Court File No. CV-10-8991-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE RECEIVERSHIP OF 2110458 ONTARIO LIMITED o/a LORETTA FLOUR, 2131413 ONTARIO LIMITED o/a LORETTA FOODS, 787755 ONTARIO LIMITED o/a NEW DURHAM TRADING, and o/a NDT FOOD SERVICE and o/a SKYWAY WHOLESALE and TARBRAC HOLDINGS INC.

IN THE MATTER OF SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, as amended, and SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C. 43, as amended

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PART I – OVERVIEW

1. Ernst & Young Inc. ("**EYI**"), in its capacity as receiver and receiver and manager (the "**Receiver**") of the assets, undertakings and properties of 2110458 Ontario Limited o/a Loretta Flour, 2131413 Ontario Limited o/a Loretta Foods, 787755 Ontario Limited o/a New Durham Trading and o/a NDT Food Service and o/a Skyway Wholesale, and Tarbrac Holdings Inc. (collectively, the "**Debtors**") seeks, among other things,

(a) an order approving and directing the Receiver to enter in an agreement to sell and approving the sale of the Food Service and Catering ("**Food Services**") business of the Debtors (the "**Purchased Assets**") to Jarvis Management Corp. (the "**Purchaser**"); and

(b) an order sealing certain appendices (the "**Confidential Appendices**") to the Second Report of the Receiver dated 9 February 2011 (the "**Second Report**") filed with this Honourable Court on a sealed and confidential basis as Appendices "C", "D" and "E" to the Second Report until the closing of the sale to the Purchaser (the "**Transaction**") and the filing with the Court of the Receiver's Certificate.

2. The Receiver has made appropriate efforts to market and sell the Food Services business and has arrived at an agreement with the Purchaser that is fair and reasonable, and that creates value for the Debtors' creditors that would not exist in a straight liquidation context. Most of the employees employed by Food Services may be employed by the Purchaser or its assignee. In the circumstances, the Transaction is commercially reasonable and it is just and convenient to approve the Transaction and authorize the Receiver to enter into it.

3. To ensure the integrity of the process and avoid any prejudice to stakeholders in the event that the Transaction does not close, it is appropriate that the Confidential Appendices are sealed and be treated as confidential until the closing of the Transaction and the filing with the Court of the Receiver's Certificate.

PART II- THE FACTS

4. By Order of the Honourable Mr. Justice Wilton-Siegel dated 26 November 2010 (the "**Receivership Order**"), EYI was appointed as Receiver of the Debtors pursuant to section 243 of the *Bankruptcy & Insolvency Act* ("**BIA**") and section 101 of the *Courts of Justice Act*. The Receivership Order, among other things, authorizes the Receiver to implement a sales process for the Food Services business in accordance with a timeline annexed thereto (the "**Food Services Timeline**").

Second Report of the Receiver dated 9 February 2011 (the "Second Report"), paras 2 and 3.

5. The Receiver identified 24 potential purchasers as likely having an interest in acquiring the Food Services business. Confidential Information Memorandums ("**CIM**") were distributed to 10 interested parties. The Receiver provided facility tours and/or additional confidential financial and other information in electronic form to 3 of the 10 parties who received the CIM and who signed a confidentiality agreement satisfactory to the Receiver.

Second Report, paras 7 and 8.

6. The Receiver received certain offers prior to the expiration of the offer deadline on January 14, 2011 (collectively, the "Offers"). After reviewing the Offers, the Receiver rejected them and instead commenced negotiations with each of them, with the intention of reaching an

agreement to sell the Food Services business on traditional "as is, where is, no representations, no warranties" receivership sale terms.

Second Report, para 12.

7. The deadline for submission of offers was extended to 20 January 2011. Following additional due diligence, the Purchaser submitted a revised offer for the purchase of the Food Services business. No revised offers were received from either of the other two interested parties. The Receiver and the Purchaser succeeded in negotiating an asset purchase agreement (the "**APA**") whose terms are acceptable to the Debtors' estate.

Second Report, paras 15 and 16.

8. The Receiver is of the view that the consideration from the Transaction, if completed, represents the maximum realization available in the circumstances from the Food Services assets:

(a) the consideration under the APA represents the highest price offered following an expedited marketing process in which offers were solicited from all parties indicated by the Receiver's research to be likely potential purchasers of the Food Services business;

(b) the Receiver considers it unlikely that a lengthier marketing process than the Food Services Timeline, or one in which the opportunity was publicly advertised, would have generated higher offers for the Food Services business. The Food Services business has limited geographic scope and scalability due to the inherent limitations of transporting fresh foods, and is, therefore, likely to be of interest to a smaller group of potential purchasers, namely organizations that are either carrying on similar businesses or involved locally in areas of the food industry that would allow them to realize sales or purchasing synergies. In addition, during the receivership the net cash flow from the Food Services business, after a reasonable allocation of the fees of the Receiver and its counsel, has been negative, and that therefore an offer received in a longer process would have needed to be substantially higher to offset this net cash outflow; and

(c) the consideration under the APA is substantially higher than the expected realizations (based on the equipment appraisal obtained, inventory count conducted and accounts receivable balances) if the Food Services business were wound down and liquidated by the Receiver.

Second Report, para 19.

9. In addition, the Transaction is (a) a straightforward cash transaction that does not involve adjustments for inventory or accounts receivable levels, and should therefore be inexpensive to close; (b) if completed, potentially provides the personnel employed by the Food Services business with new employment; and (c) if completed, allows the Receiver access to and use of part of the head office portion of the Food Services leased premises for a specified interim period, thereby saving the Debtors' estate the cost and inconvenience of relocating the electronic and hard copy records of the Debtors during the sale process for the other two divisions of the Debtors (the Spice business and the Flour business).

Second Report, paras 20.

10. In order to prevent any prejudice if the Transaction is not completed, the Receiver seeks a sealing order in respect of the Confidential Appendices referred to in the Second Report pending completion of the Transaction.

Second Report, para 17.

PART III – THE ISSUE

11. The issues before this Honourable Court are:

(a) Should the Court approve the Transaction contemplated by the APA?

(b) Should the Court seal certain confidential appendices to the Second Report until the closing of the Transaction?

PART IV – THE LAW

Approval of the Asset Purchase Agreement

12. In determining whether to approve a proposed sale of the debtor's assets by a receiver, Ontario courts have consistently and uniformly applied the principles set out by the Ontario Court of Appeal in *Royal Bank v. Soundair*.

> ***Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (Ont. C.A.) [*Soundair*].**

13. In reviewing a proposed sale of assets by a receiver, the Court must consider the following:

(a) whether the receiver made a sufficient effort to obtain 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.

> ***Soundair,* at para 16.**

14. Only in exceptional circumstances will the court intervene and proceed contrary to the recommendation of the receiver.

> ***Crown Trust Co. v. Rosenberg*, 1986 CarswellOnt 235 (Ont. Sup. Ct. H.C.J.).**

15. In the present case, each element of the *Soundair* test has been met.

(a) *Efforts to Obtain the Best Price*: Based on the Receiver's research, the Receiver identified 24 parties likely to have an interest in acquiring the Food Services business. Out of the 24 parties approached, 10 parties requested a CIM and 3 of the 10 parties elected to conduct further due diligence and/or attend for a site visit. The Receiver entered into negotiations with all three of those parties. The only viable offer to emerge out of the negotiations is the proposed Transaction with the Purchaser. The Receiver is not aware of any other potential purchaser and it is highly unlikely that another could be found who would offer a higher price in the time required.

(b) *Interests of All the Parties*: The consideration from the Transaction represents the maximum realization available in the circumstances and is an amount that would be greater than what creditors could expect to receive in a straight liquidation. The majority of current employees may likely be offered new employment by the Purchaser (or its assignee). In the circumstances, the APA is in the interests of all the parties.

(c) *The Efficacy and Integrity of the Process*: The group of potential purchasers contacted by the Receiver is relatively small due to the limited geographic scope and scalability of the Food Services business. In total, 24 parties were contacted by the Receiver. These parties were either (1) carrying on similar businesses or (2) are involved locally in areas of the food industry that would allow them to realize sales or purchasing synergies. A detailed description of the Receiver's marketing efforts is set out in the Second Report, a copy of which has been served on all affected parties. Since that time, no one has come forward to suggest that there is a better or more suitable purchaser who would be interested in purchasing the Food Services business.

(d) *Whether the Process was Unfair*: For the reasons stated above, there was no unfairness in the process. The Debtors' creditors will receive much greater value through the proposed APA than they would through a liquidation process. There has been no unfairness in the process nor in the ultimate result achieved through the APA.

16. The Receiver respectfully submits that the principles in *Soundair* have been satisfied and that the marketing and sales process and the sale of the assets is commercially reasonable. It is respectfully submitted that this Honourable Court should approve and authorize the sale of the Purchased Assets to the Purchaser, in accordance with the recommendations of the Receiver.

Sealing of Certain Appendices to Second Report

17. The Second Report of the Receiver includes the Confidential Appendices that contain commercially sensitive information and which the Receiver seeks to have sealed and be treated as confidential until the closing of the Transaction and the filing of the Receiver's Certificate with the Court.

18. A Court may order that any document filed in a civil proceeding before it, be treated as confidential, sealed and not form part of the public record.

> ***Court of Justice Act*, R.S.O. 1990, c. C-34, as amended, s. 137(2).**

19. The test for determining whether a sealing order ought to be granted in a commercial context was set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*. A confidentiality order should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

> ***Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) [*Sierra Club*] at para. 53.**

20. Three elements are subsumed under the first branch of the test:

(i) the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;

(ii) in order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and

(iii) the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible while preserving the commercial interest in question.

***Sierra Club, at* paras. 54-57.**

21. Judges sitting on the Commercial List have recognized the usual and customary practice of seeking a sealing order in sale approval motions. In *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, Madam Justice Pepall stated that "[a]s is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought".

***Ron Handelman Investments Ltd. v. Mass Properties Inc.,* 2009 CarswellOnt 4257 (Ont. S. C.J. [Commercial List]) at para 26.**

22. In the present case, a sealing order is appropriate for the following reasons:

(a) it would be prejudicial to the interests of the Debtors' creditors if the Transaction does not close since potential purchasers of the Food Services business would have a comparative advantage in their negotiations for the sale of the Food Services business;

(b) there is no other reasonable alternative to prevent the Confidential Appendices from becoming public; and

(c) the sealing order will only be in effect until the closing of the Transaction and the filing of the Receiver's Certificate.

PART V – RELIEF REQUESTED

23. The Receiver respectfully requests, among other things:

    (a) an Order authorizing and approving the Transaction; and

    (b) an Order sealing the Confidential Appendices referred to in the Second Report until the closing of the Transaction and the filing of the Receiver's Certificate with the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of February, 2011.

Michael J. MacNaughton,
of counsel to the Receiver

Mary Arzoumanidis,
of counsel to the Receiver

SCHEDULE "A"

LIST OF AUTHORITIES

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (Ont. C.A.).

Crown Trust Co. v. Rosenberg, 1986 CarswellOnt 235 (Ont. Sup. Ct. H.C.J.).

Sierra Club of Canada v. Canada (Minister of Finance), 2002 CarswellNat 822 (S.C.C.).

Ron Handelman Investments Ltd. v. Mass Properties Inc., 2009 CarswellOnt 4257 (Ont. S.C.J. [Commercial List])

SCHEDULE "B"

RELEVANT STATUTES

1. *Court of Justice Act*, R.S.O. 1990, c. C-34, as amended, s. 137(2).

   137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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PROCEEDINGS COMMENCED AT TORONTO

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