

COURT FILE NUMBER **KBG-RG-909-2023**
COURT OF KING'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE **REGINA**
APPLICANT **AFFINITY CREDIT UNION 2013**
RESPONDENT **F & L CONCRETE SERVICES LTD.**

IN THE MATTER OF THE RECEIVERSHIP OF F & L CONCRETE SERVICES LTD.

BRIEF OF LAW OF THE RECEIVER, MNP LTD.

CHAMBERS SCHEDULED FOR OCTOBER 27, 2023

A. INTRODUCTION

1. On August 3, 2023, pursuant to the Order of the Honourable Justice P.T. Bergbusch (the “**Initial Order**”), MNP Ltd. (the “**Receiver**”) was appointed as the Receiver over all of the undertakings and property of F&L Concrete Services Ltd. (the “**Debtor**”).
2. Since that time, the Receiver has worked with the Debtor, as appropriate, to organize sales of the Debtor’s assets to maximize the recovery of the Debtor’s estate, while minimizing the costs incurred. As a result of those efforts, the Receiver has negotiated an auction sale of certain assets, as more particularly described in Schedule “B” of the Draft Order and Confidential Report (the “**Equipment**” and “**Auction Sale**” respectively).
3. The Receiver also seeks approval of its actions and reports to date. As the Draft Order, and a brief discussing the same, have already been filed, those arguments will not be repeated. However, in order for the Receiver to continue to manage the Debtor’s estate, it does require the Court’s approval of its actions to date as the Court appointed officer.

B. FACTS

4. The facts relevant to this application are set out in great length in the First Report of the Trustee dated August 15, 2023 (the “**First Report**”), the Supplement to the First Report of the Trustee dated August 29, 2023 (the “**Supplemental Report**”), Second Report of the Receiver dated Septemebr 27, 2023 (the “**Second Report**”), the third Report of the Receiver dated October 12, 2023 (the “**Third Report**”) and the Confidential Report of the Receiver

dated October 24, 2023 (the “**Confidential Supplement**”). As is generally accepted, the Receiver, as an officer of the Court, provides its information by way of report.¹

5. All of the relevant facts will be discussed in the analysis portion of this brief.

C. ISSUES

1. Should the Equipment Auction Sale be approved?

D. LAW AND ANALYSIS

Should the Equipment Auction Sale be Approved?

6. As noted by Justice Layh in *Atrium Mortgage Investment Corp v King Edward Apartments Inc.*,² the Ontario Court of Appeal’s decision in *Soundair* remains the leading authority on the legal test to be applied by the Court in approving a receiver’s proposed sale of a debtor’s assets.
7. The *Soundair* factors require the Court to consider:
 - (i) Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - (ii) The interests of all parties;
 - (iii) The efficacy and integrity of the process by which offers were obtained; and
 - (iv) Whether there has been unfairness in the working out of the process.³
8. This is not expected to be a contested proceeding and it is the Receiver’s understanding all parties are in agreement with, or at least not opposed to, the proposed Auction Sale.
9. On the evidence before the Court, a consideration of the *Soundair* factors weigh in favour of approving the transaction contemplated by the Auction Sale.

² 2018 SKQB 296 at para 13, 65 CBR (6th) 15 [*Atrium*] [**TAB 1**]; see more recently *Atrium Mortgage Investment Corp, v Koh*, 2021 SKQB 285 [**TAB 2**].

³ *Soundair*, *supra* note 1 at para 21.

a) The Receiver Has Made Sufficient Effort and Has Not Acted Improvidently

10. In considering the sufficiency of the Receiver's efforts and actions, the case law states that the Court will ordinarily accord the receiver's business judgement a certain level of deference based on the information that was available to the receiver at the time of decision was made. The rationale being that it provides "participants in a receivership... a measure of confidence that the court will not lightly intervene with a receiver's power to effect a sale."⁴
11. The Court in *Soundair* also suggests that 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.⁵
12. The Receiver, in working with Ritchie Bros. to develop a sale plan for the Equipment, was presented with three options:
 - (a) Straight Commission Auction;
 - (b) Net Minimum Guarantee Auction; or
 - (c) Outright Sale to Ritchie Bros.⁶
13. As is set out in the Confidential Report, the Straight Commissions Auction process agreed to by the Receiver will maximize the recovery for the Equipment. Given the appraised value of the Equipment, the Straight Commission Auction is the most commercially reasonable manner of proceeding. The Receiver has provided a thoughtful, and complete, analysis of all three sale options and determined that the Straight Commission Auction was the most prudent course in the circumstances.⁷
14. While the Receiver did not accept the guaranteed cash method sales offer, in consideration of all the circumstances, the Receiver chose the offer that is likely to maximize the sale proceeds and the recovery for the Debtor's Estate. It is appropriate in the circumstances.

⁴ *Atrium*, *supra* note 3 at para 14.

⁵ *Soundair*, *supra* note 1 at para 21.

⁶ Confidential Report at para 5.

⁷ Confidential Report at paras 13-15.

b) The Receiver Has Considered the Interests of All Parties

15. The second *Soundair* factor instructs that, although the primary interests to be considered on a sale approval application are those of the creditors, other stakeholders' interests require consideration.⁸ Such other stakeholders may include the Debtor, and in some cases the proposed purchaser (who has likely expended time and resources bargaining with the Receiver).⁹
16. All interested parties have received notice of this application. Most notably, not only did the Debtor receive notice of this application, but the Receiver sought the Debtor's comments and feedback in the proposed sale, to ensure any concerns could be voiced, and potentially resolved, in advance. No response has been received by the Debtor. Affinity Credit Union 2013, the lead secured creditor, is supportive of the application.¹⁰
17. The only party who may have a purchase money security interest in the Equipment, being Canadian Western Bank, will receive notice of this application. No distribution of the funds is being sought at this time.¹¹
18. Notably, the Equipment that the Receiver proposed to sell is the same equipment that the Debtor first put forward as assets for a potential sale. While, as of the date of this brief, the Debtor has not provided a position on the proposed sale, it is expected that given the consistency in the assets, this will be supported by the Debtor.¹²

c) The Efficacy and Integrity of the Process by Which Offers Were Obtained

19. In *Soundair*, the Court observed that the process by which the sale agreement is obtained should be consistent with the standards of commercial efficacy and integrity.¹³

⁸ *Soundair*, *supra* note 1 at paras 39-40.

⁹ *Ibid.*

¹⁰ Paras 16 and 17 of the Confidential Report.

¹¹ Confidential Report at para 12.

¹² See Exhibit 1 of the Affidavit of Chris Fichter sworn September 14, 2023.

¹³ *Soundair*, *supra* note 1 at para 43.

20. The Receiver suggests this factor is satisfied considering the process by which offers were obtained and in adequately balancing competing objectives.
21. Here, the Receiver is proceeding by way of public auction to obtain the best possible price. This will allow for the maximum proceeds to be generated during the sales process as the general public, as well as any stakeholder's in the Debtor's estate, including its principals, can make a bid to purchase the Equipment.
22. As such, not only will the auction maximize the recovery, but it will also preserve the parties rights in redeeming the Equipment, to the extent possible.

d) There Was No Unfairness in the Working Out of the Process

23. The final *Soundair* factor requires an assessment as to whether the Receiver "acted reasonably, prudently, fairly and not arbitrarily" in conduct the sales process and making its recommendation to the Court.¹⁴ For example, in *Soundair*, there was an allegation that one of the bidders had been treated unfairly from the receiver not having provided the bidder with an offering memorandum.
24. Again, the Receiver has maximized the sale proceeds by going by way of public auction, the same auctioneer that was originally put forward by the Debtor. The Debtor has been involved and apprised of the sale process and was permitted to provide feedback.
25. In order to minimize the sales cost, the Receiver has also attempted to work with the Debtor's principals to attempt to have the Debtor's principals repair and deliver the Equipment, to the extent necessary. It is unclear if that will occur but in the event it does not, Ritchie Bros. will be able to repair and transport the Equipment for a fee.¹⁵

V. CONCLUSION

26. Given all of the above, the Receiver respectfully submits:
 - (a) Its actions and reports should be approved to date; and

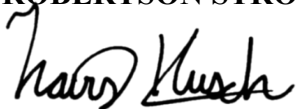
¹⁴ *Soundair*, supra note 1 at para 43.

¹⁵ Confidential Supplement at paras 8 and 9.

- (b) The Auction Sale, as more particularly described in the Confidential Report, should be approved in the form of the Sale and Vesting Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2023.

ROBERTSON STROMBERG LLP

For: 

M. Kim Anderson K.C.

LIST OF AUTHORITIES

Pursuant to Rule 13-38.1, the authorities which are publicly available on CanLii have not been appended.

Tab	Decision	Paragraph	Principal
1.	2018 SKQB 296 at para 13, 65 CBR (6th) 15	13	Sets forth the factors to consider on an application for sale and approval.

This Brief delivered by:

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