individually. The Receiver compiled a database of approximately 250 prospective purchasers, developed a marketing strategy to target high-quality prospective purchasers, advertised the Hotel and Property for sale, circulated confidential information to certain qualifying potential purchasers, established and maintained a data room for potential purchasers to access information as part of their due diligence process, and prepared a standard form letter of intent to be used by all potential purchasers to promote evaluation of the offers received. The Receiver ultimately executed approximately 75 non-disclosure agreements prior to providing potential purchasers with confidential data and subsequently obtained non-binding letters of intent from 15 different parties by the December 15, 2015 deadline. Of those, the Receiver qualified eight of the bids because it thought that they were likely to result in a successful transaction capable of closing. The qualified bidders carried out further and extensive due diligence, met with the Receiver, and submitted eight binding offers by January 29, 2016. All of the qualifying bidders insisted on delivery of vacant possession of the Hotel and Property, including the Suites and Residences, except for the 18 Suites and Residences where title has passed.

30 The Applicant Lenders were amongst the bidders. The Receiver took care to ensure that they were not provided with information that would give them an advantage in the SISP process.

31 The highest offer received was for $65 million, but it was not accompanied by the required deposit. Another high value offer contained a financing condition and the Receiver concluded that the offer was not likely capable of completing.

32 The next highest offer came from the combined effort of Metro-Can and Rev, which has been amended a number of times during the course of the hearing. It is the final version that I will refer to in these reasons as the "Rev Offer". It contains two alternate proposals, one of which concerns the three groups of occupants of the Residences. I will discuss its essential terms in the next section because it is the one recommended by the Receiver (regardless of which of the two alternate proposals is approved by the court).

The Offer Recommended by the Receiver

33 The Receiver recommends the Rev Offer because it offers the highest value for all of the stakeholders and because it says that Metro-Can and Rev have shown a demonstrable ability to fund the purchase price.

34 The Receiver accepted an offer from Rev on February 12, 2016, subject to court approval. I will refer to it as the "Original Rev Offer". Two substantial deposits of $500,000 have been paid, one to Buhler and the other to the Receiver in respect of it.

35 Although other offers made by other qualified bidders included a larger cash component than all of the offers made by Rev, the Receiver viewed them to be less favourable because the funds would not have been sufficient to fully repay the Applicant Lenders and there were other conditions attached to their offers that the Receiver did not view favourably.

36 The Original Rev Offer called for a purchase price in the total amount of $62 million, comprised of cash in the amount of $38.5 million and an assumption of various debts and obligations owed by Bison to the Applicant Lenders (which is known as a "credit bid"). In addition to the cash and credit bid, the terms of that offer provided that:

(a) A nominee company called "NOAH Holdings Ltd." ("NOAH"), related to Rev, will be incorporated to acquire the Hotel.

(b) NOAH will pay all outstanding amounts owed to Buhler and the Receiver up to a maximum of $37.5 million, plus 6% per annum will be paid to Buhler on the cash component from March 31, 2016 to the date of closing.

(c) NOAH will assume the debt owed by Bison to Metro-Can and to Rev, which as I noted was approximately $6.1 million and $12.8 million, respectively, as of March 1, 2016.

(d) NOAH will pay such other amounts as may be determined by this Court to be owed to the Purchasing Bondholders or as may otherwise be agreed between them and Rev to be owed. To facilitate that covenant, the parent of Metro-Can and Rev, who is known as the JV Driver Group, will provide a guarantee that is limited in amount (I was not made aware of the amount).

(e) The deposit of $500,000 paid to Buhler will be credited towards the purchase price.

(f) All other liabilities of the OBBH Group in connection with the Hotel will be assumed by Rev.

(g) With the exception of the 18 Suites and Residences for which title was transferred prior to the Receivership, the Hotel and Property will be delivered with vacant possession by noon of the closing date, which will be the 35th day following the day on which Court approval is obtained (or such other date as may be agreed to in writing with the Receiver).

37 To facilitate the Original Rev Offer and its subsequent iterations, Rev also entered into an agreement with Buhler ("Buhler Agreement") whereby the latter would reduce its debt claim from approximately $43 million and accept $37.5 million plus interest at the reduced rate of 6% per annum (down from 11%) to closing, in full satisfaction of the debt owed to it by the OBBH Group.

38 The Buhler Agreement also requires that court approval for the Rev Offer be obtained by no later than April 30, 2016, or else the Buhler Agreement will terminate. Consequently, the Applicant Lenders insist that there is urgency to the Receiver's application in order to obtain the discount from Buhler.

39 For tax planning reasons that do not impact on the merits of the Rev Offer, the Original Rev Offer was amended so that a limited partnership known as OB Hotels Limited Partnership ("OB Hotels"), of which Rev owns a two-thirds interest, will purchase the personal property associated with the Hotel, NOAH will acquire the Suites and the remainder lots, and 1067100 B.C. Ltd. ("1067"), which is a company controlled by Rev, will acquire the Residences. Thus, OB Hotels, NOAH, and 1067 are the proposed purchasers. I will refer to them as the "Purchasers" when I refer to them collectively in these reasons.

40 The amended offer also calls for the remaining debt owed by Bison to Buhler of approximately $5.6 million to remain with Bison; it will not be assumed by anyone. Thus, the debt "forgiveness" resulting from the Buhler Agreement means that Bison's debt in that amount will not be assumed but remain with an insolvent company. Consequently, the purchase price has been reduced to approximately $56.4 million. The interest reduction to 6% on

the proceeds of the $37.5 million to be paid to Buhler (from March 1, 2016 to closing) called for in the Original Rev Offer has not changed.

41 To facilitate the purchase, the Receiver, NOAH, and 1067 entered into a land purchase agreement on March 30, 2016 ("Land Purchase Agreement") requiring NOAH and 1067 to pay $36,197,301 towards the amounts owed to the Receiver and Buhler. The Land Purchase Agreement does not specifically require NOAH and 1067 to pay any amounts adjudged by this Court or agreed to by Rev to be owing to the Purchasing Bondholders. Consequently, at one point during its application for court approval, the Receiver amended its notice of application to seek an order that required the Purchasers to provide covenants to the Purchasing Bondholders secured by a mortgage against the Property that would rank second in priority to a first mortgage taken by Timbercreek Mortgage Investment Corporation ("Timbercreek"), a new lender who is providing financing in the amount of $38.5 million to facilitate the purchase. This second mortgage was proposed to be in priority to the secured interests of Metro-Can and Rev.

42 As it turned out, Timbercreek would not agree to advance funds if the proposed second mortgage was granted. The explanation provided was that Timbercreek did not want to risk becoming embroiled in any litigation with the Purchasing Bondholders concerning the second mortgage.

43 In light of Timbercreek's decision, Metro-Can and Rev proposed that an amount determined by this Court as appropriate "security" be taken from the sale proceeds and held in trust by their law firm, Dentons, pending determination of the Purchasing Bondholders' *REDMA* Trust claim. The Receiver further amended its notice of application to seek approval of the sale with this term.

44 The Purchasing Bondholders' objected to the funds held in trust as "security" as opposed to "substitute trust property" because the former would misstate their constructive trust claim. As a result, the Purchasers, Rev, and Metro-Can have agreed that the funds will be characterized as the latter.

45 The Receiver does not take a position concerning the distribution of funds to Buhler or in respect of the amount that is proposed to be held in trust in respect of the Purchasing Bondholders' *REDMA* Trust claim. The Receiver does, however, seek, by a separate application, a release to be approved by the court in respect of its activities to date.

46 The Receiver notified all Purchasing Bondholders who entered into Early Occupancy Agreements that they must deliver up vacant possession prior to closing if the Rev Offer is approved. Consequently, the Receiver seeks an order terminating all Early Occupancy Agreements if the Rev Offer is approved, including those entered into by the occupants of the three Residences.

47 The occupants of the three Residences oppose the granting of vacant possession if the Rev Offer is approved; at the very least, they wish to purchase their units at fair market value, without prejudice to their rights to assert their *REDMA* Trust claim.

48 Although Metro-Can and Rev insist that the offer be approved in its current form, in response to these objections, the offer to purchase was further altered by Metro-Can and Rev on behalf of the Purchasers, near the close of the hearing of the Receiver's application for court approval, to accommodate these occupants.

49 To facilitate the transaction, they are prepared to enter into new early occupancy agreements in respect of the three Residences, coupled with a right of first refusal ("ROFR") to give those Purchasing Bondholders the opportunity to repurchase their units.

50 I will review the objections of the occupants of the three Residences in a subsequent section, but for now, it is important to set out the additional terms to the Rev Offer as it has evolved over the course of these proceedings. The Receiver's latest notice of application, which is its third further amended notice of application dated April 21,

2016, seeks court approval for effectively two possible forms of order, one of which is sought as an alternative to the order it proposes.

51 The additional terms proposed can be summarized as follows:

(a) 1067 will offer the occupants of the three Residences an occupancy agreement that supersedes and replaces the Early Occupancy Agreements.

(b) Each new occupancy agreement that is entered into will take effect on closing of the sale, and will include an unregistered right of first refusal ("ROFR") in relation to the sale of their specific Residences.

(c) The ROFR will provide the occupants of each Residence with the right to match any third party offer that is acceptable to 1067 and that it wishes to accept. Each group of occupants will have a right to match the offer on 48 hours' notice.

(d) Only one ROFR will be provided for each of the three Residences and will be for the benefit of the current occupants of those units.

(e) 1067 has exclusive rights to market the three Residences for sale in its absolute discretion. With the exception of one of the units (for which there will be a 12 month prohibition on marketing it for sale), there is no timeline set by which the other two Residences must be marketed or sold. The occupants of each Residence agree to provide reasonable access to their Residences for the purpose of showing them to prospective purchasers.

(f) In the event an occupant(s) does not exercise the ROFR attached to their Residence, then they shall have a period of 60 days thereafter to vacate, unless otherwise agreed.

52 The Receiver submits that the Rev Offer as it presently stands, whether without or with the proposed new occupancy agreement and ROFR, provides an approach that takes into account and balances the competing interests of all of the parties to this application and is one that preserves trust property for the protection of the Purchasing Bondholders. The proposed new occupancy agreement and ROFR, the Receiver says, provides an "elegant solution" for those in occupation of the Residences and certainty to the ongoing operations and reputation of the Hotel as well as its staff and suppliers. At the same time, it allows the Hotel to get out of receivership and provides an opportunity for the Applicant Lenders to recover their debt.

The Applicant Lenders Support the Proposed Sale

53 The Applicant Lenders dispute that there is any merit to the *REDMA* Trust claim. They support the Rev Offer for a number of reasons. Rev and Metro-Can say that the difference between completing the proposed sale and selling to the next highest bidder is that the latter will result in a loss to Rev of its entire claim of $12.9 million. If the sale is approved, then Buhler will be paid out its reduced claim and Rev and Metro-Can may seek to recover their debt claims through ownership of a reconstituted Hotel and from the sale of Suites and Residences that they say are increasing in value due to escalating property values in the Victoria area.

54 In addition, they say that the "market has spoken" in respect of the SISP and the proposed sale represents the highest and best offer that has been tendered, in part because it includes a substantial discount by Buhler of its debt claim and of the rate of ongoing interest, which they submit is to the benefit of all stakeholders. The Applicant Lenders point out that if the Rev Offer is not approved, then Buhler's claim will revert back to $43 million plus interest at 11% per annum.

55 The Applicant Lenders also argue that there is urgency to the application, not only because of the ongoing interest charges (accruing at approximately $12,000 per day or $375,000 per month), but because of the overall effect on the value of the Hotel.

56 Rev says that it does not have funds available to it to pay funds into trust in respect of the *REDMA* Trust claim. Thus, in the circumstances, all of the Applicant Lenders submit that the proposed sale is the only viable option available.

57 There is no question that the security position of some of the Applicant Lenders is being eroded as this insolvency proceeding carries on. For example, since the start of this proceeding, over $9 million in interest has accumulated on the indebtedness owing in priority to Rev, in addition to the Receiver's borrowings to carry out its duties. Bison currently has $400,000 cash on hand and if the Receiver requires further borrowings to fund continued operations of the Hotel, it will be to the economic detriment of the Hotel.

58 The Applicant Lenders submit that the Hotel is currently operating at a loss. I will observe at this juncture that in the Reasons I found that the Hotel was operating at a profit. My finding was based on the evidence drawn to my attention on the previous application. The Receiver's statements of receipts and disbursement for the Hotel show that receipts exceeded expenses by approximately $1 million ($13.6 million in revenues compared to expenses of $12.6 million). On this application, however, the Applicant Lenders have taken me to a greater body of evidence to support their submission that the Hotel loses money as a result of this insolvency proceeding of approximately $6,000 per day. They stress that receipts from Hotel operations are inflated because they include the Receiver's borrowings of $3 million, plus they say, the Hotel incurred significant one-time expenses of approximately $3.95 million for property taxes, pre-receivership liabilities, restocking costs, and fees paid to legal and financial advisors (for the Applicant Lenders). They claim that as a result, in the last 14 months, the Hotel lost on average $191,000 per month or $6,400 per day. Further, they submit that the Receiver's statement of expenses does not reflect the ongoing accumulation of interest owed to them, which they have not been paid. In considering their further submissions, I am satisfied and find that the Hotel, as presently operated by the Receiver, is operating with a small profit when annual property taxes are taken into account and the other one-time expenses and the Receiver's borrowings are excluded from the analysis.

59 The Applicant Lenders and the Receiver submit that ongoing protracted receivership proceedings have and will continue to cause uncertainty for the Hotel and its marketing, relationships with its employees and suppliers, and will also chill the market.

60 I agree with the first part of their submission but not the latter. I find that the Receiver's written submission, as follows, effectively and appropriately describes the impediments to the Hotel's profitability arising from a protracted receivership:

> 93. The Receiver is also of the view that the ongoing receivership proceedings are preventing the Hotel from achieving its full potential and profitability. In particular, the Hotel is still a new hotel, having only three years of operations, and these early years are critical to defining long term branding and customer loyalty, and the uncertainty created by the receivership has affected personnel and the Hotel's positioning, branding and reputation. The Receiver also notes that certain capital and reconfiguration projects are required to achieve further success and profitability, and these works can only be undertaken by a new owner with fresh capital.

61 I am not satisfied, however, that a protracted receivership will chill the market, and indeed, I find that submission to be inconsistent with a submission of Metro-Can and Rev, made later in the hearing, explaining that they (and the proposed Purchasers) do not wish to be bound to a timeframe in which to market the Suites and Residences because they wish to take advantage of rising property values in the Victoria area.

62 In terms of the amount to be posted in trust, Metro-Can, and Rev also submit that although they are content to be bound by the amount fixed by this Court, it should be less than the full value of the *REDMA* Trust claim. In their submissions, they took issue with approximately $4 million of the overall claim of $18.121 million and said the amount placed in trust should be closer to $14 million.

63 As for the claims of the occupants of the three Residences, Metro-Can and Rev say that they should not stand in the way of the Rev Offer because those claims are "phantom" proprietary claims not supported by any pleading, were only raised for the first time during the hearing, and cannot spring in any sense from the Early Occupancy Agreements.

The Purchasing Bondholders Oppose the Proposed Sale

64 Except for the occupants of the three Residences, the Purchasing Bondholders do not oppose a sale of the Hotel and the Property, even a sale whose terms require vacant possession, so long as the trust property for which they advance their *REDMA* Trust claim is preserved or alternate trust property is provided in its place. They specifically oppose a proposed sale that sees sales proceeds paid out to any of the Applicant Lenders without, at a minimum, alternate trust property in place, for several reasons. I have captured some of them in the ensuing paragraphs.

65 First, they assert that the Receiver lacks jurisdiction to sell the Hotel and Property in the manner it proposes because the SISP Order requires the Receiver to hold the sale proceeds in trust as opposed to disbursing it as the Rev Offer calls for. They assert the order specifically requires the Receiver not to dispose of trust property. Nothing less than the full value of the *REDMA* Trust claim should be posted, otherwise the Purchasing Bondholders say, I will have prejudged their claim without having first given them the opportunity to prove their claims, which was the basis on which the SISP Order was granted. That result, they argue, would be procedurally unfair, and would deprive them of trust property and leave them without recourse because there would be insufficient equity left in the Property.

66 Second, they submit that the proposed sale falls afoul of the applicable model insolvency order and that neither Metro-Can, Rev, nor the Receiver have demonstrated any basis upon which to depart from it.

67 Third, they submit that inappropriate value is being ascribed to the Metro-Can and Rev debts in the credit bid, which they submit should not enhance the value of the Rev Offer because Rev may not be a stakeholder. They assert that the Rev debt has no value regardless of the outcome of the *REDMA* Trust claim and therefore it should not be permitted to buy itself consideration and elevate its position such that its interests are driving the sale. They submit that the Rev Offer does not represent the best price available for the Hotel and Property, in part because it assumes a value to the Rev debt that "may ultimately be valueless", especially if the Purchasing Bondholders' position is successful. In their written submissions, the Purchasing Bondholders argue:

> 13. The Receiver and Rev instead chose to allocate value to Rev's debt position, since the forgiveness of that debt is why the Receiver valued the Rev transaction more highly than the other cash transactions referred to in the Affidavit #1 of Mr. Bell. However, if the [Purchasing Bondholders'] claim is successful, then there is no value in Rev's debt position. Indeed, based on the arm's-length indicia of value (appraisal and cash offers) before the Court, it is not entirely apparent that there is any current value in Rev's position at present, regardless of whether or not the [Purchasing Bondholders'] claim is successful. Any value in Rev's position is speculative and based on the potential future value of the Property. What Rev is seeking to do is capture that future upside by denying the [Purchasing Bondholders'] claim before the claim can even be adjudicated.
>
> 14. The [Purchasing Bondholders'] opposition, and indeed the prejudice to [them], flows from the decision of Rev and the Receiver to accept the [Rev Offer] that inappropriately ascribes value to Rev's position and disregards the [Purchasing Bondholders'] legitimate claim.

68 The Purchasing Bondholders go further because they maintain that the interests of the Applicant Lenders, Highland Park, Metro-Can, and Rev have been overstated because they inappropriately elevated unsecured debt into secured debt in the bond investment transaction. They point to documents in evidence, as attachments to sworn affidavits, which show that Highland Park, Metro-Can, and Rev all had money invested in the form of non-purchasing bonds. The Purchasing Bondholders say that these Applicant Lenders were able at a later date to

convert their unsecured bond investments into secured mortgages, and through the transaction with the bondholders (including the Purchasing Bondholders), able, subject to their *REDMA* Trust claim, to gain priority advantage over them. The Purchasing Bondholders argue that I should consider that had these lenders been unable to elevate their unsecured debt, they would have stood in the same position as the other non-purchasing bondholders who have no chance of recovery, thereby diminishing the value to be ascribed to their secured debt claims on the Receiver's application.

69 Fourth, they claim that the Rev Offer is improvident because the offer, as structured, dooms the Hotel to failure because it will be unable to sustain operating expenses and the debt load of the Timbercreek mortgage. For that reason, they submit that the offer is not the best one available.

70 Fifth, and in respect of the occupants of the three Residences, they argue that in the circumstances of this case, they should not be required to give up vacant possession without first having the opportunity to purchase them at fair market value. Metro-Can and Rev have indicated a willingness to sell the units to them, but they disagree as to fair market value and timing of the sale in light of rising market values.

71 Sixth, they say that the Rev Offer is essentially a proposed arrangement of creditors that requires a vote from the Purchasing Bondholders.

72 Seventh, they say that any urgency to the application is solely the creation of the Applicant Lenders, and in particular, Buhler, who remains intractable in its insistence to obtain court approval by April 30, 2016.

73 Consequently, unless the full amount of the *REDMA* Trust claim is posted and the occupants of the three Residences are allowed to purchase their units, the Purchasing Bondholders seek to have the Receiver's application adjourned so that their *REDMA* Trust claim can be determined, or alternatively they seek an order, pursuant to an application they delivered prior to the hearing, determining their *REDMA* trust claim and purported interest in the Property, now, on a summary basis. Alternatively, should their summary application be unsuitable for summary determination at this time, then the Purchasing Bondholders seek an order that the Receiver engage in further negotiations with another specific bidder whose purchase price in its offer was, in the aggregate, close to the Rev Offer but more advantageous, they say, because it offered more cash and did not involve a credit bid.

Should the Rev Offer Be Approved?

74 I turn now to set out my decision concerning the Rev Offer.

75 The starting point is to determine the Purchasing Bondholders' objection to the Receiver's jurisdiction to sell Bison's assets in the manner contemplated by the Rev Offer, not only because it is a threshold issue but because through the course of my determination I resolve many of the other issues in dispute.

Does the Receiver have Jurisdiction to Sell Bison's Assets in the Manner Contemplated by the Rev Offer?

76 The Purchasing Bondholders submit that the Receiver lacks authority to sell Bison's assets if it means that the sale proceeds are fully paid out on completion, without the full amount of the *REDMA* Trust claim being set aside in trust with the Receiver.

Introductory Comments

77 The Receiver's initial appointment and authority is found in the Receivership Order issued by Brown J. on December 3, 2014, appointing the Receiver per the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]. The Receivership Order provides:

2. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable.

...

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

78 The SISP Order, issued on October 16, 2015, provided authority to the Receiver to carry out its obligations under the SISP:

2. ... the Receiver is authorized and directed to carry out the sale process for the assets, undertaking and property of Bison Properties Ltd. and the shares of Bison Properties Ltd. (the "Property") in accordance with terms therein and this Order and is hereby authorized and directed to take such steps as it considers necessary or desirable in carrying out its obligations under the SISP.

79 On its face, the terms of the SISP itself, attached as Schedule "B" to the SISP Order, also support the Receiver's position. The Receiver correctly points out that even though the language in para. 2.2 expressly states that all claims, to the extent valid and enforceable, shall attach to the net sale proceeds, it also contains qualifying language that allows for a sales agreement having a contrary effect:

2. Assets for Sale

...

2.2 In the event of a Transaction, all of the rights, titles and interests of the Vendor in and to the Assets (or only the Hotel or only the Residences, as the case may be) to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, interests thereon and there against (collectively, the **"Claims and Interests"**) pursuant to approval and vesting orders made by the Court. Contemporaneously with such approval and vesting orders being made, all such Claims and Interests, to the extent valid and enforceable, shall attach to the net proceeds of the sale of such property (without prejudice to any claims or causes of action regarding priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant Acquisition Agreement in connection with the selected Bid.

[Bold in original; underlined emphasis added]

80 The Rev Offer could be said to meet the definition of "Acquisition Agreement" in the SISP Order. Accordingly, I find that on their face, the Receivership Order and the SISP Order provide authority and jurisdiction for the Receiver to have marketed the Hotel and Property as it did and for the Receiver to sell those assets to Rev, subject to satisfying this Court that the offer is commercially reasonable having taken into account various competing interests.

The Parties' Competing Submissions

81 The Purchasing Bondholders submit that the SISP Order was granted in the context of the Purchasing Bondholders being able to have their *REDMA* Trust claim determined prior to any sale being approved. The SISP Order, they contend, follows the model insolvency order adopted by a practice direction issued by the Chief Justice of this Court. The onus, they say, falls on the Applicant Lenders to demonstrate why the model order should be departed from in any respect. To prove their point, the Purchasing Bondholders tendered in evidence communications between counsel and excerpts of the proceedings before Brown J. that resulted in the SISP Order being made.

82 The Purchasing Bondholders also provided further detailed submissions, involving, in part, equitable principles and the *Law and Equity Act*, R.S.B.C. 1996, c. 253, to demonstrate that the Receiver has no jurisdiction to dispose of trust property if the sale is approved because it has been made aware of the priority dispute. Instead, they argue that the Receiver must retain it in trust pending the determination of the *REDMA* Trust claim.

83 The Purchasing Bondholders also argue, by way of a companion submission, that the Receiver is not the receiver of their assets but only of Bison's, and relying on the principle of *nemo dat quod non habet*, they say that if the Rev Offer is approved with an amount held in trust that falls short of the full amount of their *REDMA* Trust claim, the Receiver will have vested off disputed property that does not belong to Bison, but belongs to the Purchasing Bondholders if the *REDMA* Trust claim succeeds. They say that if the Rev Offer is approved with anything less than the full amount of their claim being posted in trust as substitute trust property, and if they prove their claim, then the Receiver would be liable for breach of fiduciary duty for the difference. Therefore, they submit that the full amount of the funds should be put into trust, per *Ostrander v. Niagara Helicopters Ltd.* (1973), 40 D.L.R. (3d) 161 (Ont. H.Ct.J.); *Coast Capital v. 482451 B.C. Ltd. et. al.*, 2004 BCSC 40; *Guardian Trust and Executors Company of New Zealand, Limited v. New Zealand (Public Trustee)*, [1942] A.C. 115 (P.C.); *AON Pension Trustees Limited v. MCP Pension Trustees Limited*, [2010] EWCA Civ 377.

84 The Purchasing Bondholders have brought an application to adjourn the Receiver's application on the basis that to allow it would in effect, pre-judge their *REDMA* Trust claim, which in turn would cause numerous Purchasing Bondholders to be foreclosed of their investments and in some cases, their homes and the entirety of their retirement savings. They argue that the April 30 deadline is an arbitrary one created by Buhler, Metro-Can, and Rev in circumstances where they previously bargained for the ordering of priorities, knowing of the application of *REDMA* to the transaction between Bison, the Purchasing Bondholders, and the Construction Lenders. The deadline, they submit, is entirely within the power of Buhler and Rev to extend, and "represents an arbitrary attempt by the Applicant Lenders to impose urgency where there is none."

85 The Purchasing Bondholders also seek, by way of a further application, to have their *REDMA* Trust claim as against Bison (and the Applicant Lenders' claim of priority) determined summarily at this time, prior to the Rev Offer being considered for approval.

86 The Receiver, joined by the Applicant Lenders, submits that the Purchasing Bondholders have misconstrued the SISP Order and the context in which it was made, and that in essence, the Purchasing Bondholders' position is tantamount to a collateral attack on the SISP Order. The Receiver says that its authority is derived from that order and that it has followed the terms of it throughout.

87 The Receiver also argues that the Purchasing Bondholders' objection to its authority to sell was first advanced on March 16, 2016, which is late in the day, and after the Receiver has incurred substantial fees (and associated legal expense). The Purchasing Bondholders, they argue, did not appeal the SISP Order (which was issued following an application brought by the Receiver with notice to the Purchasing Bondholders), nor seek to have it varied or set aside. There is nothing new that has occurred in the insolvency since the SISP Order was granted on October 16, 2015. For these reasons, the Receiver submits that the Purchasing Bondholders should not be permitted to advance the objection at this stage in the proceeding.

The Receiver's Authority Arising from the Receivership and SISP Orders

88 Having summarized the parties' competing positions, I will now turn to my determination of the Purchasing Bondholders' objection to jurisdiction.

89 I will start by stating that the model vesting order expressly contemplates vesting title with a new purchaser free and clear of all security interests, whether contractual or statutory, or trusts or deemed trusts (such as the *REDMA* Trust claim):

> Upon delivery by the Receiver to the Purchaser of a certificate in substantially in the form attached as Schedule "B" hereto (the "Receiver's Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement [and listed on Schedule "C" hereto] shall vest absolutely in the Purchaser in fee simple, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims")...
>
> [Emphasis added]

90 Therefore the Rev Offer is not, on its face, offside the model order.

91 In addition, clause 77 of the SISP Order specifically contemplates the Receiver having authority to impose additional terms and conditions on the SISP, such that it may "otherwise seek to modify" the SISP "at any time in order to maximize the results obtained."

92 Therefore, the issue is whether there were any conditions attached to the SISP Order when it was made.

93 I am satisfied that when the parties attended before Brown J., submissions were made concerning the parties' intention to resolve the Purchasing Bondholders' claims through either a fast-tracked hybrid trial process or summarily, before any court approval of any proposed sale of Bison's assets was sought. That context is not alluded to or expressed in the SISP Order itself and is only found in the transcript of the proceedings and in communications between counsel where they discussed the means by which the Purchasing Bondholders' claims and their claim against Faskens could be determined at the same time on a fast-track basis. At the time the SISP order was made, the Purchasing Bondholders had commenced their action against Faskens and notified the Receiver and the Applicant Lenders that a constructive trust claim would be made. They had not, however, pleaded or particularized their claim. While I find it clear that the Purchasing Bondholders were of the view, expressed through their counsel, that their claims must be determined ahead of any sale approval application, it is not clear to me on the evidence on this application that the parties were *ad idem* or that Brown J. made the SISP Order with that condition in mind.

94 In all, the Purchasing Bondholders have not proven on this application that the sale of Bison's assets per the SSIP Order was predicated on prior determination of the Purchasing Bondholders' claims. The SISP Order and Receivership Order are clear on their face and provide jurisdiction to the Receiver to market and sell Bison's assets in a manner that will vest title of the Property to a potential purchaser so long as court approval is obtained.

95 In my respectful opinion, the cases cited by the Purchasing Bondholders (e.g., *1565397 Ontario Inc. (Re)*, [2009] O.J. No. 2596 (S.C.J.)) in support of prohibiting the Receiver from broadening its jurisdiction subsequent to the initial receivership order on an ancillary basis to deal with proprietary claims, are inapplicable because the orders granted in this case provide jurisdiction on their face. This is not a situation where I need to engage in a consideration of ancillary powers granted to this Court per s. 243 of the *BIA* or through the Court's inherent jurisdiction, nor do I need to consider the authorities cited by some of the parties touching on those issues (such as *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.); *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323; *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABQB 236, aff'd 2006 ABCA 293; *Clarkson Co. v. Credit Foncier Franco Canadian* (1984), 55 C.B.R. (N.S.) 206 (Sask. Q.B.), aff'd (1985), 57 C.B.R. (N.S.) 283 (Sask. C.A.)).

96 Moreover, as a result of my determination (which is set out in a subsequent section) that the entire amount of the Purchasing Bondholders' *REDMA* Trust claim should be placed into trust from the sale proceeds, the Purchasing Bondholders' potential proprietary claim to an interest in the Property is protected. If successful, their claims would attach to the funds held in trust because they are substitute trust property. It also means that one of

the Purchasing Bondholders' alternative arguments, that the Rev Offer constitutes an arrangement under the *Business Corporations Act*, S.B.C. 2002, c. 57, has no application to this case.

97 Lastly, the process envisioned by the Rev Offer that has sale proceeds placed into trust as substitute trust property accords with the approach taken by Mr. Justice Pitfield in *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146. As well, it meets the overall aim of the model order to preserve assets that are the subject of disputed claims when title is vested to a new purchaser.

The Purchasing Bondholders' Applications to Adjourn the Receiver's Application and for Summary Determination of their REDMA Claim

98 The parties to this proceeding sought to find a means by which to resolve the priority issue on a summary basis. They grappled with the prospect of seeking declaratory relief concerning the competing priority claims. The Applicant Lenders' ultimately brought their declaratory relief application, which was heard in March 2016. The Purchasing Bondholders defended the application in part on the basis that the funds they paid were impressed with a *REDMA* Trust. The Purchasing Bondholders sought a declaration to that effect. They also resisted the application on the basis that they had claims outstanding against Bison and the Applicant Lenders for knowing receipt of trust funds. Part way through the hearing the Purchasing Bondholders acknowledged that the application and their competing claims were not appropriate for summary determination at that time. As I said in the Reasons, the application and competing claims were unsuitable for summary determination at that time for a number of reasons (including insufficient evidence in which to find the facts necessary to determine the issues raised on the application and the involvement of many of the same issues in litigation brought by the Purchasing Bondholders in the Faskens Litigation).

99 In the Reasons, I set out my determination at para. 59 of the "likely significant duplicity of issues in the dispute between the Construction Lenders and the Purchasing Bondholders" in this proceeding and in the Faskens Litigation, and said:

> ... I am unable at this point to discern a basis on which I could decide the dispute between the parties on this application without deciding some of the issues to be determined in the Faskens Litigation. That is another reason why I have determined that the application is not appropriate for summary determination at this time.

100 Faskens has denied the existence of a *REDMA* Trust as well as certain facts that the Purchasing Bondholders will have to prove in order to succeed in the Faskens Litigation and in this proceeding. I agree with the Applicant Lenders' submission that it is "contrary to the interests of justice to adjudicate factual claims against a non-party that will significantly impact extant proceedings against that party", a principal upheld in *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918 at paras. 13 and 28.

101 Nothing further has taken place in this proceeding (and as far as I am aware, in the Faskens Litigation) as of this date that provides any greater clarity to inform a summary determination of the claims of the Purchasing Bondholders. They are not suitable for summary determination at this time.

102 Thus, whatever may have been in the parties' minds when the SISP Order was made was overtaken by subsequent events. It is not possible to determine the Purchasing Bondholders' *REDMA* Trust claim on a summary basis at this time. Nothing has changed to affect my view since the Applicant Lenders' application was dismissed. The *REDMA* Trust claim remains unsuitable for summary determination at this stage of the proceeding for all of the reasons set out in the Reasons.

Opposition from the Occupants of Three of the Residences

103 I will now turn to the opposition of the occupants of three of the Residences to the Receiver's jurisdiction to sell their units. I will refer to them as the "Occupants" when I refer to them collectively.

104 The Occupants' position is that the Receiver lacks jurisdiction to vest away their alleged proprietary interest in their units until what they characterize as their proprietary trust claims are determined.

105 The Occupants have been in occupancy of their Residences for over two and one-half years. They maintain that they paid 100% of the purchase price of their units (coincidental with their bond subscriptions) and that the money should have been held in trust by Faskens pending completion, and then paid over in exchange for legal title. Instead, the funds were disbursed to Bison who paid off pre-existing debt and used some of the funds to pay Metro-Can's accounts as general contractor. Consequently, there was no money at the outside date set for completion in the purchase agreements to be used by Bison to discharge the mortgages and to allow Bison to persuade the Construction Lenders (who presumably would have received the benefit of some or all of those funds) to agree to transfer title to the Occupants. Bison then granted the Occupants early occupancy of their respective Residences while it sought to refinance the first mortgage so that partial discharges could be obtained and title could be transferred. The receivership then intervened at the instance of the Applicant Lenders.

106 Some of the Occupants also claim to have carried out improvements to their Residences with Bison's agreement, in spite of a prohibition contained in the Early Occupancy Agreements. One of the Occupants, Ms. Barbara Asser, lives in her Residence as her home on a full time basis. Occupants of the other two Residences say that they plan to use them in their retirement. One Residence was custom-designed to accommodate an Occupant's arthritis.

107 The circumstances of Ms. Barbara Asser are particularly distressing. She is a retired accountant who is 65 years old, and is by no means a sophisticated consumer. In her evidence, she says that she wanted to purchase a Residence at the outset but was told by Bison that she had to subscribe to bonds in order to do so. She and her husband used all of their assets (i.e., savings from the sale of an investment property and from their home) and also borrowed money in order to purchase a Residence in the amount of $1,385,000. Her marriage has fallen apart, she says, because of the stress and uncertainty caused by the Bison insolvency, the potential loss of the entirety of her assets, and the prospect of having to move out of her home. Ms. Asser appears to have been able to access funds in January 2016 in order to make an offer to purchase her Residence, without prejudice to her right to pursue her *REDMA* Trust claim, at 30% of what she understood to be its market value at that time, to take into account the effect of the insolvency on its value. Ms. Asser's offer was rejected by Rev and in turn, the Receiver. Rev would not agree to sell the Residences individually and the price was unacceptable because it was viewed to be below market value. She now has to return to work in order to try to raise funds to obtain a new home.

108 The Occupants of the two other Residences also wish to purchase their units for fair market value. They also made offers in January 2016 to purchase them with new money (offering to pay approximately 30% less than what they believed was fair market value, with the discount also being ascribed to the insolvency). Their offers were rejected as well and for the same reasons.

109 In addition to what the Purchasing Bondholders complain was an unfair advantage taken by three of the Applicant Lenders to elevate bond investment debt into secured debt, the Occupants specifically complain of Rev's ability to force them to vacate their Residences in circumstances where they allege that Rev was, through its involvement with the bond transaction with all of the bondholders, able to convert (or "roll-up") its unsecured position as a non-purchasing bondholder of some $7 million (plus accruing interest) and have it secured as part of its mortgage that was registered against the Property. In addition to their *REDMA* Trust claim, the Occupants complain of Rev's ability to claim that the value of its prior unsecured bond investment should stand in priority to their interest (because of the mortgage and the Subordination Agreement) and then stand in the way of their rights under their purchase agreements to take title to their Residences, particularly when Rev did not stand in the way of other purchasers, including a purchaser who had purchased bonds and then applied the investment proceeds towards the purchase price, to obtain title.

110 I will start by stating that I am not able to determine the merits of the Purchasing Bondholders' allegations concerning the roll-up of unsecured debt taken by the Applicant Lenders on this application.

111 Turning to the specific allegation concerning Rev, it denied the allegation during the hearing, and claimed that documents obtained from Bison, which appear on their face to show the validity of the Occupants' submission, were not admissible to prove the assertion because the documents have not been authenticated. In response, the Occupants point to the order of Madam Justice Fitzpatrick, issued in this proceeding, that appointed the deponent, Mr. Craig Munro, whose affidavit the document is attached to as an exhibit, to investigate facts within Bison's possession.

112 I was also not to determine the admissibility issue. I will say, however, that if the assertion is true, it raises questions and concerns about Rev's conduct in opposing the transfer of title to the Occupants.

113 I was advised by the Receiver that selling individual units at this juncture would require a new prospectus to be prepared and issued per *REDMA*, which would drive up costs in this receivership. That is one of the reasons why the Receiver chose not to market the Suites and Residences on an individual basis. I was advised that a developer-to-developer sale in a single transaction, as the Rev Offer contemplates, is exempt from the disclosure statement requirements under *REDMA*. Once the Hotel and Property are sold, the new owner who chooses to sell units will have to prepare a new but singular disclosure statement or prospectus.

114 I will also observe that the Receiver was authorized by the SISP Order to market the Hotel and Residences *en banc* and in my opinion, cannot be criticized or faulted for following the terms of the order, especially in the absence of any application to vary it.

115 There is also nothing unique about the requirement for vacant possession in the Rev Offer. Rev, as other bidders did, insisted on vacant possession (except for those who took title prior to the receivership) in order to reconstitute the Hotel.

116 The difficulty is that the Occupants will, if they do not sign the new early occupancy agreements proposed by Metro-Can and Rev, be forced to vacate their Residences in circumstances where they could have, but did not, seek rescission or specific performance when title to their units did not transfer to them by the outside completion dates contained in their respective offers to purchase.

117 For reasons that have not been explained in the evidence, the Occupants chose to enter into the Early Occupancy Agreements that do not provide them with any greater rights, including *in rem* rights, than they already have. Nor do the Early Occupancy Agreements toll their claims, so that it can be argued, as the Applicant Lenders do, that their claims for rescission and specific performance became barred as of November 30, 2015 per a claims process order issued by Brown J. on October 16, 2015 ("Claims Process Order").

118 The Claims Process Order specifically carves out from the claims bar the rights of the Purchasing Bondholders to pursue their *REDMA* Trust claim, but apart from that, and on its face, nothing more:

> 31. Notwithstanding any other provision of this Order, any Claim asserting that property legally owned by the Debtor [Bison] is held on behalf of and beneficially owned by the holder of the Claim, in priority to any Secured Claim, shall be adjudicated by this Court outside the provisions of this Order, under a procedure to be determined by a subsequent Order of this Court.

119 The Occupants also stand united in their pleadings with the other Purchasing Bondholders and have not set themselves apart with a plea of specific performance. There is no pleading to that effect, nor any plea of breach of contract (from which the remedy of specific performance could arise), and their counsel candidly conceded that a claim for specific performance may never be made. Thus, the Purchasing Bondholders' reliance on *Fraser Valley Credit Union v. Brown*, 1991 CarswellBC 645 (S.C.) as a means to preserve a proprietary claim through a contingent right to specific performance is questionable at this juncture.

120 At the same time, and quite apart from the *REDMA* Trust claim, the Occupants' claim regarding Rev's conduct in standing in the way of title being transferred to them after having elevated its unsecured debt and their claims against Bison and the Applicant Lenders for knowing receipt of trust funds are factors that must be considered on the Receiver's application seeking court approval of the Rev Offer. So must the Applicant Lenders' delay of some 10 months between the time the Receivership Order was made and when they sought to market the Suites and Residences per the SISP Order, all while the Occupants were in possession of their Residences in accordance with the Early Occupancy Agreements.

121 I do not agree with the submission that there is no difference between the position of the Occupants and the other Purchasing Bondholders who entered into early Occupancy Agreements. The latter's agreements concerned Suites, with limited rights of use, and it made commercial sense for them to place their units into the Hotel pool as much as possible to increase the Hotel's profitability and to enhance the prospect that funds would be obtained to allow them to obtain title. The Occupants purchased their units for personal use, and in Ms. Asser's case, to be her home.

122 I am mindful of the Occupants' submission that they have a proprietary interest in their Residences such that Bison, and in turn, the Receiver, hold their Residences in trust for them. The difficulty is that their claims are not capable of summary determination at this time. Prolonging the receivership any further is not to their advantage. If the Rev Offer is not approved with the proposed new early occupancy agreement, the Occupants will face a claim from the Receiver, while their *REDMA* Trust claim is being determined, for occupational rent. In addition, until their claims are determined, they would continue to occupy what can only be regarded as temporary accommodation. Their ability to seek specific performance and the outcome of the *REDMA* Trust claim are uncertain.

123 Except for some amendments, which I will discuss in the ensuing paragraphs, I agree with the Receiver that the proposed new occupancy agreement with the ROFR provides an "elegant" solution that balances the interests and risks (pro and con), of the Applicant Lenders and the Occupants. It provides greater protection than is presently afforded to the Occupants by the Early Occupancy Agreements and allows them to remain in their Residences, rent free, with the option to purchase their units at market value, failing which they have just over 60 days in which to vacate, following the sale to a third party purchaser.

124 The Occupants submit - in the alternative to their primary submission that the Receiver's application should be adjourned to allow their *REDMA* Trust claim to be determined summarily -- that if I am inclined to approve the Rev Offer with the new early occupancy agreements, they will not oppose it so long as:

(a) the Residences are not marketed for sale for at least 12 months;

(b) they will have three business days in which to respond to an ROFR; and

(c) offers to which they must respond must come from *bona fide* independent third parties not related to the Applicant Lenders.

125 The first condition is the point of disagreement. The Applicant Lenders are prepared to agree to the second and third conditions, and to the first but only in respect of Ms. Asser. Their position is that the other Occupants are high wealth individuals who stand apart from Ms. Asser and do not occupy their Residences as their homes. Further, they have not provided any evidence, as Ms. Asser has done, to explain their prejudice.

126 After considering the competing claims between the Applicant Lenders and Occupants, their potential rights, the potential outcomes to those claims, and the singular evidence of Ms. Asser, I have determined that Ms. Asser stands in a different position than the other Occupants. Accordingly, I am of the opinion that Ms. Asser should be allowed an opportunity beyond the others in which to repurchase her Residence.

127 The purpose of the prohibition is to allow Ms. Asser the opportunity to obtain her funds, if she is successful in

her *REDMA* Trust claim, to purchase her Residence. She deposed that it is the only means in which she will be able to pay what will likely be an increased selling price.

128 Whether the determination of the *REDMA* Trust claim advanced in this proceeding and the Faskens Litigation can be determined in that time frame is uncertain. Ms. Asser has, through her counsel, made it clear that she intends to press for a fast track trial of the claims in both actions, whether by a hybrid trial or a trial of discrete issue. In any event, the Applicant Lenders have now agreed to the conditions that Ms. Asser sought in her alternate submission.

129 I have determined therefore, that the form of the proposed new early occupancy agreement found at sub-schedule "J" to Schedule "B" of the Receiver's third further amended notice of application dated April 21, 2016, is appropriate so long as it is amended to conform with the conditions set out in these reasons, including that: (a) Ms. Asser's Residence will not be marketed or offered for sale for at least 12 months from the date of these reasons; (b) the Occupants shall have three business days in which to respond to an ROFR; (c) the offers to which they must respond must come from *bona fide* independent third parties not related to the Applicant Lenders and the Purchasers; and (d) the vesting order shall exclude from the Occupants' obligations any requirement that they return their Residences to their original condition.

130 As noted, the Applicant Lenders proposed various possible means in which to fast-track the *REDMA* Trust claim in this proceeding and in the Faskens Litigation. The Purchasing Bondholders made their own proposal to the Applicant Lenders and to Faskens in October 2015. My preference is not to issue any orders or directions at this time, but instead to encourage the parties to this proceeding and the Faskens litigation to work up a process to do that, failing which any of the parties may request a case management conference before me, as I was appointed by the Chief Justice to case manage this proceeding.

The Amount of the Sale Proceeds to be Placed In Trust

131 The Applicant Lenders challenged some $4 million of the *REDMA* Trust claim, arguing that: (a) per *Graphicshoppe Ltd. (Re)* (2005), 260 D.L.R. (4th) 713 (Ont. C.A.), some of the funds had dissipated and could not be traced; (b) some of the Purchasing Bondholders could not prove a *REDMA* Trust claim because they decided to purchase units well after they subscribed for bonds; and (c) the Purchasing Bondholders could not prove damages because if their claim was successful against Faskens, they would be fully indemnified.

132 Thus, the next question to be determined, before I come to whether the Rev Offer itself is commercially reasonable, as the Receiver commended it to be, is to determine whether I should, assuming I approve the offer, determine the merits of the submissions of Metro-Can and Rev that the amount placed in trust as substitute trust property be something less than the full amount of the claim. I have determined that I should not.

133 I agree with the Purchasing Bondholders that it is not possible to do so at this juncture because the position of the Applicant Lenders is not capable of summary determination at this time.

134 I also am of the opinion that it would be procedurally unfair to attempt to do so, especially when it is not open to the Purchasing Bondholders at this juncture to prove their claims on a summary basis. To do otherwise, would involve prejudging part of the *REDMA* Trust claim in circumstances where they have been denied the opportunity to present their case. I also agree with their submissions that if I were to accept the submissions of Metro-Can and Rev, I would, because of the nature of the attack, essentially dismiss most if not all of the claims of three of the Purchasing Bondholders on what I would characterize as a significantly truncated basis that does not afford them the opportunity to advance all of their arguments and evidence (e.g., that equity presumes Bison to have dissipated its own funds in advance of the Purchasing Bondholders, per *Re Hallett's Estate* (1880), 13 Ch. D. 696; *Re Oatway*, [1903] 2 Ch. 356).

135 For that reason, I have determined that the full amount of the *REDMA* Trust claim should be placed in trust

from the sale of the Hotel and Property.

The Merits of the Rev Offer

136 In considering whether to approve a proposed sale, the court must consider, per *Royal Bank of Canada v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 at para. 16 (Ont. C.A.) and *Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058 at para. 31:

> (a) whether the Receiver made sufficient effort to obtain the best price and has not acted improvidently;
>
> (b) the interests of all parties, including the debtor, and of the proposed purchaser;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been any unfairness in the process.

137 I have previously set out the positions of the Applicant Lenders and Purchasing Bondholders concerning the Rev Offer. I will now turn to the submissions and recommendation of the Receiver.

138 The Receiver considered all of the offers received from the qualified bidders, including bids submitted from individual occupants of the Residences to purchase their units. In assessing the various Rev offers, the Receiver considered that:

> (a) the total consideration provides greater recovery than the other offers in light of the assumption of certain debts;
>
> (b) the purchase price is fair and reasonable based on the market response and the offers received; and
>
> (c) the support of the Construction Lenders for the Rev Offer and the expected opposition of Rev and Metro-Can to other bids.

139 It is the Receiver's view that the Rev Offer as currently framed before the Court represents the greatest overall recovery for the stakeholders of the OBBH Group, and consequently:

> The Receiver ... recommends that this Honourable Court approve the Sale Agreement [amended Rev Offer] and the contemplated transaction, provided the Court is satisfied with its conditions, including the distribution to Buhler and the covenant in favour of the Bondholder Purchasers.

140 I agree. The Rev Offer, coupled with the protections afforded to the Purchasing Bondholders contained within it, together with proceeds being placed in trust, represents the greatest overall value for stakeholders and appropriately balances the interests of competing creditors. In addition, the fate of the Hotel and of its employees will be more certain.

141 The urgency to the Receiver's application arises not from what appears to be Buhler's insistence on court approval being obtained by April 30, 2016, regardless of the proximity of the hearing dates in this complex insolvency to that deadline. Rather, the urgency to its application is the result of the need to obtain certainty for the Hotel, its operation, and its employees, and to secure the best means to stem the rise of overall debt as soon as practicable.

142 I am satisfied that the Rev Offer is not improvident from a commercial perspective. Based on the evidence before me, I find that there should be sufficient funds to operate the Hotel, realize a profit (albeit initially small), satisfy the debt obligation to Timbercreek (which is interest only), and to pay down principal on that debt over time. As well, JV Driver Group, the parent of Metro-Can and Rev, has committed to provide additional financial support if

necessary, particularly during the slower winter season, to sustain the new Hotel while its operations are being reorganized and the Hotel is marketed, all in order to assist the efforts of its related entities to realize recovery of some or all of the outstanding debt owed by Bison.

143 The Rev Offer also allows Metro-Can and Rev the opportunity to recover debt through the sale of Suites and Residences in an escalating market.

144 Thus, whether there is any value to the Rev debt, which the Purchasing Bondholders contend there is not, will depend on the outcome of the sales of Suites and Residences and potential long term profitability of the Hotel. In view of the protection afforded to the Purchasing Bondholders from the full value of their *REDMA* Trust claim being posted in trust, the ultimate recovery made by Rev is now of no consequence to them.

145 One of the orders sought by the Purchasing Bondholders was to compel the Receiver to resume negotiations with the next highest bidder whose offer was, in terms of cash, close if not on par with the cash component of the Rev Offer. That offer, however, is less attractive than the Rev Offer in my opinion, because it calls for the Purchasing Bondholders to give up vacant possession and does not afford any opportunity for Metro-Can and Rev to recover their debt.

146 Accordingly, I approve of the Rev Offer set out in Schedule "B" to the Receiver's third further amended notice of application so long as it is amended to accord with these reasons.

147 It is also appropriate for the Receiver to terminate the Early Occupancy Agreements pertaining to the Suites. As for the Residences, they may be terminated when new occupancy agreements with an ROFR are entered into. If not, then the Early Occupancy Agreements may be terminated in accordance with their provisions.

Undertaking as to Damages

148 Metro-Can and Rev seek an order requiring the Purchasing Bondholders to provide an undertaking as to damages. The undertaking was first sought in the event that the Receiver's application for court approval of the Rev Offer was adjourned. Their application was subsequently augmented to seek an undertaking in the event that funds from the sale proceeds were posted in trust pending the outcome of the Purchasing Bondholders' *REDMA* Trust claim. The notice of application was delivered shortly before the start of the hearing of the Receiver's application for court approval of the Rev Offer. The request for an undertaking is not tied to court approval of the Rev Offer and the proposed new occupancy agreements and ROFR.

149 In view of my decision to approve the Rev Offer and to dismiss the Purchasing Bondholders' application to adjourn the Receiver's application, it is only the second aspect of the order for an undertaking that must be dealt with.

150 In that respect, Metro-Can and Rev argue that an undertaking is required "as a matter of course" where a court orders an injunction restraining the disposition of property that is the subject matter of the litigation. They want the Purchasing Bondholders to undertake to pay damages that are the natural consequence of the injunction. Metro-Can and Rev submit that they should be protected because funds are being tied up in advance of the determination of substantive rights.

151 The Receiver does not take a position on this particular application.

152 In my respectful opinion, the authorities cited by Metro-Can and Rev are inapplicable to the facts of this case: e.g., *Kashani v. Dhalla*, 2002 BCSC 1353; *Village Gate Resorts Ltd. v. Moore et. al.*, 1999 BCCA 626; *Peter Kiewit Sons Co. Ltd. v. North Pacific Roadbuilders Ltd.*, 2005 BCSC 1586, leave to appeal ref'd 2006 BCCA 439; *Puratone Corp. (Re)*, 2013 MBQB 171, leave to appeal allowed 2014 MBCA 13.

153 The two cases on which they primarily relied are readily distinguished. *Puratone* was decided in a proceeding

brought pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 that involved a debtor-in-possession statute, where the debtor continues to hold its own property, as opposed to the Receiver who holds Bison's property as a fiduciary for the stakeholders and is not obliged to deal with it in circumstances where it is on notice of competing claims to ownership of that property: *Guardian Trust* at 127-128. *Kashani* involved a matrimonial dispute where one party sought to enjoin distribution of funds held by the other, which is not akin or analogous to the facts of this case.

154 The determination of the competing claims without an undertaking as to damages is also contemplated by *CareVest*, a case that I find to be compelling on its facts and to the circumstances of this case. In the face of a dispute over priority, where beneficial ownership was in dispute and not yet proven, Pitfield J. held, at para. 12, that he was only prepared to authorize the sale with the disputed funds being held pending determination of priority and entitlement.

155 The Purchasing Bondholders are not seeking an injunction nor are they seeking to disturb the *status quo*. I agree with the Purchasing Bondholders that to the contrary, at that point in time when Metro-Can and Rev were joining with the Receiver seeking approval of a Rev offer that contained a covenant or some form of security for the *REDMA* Trust claim, they were seeking to dispose of the Property before claims to its ownership had been determined.

156 Even though the Applicant Lenders dispute the claims of the Purchasing Bondholders, in the Reasons, at para. 50, I noted that the Purchasing Bondholders' submissions identified *prima facie* evidence that could support their defence of equitable fraud against Metro-Can and Rev sufficient to displace s. 29(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250.

157 At the present time, the *status quo* in the present case is that there are competing claims to Bison's property that must be determined.

158 It does not advance the position of Metro-Can and Rev to argue reliance on the Receiver's opinion that they had valid security over Bison's assets because the Receiver has made it clear during the hearing that its opinion was rendered before the *REDMA* Trust claim was advanced and its particulars were known.

159 No one party has proven their entitlement to the funds that will be placed into trust. There is no one party seeking to disrupt the *status quo* and no basis, therefore, on which to order an undertaking.

160 The application for an undertaking is dismissed.

Release and Approval of the Receiver's Fees

161 Normally, a receiver is released upon discharge. In this case, however, the Receiver seeks approval of its activities to date and to be released when (and if) the Rev Offer is approved because effectively there will be nothing left in the estate for the Receiver to deal with. It will have realized all of the OBBH Group's assets and will forthwith distribute the cash proceeds.

162 The Receiver submits that it is appropriate and necessary for an order to be issued releasing it for several reasons:

(a) Relying on *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Ltd.*, [2009] O.J. No. 4265 at paras. 8 and 9, it submits that it is a court appointed officer and instrument of the Court. For that reason, and subject to certain exceptions (such as claims involving allegations of gross negligence and willful misconduct), the Receiver typically receives a first charge over the assets under receivership to secure its fees and disbursements and any liability it may incur.

(b) Although the Purchasing Bondholders have objected to the Rev Offer for various reasons, there is no evidence tendered or any allegation of improper or negligent conduct on the part of the Receiver.

(c) The Receiver's activities in carrying out the SISP and concluding the transaction were done in accordance with the SISP Orders.

(d) The Receiver's conduct for which it is seeking to be released flows from the unique terms of the Rev Offer.

(e) The Receiver's position, if the Rev Offer is approved, is akin to the position it would find itself in at the end of an insolvency proceeding.

(f) In the absence of a release, a receiver in the position of the Receiver would seek a holdback from the sale proceeds, which is not available on the terms of the Rev Offer and the agreement between Rev and Buhler.

(g) The scope of the proposed release is limited to exclude gross negligence and willful misconduct and to specific activities approved by this Court.

(h) A release will ensure that the Receiver is not embroiled as an active participant or defendant in the ongoing claims advanced by the Purchasing Bondholders.

(i) Even though a newly constituted Hotel operated by the new owner will likely hire some of the existing employees currently employed by the Hotel, the Receiver will not face claims from those employees once their employment is terminated (assuming the Rev Offer is approved).

163 The Receiver has delivered notice of its application seeking court approval of its activities and for a court ordered release, to all interested parties, including Hotel employees and suppliers.

164 The only persons objecting to the release are the Purchasing Bondholders, and ultimately, only on the basis that if the full amount of their *REDMA* Trust claim was not put up in trust, then the Receiver should not be released because depending on the outcome of their claim, the Receiver could be liable for breach of fiduciary duty.

165 Given my decision concerning the amount to be posted in trust, there is no basis, as I see it, not to grant the release sought by the Receiver in respect of its activities to date because I am satisfied that it has followed the orders of this Court and has fulfilled its obligation under the *BIA* to act honestly and in good faith, and to deal with the property of Bison in a commercially reasonable manner.

166 Since I am not discharging the Receiver at this point for reasons explained below, it is not appropriate to grant a release to the Receiver in respect of its future activities. The release it seeks should be modified to reflect its activities to date.

167 Given the Rev Offer I have approved, the Receiver cannot be said to be acting in bad faith in seeking a vesting order that terminates the Early Occupancy Agreements: *Royal Bank of Canada v. Penex Metropolis Ltd.*, [2009] O.J. No. 3645 at paras. 43-44; *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816.

168 I will therefore grant the release sought that is found in the Receiver's third further amended notice of application dated April 21, 2016 and approve of its activities to date. I have also reviewed their accounts and the evidence in respect of them, and am satisfied that the evidence meets the requirements set out in *Redcorp Ventures Ltd. (Re)*, 2016 BCSC 188.

169 In considering whether to approve the Receivers' fees and those of its counsel, courts must consider whether they are reasonable in light of various factors, including the:

(a) nature, extent, and value of the assets;

(b) complications and difficulties encountered;

(c) time spent;

(d) knowledge, experience, and skill of the professionals involved;

(e) diligence and thoroughness displayed by the Receiver;

(f) degree of responsibility assumed;

(g) results of the receiver's efforts; and

(h) the cost of comparable services.

See: HSBC Bank Canada v. Maple Leaf Loading Ltd., 2014 BCSC 2245 at para. 11.

170 I agree with the Receiver's submission that its fees and those of its counsel are reasonable in the circumstances of this insolvency. I also agree with the Receiver's characterization of its role and the services it provided as set out in its written submissions:

99. ...These proceedings involve a single, but substantial asset. The Receiver has been responsible for overseeing the management of the Hotel and ensuring its smooth operations in order to maximize cash flow. The proceedings are complex, involving several creditors and unusual debt structures, resulting in contentious disputes. The Receiver has participated in those disputes as little as possible, but many of the disputes and issues raised impact these proceedings, necessitating the Receiver's involvement.

100. During the relevant time period, the Receiver's activities have included:

a. conducting the sales process, including numerous communications with potential bidders and other stakeholders and assessing the offers received;

b. negotiating the Sale Agreement;

c. assessing the secured claims submitted pursuant to the Claims Process Order;

d. overseeing the operations of the Hotel; and

e. various and numerous communications with stakeholders, including creditors and suppliers.

171 I find that the accounts are appropriate and reasonable in the circumstances, and should be paid.

172 I am, however, of the opinion that the Receiver should not be discharged at this time. I am persuaded by the Purchasing Bondholders' submissions that in order to determine their *REDMA* Trust claim they will require documents from Bison, which they will need to obtain through the Receiver. I am also of the view that the Receiver should hold the trust funds and attempt to invest them appropriately, with the consent of the Applicant Lenders and the Purchasing Bondholders, to realize greater returns than those that could be realized if the law firm representing Metro-Can and Rev placed them in the trust accounts available to them. I am confident that the parties will strive to limit the Receiver's ongoing involvement in this case and in the Faskens Litigation. Should the Receiver require a further charge or directions concerning payments of its ongoing accounts, I grant it liberty to apply.

Summary

173 The Rev Offer contained in the form set out in Schedule "B" to the Receiver's third further amended notice of application dated April 21, 2016, is approved so long as it conforms with these reasons, including the following amendments and conditions:

(a) On closing, the amount of $18.121 million shall be retained and held in trust with the Receiver pending the determination of the *REDMA* Trust claim.

(b) Early occupancy agreements containing an ROFR, in the form set out in sub-schedule "J" to Schedule "B" of the Receiver's third further amended notice of application dated April 21, 2016, amended to conform with these reasons, shall, within five days from the release of these reasons, be offered to the Occupants of the three Residences who are currently parties to Early Occupancy Agreements with Bison. Those amendments include:

(i) Following delivery of an ROFR pertaining to their Residence, the recipient Occupant(s) shall have three business days in which to exercise the ROFR.

(ii) Any offer presented to an Occupant or Occupants, as the case may be, pursuant to the ROFR shall be from a *bona fide* third party purchaser independent of the Applicant Lenders and the Purchasers.

(iii) The Residence occupied by Ms. Barbara Asser shall not be marketed and offered for sale for at least 12 months from April 29, 2016, so long as she enters into an early occupancy agreement.

(iv) The other two Residences shall be marketed for sale individually and not *en bloc*, at the absolute discretion of 1067.

(c) Each Occupant or Occupants, as the case may be, shall have 10 days from the date of receipt of their respective proposed new early occupancy agreements in which to decide whether to enter into it. If accepted, their Early Occupancy Agreement shall terminate. If an Occupant or Occupants choose not to enter into a new early occupancy agreement, then their Early Occupancy Agreement will terminate in accordance with its provisions.

(d) The vesting order shall exclude from the Occupants' obligations any requirement to return their Residences to their original condition.

174 The applications of the Purchasing Bondholders for an order adjourning the Receiver's application for approval of the Rev Offer and for a summary determination of their *REDMA* Trust claim are dismissed. The Purchasing Bondholders have liberty to apply for summary determination at a later date.

175 The application of Metro-Can and Rev for an order requiring the Purchasing Bondholders to provide an undertaking as to damages is dismissed.

176 The Receiver is not discharged. It will hold the trust funds and invest them appropriately, with the consent of the parties, and failing consent, by court order, to obtain, if possible, a rate of return higher than those available to a law firm's trust accounts. The Receiver may also be required to facilitate production of documents from Bison. Hopefully, its activities and involvement in the ongoing dispute between the Purchasing Bondholders, Bison, the Applicant Lenders, and Faskens, will be kept to a minimum. The Receiver has liberty to apply for directions in respect of a further charge to cover its expenses if necessary.

177 The activities and fees of the Receiver as well as the fees of its counsel presented for review in the Receiver's application are approved.

178 The limited release sought by the Receiver is also approved, but only in respect of its activities to date. Any proposed release of its future activities is a matter that can be dealt with at a later date.

179 The parties may seek to schedule a case planning conference before me in order to determine an appropriate means to determine their *REDMA* Trust claim in this proceeding and in the Faskens Litigation.

P.W. WALKER J.

Kotler v. Bayshore Investments Ltd., [1982] B.C.J. No. 2298

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Seaton, Carrothers and Lambert JJ.A.

Oral judgment: March 31, 1982.

Vancouver Registry No. CA820299

Victoria Registry No. CA45/82

[1982] B.C.J. No. 2298 | 42 C.B.R. (N.S.) 127 | 14 A.C.W.S. (2d) 11

Between Alana Wendy Kotler and Kalla Cynthia Black, petitioners (appellants), and Bayshore Investments Ltd., Jeffrey Marshall Black, Mark Philip Lindsay Black and Rita Black, respondents (respondents)

(27 paras.)

Counsel

D.I. Knowles, appearing for the petitioners/appellants. R. Sewell, appearing for the respondents/respondents Jeffrey Marshall Black, Mark Philip Lindsay Black and Rita Black. M.H. Heller, appearing for the respondent/respondent Bayshore Investments Ltd.

The judgment of the Court was delivered by

CARROTHERS J.A. (orally)

1 This imbroglio involves a complex cast of characters which requires at the outset to be sorted out and identified.

2 In the eye of the corporate whirlwind he is one Morris Black, now deceased. I shall for brevity refer to individuals by their given names as most of them have or had the common surname of "Black". Accordingly I refer to Morris Black as "Morris".

3 Morris was married to the respondent Rita Morris and Rita had four children, the appellants Kalla and Alana and the respondents Jeff and Mark. These four children, Kalla, Alana, Jeff and Mark had issued to them at the instigation of their father Morris, for tax reasons, one quarter each of the Class A non-voting equity shares of the respondent Bayshore Investments Ltd. which I shall call "Bayshore", a British Columbia incorporation.

4 As I have indicated Morris is dead and Rita, his widow, has inherited from Morris all of the Bayshore voting shares. with such control Rita has maintained the appointment of herself and the respondent Jeff as sole officers and directors of Bayshore.

5 I now attempt to unravel the tangled web of companies related to Bayshore and in whose securities Bayshore had holdings and dealings.

6 First there is Key Trading Ltd., which I shall call "Key", a British Columbia incorporation, all of the voting shares and hence, control of which are owned by Rita and all of the non-voting common shares and preferred,shares of which are owned by Trimart Investments Ltd., which I shall call "Trimart": Rita and Jeff are officers and directors. Key owes Bayshore about two million dollars unsecured.

7 Trimart is wholly owned by Rita who is the sole officer and director of Trimart. Key owes Trimart several hundred thousand dollars secured by debentures. The question as to the validity of these debentures became an issue.

8 Fleet Trading Ltd., which I shall call "Fleet", also a British Columbia incorporation, is controlled by Rita directly by 508 ownership of it's voting shares and indirectly through Key which ow:is the other 508 of it's voting shares. One hundred percent of the common non-voting equity shares of Key are owned by Bayshore. Rita and Jeff are officers and directors of Fleet.

9 There are other trading companies such as West End Investments Ltd., which I will call "West End", of which Rita is the sole shareholder and officer and director.

10 There is Jeffmar Investments Limited, which I shall call "Jeffmar", of which Jeff and Mark are sole shareholders, officers and directors.

11 I now make brief reference to a criss-cross pattern of debts, guarantees and security holdings and dealings. West End and Jeffmar are members of a joint venture known as the Granite Group which allegedly owes Bayshore some $58,000.00.

12 Bayshore had an option to purchase shares in a Public Company known as Black John Mines Ltd., which Jeff is alleged to have exercised for his own benefit without payment to Bayshore.

13 Dankoe Mines Ltd., which I shall call "Dankoe", was indebted to Bayshore for approximately one million, nine hundred thousand dollars secured by Dankoe debentures, Rita is managing director of Dankoe. Bayshore and Morris owed Revenue Canada substantial income taxes and Bayshore guaranteed payment of the income tax arrears of Morris. The Dankoe debentures were pledged by Bayshore to Revenue Canada. These assigned debentures became due in January of this year and Revenue Canada demanded payment and also served third party notice on Dankoe.

14 This sets the stage for allegations of mismanagement, breach of fiduciary duties, improper use of insider information, improper guarantees, pledges and payments and misappropriation and wasting of assets. In October of 1981 Alana and Kalla brought action to look into these matters, to appoint a receiver and to wind up Bayshore. Immediately motion was made by Alana and Kalla for the appointment of a receiver manager of Bayshore pending trial.

15 On December 22nd, 1981 Chief Justice of the Supreme Court, sitting in Chambers, appointed Henfrey & Company Ltd. as receiver manager of all the property, rights, assets, businesses and undertakings of Bayshore to act until trial or further order and to report within thirty days the results of it's investigations and to make recommendations and to give conclusions on the merits of the various claims.

16 This order of the Chief Justice was appealed and the appeal today has been abandoned and dismissed as such. Mr. Justice Meredith had advice of this intended abandonment when a motion was heard by him on March 8th and 9th last brought by the respondents for the discharge of the receiver manager. Mr. Justice Meredith ordered

the discharge of the receiver manager and that is the order which is under appeal to us. The appeal has been limited to that particular issue or ground of appeal.

17 On March 26th, 1982 we are advised that Bayshore brought action in the Federal Court of Canada challenging the validity of Bayshore's guarantee of payment of Morris' income tax arrears.

18 I should go back and indicate that the receiver manager had completed an interim report which was filed in the Court Registry on January 22nd; 1982 and was accompanied by a motion,for an extension of time for the receiver manager's investigation and authority or Court directions to prosecute certain claims on behalf of Bayshore. That motion or, I think it was in the report itself, also made a request,that the receiver manager's costs be made a first charge on the assets of Bayshore. It had been a condition of the appointment of the receiver manager that the plaintiffs, the appellants here, give an undertaking to assume the burden of the costs of the receiver manager.

19 The respondents argue that the facts have materially altered as a result of the discharge of the receiver manager earlier this month. The Bayshore tax assessment had been substantially negotiated down and the payment, which I shall refer to in a minute, of the proceeds of the Dankoe debenture to Revenue Canada have resolved some of the problems. The problems with the Trimart debenture has also been reduced.

20 The principal objections which the respondents raise to the presence of the receiver manager as an independent watchdog investigator are threefold.

21 Firstly the costs which had reached some $30,000 by the time of the hearing before Mr. Justice Meredith were obviously going to be substantial. As I have mentioned the order of appointment required an undertaking that Alana and Kalla be responsible for the receiver manager's costs, but the respondents are fearful that the respondent Bayshore may ultimately have to bear these costs. No order has been made to this effect. This issue is an anticipatory concern and will probably have to be dealt with by the trial judge.

22 The second objection is that the receiver manager principally in January of this year, was obstructing tax settlement with Revenue Canada and precipitated collective and execution activity on the part of Revenue, Canada which put other assets of Bayshore in jeopardy at a time when their liquidation would be extremely disadvantageous. About one million dollars of the proceeds of the Dankoe debenture, which became due January 1st, 1982, has been paid to Revenue Canada presumably on account of the Bayshore and Morris tax arrears, but we do not know in what proportion. What we do know is that the pressure is off the other Bayshore assets. The issue of the impugned Bayshore guarantee of Morris' income tax arrears is now to be settled in the Federal Court action. I would conclude that, Revenue Canada having received this money, this objection to the instruction by the receiver manager is a dead issue.

23 The third objection to the presence of the receiver manager is that it will seriously prejudice the trial, but in particular will inhibit the conduct of the business of Bayshore and the other.Trading Companies and also the Public Companies in which Bayshore holds securities. Application could be made to limit any receivership to allow Jeff, who is the operating officer of these companies, to conduct the day to day operations of Bayshore or otherwise advise the receiver in connection therewith and thus take advantage of his skills as was suggested by the Chief Justice when making the original appointment.

24 In conclusion and in my view this is a matter of balancing the interests of the parties. The circumstances of this case weigh heavily in favour of the appellants; all the more so in the light of events since the discharging order. Further I am of the view that directions to the Court-appointed receiver in response to it's report and recommendations and objections from the respondents would have more appropriately dealt with the complaints of the respondents. I consider there was overriding error in discharging the receiver. Such overkill, in my view, works a substantial injustice and was clearly wrong. I would allow the appeal and reinstate the receiver manager.

25 I would add this admonition regarding the concern about the mounting costs of the receiver manager. The

original appointment placed this burden with the appellants. Mr. Justice Meredith rebuffed the request of the receiver manager that these costs become a first charge on Bayshore's assets. This, to my mind, is indication of the thinking of the Courts on this subject so far. If there is to be any change in the responsibility for these costs, there will be a better guide in the success or otherwise of the action. I would expect that the receiver manager will temper the wind to the thorn lamb. That issue is not before us and I make no further comment upon it. In allowing the appeal I would suggest that costs follow the event.

CARROTHERS J.A.

SEATON J.A.:— I agree.

LAMBERT J.A.:— I agree.

SEATON J.A.

26 The appeal is allowed with costs.

SEATON J.A.

27 A Notice of Appeal was given from the judgment of Chief Justice McEachern. That Notice of Appeal was given on behalf of Bayshore Investments Ltd., Jeffery Marshall Black, Mark Philip Lindsay Black and Rita Black. The present counsel for all of those persons and the company concede that that appeal, if it was properly launched, is now abandoned and it is dismissed as abandoned.

End of Document

1994 CarswellOnt 231
Ontario Court of Justice (General Division)

Levy-Russell Ltd. v. Tecmotiv Inc.

1994 CarswellOnt 231, [1994] O.J. No. 650, 13 B.L.R. (2d) 1, 46 A.C.W.S. (3d) 1386, 54 C.P.R. (3d) 161

LEVY-RUSSELL LIMITED and LEVY INDUSTRIES LIMITED v. TECMOTIV INC., KENNETH FOREHT, RONALD BRADSHAW, MORTON KRESTELL, TERRENCE GODSALL, SHIELDINGS INCORPORATED, CANADIAN IMPERIAL BANK OF COMMERCE and PEAT MARWICK LIMITED

D. Lane J.

Heard: November 2, 3, 5, 6, 12, 13, 16-20, 23-27, December 7-10, 14-18, 1992, January 22, 25-27, February 1-5, 8-12, March 1-5, 8-12, 15-18, 22, 23, April 5, 7, 8, 13-16, 19-23, 26-29, 1993
Judgment: April 5, 1994

Subject: Intellectual Property; Corporate and Commercial; Property; Torts; Civil Practice and Procedure

Headnote

Banking and Banks --- Tortious liability of banks — Negligence of bank — Miscellaneous negligent acts of banks

Conspiracy --- Nature and elements of tort — General

Corporations --- Directors and officers — Fiduciary duties — General

Receivers --- Actions by and against — Actions against receiver

Full disclosure of conflict of interest not reducing fiduciary duties.

Purchaser corporation and its guiding mind being jointly and severally liable to selling corporation when directors and officers of selling corporation conspire with guiding mind and breach their fiduciary duties.

No negligence on bank's part.

Duty of receiver to act in commercially reasonable manner.

L-R Ltd. was in the new and used parts business for heavy trucks and military vehicles. In 1983, the U.S. government suspended L-R Ltd. as a supplier due to L-R Ltd.'s violation of its embargo on military sales to Iran. After reinstatement for about one year, L-R Ltd. was again suspended as a U.S. military supplier for substituting used parts for new and for bribing inspectors.

In 1986, the defendants, F, B and K, all long-service executives of L-R Ltd., became directors. BH became trustee of the shares of L-R Ltd. held by its parent and BH assumed an ill-defined management role. S Inc. was introduced to L-R Ltd. through F and began to contemplate a purchase of L-R Ltd.'s assets. In September 1986, S Inc. offered $8 million for fixed assets, inventory, intangibles and certain real property, excluding the main Toronto location. BH negotiated with G, the vice-president of S Inc. F, B and K formed a close relationship with G, which resulted in an understanding that F, B and K would manage the business if bought by S Inc. BH knew that F, B and K expected to become managers of the purchaser and to have a minor equity interest but did not know that their interest would exceed 60 per cent. BH also was unaware that F, B and K were working against BH in the negotiation by feeding G confidential information and by not informing BH of important information obtained from G. BH was unable to reach agreement with G.

In April 1987, the bank to L-R Ltd. appointed PM as receiver and manager. PM advertised the land on which L-R Ltd.'s main facility in Toronto was located and agreed to sell it to M Ltd. PM agreed to sell the business to the defendant, T Inc. F, B and K owned a majority interest in T Inc., subject to certain rights of S Inc. which provided all of the money. The price for the business was $3.35 million including payables and receivables. T Inc. collected receivables equal to more than half of the price.

L-R Ltd. and its parent corporation, LT Ltd., brought an action alleging that the sale was improvident and unnecessary as the sale of the land was sufficient to pay off all or nearly all of the bank's loans. The receivership produced a substantial surplus for L-R Ltd.

The plaintiffs also alleged that there was a conspiracy among G, F, B and K to acquire the business for a bargain price by deceit and that F, B and K breached their fiduciary duties to L-R Ltd. in collaboration with G. The plaintiffs also alleged that the business was sold at less than fair market value and that the bank and PM acted unreasonably with respect to the sale of the lands and business.

Held:

The action was allowed against G, F, B and K and was dismissed against the bank and PM.

F, although chief financial officer of L-R Ltd., tried to scuttle L-R Ltd.'s business plan with the bank in order to force L-R Ltd. into receivership and provide the opportunity for S Inc. to purchase the business at a low price. F informed G of the pressure that the bank was placing on BH, information which was highly confidential and very detrimental to L-R Ltd.

The first offer of S Inc. for the assets of L-R Ltd., other than the Toronto lands, was for $8 million. F failed to make full disclosure of his relationship with S Inc. and his proposed interest in the purchaser. F was involved in briefing both sides of the subsequent negotiations. F, B and K actively tried to reduce the role of BH in the negotiations. As a result of a due diligence review, the offer price was reduced to $7.2 million subject to various adjustments and conditions. The bank was very concerned about the uncertainties. Inventory adjustments further reduced the price to $6.7 million. S Inc. offered to guarantee $6.7 million as a floor if the bank and the controlling shareholder of L-R Ltd. agreed in principle to the deal. The bank wanted S Inc. to take over all accounts payable and receivable. In March 1987, the bank made demand on its loans to L-R Ltd. BH's position was that the value of the assets exceeded the liabilities to the bank and that the sale of the Toronto lands would pay out most or all of the bank's loans. S Inc. wanted some control over the Toronto lands to avoid having to relocate on a precipitous basis. S Inc. could not reach agreement with the prospective purchaser of the Toronto land. S Inc. then offered to buy the assets including the Toronto lands for $19 million and S Inc. would assume the accounts payable and receivable. The bank would not agree since it could not guarantee clear title to the lands. The bank appointed PM as receiver.

After PM was appointed as receiver, F offered to resign as a director and officer but the offer was not accepted. F did not fulfil his duty to provide full information to PM about the position of S Inc. or of his own intentions to obtain substantial equity. The directors of L-R Ltd. did not inform the receiver of certain potentially valuable sales prospects involving technology and expertise possessed by L-R Ltd. F, K and B deliberately misled the receiver on issues of value as such disclosure was not in

their personal interest. Key information on inventory was withheld from other potential purchasers.

PM ultimately sold the principal lands of L-R Ltd. to the original offeror for approximately $2 million less than was offered by another prospective buyer to avoid litigation by the original offeror. That action was taken without involving H or the owners of L-R Ltd., even though it reduced the surplus available to the shareholders.

On the ultimate sale of the business of L-R Ltd. to T Inc., S Inc. guaranteed T Inc.'s obligations and received redeemable preferred shares as a means of recovering its investment and ending up with 30 per cent of the equity. F ended up with 51 per cent of the voting common shares. B, K and other former employees of L-R Ltd. each ended up with non-voting shares of less than 10 per cent of T Inc. T Inc. and S Inc. lost money operating the business of L-R Ltd. and T Inc. went into receivership.

The best interests of L-R Ltd. were not equated with the interests of L, the ultimate owner of most of the shares. No one sectional interest of shareholders should be allowed to prevail. Although the fact that F sought legal advice provided him with a strong case, he did not disclose to the lawyers that he was going to the bank behind BH's back and not discussing developments with BH, yet F was keeping G fully informed. F and the other directors acted purely out of self-interest to reduce the price. F, B and K breached their fiduciary duties to L-R Ltd.

Conspiracy includes unlawful conduct directed towards the plaintiff which the defendants should know is likely to cause injury to the plaintiff and does so. An agreement to join in concerted action or common design is necessary; it can be inferred from conduct. Mere knowledge or even approval of wrongful conduct does not make one a co-conspirator. Unlawful conduct includes a crime, tort, breach of contract or breach of statute. Breach of fiduciary duties to a corporation is unlawful conduct in this context. There was a conspiracy amongst the defendants for S Inc. to acquire the assets of L-R Ltd. at a below-market price. G did more than merely receive confidential information. Along with the directors, G was working against BH. The conspiracy continued after the receivership. The limited knowledge that BH had about F, B and K's possible equity interest in the purchaser did not absolve them from their duties. There was no fair and full disclosure. Such disclosure is required under both common law and the *Business Corporations Act* (Ont.).

Even full disclosure does not remove the directors' fiduciary obligations. Representatives of competitors who serve on a common board need not disclose confidential business of their nominator unless it affects the corporation on the board of which they serve in a vital aspect of its business. In this case, there were no special circumstances to limit the duty to disclose. The only escape from the duties of a director is resignation. The duties of directors do not depend on proof of actual placement of trust and confidence in the directors. L-R Ltd. was vulnerable to F, B and K's misuse of their position.

The directors continue to have a duty to act in the best interests of a corporation even after most of their powers have passed to a receiver. The receiver's duty is to maximize return to the shareholders. The directors' duties continue to the unsecured debtholders and to the shareholders. The interest of L-R Ltd. was to obtain the best possible price for its assets. F, B and K continued to breach their duties to L-R Ltd. during the receivership.

In selling the collateral the receiver is agent for the debentureholder even though the debenture states that the receiver is agent for the debtor. The plaintiffs alleged that the receiver was negligent and did not act in a commercially reasonable manner in realizing on the collateral. The receiver must not act fraudulently or recklessly. The law is unclear whether a receiver who acts in good faith is liable for negligence. The better view is that if a receiver decides to sell, he must take reasonable care to obtain a proper price. The receiver need not obtain the best price.

The bank had no duty to advise L-R Ltd. of any concerns it may have had respecting conflicts of interest of F, B or K. The relationship between the bank and L-R Ltd. was that of debtor and creditor. In any event, if the bank had such a duty, it fulfilled it. The bank adequately briefed the receiver on the degree of conflict of F, B and K. With respect to the debtor, the bank and the receiver were one entity. It was not unreasonable to permit bidders to meet with senior management.

Each of the individual decisions of the receiver attacked by the plaintiffs was reasonable in the circumstances, especially given the failure of F, B and K to provide full disclosure.

The creditor and receiver can choose when to sell the collateral in the interests of the creditor, not the debtor, if such decision is made in good faith. Sale of the real estate alone would not have retired the debt. The receiver acted reasonably. The receiver took reasonable precautions to obtain a proper price.

Hindsight should not be used to determine values. At most, future results may be used to test the reasonableness of assumptions at the time. Foresight, projections and expectations are appropriate. The bidders on the business were concerned with the value to them not with the value to L-R Ltd.

An expert valuator for the defendants preferred the net tangible asset approach over the capitalization of maintainable earnings approach due to uncertainties about L-R Ltd. prospects. The amount that S Inc. was prepared to pay was relevant to the valuation. The expert valuator for the plaintiffs preferred the capitalization of earnings approach. The S Inc. negotiations provided some indication of what a willing buyer would pay. That expert also valued the assets on an orderly liquidation basis.

The court must reach its own conclusion on values, adjusting the experts' opinions where required. The aim is not to reach a precise figure but to obtain a feel for the general level of value when the various approaches are compared. The fact that no other buyers were interested at a price above that offered by S Inc. was relevant but was affected by the conspiracy to force the price down and preclude other potential purchasers. The fair market value of the business assets of L-R Ltd. (excluding land) was $8.5 million in the spring of 1987.

The damages for conspiracy are the loss caused to the plaintiffs. The same measure applies to breaches of fiduciary duty. Foreseeability is not relevant as it would be in tort. There must be a link between the breach and the loss. The defendants argued that L, the ultimate owner of L-R Ltd., caused the loss by his illegal acts and refusal to accede to S Inc.'s offers prior to the receivership.

The receiver's view of the reasonableness of the S Inc. offer was hopelessly skewed by the directors' breaches of duty. S Inc.'s initial offer actually declined through the process. G, on behalf of S Inc., negotiated in bad faith. Delaying reaching agreement was part of the scheme.

After all factors were considered, the hypothetical sale price would have been $7.5 million; the damages were that amount less $2.239 million that T Inc. paid, for a balance of $5.261 million. The higher value that was received for the lands arising from the receivership did not offset the damages as the transactions were unrelated.

S Inc., the directors (F, B and K) and G were all liable. S Inc. was vicariously liable for the acts of G performed in the course of his employment. In all of the circumstances, no punitive damages were awarded. The action was dismissed against the bank and the receiver.

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Rowe v. Investors Syndicate Ltd. (1984), 46 C.P.C. 209 (Ont. H.C.) — *distinguished*

S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 49 C.P.C. (2d) 234, 1 O.R. (3d) 243, 45 O.A.C. 394 — *considered*

Scarboro (Scarborough) Golf & Country Club Ltd. v. Scarborough (City) (1986), (sub nom. *Scarboro Golf & Country Club Ltd. v. Scarborough (City) (No. 2))* 57 O.R. (2d) 202, 32 D.L.R. (4th) 732 (H.C.) [varied (1988), 1 R.P.R. (2d) 225, 41 M.P.L.R. 1, 66 O.R. (2d) 257, 54 D.L.R. (4th) 1, 31 O.A.C. 260 (C.A.) , leave to appeal to S.C.C. refused (1989), 103 N.R. 399 (note), 37 O.A.C. 91 (note)] — *distinguished*

Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324, [1958] 3 All E.R. 66 (H.L.) — *considered*

Slater v. Watts (1911), 16 W.L.R. 234, 16 B.C.R. 36 (C.A.) — *referred to*

Société générale (Canada) v. 743823 Ontario Ltd. (1989), 41 C.P.C. (2d) 286 (Ont. Master) — *applied*

Spencer v. Rosati (1985), 1 C.P.C. (2d) 301, 50 O.R. (2d) 661, 9 O.A.C. 119 — *referred to*

Sweeney v. Coote, [1907] A.C. 221 (H.L.) — *referred to*

Teck Corp. v. Millar (1972), [1973] 2 W.W.R. 385, 33 D.L.R. (3d) 288 (B.C. S.C.) — *referred to*

Toronto Dominion Bank v. Fortin, [1978] 2 W.W.R. 761, 26 C.B.R. (N.S.) 168, 85 D.L.R. (3d) 111 (B.C. S.C.) — *referred to*

Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc. (1988), 41 C.P.C. (2d) 318 (Ont. H.C.) [varied (1992), 89 D.L.R. (4th) 722 (Ont. C.A.)] — *distinguished*

Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co. (1991), 50 C.P.C. (2d) 308, 60 B.C.L.R. (2d) 50 (S.C.) [affirmed 79 B.C.L.R. (2d) 379, [1993] 7 W.W.R. 112 (C.A.) , additional reasons at (1993), 79 B.C.L.R. (2d) 388, 18 C.P.C. (3d) 328, 28 B.C.A.C. 300, 47 W.A.C. 300 (C.A.)] — *distinguished*

Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 42 B.L.R. 111, 25 C.C.E.L. 81, [1989] 4 W.W.R. 218, 36 B.C.L.R. (2d) 273, 94 N.R. 321, 58 D.L.R. (4th) 193, 90 C.L.L.C. 14,035 — *referred to*

W.H. Bosley & Co. v. Marathon Realty Co. (1982), 29 C.P.C. 255, 39 O.R. (2d) 144 (H.C.) — *distinguished*

Walker v. Murray (1978), 9 C.P.C. 78, 27 Chitty's L.J. 131 (Ont. H.C.) — *distinguished*

Watson v. Holyoake (1986), 15 C.P.C. (2d) 262 (Ont. H.C.) [affirmed (May 5, 1989), Doc. CA 67/87 (Ont. C.A.)] — *referred to*

Wellington v. Odlum (1971), 4 N.S.R. (2d) 223, 19 D.L.R. (3d) 121 (T.D.) — *considered*

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.) [additional reasons at (May 7, 1991), Doc. RE 1305/90, Farley J. (Ont. Gen. Div.)] affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) — *referred to*

Statutes considered:

Business Corporations Act, 1982, S.O. 1982, c. 4 —

s. 115

s. 132

s. 132(7)

s. 132(9)

s. 134(1)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Company Act, R.S.B.C. 1979, c. 59.

Courts of Justice Act, 1984, S.O. 1984, c. C.11 [R.S.O. 1990, c. C.43] —

s. 138 [R.S.O. 1990, c. C.11, s. 128]

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 128

Mortgages Act, R.S.O. 1990, c. M.40.

Rules considered:

Ontario, Rules of Civil Procedure —

R. 49

r. 49.13

r. 57.01(1)

Words and phrases considered:

reasonable precautions to obtain a proper price — "The Supreme Court of Canada, per Duff J., in *British Columbia Land & Investment Agency v. Ishitaka* (1911), 45 S.C.R. 302 , held that a mortgagee's duties to the mortgagor did not include an obligation to take all the measures that a prudent man would take in selling his own property. However, many cases recognized a further duty, short of a general liability for negligence, to take 'reasonable precautions to obtain a proper price'. In *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (Ch.) , affirmed [1897] A.C. 180 (H.L.) , Lindley L.J. explained this phrase [at p. 772] as not implying liability for negligence, but that the mortgagee must not 'fraudulently, or wilfully or recklessly' sacrifice the debtor's interests. In the Lords, the view was expressed that a mortgagee acting in good faith was not liable for negligence in the exercise of his power of sale."

Action for damages as a result of alleged sale of assets at below fair value due to breaches of fiduciary duty by directors and officers, conspiracy among directors and purchaser and its principal, and negligence on part of receiver and debtor.

Editor's Note: The Levy-Russell Ltd. *case is of special interest in two aspects. First, it applies the* PWA Corp. v. Gemini *case and concludes that full disclosure of a conflicting position by a director does not reduce his/her fiduciary duties and that a conflicted director must continue to place the interests of the corporation before his/her own interests. The only escape from this obligation is resignation. Second, the court wrestled with the difficult position of the receiver and whether, although acting in good faith, it could be negligent in selling the collateral for an under-value. The court resolved the question by concluding that once the receiver decided to sell, it must simply take reasonable care to obtain a proper price, not necessarily the best price obtainable. The court found that the receiver's views as to price were hopelessly skewed by the directors' breaches of duty. While this result seems supportable on the facts of this case, receivers will want to be especially careful when any hint of breach of directors' duties arises.*

***D. Lane J.*:**

1 Levy-Russell Limited emerged from receivership with all guns blazing. It, and its parent, say that its business was improvidently sold by the bank's receiver as a result of the negligence of the bank and receiver and a conspiracy involving the remaining defendants. They sue their former bank, the C.I.B.C.; the receiver, Peat Marwick; the purchaser of the business, Tecmotiv and its principal backer Shieldings; Godsall, vice-president of Shieldings; and three former directors of the plaintiff Levy-Russell, Messrs. Foreht, Bradshaw and Krestell, who were majority shareholders of Tecmotiv.

2 The essence of the plaintiffs' case is that three of Levy-Russell's own directors — Foreht, Bradshaw & Krestell — conspired with Godsall to breach their fiduciary duties to Levy-Russell and to arrange matters so that, in concert with Shieldings, they could purchase the Levy-Russell business from the receiver at far less than fair value. In doing so, they say, the directors were aided by the negligence of the bank and the receiver.

3 As against the bank the action is based on allegations of negligence, largely failing to fully inform its receiver of the facts. As against Peat Marwick and the bank the case focuses on their alleged failure to act in a commercially reasonable manner in realizing upon the bank's security.

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Synopsis of the case

5 Levy-Russell, as "Levy Auto Parts", supplied new, used and rebuilt components for heavy trucks and military vehicles. Its principal customers were the defence departments of Canada, the United States and allies of the U.S. who purchased equipment with funding from the U.S. Foreign Military Sales (FMS) support program. About 30% of the business in the early 1980s came from sales of the CD 850 transmission. Levy-Russell had developed and had high hopes for, a kit of parts to convert the M-41 tank's gasoline engine to diesel. On its 38 acre headquarters on Weston Road in Metropolitan Toronto, Levy had its shops, an office building and a vast store of military surplus vehicles and parts, primarily acquired post World War II and kept in sheds and crates in the yard.

6 Although the business was a cyclical one, Levy-Russell had been profitable up to 1983. On April 29, 1983 the U.S. Defence Logistics Agency (DLA) suspended it from further U.S. government contracts for violating the U.S. embargo on military sales to Iran. The suspension was lifted in January 1985 due to a favourable court decision and reimposed in April 1986 when that decision was reversed. In March 1986 Levy-Russell was suspended again due to substitution of used parts for new and the bribing of inspectors to pass the substituted goods.

7 Levy-Russell's profitability suffered in this 1983-86 period. In April 1986, the bank asked Levy to find another financier by June 15, 1986 and repay its loans of some $17 million. This deadline was extended bit by bit throughout 1986 and into 1987 while the company sought to arrange alternate financing, bring in an investor or sell the company. Morris "Pep" Levy, who owned some 90% of the ultimate parent company, resigned as C.E.O. in August 1986 as part of a deal to get the DLA suspension lifted. Ken Foreht, Ron Bradshaw and Morton Krestell, all long-service executives at Levy-Russell, became the directors and Ben Hayeems C.A. became Trustee of the shares held by the parent company and assumed an ill-defined management role.

8 In March or April 1986, Shieldings, through its vice-president Godsall, was introduced to the situation by Foreht's efforts and began to contemplate purchasing Levy-Russell's assets. An offer was made in September 1986 of $8 million for fixed assets, inventory, intangibles and lands at Bradford, Ontario. The Weston lands were not included. Hayeems began protracted negotiations with Godsall. The three directors had formed a close relationship with Godsall and had developed an understanding — the plaintiffs say a conspiracy — that if Shieldings bought Levy-Russell, they would manage it and have substantial equity. Although Hayeems knew that the directors favoured a sale to Shieldings, expected to be the managers and might have some possibility of minor equity, he was not aware that the directors would in fact have a very substantial stake — over 60%. This fact was, the plaintiffs say, carefully concealed from Hayeems.

9 Hayeems was also not aware that the directors were actively working against him as he sought to negotiate with Shieldings. The directors fed Godsall information about every important event in the company often before Hayeems knew of it and sometimes without telling Hayeems at all. They did not tell Hayeems a number of important facts they learned about Godsall's willingness to pay more than he was offering.

10 Hayeems was unable to close a deal with Shieldings which kept reducing the price, although in February 1987 Godsall committed to a floor price of $6.7 million for the inventory and fixed assets of the company. Other matters were open and no

final deal was consummated.

11 The bank lost patience and on April 2, 1987 appointed Peat Marwick as Receiver and Manager. Peat advertised both the business and the Weston lands and on June 5, 1987 agreed to sell the lands to Metrontario Ltd. and the business to Tecmotiv Inc. Tecmotiv was a company in which the Levy-Russell directors held a majority share interest subject to certain rights of Shieldings which put up all the money. The price paid to the receiver was $3.35 million for the whole business as of April 2nd, including payables and receivables from the receivership period. The receivership had generated a cash surplus of $290,000 in two months. Altogether, Levy-Russell's cash and receivables (most actually collected by June 5th) amounted to well over half the price paid by Tecmotiv. The plaintiffs say that this sale was improvident and further that it was unnecessary since the sale of the land brought in enough money to pay off the loans, or at least, to leave so little owing that the Bank should have turned the business back to its owner who would have been able to refinance it. Morris Levy's letter along these lines, dated June 1, 1987, was ignored by the bank. A sub stantial surplus realized in the receivership was turned over to the company.

12 In general terms the issues are:

1. Was there a conspiracy involving Godsall, Foreht, Bradshaw and Krestell to acquire the company at a bargain price by deceit?

2. Were the Levy-Russell directors guilty of breaches of their duty to the company in their collaboration with Godsall?

3. Was the business sold at less than fair market value?

4. Did the Bank and its Receiver act reasonably in their receivership decisions and the sale of the business and lands?

13 My answer to each of these questions is yes.

The background

14 Since 1927 the Levy family had been in the vehicle parts business through Levy Auto Parts, now the plaintiff Levy-Russell Ltd. ("Levy-Russell"). By the 1980s Levy-Russell was a wholly owned subsidiary through Levy Industries Limited of Seaway MultiCorp. Limited ("Seaway"), a public company. Some 90% of the shares of Seaway were owned by the Levy family. In June, 1985, Morris "Pep" Levy (Levy) acquired the shares of his brothers Ben and Mark, in part through his company, Peplevy Corp. He thus controlled Seaway and through its ownership of Levy-Russell and Levy Industries Limited, he controlled the vehicle parts business. Peplevy Corp.'s acquisition of shares was financed by a C.I.B.C. loan to Peplevy guaranteed by Levy-Russell in the amount of $1.6 million. In addition, the Bank loaned a similar sum to Levy personally.

15 At the time of this share purchase, as had been the case for many years, Levy-Russell's major business was the supply of parts for military vehicles. Following the end of the Second World War, Levy-Russell had acquired a very large stock of surplus parts for tanks and military trucks and there proved to be a market for these parts both in the U.S. and in the smaller countries which had acquired such vehicles for their armed forces. The sales from this "mine" of surplus parts suffered after 1983 because the U.S. government cut back on its use of surplus material but other countries continued to buy. Levy-Russell also bought and sold parts as their customers required, often adding value by manufacturing, remanufacturing or assembling components. Much of this trade was either with the United States or with its allies. Some business was financed by the U.S. under its Foreign Military Sales (FMS) program, under the general supervision of the U.S. Defence Liaison Agency (DLA). To the extent that manufacturing was done in Canada for the U.S. or other military purposes the Department of National Defence, by agreement with the U.S., supplied inspectors at the Levy-Russell plant, whose function was to ensure compliance with the standards required by contract or regulation.

Inventory valuation methodology

16 Because the value of Levy-Russell's inventory plays a central role in the case an understanding of the company's valuation methods is necessary. The surplus parts were stored in sheds and crates in the yard at Weston Road. There were

causes of action, why the same basic claim should give rise to different redress if framed in equity than at common law. Common sense and reasonableness were central to both common law and equity. Damages equivalent to those for deceit were sufficient in the case.

734 Stevenson J. agreed in large measure. He did not find the fusion of law and equity a persuasive element in the case and certainly not as introducing the law of contributory negligence to the law of fiduciaries, the beneficiary being under no duty to the trustee or fiduciary. He preferred to approach the matter as one where a court might find some losses to be caused by a plaintiff rather than a defendant and so be too remote. Damages in a compensation claim may not always be the same as in an action for deceit or negligence: *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.) , per Viscount Haldane L.C. at p. 958.

735 McLachlin J., writing for herself and two of her colleagues, concurred in the result. She reached this conclusion via equity and without resort to the common law, holding that it was not appropriate to measure damages for breach of fiduciary duty by analogy to tort or contract. Fiduciary obligations were trust-like, involving power, superior information and control in the fiduciary and vulnerability in the beneficiary which may justify more stringent remedies than for negligence or breach of contract. Thus foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty. However liability is not unlimited. The major limit is the need for a link between the breach and the loss; hence losses flowing from the plaintiff's unreasonable acts, "[where] in any true sense [the plaintiff can] be said to have been the author of his own misfortune", are not compensable: *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158 (C.A.) , at p. 167.

736 The question of foreseeability was not an issue in the argument before me; nor were the specifically common law notions of contributory negligence or failure to mitigate raised. The focus of the damages argument on behalf of the directors, Godsall and Shieldings, was causation. It was said that Levy, by his illegal acts and refusal to accede to Shieldings' offers, was the author of his own misfortune; and that the breaches of duty did not cause the loss; that was inevitable as the company was doomed. All of the judges in both *LaFarge* and in *Canson* stressed causation and that is the most important factor argued in this case.

Damages II: The cause of the loss

737 The plaintiffs say that their loss is the difference between the fair market value of the business assets of Levy-Russell and the actual net price obtained for them by the receiver. This is the measure regardless of which of the defendants is liable. This approach presupposes that there would have been a sale at fair market value but for the conspiracy or the breaches of duty alleged against the bank and the receiver.

738 The defendant directors, Godsall and Shieldings, argue that Levy-Russell was already doomed in April, 1986, by circumstances having nothing to do with them. They were not responsible for the criminal acts, the loss of experienced people as a result, the two suspensions, the bad publicity, the loss of customers, especially the United States and South Africa, nor for the aging of the inventory and the changing nature of the business. I accept that they bore no responsibility for these adverse factors, although the changing nature of the business did not become apparent to anyone involved in the company until long after the Tecmotiv purchase and played no role in the events which concern us. The argument continues that there was no investor or buyer other than Shieldings, despite every effort. Shieldings' offers were not accepted in spite of their efforts and the receivership was thus unavoidable. There can be no liability on them for the act of the receiver in selling at a price which he regarded as reasonable without relying on them.

739 The directors also argue that there was in any event no loss because the receiver sold the assets at their fair market value or at least at a commercially reasonable price.

740 As is apparent from the earlier parts of these reasons, I do not accept many of the underlying assumptions on which these arguments rest. The receiver's view of the reasonableness of the Tecmotiv bid was hopelessly skewed by the directors' breaches of their duty, owed to Levy-Russell, to brief him. The entire bargaining process between Hayeems and Godsall was likewise skewed by the directors' breaches, particularly in giving Godsall information about the banking problems of the company and the absence of competitors, the two factors that made the conspirators' strategy viable.

The effect of the conspiracy

