

2009 MBQB 171
Manitoba Court of Queen's Bench

Shape Foods Inc. (Receiver of), Re

2009 CarswellMan 312, 2009 MBQB 171, [2009] M.J. No. 240,
178 A.C.W.S. (3d) 570, 241 Man. R. (2d) 235, 54 C.B.R. (5th) 224

In the Matter of The Receivership of Shape Foods Inc.

And In the Matter of The Receivership of 0767623 B.C. Ltd.

Deloitte & Touche Inc. in its capacity as receiver and manager of Shape Foods Inc. and 0767623 B.C. Ltd.

Menzies J.

Judgment: June 22, 2009
Docket: Brandon Centre CI 09-02-02233

Counsel: D. Swayze for Deloitte & Touche

B. Filyk for Vanguard Credit Union

W. Leslie for 884498 Alberta Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks, Richard Brugger

J. Hirsch for 5842264 Manitoba Ltd. (watching brief)

R. Paterson for City of Brandon (watching brief)

Subject: Corporate and Commercial; Insolvency; Property; Intellectual Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Debtors and creditors --- Receivers --- Conduct and liability of receiver --- General conduct of receiver

Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Receiver manager made reasonable efforts to achieve best deal and its recommendation should not be rejected — Fact that one potential bidder did not meet requirements or deadline did not mean sale was improvident — Process of sale was fair and receiver manager was able to obtain higher price than tender — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.

Debtors and creditors --- Miscellaneous issues

Standing to oppose sale by receiver manager — Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Unsuccessful purchasers did not have standing to oppose application — Prospective purchasers did not have rights in property — Minority shareholders did not have standing to oppose sale — Sale to another entity would not effect shareholder's capacity as unsecured creditors — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.

Table of Authorities

Cases considered by *Menzies J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Selkirk, Re (1987), 1987 CarswellOnt 177, 64 C.B.R. (N.S.) 140 (Ont. S.C.) — considered

Skyepharm PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Statutes considered:

Corporations Act, R.S.M. 1987, c. C225
s. 94 — referred to

APPLICATION by receiver manager for approval of sale of property.

Menzies J.:

1 Shape Foods Inc. ('Shape') operated a food processing business in the City of Brandon. 0767623 B.C. Ltd. ('B.C.') was a related corporation which held ownership to the intellectual property (patents and trademarks) associated with Shape's food processing business. Both corporations executed a security agreement in favor of Vanguard Credit Union ('Vanguard') as security for a loan. The security agreement provided that in the event of default on the loan, Vanguard had the right to appoint a receiver-manager to realize on its security.

2 On October 23, 2008, Vanguard appointed Deloitte & Touche ('the Receiver') as receiver-manager of Shape Foods Inc.

3 Subsequently on December 10, 2008, Vanguard, appointed Deloitte & Touche receiver-manager of 0767623 B.C. Ltd.

4 On April 14, 2009, the Receiver accepted an offer to purchase the assets of Shape and B.C. in the amount of \$5.1 million from 5842664 Manitoba Ltd. ('the purchaser'). A formal agreement was executed on May 6, 2009 which required the Receiver to provide a vesting order of the property in the name of the purchaser on or before June 5, 2009.

5 The Receiver-manager brought an application is for a vesting order to complete the transaction with the purchaser and for a declaration that the sale of the corporate assets is not reviewable by the remaining creditors of Shape or B.C. or by any subsequent trustee in bankruptcy.

The Standing of Parties on the Application

6 The application by the Receiver-manager is opposed by 884498 Manitoba Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks and Richard Brugger. The Receiver-manager argues these parties do not enjoy standing before the court as they are not interested parties in the outcome of the application.

7 Before deciding the issue of standing, I allowed Todd Hicks on behalf of 884498 Manitoba Ltd. and Nick Mashin on behalf of Canrex Biofuels Ltd. to file affidavits as to their attempts to purchase the assets of Shape and B.C. My decision was based on the premise the evidence was relevant to the issue of the integrity of the Receiver-manager's actions taken to sell the security.

8 The Receiver-manager brought the application for the vesting order shortly before the closing date of June 5, 2009. A decision as to whether or not the vesting order would issue was required in a timely fashion or the sale agreement would be in jeopardy. With some misgivings, I reserved my decision on the issue of standing and heard the arguments of the opposing

parties to allow the ultimate application to proceed. While this is not the best procedure in which to consider an application, the process did allow me to render a decision on the issue of the vesting order within the time constraints of the purchase agreement.

Interested Parties

9 884498 Manitoba Ltd. and Canrex Biofuels Ltd. attempted unsuccessfully to purchase the assets of Shape and B.C. from the Receiver-manager. Barry Comis, Ben Comis, Todd Hicks and Richard Brugger are shareholders of 884498 Manitoba Ltd.

10 I have concluded an unsuccessful purchaser does not have standing to challenge a proposed sale. In coming to this conclusion I rely upon the reasons of O'Connor J. A. of the Ontario Court of Appeal in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467, 47 O.R. (3d) 234 (Ont. C.A.) beginning at para 25:

There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold...The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H. C. J.).

Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of the process: *Crown Trust v. Rosenberg*, supra; *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O. R. (3d) 1, 83 D. L. R. (4th) 76 (C. A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

[para. 29] In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest in not sufficient.

11 As prospective purchasers, none of the opposing parties have a legal right or interest in the assets arising out of the circumstances of the sale process. Although I have considered their evidence in assessing the integrity of the sale process, they are not interested parties merely due to their status of unsuccessful purchasers.

12 Barry Comis and Ben Comis claim standing as interested parties by virtue of being shareholders of Shape. Richard Brugger and Todd Hicks claim standing as shareholders of Falcon Creek Holdings Inc., a corporation which is a shareholder in Shape. The extent of their holdings in Shape were not disclosed except to the extent of an admission by their counsel that they are minority shareholders in Shape. They were not appearing on behalf of Shape, but simply in their capacity as minority shareholders.

13 Ben Comis also claims status as an interested party by virtue of being a creditor of Shape in the amount of \$6,300.00.

14 I am not satisfied that the status of shareholder, in and of itself, or the status of creditor gives one the status of an interested party. In my opinion, more is required. In this case the assets of Shape and B. C. are secured by three secured creditors. Vanguard is the first secured creditor. As of May 19, 2009, Vanguard was owed \$4,711,865.50 with daily interest accruing at the rate of \$822.26. The Manitoba Development Corporation ('MDC') is the second secured creditor. The debt owed to MDC

as of May 1, 2009 was \$4,145,541.82 with interest accruing at the daily rate of \$868.14. In addition, MDC had guaranteed repayment of Vanguard's debt. The third debtor is RAB Special Situation (Master) Fund Ltd. with a debt in the approximate amount of \$2,000,000.00.

15 The completion of the agreement between the Receiver and the successful purchaser will result in Vanguard being paid in full and MDC receiving only partial payment. In addition, MDC will be relieved of any obligation under its guarantee of the Vanguard debt.

16 The two prospective offers not accepted by the Receiver will result in Vanguard being paid in full, and MDC receiving an increased partial payment on its debt. The acceptance or the rejection of the Receiver-manager's recommended sale in favor of one of the unsuccessful purchasers will not affect the position of Ben Comis, Barry Comis, Todd Hicks or Richard Brugger in their capacity as minority shareholders or Ben Comis in his capacity as an unsecured creditor.

17 As receiverships often affect numerous parties, I am of the opinion that a party requesting to appear to oppose a proposed sale by a receiver-manager must minimally show an interest to the extent that any alleged failure of the receiver-manager to act in a commercially reasonable manner may affect their interests in a material fashion.

18 I am not satisfied that 884498 Manitoba Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks or Richard Brugger have proven they are interested parties to this application.

The Duty of the Receiver

19 S. 94 of *The Corporations Act* (Manitoba) provides that a receiver or receiver-manager of a corporation appointed under an instrument shall act honestly and in good faith; and deal with any property of the corporation in his possession or control in a commercially reasonable manner.

20 On considering a proposed sale of a debtor's property by a receiver-manager, there are four criteria for the court to consider. (See: *Crown Trust Co. v. Rosenberg*, supra; Bennett on Receiverships, (2nd Ed.) (1999) Carswell at p. 251 et seq.)

- 1) The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
- 2) The court should consider the interests of the parties.
- 3) The court should consider the efficacy and integrity of the process by which offers are obtained.
- 4) The court should consider whether there has been unfairness in the working out of the process.

21 In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), the Ontario Court of Appeal outlined two principles for a court to consider in reviewing a sale of property. The first principle is that a court should place a great deal of confidence in the actions taken and the opinions formed by the receiver-manager. Unless the contrary is clearly shown, the court should assume that the receiver-manager is acting properly. The second principle is a court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager. I will now consider the relevant criteria in this transaction.

Did the Receiver Make a Sufficient Effort to Get the Best Price and Did It Act Providently?

22 In this instance the Receiver-manager was appointed to take control of the assets of Shape in October 2008. The Receiver-manager advertised the sale of the assets of Shape and B. C. by way of tender with the advertisements being published in the Brandon Sun, the Winnipeg Free Press and the Globe and Mail on November 26, 2008. Tenders closed on December 17, 2008 with the highest bid being in the amount of \$750,000.00.

23 Following the attempt to sell by tender, a sales and information package was distributed to potential purchasers and interested parties on April 16, 2009. By March 31, 2009, the Receiver-manager had received five additional proposals with the highest being \$4.5 million.

24 The Receiver-manager advised the interested parties to reconsider their bids and that no bid under \$5 million would be considered. The Receiver-manager maintains that all parties were advised that bids would require either a deposit or a letter from a financial institution confirming financing.

25 Two bids were received which complied with the conditions as set out by the Receiver-manager. The highest bid was received from the purchaser and was accepted.

26 The evidence establishes the Receiver-manager put considerable effort into obtaining the best price for the assets of Shape and B. C.

27 The real issue to be determined is whether the Receiver-manager acted improvidently. I am guided by the comments of Anderson J. in the decision of *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O. 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 on the motion for approval.

28 I repeat that a court should be reluctant to reject the recommendation of the Receiver-manager based upon information which comes to light after the decision was made. Evidence as to the value of competing bids was placed before me on this application. This evidence is relevant only to the extent it allows me to evaluate the reasonableness of the price obtained by the Receiver-manager. (See: *Crown Trust Co. v. Rosenberg*, supra)

29 Evidence of the value of competing bids was considered by McRae J. in *Selkirk, Re* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at 142:

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.

30 The evidence alleging improvident behavior on behalf of the Receiver-manager comes from two sources. One such source is the affidavit of Nick Mashin, the President of Canrex Biofuels Ltd, who submitted a proposal of \$6.25 million for the assets of Shape and B.C. In brief, the evidence of Mashin was that although he forwarded the proposal to the Receiver-manager on March 13, 2009, he was not prepared to provide either a deposit or a letter of commitment for financing by the date on which the Receiver-manager accepted the purchaser's offer. These allegations do not amount to evidence of improvident behavior by the Receiver-manager.

31 The other source is the affidavit of Todd Hicks. According to Hicks, 884498 Alberta Ltd. submitted a proposal in the amount of \$6.51 million on April 9, 2009. On April 14, 2009, Hicks was advised that a 7% deposit and a letter of commitment for financing would need to be provided to the Receiver-manager by 1:00 p.m. that day. Hicks forwarded the letter confirming financing to their Manitoba lawyer but instructed him not to forward it on to the Receiver-manager until he received further instructions.

32 At 3:04 p.m. on April 14, 2009, the lawyer for 884498 Alberta Ltd. emailed the Receiver advising that his client was aware the confirmation of financing letter must be provided and that the 7% deposit was being raised. This was two hours after the deadline as advised by the Receiver. On April 15, 2009, the Receiver advised 884498 Alberta Ltd. that another offer had been accepted.

33 Hicks provides much evidence as to conversations he had with respect to the purchase of the property. However, Hicks knew of the April 14, 2009 at 1:00 p.m. deadline and did not meet it. There is no evidence of a request for an extension of time to raise the deposit. The letter of commitment for financing was available but not forwarded until after the deadline.

34 Business negotiations take many interesting and varied approaches. 884498 Alberta Ltd. decided not to forward the available letter of commitment for financing which is their right to do. However, as of April 14, 2009 at 1:00 p.m., the Receiver did not have a deposit or a letter of commitment of financing to back up the offer of \$6.5 million. The Receiver-manager, with the information it had, made his decision. He accepted the purchaser's proposal. I am not persuaded the Receiver-manager acted improvidently.

The Interests of the Parties

35 No one appeared on behalf of Shape and B. C. on this application.

36 There are three major creditors holding security against the assets the Receiver-manager proposes to sell. The first secured creditor in priority is Vanguard who as of May 19, 2009 was owed \$4,711,865.50 with interest continuing to accrue at the per diem rate of \$882.26.

37 The second secured creditor in priority is MDC. As of May 1, 2009, MDC was owed \$4,145,541.82 with interest accruing at the rate of \$868.14 daily. In addition to its own loan to Sharpe and B.C., MDC has guaranteed the loan held by Vanguard.

38 The third secured creditor in priority is RAB Special Situations (Master) Fund Ltd. whose loan is in the approximate amount of \$2,000,000.00. This creditor took no part in these proceedings.

39 Vanguard supports the Receiver-manager's proposal in favor of the purchaser. Vanguard will be paid in full by the Receiver-manager's proposal.

40 MDC also supports the Receiver-manager's proposal. With the closing of the transaction with the purchaser, Vanguard will be paid off and MDC will be released of any liability under their guarantee. It is anticipated that there will also be some monies available to reduce the amount of indebtedness on the MDC loan. RAB will get nothing.

41 MDC does not support the position of 884498 Manitoba Ltd. Although 884498 Manitoba Ltd.'s bid exceeds the purchaser's offer by \$1.5 million, the bid is subject to the completion of a due diligence review. It is not a guaranteed transaction. MDC supports the Receiver-manager's proposal as it is to close imminently.

42 Neither scenario will result in MDC being paid in full. RAB will not receive any payment on account of their debt no matter which proposal is accepted.

43 It is in the interests of the interested parties that approval to the Receiver-manager's proposal be given.

Consideration of the Efficacy and Integrity of the Process

44 It is important that the potential purchasers in a receivership situation have confidence that if they act in good faith, undertake bona fide negotiations with a receiver-manager and enter into an agreement for purchase of the assets that a court will not lightly interfere with the negotiated agreement. Potential purchasers must have some degree of confidence in the efficacy and integrity of the process. The comments of Saunders J. in *Re: Selkirk*, supra, at p. 246 [C. B. R.] are of assistance:

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 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.

45 Hicks and Mashin attack the process used by the Receiver-manager in their affidavits. They claim they were unable to obtain information in a timely manner and their bids were made subject to conditions that the ultimate purchaser did not have to comply with, notably the provision of a deposit. I do know that the purchaser did ultimately provide a deposit but I do not know when and under what circumstances. Although their allegations raise some concern, I am unable to adjudicate if the procedures required of Mashin or Hicks were substantially different than the procedure for the purchaser based solely on the affidavit evidence before the court.

46 It is true that there were strict timelines under which parties were expected to comply with conditions of the receiver's process, but that does not affect the integrity of the process.

47 As far as efficacy of the process, the Receiver-manager began with a tendering process which resulted in an offer of \$750,000.00 and was able to negotiate a proposal from the purchaser in the amount of \$5,100,000.00. The efforts of the receiver-manager obtained positive results for the debtor and creditors. As was stated earlier in the *Skyepharm* decision, *supra*, the integrity of the process should be analyzed from the perspective of those for whose benefit it has been conducted. In that regard, the proposal accepted by the Receiver-manager was considerably higher than the initial tenders at the beginning of the process.

Consideration of Unfairness in the Process

48 The Receiver-manager undertook to sell the assets with a tendering process which was unsuccessful. The Receiver moved on to a second bidding process which once again was unsuccessful. Finally the Receiver followed up with who he considered to be serious buyers and accepted a proposal from the purchaser. All parties were provided with notice of what constituted an acceptable tender by the Receiver and all potential bidders were aware of the time guidelines. The only unfairness alleged is that the conditions of a tender were not the same for all parties. As I have already said I am unable on the evidence before me to conclude whether this allegation has been made out or not. However, other than that one allegation, the process undertaken was a fair process to all concerned.

Decision

49 The court should accept the recommendation of the Receiver except in circumstances where the necessity of rejection of the Receiver-manager's recommendation is clear (See *Crown Trust and Rosenberg*, *supra*.).

50 Receiver-manager has made a considered effort to obtain the best price and has not acted improvidently. In light of the position of MDC, I have no hesitation in finding that the approval of the proposed sale to the purchaser would be in the best interests of the interested parties.

51 I am unsure if there has been any unfairness in the working of the process with respect to the conditions imposed on the final purchase bids on the property. The evidence is somewhat contradictory and I am unable to resolve the credibility issues

on the basis of affidavits alone. However, a decision was required as of the date of the hearing or the sale agreement with the purchaser would have been breached.

52 Due consideration must be given to preserving the efficacy and integrity of the sale process undertaken by the Receiver-manager.

53 After consideration of all the criteria set out in the case law, I have concluded the proposed sale should be approved as requested by the Receiver-manager. To not do so would put any potential sale of the assets at jeopardy and place the parties back into a situation of uncertainty.

54 The vesting orders as requested by the Receiver will be granted.

55 Because I was unable to resolve the issue of unfairness with any degree of certainty, I am not prepared to grant the declaratory relief as requested by the Receiver and that portion of the application is dismissed.

Order accordingly.

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