Court File No. CV-12-9566-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 TERRACE BAY PULP INC.

The Applicant

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP
40 King Street West
Toronto, Ontario
M5H 3Y4

Alec Zimmerman
Tel: 416-367-6003
Fax: 416-361-2520
LSUC # 17663W

James Szumski
Tel: 416-367-6310
Fax: 416-682-2811
LSUC # 56958S

Lawyers for Birchwood Trading, Inc.

Index

Court File No. CV-12-9566-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 TERRACE BAY PULP INC.

The Applicant

INDEX

Joint Book of Authorities

1

1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321

Royal Bank v. Soundair Corp.

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Ontario Court of Appeal

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: *J. B. Berkow* and *S. H. Goldman*, for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

J. T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and *L.E. Ritchie*, for plaintiff/respondent Royal Bank of Canada.

S.F. Dunphy and *G.K. Ketcheson*, for Ernst & Young Inc., receiver of respondent Soundair Corporation.

W.G. Horton, for Ontario Express Limited.

N.J. Spies, for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — General conduct of receiver.

Receivers — Sale of debtor's assets — Approval by court — Court appointing receiver to sell airline as going concern — Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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 assets to them.

Per McKinlay J.A. (concurring in the result): 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. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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 the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

***Galligan J.A.*:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. 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.

2 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.

3 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 million dollars. 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 million on the winding up of Soundair.

4 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

5 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.

6 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.

7 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.

8 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, 1990. 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.

9 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."

10 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.

11 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

supported the acceptance of the second 922 offer.

12 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?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 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.

15 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.

16 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, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.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.

17 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?

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

18 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.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 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.

20 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.

21 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 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 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.]

22 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, 86 A.P.R. 303 (C.A.), at p. 11 [C.B.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.

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

[Emphasis added.]

23 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 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.

24 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 10 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.

25 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.

26 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 Co. v. Rosenberg*, supra, Anderson J., at p. 113 [O.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.

27 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. S.C.), at p. 247:

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.), 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.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), 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.]

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. 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.

31 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.

32 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.

33 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-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.

35 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 Sound- Air.

36 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.

37 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.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 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*, supra (Saunders J.). 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."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987), 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.

41 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

42 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 con- cern.

43 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*, 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 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.
>
> 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.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at 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.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

> 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.]

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

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

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

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of 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?

49 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.

50 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.

51 The offering memorandum had not been completed by February11, 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.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

not the letter, of its letter of intent with OEL.

53 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.

54 Moreover, I am not prepared to 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.

55 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 7 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, that it would have told the court that it needed more information before it would be able to make a bid.

56 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.

57 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.

58 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.]:

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

> 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.]:

> 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.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, 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.

60 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.

61 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.

62 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

the process of sale by a court-appointed receiver.

63 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 receiv- er.

64 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 debtor's assets.

65 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 inter-lender 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 inter-lender 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 million 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.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million 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.

67 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 inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 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.

69 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

70 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.

71 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-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.*:**

72 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), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.). 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.

73 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 therefore), 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):**

74 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.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by 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. 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.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.), Berger J. said at 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 have 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.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. 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:

> 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.

78 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 million to $4 million. 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 down payment on closing.

79 In *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.), Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

> entered into in good faith by the receiver but would have to look to the broader picture to see that that 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.

80 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.

81 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.

82 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.

83 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. S.C.), 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.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), Saunders J. heard an application for court approval of 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:

> 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 commercial efficacy and integrity.

85 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, 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.]:

> 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.

86 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.

87 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.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> 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 1st. 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.

89 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 his 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 "hardball," 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.

90 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

91 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.

92 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.

93 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.

94 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 million. 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 op- tion.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 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.

97 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.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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 million and $12 million.

99 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 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 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.

101 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.

102 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.

103 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.

104 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.

105 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 that 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

106 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.

107 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 inter-lender 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.

108 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 3 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.

109 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.

110 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.

111 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 3 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

was that of an agreement which amounted to little more than an option in favour of the offeror.

112 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 3 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.

113 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:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in 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*."

114 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 inter-lender condition removed.

115 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 proximately 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 million to $4 million.

116 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.

117 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

118 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 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.

119 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.

120 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.

121 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.

122 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 that it knew that CCFl was interested in purchasing Air Toronto.

123 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

124 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.

125 For the above reasons I would allow the appeal 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-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

C
1986 CarswellOnt 172, 58 C.B.R. (N.S.) 245

Selkirk, Re

Re SELKIRK

Ontario Supreme Court, In Bankruptcy

Saunders J.

Judgment: February 21, 1986
Docket: No. 844-60

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: *R. Shour* , for sheriff of Judicial District of York.

R.J. Morris , for 266741 Ontario Limited.

M. Templeton , for Attorney General of Canada.

E. Olkovich , for Dennis Leung Enterprises Inc.

Sydney Morayniss in person.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Sale of assets.

Court approving offer accepted by sheriff despite later receipt of higher offer.

In bankruptcy proceedings, the sheriff applied for court approval of a sale of vacant land with development potential. Pursuant to a court order, certain property was held by the sheriff as a receiver on condition that the sheriff list the property for sale with any agreement for sale being subject to the approval of the court. The sheriff entered into an exclusive listing agreement with a real estate firm under which the property was listed for six months at a price of $340,000. The sheriff accepted, subject to court approval, a cash offer for the price of $360,000. Subsequent to the acceptance, another offer was submitted for $381,800 in cash. The sheriff applied for approval of the sale at $360,000.

Held:

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

Earlier offer approved.

The sheriff had properly conducted and carried out his function as contemplated by the court order in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale. He considered the offers that were made and accepted the highest unconditional offer of which he had any knowledge. No circumstances existed indicating a defect in the sale process, nor was the second offer so substantially higher as to call into question the receiver's actions.

Cases considered

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.) — *applied*

Application for court approval of sale of real property.

***Saunders J.* (orally):**

1 This is an application for court approval of a sale of real property in the town of Markham. It is vacant land with development potential. Pursuant to an order the property has been held by the sheriff of the Judicial District of York as a receiver, and on 9th October 1985 Trainor J. ordered that the sheriff list the property for sale and provided that any agreement should be subject to the approval of this court.

2 The issue involves the determination of the criteria that the court should employ in determining whether or not to grant the approval.

3 The sheriff had the property appraised by a recognized real estate firm. He then entered into an exclusive listing agreement with that firm under which the property was listed for six months at a listing price of $340,000. It was decided to use the more common method of negotiating a private sale rather than inviting tenders. At least ten offers were received, some of which were in excess of the listing price. The sheriff accepted, subject to court approval, an offer from 266741 Ontario Limited for the price of $360,000 in cash. There were two offers at that price and none were higher. The offer that was not accepted contained additional conditions.

4 Subsequent to the acceptance, an offer from Dennis Leung Enterprises Inc. ("Leung") was submitted for $381,800 in cash.

5 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.

6 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

7 The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

8 In this case the price offered by Leung, in my opinion, is not so much greater as to put in question the efforts of the receiver. The only suggested defect in the process is that Leung was denied an opportunity to submit an offer and its position is set out in an affidavit filed by Mr. Leung. He was well aware that the property was offered for sale and was even provided with a form of offer by the real estate agent. For reasons that are indicated in his affidavit, he did not submit the offer until after the sheriff had accepted the offer of 266741 Ontario Limited.

9 On reading the affidavit, I respectfully agree with the submissions by Mr. Morris that it does not indicate that Mr. Leung was misled or that the sale process was in any way defective. In my opinion the sheriff has properly conducted and carried out his function as contemplated by the order of Trainor J. in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale; he considered the offers that were made and accepted the highest unconditional offer of which he had any knowledge. On that basis there is no reason why the sale in my view ought not to be approved and, accordingly, I will approve it on behalf of the court.

10 With respect to the other items in the notice of motion, an order can go in accordance with para. 2 and in accordance with para. 5, which permits the receiver to hold back the sum of $40,000.

11 Paragraph 6 will be varied to provide for interim fees and disbursements of the receiver subject to assess- ment.

12 Paragraph 7 is modified to provide simply for the payment of the proceeds of any sale into an interest-bearing account preserving the rights of the Attorney General of Canada and the other execution creditors as to its ultimate distribution, which will probably have to be dealt with by further court application.

13 With respect to para. 10, an order will go in terms of that paragraph, subject to the approval of the purchaser of any contractual extensions and with a time limit of 30th June 1986.

14 There will be an order in the terms of para. 11 so far as they affect the property to be sold under the contract which has been approved.

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

15 There will be an order in accordance with para. 4 for legal fees and disbursements subject to assessment.

16 If there is any difficulty in preparing the order to give effect to these reasons, then counsel will have to attend. I will simply endorse the record: "Order to go in accordance with reasons dictated. Costs to purchaser and to sheriff out of the estate, those of the sheriff on a solicitor-and-client basis."

Order accordingly.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

2

C

1986 CarswellOnt 172, 58 C.B.R. (N.S.) 245

Selkirk, Re

Re SELKIRK

Ontario Supreme Court, In Bankruptcy

Saunders J.

Judgment: February 21, 1986
Docket: No. 844-60

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: *R. Shour* , for sheriff of Judicial District of York.

R.J. Morris , for 266741 Ontario Limited.

M. Templeton , for Attorney General of Canada.

E. Olkovich , for Dennis Leung Enterprises Inc.

Sydney Morayniss in person.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Sale of assets.

Court approving offer accepted by sheriff despite later receipt of higher offer.

In bankruptcy proceedings, the sheriff applied for court approval of a sale of vacant land with development potential. Pursuant to a court order, certain property was held by the sheriff as a receiver on condition that the sheriff list the property for sale with any agreement for sale being subject to the approval of the court. The sheriff entered into an exclusive listing agreement with a real estate firm under which the property was listed for six months at a price of $340,000. The sheriff accepted, subject to court approval, a cash offer for the price of $360,000. Subsequent to the acceptance, another offer was submitted for $381,800 in cash. The sheriff applied for approval of the sale at $360,000.

Held:

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

Earlier offer approved.

The sheriff had properly conducted and carried out his function as contemplated by the court order in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale. He considered the offers that were made and accepted the highest unconditional offer of which he had any knowledge. No circumstances existed indicating a defect in the sale process, nor was the second offer so substantially higher as to call into question the receiver's actions.

Cases considered

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.) — *applied*

Application for court approval of sale of real property.

***Saunders J.* (orally):**

1 This is an application for court approval of a sale of real property in the town of Markham. It is vacant land with development potential. Pursuant to an order the property has been held by the sheriff of the Judicial District of York as a receiver, and on 9th October 1985 Trainor J. ordered that the sheriff list the property for sale and provided that any agreement should be subject to the approval of this court.

2 The issue involves the determination of the criteria that the court should employ in determining whether or not to grant the approval.

3 The sheriff had the property appraised by a recognized real estate firm. He then entered into an exclusive listing agreement with that firm under which the property was listed for six months at a listing price of $340,000. It was decided to use the more common method of negotiating a private sale rather than inviting tenders. At least ten offers were received, some of which were in excess of the listing price. The sheriff accepted, subject to court approval, an offer from 266741 Ontario Limited for the price of $360,000 in cash. There were two offers at that price and none were higher. The offer that was not accepted contained additional conditions.

4 Subsequent to the acceptance, an offer from Dennis Leung Enterprises Inc. ("Leung") was submitted for $381,800 in cash.

5 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.

6 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

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

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.

7 The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

8 In this case the price offered by Leung, in my opinion, is not so much greater as to put in question the efforts of the receiver. The only suggested defect in the process is that Leung was denied an opportunity to submit an offer and its position is set out in an affidavit filed by Mr. Leung. He was well aware that the property was offered for sale and was even provided with a form of offer by the real estate agent. For reasons that are indicated in his affidavit, he did not submit the offer until after the sheriff had accepted the offer of 266741 Ontario Limited.

9 On reading the affidavit, I respectfully agree with the submissions by Mr. Morris that it does not indicate that Mr. Leung was misled or that the sale process was in any way defective. In my opinion the sheriff has properly conducted and carried out his function as contemplated by the order of Trainor J. in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale; he considered the offers that were made and accepted the highest unconditional offer of which he had any knowledge. On that basis there is no reason why the sale in my view ought not to be approved and, accordingly, I will approve it on behalf of the court.

10 With respect to the other items in the notice of motion, an order can go in accordance with para. 2 and in accordance with para. 5, which permits the receiver to hold back the sum of $40,000.

11 Paragraph 6 will be varied to provide for interim fees and disbursements of the receiver subject to assess- ment.

12 Paragraph 7 is modified to provide simply for the payment of the proceeds of any sale into an interest-bearing account preserving the rights of the Attorney General of Canada and the other execution creditors as to its ultimate distribution, which will probably have to be dealt with by further court application.

13 With respect to para. 10, an order will go in terms of that paragraph, subject to the approval of the purchaser of any contractual extensions and with a time limit of 30th June 1986.

14 There will be an order in the terms of para. 11 so far as they affect the property to be sold under the contract which has been approved.

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

15 There will be an order in accordance with para. 4 for legal fees and disbursements subject to assessment.

16 If there is any difficulty in preparing the order to give effect to these reasons, then counsel will have to attend. I will simply endorse the record: "Order to go in accordance with reasons dictated. Costs to purchaser and to sheriff out of the estate, those of the sheriff on a solicitor-and-client basis."

Order accordingly.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

3

Crown Trust Co. et al. v. Rosenberg et al.

60 O.R. (2d) 87

ONTARIO
HIGH COURT OF JUSTICE

ANDERSON J.

6TH NOVEMBER 1986.

Civil procedure -- Parties -- Intervention -- Receiver not recommending highest offer for court approval -- Offeror seeking to be added as intervenor on motion for approval -- No right to be added on motion -- No interest in matter -- Not adversely affected -- Considerations -- Rules 1.03, paras. 15, 22, 13.01.

Courts -- Jurisdiction -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Moving for approval of offers -- Duties of court on motion.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Receiver acted reasonably, properly and fairly -- Offers to be approved.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Highest offeror submitting new offer after commencement of hearing -- New offer not to be considered.

In 1983, C Inc. was appointed by court order as interim receiver and manager of the defendants' properties. Subsequently in 1983, an order was made with respect to the marketing of the properties pursuant to a disposition strategy. That strategy involved first, a negotiation stage which included meetings between C Inc. and prospective offerors. This stage ended on September 3, 1986, with offers from prospective purchasers to the receiver wherein all terms and conditions of the transaction except the final offering price were settled. The second stage required prospective purchasers wishing to bid on individual properties, groups of properties, or all of the properties to submit sealed bids by September 10th. The third stage called for the receiver to notify the bidders of the acceptance or rejection of their offers within 15 days of September 10th. Pursuant to the disposition strategy, C Inc. received approximately 200 offers on September 3, 1986. Also pursuant to the strategy, C Inc. received approximately 230 sealed bids on September 10th. The receiver selected 26 offers by 14 offerors and brought a motion recommending approval of those offers by the court.

L Inc. submitted four draft offers on September 3rd and four sealed bids on September 10th. The receiver rejected three of them and held the fourth open pending the disposition of this motion, but did not recommend it. L Inc. was the highest bidder. The reason the receiver did not recommend the L Inc. fourth offer was because the receiver was concerned to maintain the integrity and fairness of the tender process and because it believed that the offer, as supplemented by letters, was not in acceptable form, nor in accordance with the rules of the process. Among other things, L Inc. proposed to finance the purchase in a novel fashion by the use of a promissory note, which caused problems with the discount rate and the sale and purchase of the note; inserted a financing condition in the sealed bid which was not in its offer; failed to identify the mortgages to be discharged; and waived the financing condition on September 18th by letter from its solicitors. Further, the terms and conditions of the offer were unclear and were not clarified by L Inc. to the satisfaction of the receiver. In addition, the receiver was concerned, in view of the history of the properties and the attention they attracted in political circles, among the tenants of the properties, in the media and from the public, that L Inc.'s inflated nominal purchase price might be regarded as intended to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. If so, this might cause intervention in the transaction which would imperil a successful closing.

On the return of the motion, L Inc. moved to be added as an intervenor and several days later presented an entirely new offer for a still higher amount.

Held, the offers recommended by the receiver should be approved; L Inc.'s motion to be added as an intervenor should be dismissed, and L Inc.'s newest offer should not be considered.

(1) The court has jurisdiction under rule 13.01 to add a person as an intervenor to a proceeding where the person claims an interest in the subject-matter of the proceeding and that he or she may be adversely affected by a judgment in it. L Inc.'s motion to be added should be dismissed, because the rule applies only to a proceeding, defined in rule 1.03, para. 22, as an action or application. Further, para. 15 defines "judgment" as a decision that finally disposes of an application or action. Hence, rule 13.01 does not apply to a motion. In any event, L Inc. had no interest in the question whether approval of the offers recommended by the receiver was in the best interests of the parties to the action, but only in seeking to have its offer accepted. Nor would L Inc. be adversely affected by any "judgment" in the proceedings in respect of any legal or proprietary right, since it had no such right. Furthermore, the consequences of making the orders sought would likely cause delay and complication in the completion of the transactions.

(2) The late offer by L Inc. should not be considered even though it was approximately $15 million higher than those the receiver recommended for approval, that is, approximately 3% of the aggregate of the purchase price of all the properties. To consider the offer at this date in the proceedings would make a mockery of the elaborate process devised and followed in the marketing of the property. Further, it would cause inevitable confusion and delay. There was no issue of unfairness towards L Inc. Rather, its belated offer was a blatant effort to circumvent the bidding process and to acquire the properties over those who had abided by the rules.

(3) On a motion by a receiver for approval of offers to purchase, the court must consider: (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 the offers were obtained, and (d) whether there has been unfairness in the working out of the process.

(4) The concerns that the receiver had about L Inc.'s fourth offer and the questions the receiver raised about the offer were reasonable and were not answered promptly, frankly or fully. Among other things, the financing condition should have been contained in the offer in accordance with the invitation to tender, and not inserted in the sealed bid. Moreover, in a transaction of this importance and magnitude, the receiver was properly concerned about the fact that waiver of the condition came from L Inc.'s solicitors and not from L Inc. All of these factors taken together, were reasonably considered by the receiver as adverse to and to weigh against approval of the L Inc. offer. Further, throughout the process, it was clear that L Inc. was not misled by the receiver about the disposition process.

(5) Although the L Inc. fourth offer was substantially higher than the others in absolute amount, it was not so much higher relative to the over-all amounts involved in the transactions. Hence, in view of the receiver's concerns about the L Inc. fourth offer, the receiver acted properly and reasonably in not recommending it for approval and instead recommended the other offers, about which it had no such concerns. For those reasons, the court should not intervene in the process, but approve the receiver's recommendations.

Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242; Re Selkirk (1986), 58 C.B.R. (N.S.) 245; Bank of Montreal v. Maitland Seafoods Ltd. et al. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20; Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1; Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237, folld

The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72, 35 N.R. 40, distd

Other cases referred to

Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5

Rules and regulations referred to

Rules of Civil Procedure, rules 1.03, paras. 15, 22, 1.04(1), 1.05, 13.01 (am. O. Reg. 221/86, s. 1)

MOTION by a court-appointed receiver and manager approving the sale of certain property; MOTION to add an offeror as an intervenor; RULING on disposition of a new offer to purchase.

P.S.A. Lamek, Q.C., and I.V.B. Nordheimer, for interim receiver, Clarkson Gordon Inc.

W.G. Horton, for plaintiffs.

H.T. Strosberg, Q.C., and R.E. Carr, for defendant, Leonard Rosenberg.

B.P. Bellmore, Q.C., for defendant, Maysfield Property Management Inc.

D. Stockwood, Q.C., and N.J. Spies, for defendant, Victor Prousky.

C.L. Campbell, Q.C., G.D. Lemon and M.M. Thomson, for applicant, Larco Enterprises Inc.

R.L. Falby, Q.C., F.T. Richmond and L. Walton, for defendant, Green Door Investments Ltd.

J.B. Laskin, for Canada Deposit Insurance.

ANDERSON J. (orally):-- This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them during the course of my reasons, although they will form part of the reasons should they be transcribed.

On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest bidder. The extent of the difference I will discuss in a moment and I will also discuss the reasons advanced by Clarkson for not recommending it.

On the return of the motion Larco moved to be added as an intervenor under rule 13.01. I dismissed that application on the following day. The reasons for that ruling are an appendix to these reasons. (See App. I [not reproduced]).

On Wednesday, October 27th, Larco presented during the hearing of the motion an entirely new offer in a still higher amount. On Thursday, October 23rd, I made a ruling that I would not consider that offer. My reasons for that ruling are likewise an appendix to these reasons. (See App. II [not reproduced]). On the argument of the motion no criticism was advanced of any of the offers recommended by the Receiver. The only criticism that was advanced on behalf of some defendants was that the Larco bid should have been recommended and in any event should be approved by the court. The plaintiffs in the action supported the recommendation of the Receiver.

Before dealing with the elements of the ensuing dispute, I turn to a consideration of the nature of the motion which is before me and of the duty of the court in the disposition of such a motion. The duties of the court I conceive to be the following, and I do not put them in any order of priority:

I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently. Authority for that proposition is to be found in a judgment of the Alberta Court of Appeal, Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58. The [D.L.R.] headnote is of assistance, as is the judgment delivered by Kerans J.A. and particularly that portion which appears at p. 476. The questions with which the court was dealing were similar to those with which I am now concerned.

> The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court in an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In Canada Permanent Trust Co. v. King Art Developments Ltd. et al. (1984), 12 D.L.R. (4th) 161, [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an on-going business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

> We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.

II. The court should consider the interests of all parties, plaintiffs and defendants alike.

That is made apparent by the judgment of this court in Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5, although the conclusion appears rather by indirection and as a statement obiter to judgment.

III. The court must consider the efficacy and integrity of the process by which the offers are obtained.

The first authority which is of assistance in that regard is the judgment of Saunders J. in Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C. Bkcy.). There, in dealing with the question of approval, he has this to say in his reasons at p. 246:

> 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 Nova Scotia et al. (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1 at p. 11 (C.A.), where he said:
>
> "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."
>
> 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.

The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court

> would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

A further authority for that proposition is to be found in Bank of Montreal v. Maitland Seafoods Ltd. et al. (1983), 57 N.S.R. (2d) 20 at p. 23, 46 C.B.R. (N.S.) 75 (N.S.S.C.):

> If any efficacy is to be given to the tender system, then it requires that ... a person, whether insider or guarantor, who obtains full information of the amounts of the tender ought not, at the last moment, be entitled to make a somewhat higher offer and obtain the property. To permit this would create "chaos in the commercial world". Not only would there be uncertainty ... but it could lead to the situation where there might be no bidders.

IV. The court should consider whether there has been unfairness in the working out of the process.

The authority for that is the case to which reference was made by Saunders J., Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1. The [C.B.R.] headnote again is useful as is, in this connection, the language at the concluding portion of the judgment where this is said:

> Misleading a bidder, even unintentionally, by a receiver must always be a sufficient ground for a court to refuse to approve an agreement of purchase and sale.

That case is also authority, if authority were needed for the proposition that in a proper case the court has the power to disregard the recommendation of the Receiver and to approve another offer.

It is with those areas of responsibility in mind that I proceed to deal with the motion. I have already said that no criticism is made of the offers which are recommended. Likewise no criticism has been made of the process by which the offers were obtained. Attention has focused on the different economic returns which it is anticipated would flow from the recommended offers on the one hand and the Larco offer on the other. Depending upon whose data and calculations are accepted, that difference may be as high as $7 million odd, or as low as $1 million odd. I do not propose to analyze the data or the calculations which have been advanced, because in the view which I take of the matter they are not material.

The central issue is whether the court should disregard the recommendations of the Receiver and approve the higher bid. Indeed at the end of the day that is the only real issue. This requires first some review of the reasons advanced by the Receiver for rejecting or at any rate not recommending the Larco bid. This is dealt with in the motion record in the Receiver's report in para. 38, at pp. 51-67 of the record:

38. Clarkson did not accept Enterprises'Enterprises was the initial name used for Larco Enterprises Inc. Offer, and does not recommend its acceptance and approval by this Court, for the following reasons:

(a) Clarkson's concern to maintain the integrity and fairness of the tender process embodied in the Invitation to Tender, and Clarkson's conviction that the evident success of the marketing and tender process as reflected both in the quantity and quality of the offers which were received was due in large measure to the faith and trust of prospective purchasers that they would each be afforded a fair and equal opportunity to purchase, have been discussed at length above. Clarkson and Cogan were advised on August 14, 1986 by representatives of Enterprises that Enterprises shared those concerns as a result of an unsuccessful tender recently made by Enterprises in respect of certain other properties, and particular emphasis was placed by the said representatives of Enterprises on their need to understand the tender rules, that the rules not be changed, and that they expected everyone to adhere to such rules.

Nevertheless, Clarkson does not believe that Enterprises' Offer as supplemented by the letters delivered after the Bid Deadline was in acceptable form or in accordance with the rules of the tender process established by and embodied in the Invitation to Tender in that, inter alia,

(i) the above-mentioned mechanism for determining the price at which Clarkson would be required to sell the Note might be said to have afforded Enterprises the opportunity to change the cash purchase price offered for the subject Properties, after the Bid Deadline, although no objection could be raised to a change in such cash purchase price if the percentage to be stipulated by one of the designated financial institutions was determined by such financial institution solely on the basis of objective market interest rate criteria; Clarkson and Fraser & Beatty, following the Bid Deadline, therefore repeatedly requested confirmation from The Royal Bank of Canada that the percentage set out in its said letter dated September 15, 1986 was determined by such bank based upon objective market interest rate criteria alone, but no such confirmation was received by Clarkson;

(ii) Enterprises or persons acting on its behalf changed or attempted to change or might have changed, after the Bid Deadline, material terms and conditions of Enterprises' Offer; namely

(A) price by means of the Note purchase mechanism;

(B) the financing condition in Enterprises' Sealed Bid referred to in paragraph 34 above was included in such sealed bid despite repeated statements by Clarkson, Cogan and Fraser & Beatty to representatives of and to the solicitors for Enterprises prior to the Bid Deadline that this would represent a serious negative feature of any offer submitted; by letter dated September 18, 1986 from Enterprises' solicitors addressed to

Clarkson (a copy of which is annexed hereto as Schedule H (Appendix III [not reproduced]) and received by Clarkson the following day, nine days after the Bid Deadline, this condition was purportedly waived;

(C) as mentioned in paragraph 36 above, Clarkson did not receive, on or before September 17, 1986, the purchase undertaking from one of the designated financial institutions in accordance with Enterprises' Sealed Bid, and in lieu thereof the solicitors for Enterprises, by means of the aforesaid letter dated September 18, 1986, a copy of which is annexed hereto as Schedule H, purported to amend Enterprises' Offer to provide that Enterprises would cause the Note to be purchased on closing "on the same terms and conditions as contemplated in [Sealed Bid Schedule 3] paragraph 8";

(D) Clarkson and Fraser & Beatty had indicated to Enterprises and its solicitors following the Bid Deadline that Clarkson had difficulty in properly evaluating Enterprises' Offer until it knew what mortgages Enterprises intended to require be discharged. While the amount payable by Enterprises would increase dollar for dollar for each dollar spent to obtain a mortgage discharge, the effect of the aforesaid Note purchase mechanism would be to satisfy such amount (including dollars expended to obtain mortgage discharges) at 81.2 cents per dollar. Fraser & Beatty therefore asked Enterprises' solicitors to confirm in writing to Clarkson what mortgages Enterprises' solicitors believed Enterprises was entitled to request a discharge of under the terms of Enterprises' Offer, it being a fair assumption that a request for a discharge of as many mortgages as possible would be received by Clarkson given the aforesaid discount achieved by means of the Note purchase mechanism. Instead, by letter dated September 21, 1986, a copy of which is annexed hereto as Schedule I, (Appendix IV [not reproduced]) Enterprises' solicitors purported to further amend Enterprises' Offer in this regard; and

(E) notwithstanding the clear provisions of the Invitation to Tender, as late as September 17, 1986 and again on September 18, 1986 a representative of Enterprises requested that Clarkson agree to negotiate a reduction in the amount of the required deposits, which request was denied, and then requested that Clarkson agree to a reduction in the amount of the further deposit to be provided within 5 days of acceptance of any offer, which further request was also denied by Clarkson;

(b) despite repeated requests by Clarkson and Fraser & Beatty for an explanation of the commercial reason for the use of the Note purchase mechanism (which on its face only serves to reduce the purchase price for the subject Properties from a high nominal value to a lower real value), in the view of Clarkson and Fraser & Beatty no clear and consistent reasons were given. Accordingly, a written explanation was requested and a reason was cited in the letter annexed hereto as Schedule I, but Clarkson did not and does not regard the explanations received as satisfactory;

(c) Clarkson was concerned and remains concerned, particularly given the history of the subject Properties and the attention they have attracted in federal, provincial and municipal political circles and with the tenants thereof and those representing such tenants, with the appearance of the proposed transaction in the minds of the tenants, the media, the politicians and the public at large, some of whom might be expected to question seriously whether the inflated nominal purchase price was being used to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. In the absence of definitive evidence to the contrary, Clarkson believes that this aspect raises perceptible risks of intervention of some kind which might imperil a successful closing of the proposed transaction with Enterprises;

(d) as was mentioned above, Enterprises failed to cause the Note purchase undertaking from Citibank to be delivered to Clarkson on or before September 17, 1986 as provided in Enterprises' Sealed Bid, and Clarkson was concerned and remains concerned with the acceptance of any offer in respect of which the offeror, before Clarkson has even had a reasonable opportunity to accept the same, has already failed to perform a material term thereof; and

(e) Clarkson was not satisfied, notwithstanding all of the foregoing, that Enterprises' Offer was capable of acceptance, and believed that certain aspects thereof would have to be successfully negotiated prior to any such acceptance, including in particular:

(i) the waiver of the financing condition which, as noted above, was purportedly effected by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson despite the relevant provisions of Enterprises' Offer in respect of amendments and despite the statement of Enterprises' solicitors, with which Fraser & Beatty agreed, in a telephone conversation between such solicitors that this and any other matter pertaining to the terms of Enterprises' Offer should be in the name of and executed by Enterprises;

(ii) the substitution of Enterprises' agreement to cause the Note to be purchased on closing "on the same terms and conditions as contemplated in paragraph 8", which again was purportedly effected by the letter dated September 18, 1986 and therefore suffered from the same difficulties as the purported waiver plus the additional difficulty that it is unclear what such "same terms and conditions" are; in Clarkson's view, it is totally unsatisfactory for a transaction of this magnitude, which contemplates an unsecured note in the order of $375,000,000, to hinge on such vague and uncertain wording;

(iii) in connection with the aforesaid purchase of the Note on closing, reference was made in paragraph 34 above to the provision in Enterprises' Sealed Bid that the Note was to be purchased "at the closing at the said [price] as part of the escrow arrangements herein provided", but in view of the uncertainty as to the intent and effect of these words, clarification would be required to ensure that there was no misunderstanding in this respect; and

(iv) the amendment to Enterprises' Offer purportedly effected by the aforesaid letter dated September 21, 1986 from Enterprises' solicitors addressed to Clarkson in respect of the mortgages to be discharged on closing and the effect thereof on the ultimate purchase

> price realized by Clarkson, which at the very least suffers from the same difficulties as the aforesaid purported waiver.
>
> Apart altogether from its concern to maintain the integrity and fairness of the tender process, Clarkson concluded that, even if it were prepared to attempt such negotiations in an effort to put Enterprises' Offer into acceptable form, the time constraints imposed by the tender rules and the fact that all offers would expire on September 25, 1986 and the difficulties encountered in resolving outstanding questions to date raised a serious question as to the successful outcome of such negotiations. In view of the risks to the entire sales process if that had happened, Clarkson decided not to attempt such negotiations but to accept the offers in hand that were capable of acceptance as they stood.

The motion was brought on in the usual way on a written report of the Receiver signed by Mr. S.R. Shaver, a vice-president of Clarkson, and unsworn.

Counsel for the Receiver submitted at the opening of the motion that for reasons pertaining to the importance of the matter and its public interest, he proposed to lead the evidence of Mr. Shaver viva voce although it is something of an exception in the disposition of a motion of this kind. I acceded to that submission. I confess to having had moments during the subsequent proceedings when I doubted the wisdom of that decision. The inevitable result was that evidence was called by the defendants who were advancing a different position, and a considerable amount of time was spent. Notwithstanding my doubts, I think that for the reasons advanced by the Receiver, and because an element of catharsis is involved, perhaps the hearing of viva voce evidence was appropriate in all the circumstances.

I have made references to the Disposition Strategy Report which lay behind the negotiations which produced the offers which are now before the court for consideration. It is a voluminous and detailed document comprising, without its various appendices and schedules, some 98 pages. It was pursuant to that strategy report that the order of Catzman J. in July of this year set in motion the sequence of events leading to the report and motion which are now before me.

Throughout that sequence of events, the Receiver has had the benefit and assistance of the advice of eminent solicitors and counsel and of an eminent real estate consultant appointed for the purpose.

In the motion which is before me some 15 counsel appeared at various times, eight for most of the time, representing various interests. The evidence consumed seven full days and final argument a further day. Most of the principal participants in the sequence of events made their appearance in the witness-box. The ponderous chain of happenings which followed the order of Catzman J. and culminating in the motion and the nature and extent of that motion are both matters of consequence to which I will refer subsequently.

Events were set in train by a letter written by Clarkson to potential purchasers which is dated July 28, 1986. It is found in the motion record at p. 124:

> On July 25, 1986 Mr. Justice Catzman approved the final stages of the disposition process which include the following:

1. A negotiation stage culminating on September 3, 1986 with an offer as between the Interim Receiver and Manager and prospective purchasers wherein all terms and conditions respecting the transaction, exclusive of the final offering price, are settled ("Approved Offers").
2. After the Approved Offers are settled prospective purchasers wishing to bid on individual Properties, groups of Properties or all of the Properties are directed to forward Sealed Bids to the Office of the Registrar of the Supreme Court of Ontario addressed to the Interim Receiver and Manager. The Sealed Bids must be submitted to the Registrar on or by 3:00 p.m. September 10, 1986 (Bid Deadline Date).
3. After reviewing and analyzing the Sealed Bids, in context with the Approved Offers, bidders will be notified whether or not their offers are accepted within 15 days of the Bid Deadline Date.
4. The Standard Form of Offer and the Invitation to Tender stipulate that offerors must submit with their Sealed Bids deposits amounting to the greater of $100,000 or 21/2% of the price offered in the Sealed Bid in the form of a certified cheque or bank draft.

For greater certainty and clarity we request that you carefully review the Invitation to Tender, Sealed Bid form and Standard Form of Offer in order that all aspects of the above outlined disposition process are understood and, more importantly, closely adhered to so that no one is disadvantaged throughout this process.

We urge each of you to convene meetings with us at the earliest possible date to ensure that all of your queries and concerns are adequately addressed. These meetings should assist you in preparing and submitting an Approved Offer on or by September 3, 1986. To this end, we have prepared all of the schedule for each Property to be affixed to the offer(s) including financial information and rent rolls as of June 30 and July 1, 1986 respectively.

There will be one and only one opportunity to bid. Because of the nature of the process, prospective purchasers will be automatically encouraged to submit their highest and best offers. Please be cognizant of the fact that all offers will be evaluated on a "cash equivalent" basis to ensure a fair and equitable evaluation process.

A prospective purchaser's chance to be the successful bidder will be enhanced relative to another purchaser, assuming equal "cash equivalent" offers are received, if:

1. the Approved Offer contains fewer onerous and time consuming conditions.
2. the prospective purchaser establishes his "credit worthiness". This aspect can best be established if conclusive third party evidence of the purchaser's ability to arrange the necessary financing to close the transaction is provided; and
3. Property inspections are completed in advance of the final Bid Deadline Date, September 10, 1986.

The invitation to tender is an exhibit on these proceedings. Again, its contents are material. I do not intend to read them but they will be included in the reasons. (See App. V [not reproduced])

I said when referring to the portion of the report which set out the reasons by the Receiver for not recommending the Larco offer that I did not propose to deal in detail with each of the points raised. The objections upon which emphasis was particularly placed were the following:

1. the use of the promissory note and the related problems of the discount rate and the sale and purchase of that note;
2. the inclusion in the sealed bid of a financing condition which had not been provided in Larco's formal offer;
3. the identification and amount of the mortgages which Larco would require to be discharged upon closing, and
4. relating to the financing condition, the ultimate waiver of that condition.

The uncontentious history of the Larco offer is that prior to its being made there was a meeting in August of 1986 attended by representatives of Larco and representatives of Clarkson when the prospective offering and bidding procedure were discussed.

On September 3rd offers were submitted. On September 8th Clarkson replied in writing with certain comments. Between September 3rd and September 9th there were meetings and telephone conversations between the representatives of Larco and representatives of the Receiver. On September 10th there were consultations and there was a subsequent exchange of correspondence. When the final decision of the Receiver was announced September 25th the Larco offers were not recommended.

I have already indicated that the difference between the competing offers figured largely in the hearing and blow-by-blow accounts were given by the various participants of the exchanges between representatives of Larco and representatives of the Receiver. These exchanges must be explored to some extent, though not with the attention to detail which they received during the hearing.

I do not intend to deal seriatim with each of the Receiver's objections as was done by counsel for the defendants, Green Door and Walton, and I trust that he will not feel that his argument was slighted or not considered because I do not do so. I do intend to mention some of the major points.

The first of those was the note mechanism. In the preliminary discussions between representatives of Larco and the Receiver there had been some mention of the use of a note or debenture to finance a portion of the price. I think nothing turns on the contents of those precise discussions. The actual mechanism was not fully disclosed until the bid deadline and the submission of the sealed bid.

It is appropriate I think to consider that, in the offer which was submitted on September 3rd, para. 3 dealing with payment, after setting out provisions with respect to deposit and the taking back of mortgages, concluded with the following subparagraph:

> And the balance of the price for the Properties shall be paid subject to adjustments to the Interim Receiver on the Escrow Closing by certified cheque or bank draft payable to the Interim Receiver drawn on or by a Canadian chartered bank or by another Canadian financial institution acceptable to the Interim Receiver.

When the sealed bid was submitted the note mechanism, a phrase which I shall adopt although it is not in all respects a happy one, was in the form which appears at p. 136 of the record, this by way of amendment to the offer to which I have just referred:

> 8. Paragraph 3 of the Form of Offer shall be amended by adding thereto the following paragraphs:
>
> "The balance of the price referred to in paragraph 3 of the Form of Offer shall be paid by Offeror to the Interim Receiver by Offeror's delivering to the Interim Receiver a promissory note ("Citibank Guaranteed Note") in that amount, which note shall be unsecured by any charge against the Properties, but which shall be absolutely and unconditionally guaranteed by one of Citibank Canada, Royal Bank of Canada or another financial institution reasonably acceptable to the Interim Receiver (which financial institution is herein referred to as "Citibank"). The said promissory note shall require equal monthly payments of principal and interest sufficient to fully amortize the said sum at the rate of 8.222% per annum over a term of thirty (30) years. Offeror shall arrange a conventional mortgage loan with Citibank or its designee (which party is herein called ("Lender") which shall be secured by a charge against the Properties which shall be subject and subordinate in all respects to the existing loans which are assumed by Offeror on the date of Closing."
>
> The Interim Receiver shall sell the Citibank Guaranteed Note on the date of Closing to Lender for cash purchase price determined as follows:
>
> "on or before Monday, September 15th Citibank shall report in writing to the Interim Receiver stating the cash price (the "Cash Purchase Price") for the Citibank Guaranteed Note as of Wednesday, September 10, 1986. On or before Wednesday, September 17, 1986 the Interim Receiver shall have received in form satisfactory to Interim Receiver acting reasonably an undertaking from Citibank to purchase or cause to be purchased the Citibank Guaranteed Note at the Closing at the said Cash Purchase Price as part of the escrow arrangements herein provided, subject only to the acceptance of this Offer and such reasonable warranties and representations from the Interim Receiver that he has not encumbered or accepted payment on the said note as Citibank may require. Any such sale of the Citibank Guaranteed Note by the Interim Receiver will be on a non-recourse basis."
>
> Any Court approval of this Agreement to be effective and acceptable to the Offeror shall also include approval of the sale by the Interim Receiver of the Citibank Guaranteed Note as herein provided.

The concerns of the Receiver to which this aspect of the transaction gave rise are set out, as I have indicated, in para. 38 of the report. It was, I think it is fair to say, a complicated mechanism and had some elements of novelty. In its very nature it gave rise to questions, particularly perhaps having regard for the history of these properties in the recent past. It gave rise to questions as to the reasons for its use and also as to its possible effect on the price. In my view, the questions raised by the Receiver were reasonable questions and they were not answered promptly, frankly or fully.

The position of Larco, in part made explicit and in part to be inferred from conduct and from the evidence, was that this was largely none of the Receiver's business. Larco was perfectly entitled to take that position. I should say by way of digression that if in any previous ruling or in these reasons I appear to be critical of what was done by Larco, it is within the limited framework of the process with which I am concerned and not otherwise. Larco is not a charitable organization. It is a commercial corporation entitled, within the limits of the law, to carry on its commercial affairs as those having the charge of those affairs deem appropriate. But if in some respects it produced adverse reactions in the Receiver, and adverse consequences for the reception of its offer, it cannot be heard to complain.

The next contentious item to which I propose to make reference was what has been called in the evidence the "Financing Condition". This was not part of the draft offer but was contained in the sealed bid and was set out in the following terms by way of amendment to that offer:

> Notwithstanding any other provision of this Offer, the obligation of the Offeror to proceed with this transaction shall be conditional upon the Offeror's obtaining written commitments, reasonably acceptable to Offeror, for the Citibank Guaranteed Note and the conventional mortgage loan from the Lender no later than twenty (20) days after Acceptance of this Offer. If Offeror does not obtain the written commitments from Citibank and the Lender within the time period of twenty (20) days, Offeror may terminate this Agreement, in which case, the Interim Receiver shall return the deposits and interest thereon to Offeror promptly following demand.

In my view, such a provision given the mechanism and procedure, the process which was being followed, ought to have been part of the Larco offer and subject to negotiation at the proper time and not at the 11th hour.

The evidence of Mr. Shiraz Lalji was to the effect that he considered the offer as merely a format for the transaction and that the real substance was to be in the sealed bid. He also testified that he had been led to believe that conditional offers would be at no disadvantage. I find it difficult to accept that evidence. The financing condition was a provision so material and of such obvious advantage to the purchaser and a commensurate disadvantage to the vendor that it went to the very root of the transaction. Indeed, as the apprehension of the Receiver indicated, it converted what purported to be an offer into what was in substance an option. I shall have to discuss further in a moment the reasons that I cannot accept Mr. Lalji's evidence in that regard. I can only say for the present that if he entertained the view which he expressed with respect to the form of offer it was a mistaken view and should have been recognized as mistaken having regard particularly for the form of the invitation to tender and of the converting letter with which that invitation went out. Whether this deferral of a term so critical was deliberate or inadvertent, I need express no conclusion. It operated, however, to the detriment of Larco in the consideration of its offer by the Receiver.

Eventually it was recognized by Larco that the financing condition was likely to be seriously prejudicial, if not fatal. Steps were set in train to address its removal. That removal entailed a financial cost and risk to Larco which it had sought to avoid. Approval of its board of directors was required and that approval was obtained early on the morning of September 18th, 10 days after the bid deadline. Written confirmation of that waiver is found in sch. 8 to the report, at p. 179, in a letter from Messrs. Weir & Foulds, Solicitors to Clarkson Gordon Inc. which says after some reference of a preliminary nature to the sealed bids: "Our client has instructed us to waive, and we hereby waive, the benefit of paragraph 10 to Schedule 3."

The evidence indicated that Mr. Carthy apparently wanted some assurances from Larco before writing that letter; an apprehension which is not difficult to understand. The Receiver has taken the position that the waiver should have come direct from Larco and not from its solicitors. I do not propose to determine as a matter of law whether the purported waiver was effectual or not, although invited in argument to do so. I do not consider it any necessary part of my function on this motion. What is to be considered is the reaction of the Receiver.

In a transaction of such magnitude and pertaining to a condition so material, I do not consider it in any way unreasonable that the Receiver looked upon it as one of the unfavourable elements which ultimately tipped the scales against the Larco bid. Solicitors, of course, have certain general and accepted authority to bind their clients. But the annals of law are not wanting in cases where the authority and its exercise have become a topic of litigation. And there is a maxim well-known among businessmen that no one wants to buy a lawsuit. All of this dealing with the form of the waiver I say, without any reflection upon or lack of respect for the eminently capable and reliable firm of solicitors who offered it.

I turn now to the question of the mortgages to be discharged which proved to be a bone of contention. In view of the mechanism of the promissory note, which was to be sold at a discount, it was essential for the Receiver to know the mortgages to be discharged in order to know the real price. The final position of Larco in this regard is contained in a letter dated September 21st from Weir & Foulds which is contained at p. 181 of the record:

4. Assumed Mortgages

> By letter dated September 16, 1986, provided you with a letter explaining the "Estimated Assumed Loans" in connection with 's bids. As you may know, we have not had the opportunity to fully review all of the existing mortgages which affect the properties and make a final decision as to which existing mortgages will be assumed at closing by . hereby agrees that the "Reconciled Contract Price" set forth in 's letter for each of 's bids shall be the exact cash equivalent price which the Receiver shall receive at closing from . For example, if the actual assumed mortgages are less than the amount stated by in his letter, the shortfall shall be paid by in cash at closing in order to maintain the "Reconciled Contract Price" as stated in 's letter. On the other hand, if the actual assumed mortgages are more than the amount stated by in his letter, the "Face Value of Vendor Note at Closing" will be adjusted downward in such a manner as to maintain the stated "Reconciled Contract Price" as stated by in his letter.
>
> If further clarifications of the offers are required, please advise the undersigned.

It does not respond in exactly the terms in which the Receiver had put its inquiries but instead provided a mechanism for possible adjustment with respect to the mortgages assumed. Again, I do not propose to consider whether this was a satisfactory response or not. It was another complication, another blemish on the Larco offer, another factor which the Receiver not unreasonably considered to be adverse and to weigh against approval.

There is a further matter dealing with the utilization of the note. As I have indicated, the precise mechanism made its appearance in the sealed bid and I have already read the relevant paragraph. I do not propose to review all of the evidence, which was considerable, bearing on this topic. It is sufficient to say that the final solution unilaterally proposed by Larco is as found in the record at p. 179 in the letter from Weir & Foulds of September 18th to which I have already referred in another context. The concluding paragraph of that letter reads:

> Enterprises Inc. hereby agrees to cause the Citibank Guaranteed Note to be purchased on closing on the same terms and conditions as contemplated in paragraph 8.

No reference is made to the Royal Bank who at one time had been proposed as a potential purchaser or to any other purchaser. The covenant of Larco has been substituted for that of Citibank, and as I have indicated, no purchaser has been provided or even proposed.

It is the position of Larco, as put in argument and in evidence, that from a commercial standpoint the purchase of the note became irrelevant once Larco had demonstrated credit capacity adequate for the transaction, as it did by a letter from Citibank dated September 9th. Larco was then, it is said, in the same position as other tenderers, obliged to pay on closing or otherwise make good. Ignoring any frailties which may be inherent in that argument, it is undeniable that it did not put the Receiver in the position which it had originally been proposed of having a bank liable to make good.

It has been submitted by counsel supporting the Larco offer that the requirement for a purchaser of the note had been waived by the Receiver. Again, I do not propose to dispose of waiver or estoppel as matters of law. I refer to the episode as yet another problem for the Receiver and its counsel and a problem which militated against the Larco offer.

In outlining initially the obligations of the court on a motion of this kind, I adverted to the question of whether the Receiver has in any way misled a bidder. It is clear that if a bidder has been misled that may constitute a circumstance upon which the court will intervene upon the motion for approval. Though it was not passed in argument, there was clear indication in the evidence, particularly that of Mr. Shiraz Lalji, that Larco had been misled as to the acceptability of a conditional offer. This was relevant to the much discussed financing condition.

Any suggestion that Larco was misled in this respect must be approached with a measure of skepticism. Larco is apparently a large sophisticated enterprise and those charged with its affairs appear expert in matters of contract negotiation and finance. It was advised in and about this transaction not only by members of its own board of directors but by an attorney of Seattle, Washington, Mr. Thaddas Alston. Mr. Alston testified and was quite evidently an able and experienced lawyer with a connection of some duration with the affairs of Larco. Larco was also advised by eminently capable solicitors in Toronto. It had every advantage to review and consider every aspect of the transaction.

Mr. Lalji testified that early in the discussions Shaver indicated that conditional offers would be considered on a par with unconditional offers. This Shaver denies and says that all he ever said was to the effect that: "We will look at all offers." The evidence of other representatives of the Receiver was that Larco was repeatedly told that a condition would be to its disadvantage.

It is always difficult and distasteful to a judge to have to resolve a direct conflict of evidence between what are apparently respectable and reliable witnesses. But sometimes the duty is one which cannot be avoided, and in this instance I find myself compelled to accept the evidence of Shaver and to reject that of Lalji. I do so chiefly on what is most probable. The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it. Indeed it is a clear inference from Mr. Lalji's evidence that he recognized that it was bizarre and had it been said I doubt very much that he would have taken it seriously.

It was also suggested that Larco was misled into concluding at the last stages that the Receiver was not insisting on the undertaking of the bank to purchase the note. I have already made brief reference to this. It was said that Mr. Cogan, a representative of the real estate consultant advising the Receiver, had either said so or had plainly inferred it. This Cogan denies. Cogan was responsible for the real estate aspects of the transaction and not for the legal or financial ones. If Larco received such an impression from Cogan, prudence would have dictated that the matter be verified either with Mr. Shaver or with the solicitors advising the Receiver. So much Mr. Alston conceded in his evidence. It would appear that Mr. Carthy of Weir & Foulds recognized that there was a deficiency in that regard.

The evidence of Mr. Zimmerman, a member of the firm of solicitors advising the Receiver, confirmed by the uncontradicted evidence of Shaver, was that on September 16th Carthy and Alson were advised during a telephone conversation that the note purchase undertaking was expected by the Receiver on the following day. It was never received.

Taking the evidence as a whole, I am not at all persuaded that Larco was misled in any material respect.

In criticism of the conduct of the Receiver, criticism which I may say has been very limited in extent, it was submitted that the Receiver negotiated with other parties after the bid deadline. Specifically reference was made to the Ivordale-Maisonettes property where a discrepancy had appeared between the words and the numerals in the offer. I am not persuaded that the resolution of the problem involved negotiation, nor that if it did it offended the process or was prejudicial to Larco.

There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

A special and somewhat peculiar position in the matter was put on behalf of the defendant Maysfield Property Management Inc. Maysfield is a corporation whose shares are effectively held by receivers appointed for two other corporations. Maysfield managed and operated the subject properties before Clarkson was appointed Receiver, and by arrangement with Clarkson continued to perform that function after the receivership commenced. It employs something over 200 persons. It has substantial worth and it has substantial revenues.

By letter dated October 16, 1986, Larco offered to purchase the outstanding shares in Maysfield for net book value, an offer conditional upon approval of the Larco offer by the court. If the offers recommended by the Receiver are approved, there appears to be no certainty and perhaps not even any probability of the continued viability of Maysfield.

In a secondary submission counsel for Maysfield asked that if an order were made as sought by the Receiver, that that order should be stayed for some period of time to enable Maysfield to negotiate with the purchaser.

I observe by looking at the clock that I have been going for something well over an hour at the moment, and I regret to tell everyone that I am not finished yet. I propose to take 10 minutes for my benefit and perhaps for yours as well.

[Court recessed 11.07 a.m. and resumed 11.19 a.m.]

I propose now to express some factual conclusions with respect to the matter.

The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

Mr. Zimmerman very fairly conceded in his evidence that probably none of those causes was in itself fatal. I think that probably is so. They were, however, considered cumulatively by the Receiver and it was in my view legitimate and reasonable to do so.

In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. 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. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. 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.

In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

Reference was made in argument to The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

The decision made by the Receiver was one to which it brought its experience and expertise for the position to which it was appointed. It was a decision upon which the Receiver had the advice of solicitors and counsel and of an expert real estate consultant retained for the purpose. It was a decision from which the Receiver did not resile at the conclusion of two weeks of hearing.

It is clear on the one hand that the court is not to apply an automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

The court no doubt has power to enter into the process to any extent which appears proper in the circumstances. In Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, to which I have referred, the judge in chambers actually received bids.

In this case it was suggested by counsel for some of the objecting defendants that the court conduct a run-off or direct the Receiver to do so between the Larco and the recommended offerors. I have no doubt that I have the power to do so. To exercise it would, in my view, exhibit very little judgment. It would be to open a Pandora's box, the contents of which might be more unruly and unpredictable than the consequences which followed my decision to hear viva voce evidence in this case.

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.

Much was said during the hearing about the integrity of the process, that is, the process carried through by the Receiver pursuant to the July order made by Catzman J., and whether Larco had abused or evaded or sought to abuse or evade it. The Receiver perceived, not unreasonably in my view, that that was so. Certainly it must be said that Larco fell somewhat short of coming forward promptly, openly, forthrightly and unequivocally with its best offer, an objective at which the process was directed.

In the arguments of counsel for the objecting defendants, particularly for the defendant Prousky, the process was very narrowly defined; virtually confined to the precise provisions of the plan approved by the court. I do not consider it appropriate to view it so narrowly or that the ambit of the Receiver's discretion should be so narrowly limited.

In addition to the regard which must be had for the process in this case, there is another similar factor for which I must have regard. It was adverted to by Saunders J. in the two cases of Re Selkirk (1986), 58 C.B.R. (N.S.) 245, and Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237, which have been referred to in the argument. It was also reflected in the Nova Scotia Court of Appeal decision in Cameron. In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J. A. in Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests", that is a relevant and material one.

In this case I am reviewing the recommendations of the Receiver. I have had the benefit of two weeks of hearing and the assistance of a dozen learned counsel, advantages which were denied to the Receiver.

If I were persuaded, and I am not, to conclude that as a result of this hearing the objections of the Receiver had been fully and satisfactorily met, I should still have much hesitation in rejecting the Receiver's recommendation.

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.

Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are, as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

During the time which I have spent considering this matter, I have asked myself many times what the situation would have been had we been dealing with hundreds of thousands of dollars, rather than hundreds of millions, and a potential difference in the result potentially reduced accordingly. I have asked myself whether I would have had any difficulty in arriving at a conclusion and have found myself forced to answer that question in the negative. It is a well-worn adage among lawyers and judges that hard cases make bad law. Perhaps there is a corollary proposition that large cases have a tendency to do the same sort of thing.

The actual difference between the offers under consideration, I am repeating myself, is substantial. It is that alone which has really created the issue before me. While the actual difference is a factor of much weight, it must also be viewed in its relative relation to the size of the transaction. 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.

The importance of this motion, and the measure of interest which it has for the parties and for the public, might have made desirable a period under reserve of sufficient duration to permit the writing of formal reasons for judgment. The circumstances related to the prospective sales were such that prompt disposition of the motion seemed more important than elegance of expression. The worst grammatical solecisms will be massaged out in the editorial process. As to the substance of the reasons, I feel as much confidence as is possible when one is dealing with matters of difficulty, of importance and of some notoriety.

There will be orders as asked upon the motion approving the sales. I presume that there will be some mechanical matters to be dealt with before we all part and I invite counsel, I guess first of all Mr. Lamek, to suggest whether it would be appropriate that I adjourn for a few moments while those matters be considered and discussed, or whether I should proceed to deal with them immediately.

MR. LAMEK: I suggest a short adjournment might be useful, My Lord. On the possibility that your lordship would take the view of this matter that you have expressed this morning a revised draft order was prepared to take into account the matters that occurred during the course of the hearing. We have not been so bold as to distribute that to other counsel in advance. Having not seen the revised draft, and of course neither has your lordship, it might be helpful if we do and until your lordship has a good look at the draft.

HIS LORDSHIP: Does it make any disposition as to costs, Mr. Lamek.

MR. LAMEK: I did not, my lord.

HIS LORDSHIP: If you will be kind enough to send my copy of it through the Registrar, I will recess now for what, 15 minutes?

MR. LAMEK: I think that should be sufficient, my lord, yes. If it is not perhaps ...

HIS LORDSHIP: You can let me know?

MR. LAMEK: Thank you, my lord.

[Court recessed 11.45 a.m. and resumed 12.07 p.m. Counsel made submissions as to costs.]

HIS LORDSHIP: There will be no order as to costs. Mr. Strosberg's argument, as usual, makes good sense and I would be hard put to diagree that a measure of benefit has flowed from the proceedings.

At the same time, I think it fair to observe that the objecting defendants were not proceeding pro bono publico, and I see no sufficient reason that their participation should be other than at their own expense.

Before I depart from the matter I should, which I normally do at the outset before anybody knows whether they have won or lost, record my gratitude to counsel for their assistance in dealing with the matter and for the orderly conduct of the proceedings throughout.

Motion granted.

RULING ON MOTION BY LARCO ENTERPRISES INC. TO BE ADDED AS AN INTERVENOR

HIS LORDSHIP: There is a motion before the court brought by the interim receiver and manager Clarkson Gordon Inc. to approve the sales of certain properties on the recommendation of Clarkson, and for direction as to details relating to the completion of the sales which are approved.

The motion comes on pursuant to leave reserved by the order of the Honourable the Associate Chief Justice of the High Court made on November 29, 1985. Service of notice of motion was effected in accordance with an order of the Honourable Mr. Justice Catzman made on July 25, 1986.

On the return of the Receiver's motion, a motion was made on behalf of Larco Enterprises Inc. That motion seeks an order adding Larco Enterprises Inc. as an intervenor in the action and allowing the intervenor access to the report of the Receiver dated October, 1986, with respect to the proposed purchase of properties as set out.

The properties affected by the Receiver's motion are numerous and various in their quality. Details as to those matters are not necessary for present purposes. Because of the nature and number of the properties and the consequent difficulties in marketing them effectively, a complex and sophisticated plan was evolved and pursued under the authority of the order of the Honourable Mr. Justice Catzman to which I have referred. Again, details of that process are not necessary for present purposes. It is sufficient to say that a very large number of offers were made to and considered by the Receiver, of which some 26 are recommended for the approval of the court.

Among the offers received, but not recommended for approval, was one from Larco. As to its disposition of the Larco offer, it is useful to refer very briefly to two portions of the report of Clarkson which is filed in support of the substantive motion.

The first reference is to para. 33 of the report which is found at p. 52:

> Annexed hereto as Schedule E is a photocopy of one of the four sealed bids, (the "Enterprises' Sealed Bid") submitted by a particular offeror ("Enterprises") and a photocopy of Enterprises' form of offer in connection therewith, in each of which the name of Enterprises has been deleted and which together comprise one of the offers ("Enterprises' Offer") in respect of which Clarkson exercised its discretion to extend the date by which such offer may be accepted as aforesaid. Clarkson does not want the fact that this offer has been kept open to permit an inference that it in any way endorses the Enterprise Offer. Clarkson has chosen to extend such acceptance date in order that this court may effectively assess the rationale behind Clarkson's decision not to accept and recommend Enterprises's Offer. Clarkson has advised Enterprises that it has chosen not to accept any of the other three offers submitted by Enterprises.

And also for present purposes only a portion of para. 37 which is found at p. 56 of that report:

> It will be noted that if the value put by Enterprises on its offer in its letter of September 15th, 1986 referred to in paragraph 35 hereof is accepted, and if that amount is coupled with the offers accepted in respect to the Bretton Place and Bay Charles Tower Properties, the value of these offers is approximately $422,000,000 which is estimated to be, at the most, about $9,900,000 or 2.4% in excess of the cash equivalent value of those offers which Clarkson has accepted. However, Clarkson, after considering the matter at length in conjunction with Fraser & Beatty and Cogan, decided not to accept Enterprises' Offer for the reasons set forth in paragraph 38 hereof.

I need not refer at present to those reasons. Fraser & Beatty are the solicitors advising the Receiver and Cogan is the real estate expert also advising the Receiver.

I turn now to the nature and relief sought in the Larco motion and the grounds upon which it is based. Reliance is placed on rule 13.01 of the Rules of Civil Procedure. That rule, in so far as it is germane for my purposes, reads as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;

[then I miss a clause which is not material]

the person may move for leave to intervene as an added party.

> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the

court may add the person as a party to the proceeding and may make such order as is just.

In support of the Larco motion, it has filed the affidavit of one John Hunt Nolan, and I propose to read briefly from that affidavit at p. 8 of the motion record commencing at para. 10 of the affidavit:

10. In the report, Clarkson has placed Bid 4 before this Court and has raised some concerns with respect to it.
11. It is clear from the report (paragraph 37) that the Larco bid is the highest value of all submitted bids.
12. In order to properly respond to Clarkson's concerns, I believe that it is necessary for Larco to be added as a party to these proceedings.
13. Larco, through its officers, was of the understanding that at all material times Clarkson had recognized the status of Larco herein and believed that Larco would be able to make representations to the Court with respect to Clarkson's report, insofar as it respected Larco's bid.
14. I believe that Larco has a valid commercial interest in these proceedings. I further believe that those interests may be adversely affected if Larco is not given standing in these proceedings and an opportunity to examine and reply to the Clarkson report. Indeed, I believe that the various defendants in these proceedings may be adversely affected if Larco is not given standing in light of its apparent highest value bid.

Larco's motion for intervention is opposed by counsel for Clarkson and by counsel for the trust companies, and is supported by counsel for the defendants Rosenberg and Prousky and for Green Door Investments Ltd. and Leonard Walton.

The first question to be addressed is whether Larco can be brought within the ambit of rule 13.01. In considering this, it is necessary to decide what is the "proceeding" to take that word from the rule.

The notice of motion says that an order is sought adding Larco "as an intervenor in the action". As the argument proceeded I think it was common ground that the "proceeding" was the motion for approval of the sales.

Counsel for Clarkson submits that the rule does not apply to such a motion, indeed does not apply to an interlocutory motion at all. In that connection reference is made to rule 1.03 and in particular to para. 22 of that rule which defines "proceeding" in these terms:

22. "proceeding" means an action or application;

It is also useful to consider para. 15 of that subrule where "judgment" is defined in these terms:

15. "judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party;

There can be no doubt that the motion brought by Larco is neither an action nor an application as those terms are defined in the rules. It is, I think, questionable whether the result of the substantive motion can properly be designated as a judgment, and I do not consider it necessary to trace my way through the procedural maze which would be necessary in order to arrive at a reasonable conclusion as to whether it was or not.

I am referred by counsel for Larco to other provisions of the rules, in particular the opening words of rule 1.03 which contains the definitions to which I have referred and which says:

> 1.03 In these rules, unless the context requires otherwise ...

I am also referred to rule 1.04(1):

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

And, finally, reference is made to rule 1.05:

> 1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

I find nothing in the context of rule 13.01 which requires me to give to the word "proceeding" any other meaning than as defined in rule 1.03, para. 22. Nor do I consider that rule 1.04(1) gives me any licence to do so.

Thus, on purely technical grounds I hold that the Larco motion is not a motion related to a "proceeding" within the meaning of rule 13.01 and should be dismissed.

The disposition by a judge of first instance of what is essentially a question of law may well prove to be ephemeral in its nature. For that reason, and because I would prefer that my decision not be perceived as resting on grounds so narrow as technical, I intend to explore some other aspects of the matter.

If the proceeding were one to which the rule applied, the next question to explore would be whether Larco has an "interest" in the subject-matter of the proceeding.

The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.

Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

When this offer was made it knew that the Receiver need not accept the highest or any bid. I see no force in the argument that Larco has some special right by reason of the decision of Clarkson to extend the date for acceptance having regard for the limited and special reason for which that extension was made.

While I would not give it substantial weight, I am not unmindful that the consequences of such an order, that is an order adding Larco, would be extremely difficult to predict in terms of delay and in terms of complications in the completion of the transactions under review, consequences which I have decided would not be satisfactorily resolved by any conditions which I could devise and attach.

In the course of argument I expressed the view that there would be some advantage for the court in having Larco's submissions on the Receiver's reasons for rejecting its offer. My concern on that score has been resolved by the realization that there are many counsel present in a position to extol such advantages as the Larco offer may have, and by the expressed position taken by counsel for the defendant Rosenberg that it was prepared to advance the advantages of that offer.

It has not escaped my attention that the Larco motion, however dealt with, has a potential for complication and delay of the proceedings. That is simply a fact of life and nothing within my power can alter it. Fully conscious of that I have arrived at the disposition I propose as being consistent with the law as I see it, and with, at least, no greater potential for adverse consequences.

The matter appears to be one of first impression. I would have preferred for that reason the opportunity to reserve and to deliver a written judgment. It seemed apparent, however, that the circumstances were such that expedition in the result was to be preferred over elegance in its expression.

I was referred to several cases, none of which I considered to be sufficiently on point to make it useful or necessary to refer to them.

The motion of Larco to intervene is dismissed.

Motion dismissed.

ORAL RULING REGARDING LARCO ENTERPRISES INC.'S LATE OFFER

The ruling which I must make this morning involves what disposition is to be made of a new offer by Larco Enterprises Inc., an offer delivered by counsel for the defendant Rosenberg to the counsel for the Receiver during the luncheon recess on Wednesday, October 22, 1986.

Before proceeding to the substance of my ruling, I wish to review briefly the progress of this motion to date. The notice of motion, the substantive motion that is to approve sales, is dated October 10, 1986, and it was on that date served on agents for the solicitors for the defendant Rosenberg. It was made returnable on Monday, October 20th, and according to its return date came before me.

Also made returnable on that date was a motion by Larco for status as an intervenor in the application for approval. The supporting material filed upon that motion indicates that it was prepared not later than October 17th when the affidavit of Nolan was sworn. It is an inescapable inference that Larco knew by that time at least that the Receiver was not recommending its offer and knew the bases advanced by the Receiver for refusing to do so. It would not be unfair to surmise that Larco knew some time before that.

In the affidavit of Nolan filed in support of that motion to intervene there is no reference made to any new offer, or to the possibility of any new offer, but only an intention to address the concerns of the liquidator about the offer which was then under consideration.

The disposition of that motion to intervene was not without difficulty. It came before me as a matter of first impression. It had obvious implications whatever its disposition was and for that reason I reserved my judgment and made my ruling on the following morning at 10:00 a.m. on Tuesday, October 21, 1986.

At the request of counsel, I adjourned to chambers to discuss what method of proceeding with the substantive motion should be followed in light of that ruling, and in light of the possibility that an appeal would be taken from that ruling. After considerable discussion and the submissions of counsel, I decided not to resume the argument that day but to do so on the morning of Wednesday, October 22nd.

At the opening of court on Wednesday, October 22nd, Mr. Lamek, as counsel for the Receiver, requested leave to adduce viva voce evidence of an officer of the Receiver company, the vice-president of Clarkson and Gordon Inc. and such leave was granted.

Mr. Shaver was examined in-chief during the forenoon, and it was after the luncheon recess, as I have indicated, that the new offer of Larco was tendered by counsel for Rosenberg. The precise time of its tendering I do not know, but it was first drawn to my attention when the court resumed in the afternoon.

I am urged by counsel for Rosenberg and for some other defendants to receive this offer in evidence and to consider it upon the disposition of this motion. The new offer, the details of which I have not reviewed, is said to be some $15 million higher than that which is proposed by the trustee for acceptance. This amounts to something in excess of 3% of the aggregate amount of the purchase price of all of the properties.

It is the submission of counsel for the defendant Rosenberg and some other defendants that I should receive the offer in evidence, permit the representative of the Receiver to be cross-examined with respect to it, and, at the conclusion of the motion, decide whether it should be accepted in place of that recommended by the Receiver.

I do not intend to do either. The conclusion I may say I have reached without hesitation or doubt, the reasons I am now expressing are expressed only because there is some public interest in the question, and it should be made manifest that I am deciding what I am deciding and, of course, it should be available to a reviewing court should such a court review the discretion which I have now exercised.

The sale procedure in this case was carefully devised and carefully applied. I need not review either the details of the plan or its application. They are matters of record.

Larco knew early in the procedure that its offer was perceived by the Receiver to present difficulties. Various efforts were made to resolve those difficulties. They were not successful. Larco moved to intervene in these proceedings and failed.

On the third day of the motion an entirely new offer was tendered. My reasons for refusing to admit or consider that offer are simple and basic. To do so would make a farce and a mockery of the elaborate process devised and followed in the marketing of these properties. Indeed, it would make completion of a sale such as this potentially impossible as it would deprive the process of any finality.

A judge is not equipped by training nor required in the nature of his office to assess immediately the merits or demerits of an offer so complex as this without previous analysis and advice. Inevitably, therefore, when such an offer is presented at this stage, the judge is either required to do that which he is not properly able to do, or must direct the Receiver to do so. The latter, of course, is the only rational manner of proceeding if it is to be dealt with at all.

The potential for confusion and delay, if that were done in this case, is so obvious as not to require elaboration. The dilemma with which I am presented is not new, although it has not perhaps been presented before in circumstances so adverse and so complex as those which are before me.

It was dealt with by the Honourable Mr. Justice Saunders of this court in two judgments to which I was referred in argument, the first being the judgment in Re Selkirk (1986), a report of which is in 58 C.B.R. (N.S.) 245. There the circumstances under consideration involved the sale by the sheriff and the appearance after the sheriff had accepted an offer of a new and higher offer.

Mr. Justice Saunders in dealing with the matter says at p. 246 of his reasons the following:

> 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.

He then quotes a judgment of the Nova Scotia Court of Appeal [Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1, per Macdonald J.A.] in the following terms:

> "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."

Continuing with Mr. Justice Saunders' judgment [at pp. 246-7]:

> 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.
>
> The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not

> approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

The second judgment of Mr. Justice Saunders is one in Re Beauty Counsellors of Canada Ltd., again in 58 C.B.R. (N.S.) at p. 237. There the facts were very similar to those in the Selkirk case. At p. 242 Mr. Justice Saunders makes the following observation:

> I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:
>
> 1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or
>
> 2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

At p. 243 he says:

> Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

I consider that the concluding observation made by Mr. Justice Saunders in that context was something of an understatement:

> 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. 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.

> In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

I consider that these cases should be followed in this case. I refer especially to what I just read from the judgment of Mr. Justice Saunders. The logic is, in my view, impeccable and, in application to this case, unanswerable. The processes discussed there apply with even greater force in a case such as this where the process of sale has been so complex, so demanding and so exhausting.

No question of fairness as raised by Mr. Justice Saunders arises in respect to Larko. If there is a want of fairness involved it has been exhibited by Larko. The present offer is a belated and blatant effort to circumvent the bidding process and to acquire the property over the heads of those who have dealt according to the rules prescribed. Only most extraordinary circumstances would justify the court in putting its approval on such conduct. No such circumstances exist here.

Counsel for the defendant Rosenberg submits with his customary vigour that $15 million is a lot of money; that the court must have regard for commercial reality; that this last offer represents the current state of a buoyant real estate market; and, that it is notorious that court-conducted sales always realize less than the full potential value of the subject property.

Let me deal with those submissions in order. $15 million is a lot of money in absolute terms even in the debased currency of 1986, but in relative terms it is something over 3% of the aggregate value of the properties. There is no such shortfall or disproportion as to call in question the fundamental soundness of the sale procedure ordered by the court, or the application of that procedure by the Receiver.

The court must, of course, have regard for commercial reality. One aspect of commercial reality is that there are certain inherent limitations in a court sale, limitations which are unavoidable. The court has not the capacity to wheel and deal as an individual entrepreneur is able to do, and the court must have regard not only for commercial reality but for commercial morality, a conditioning factor which is not always apparent in private deals.

This last offer may represent the current market. It may also represent simply the desire of the offeror to acquire an advantage over other bidders. It is customary that court sales and sales in foreclosure or liquidation or under other constraint, tend to obtain less advantageous prices than those which might be obtained by a skilful and unfettered vendor free to manoeuvre in an open market. But it must not be forgotten that court sales or other liquidation or forced sales are symptoms of a commercial collapse or dispute or disease of some kind, and the sale cannot wholely escape the consequences of the disease.

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.

Some suggestion was made by counsel for the defendant Rosenberg that the extra recovery which this new offer purports to make available might significantly reduce the ambit of the litigation of which this motion is an offshoot. That would be a consummation much to be desired. But in my view, this prospect is too indefinite, too amorphous, and too remote to be given weight in the disposition of the matter which is now before me.

When the offer was produced I said to Mr. Lamek with what may have been an unfortunate air of flippancy that it would not go away, nor will it. But it will have no role in the conduct of this motion so long as I am seized with the motion.

The offer or a copy will be marked ex. A to these proceedings for the purpose of identification only and so that it may be available to any other court in any review of the discretion which I have exercised in excluding it from present consideration. It will not be the subject of examination or cross-examination of any witness.

Ruling accordingly.

4

Indexed as:
Royal Bank of Canada v. Soundair Corp.

Between
The Royal Bank of Canada, Plaintiff, and
Soundair Corporation, Canadian Pension Capital Limited and
Canadian Insurers' Capital Corporation, Defendant

[1991] O.J. No. 650

Action No. 48593/90Q

Ontario Court of Justice - General Division
Toronto, Ontario

Rosenberg J.

Heard: April 22, 23, 1991
Judgment: May 1, 1991

(34 pp.)

Lyndon Barnes and Lawrence Ritchie, for the Royal Bank of Canada.
William G. Horton, Nancy Spies and Carmen Theriault, for Ontario Express Ltd. and Frontier Air Ltd.
Sean F. Dunphy, for Ernst & Young Inc., Receiver of Soundair Corporation.
Jack Berkow and S. Goldman, for Canadian Pension Capital Limited and Canadian Insurer's Capital Corporation.
John Morin, for Air Canada.

ROSENBERG J.:--

NATURE OF PROCEEDINGS

Ernst & Young Inc. (the "Receiver") moved for an order approving the share purchase agreement dated March 8, 1991 between Frontier Air Limited, Ontario Express Limited ("OEL"), 174590 Canada Inc. and the Receiver (the "OEL Offer") and for an order authorizing and directing the Receiver and 174590 Canada Inc., as vendors, to complete that agreement in accordance with its terms.

The defendants, Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively "CCFL"), moved for an order approving the offer of 922246 Ontario Limited ("922") dated April 5, 1991 (the "922 Offer") to purchase the assets of Air Toronto, a division of Soundair Corporation ("Air Toronto" and "Soundair", respectively), or in the alternative for directions regarding the sale of the assets of Air Toronto.

Either as a result of the motion by CCFL or as a practical matter, the third possibility before the court is to order that neither offer be accepted and to make an order setting out the procedure to be adopted by the Receiver in dealing with the two competing groups wishing to purchase the assets of Air Toronto.

PARTIES

Matters involving the Soundair receivership came before me on a number of occasions and it was necessary to make a number of preliminary orders with regard to the aforesaid motions (i.e. ordering disclosure of certain information setting out time tables for offers to be submitted, scheduling cross-examinations, etc.). As a result of these preliminary appearances and on hearing what cross-examinations had taken place and who participated, it became clear that the real issue to be determined was whether OEL or 922 would be successful in purchasing Air Toronto assets. This was the real contest before me. The OEL offer was supported by Canadian International Airlines Limited ("Canadian International") and the CCLF offer was supported by Air Canada and Air Canada was a substantial participant in this 922 offer by the time the motion was heard. Accordingly, I added OEL as a party with the full right to participate in the proceedings. CCFL being a party to the one motion was allowed to participate fully as a party with regard to both motions and Air Canada was allowed to participate to the extent that they wished to counter any allegations that were made against Air Canada. In fact, Air Canada did not make any submissions.

FACTS

Prior to April 26, 1990, Soundair was engaged in the air service business and operated three divisions, being Air Toronto, Odyssey International and Soundair Express. Air Toronto operates a scheduled airline, providing commuter services from Pearson International Airport in Toronto on an exclusive basis to certain cities in the United States of America (the "routes"). Many of the routes served as important feeders to various Air Canada routes.

By an order of Mr. Justice O'Brien of the Supreme Court of Ontario dated April 26, 1990 (the "Order"), Ernst & Young Inc. were appointed Receiver of the assets, property and undertaking of Soundair and the manager and operator of the assets, property and undertaking of Air Toronto.

Prior to the appointment of the Receiver, Soundair had been negotiating a sale of its Air Toronto division to Air Canada for approximately $18,000,000 pursuant to the terms of a letter of intent dated April 4, 1990 from Air Canada to Soundair (the "Letter of Intent").

Paragraph 4(c) of the Order directed the Receiver,

> ... 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.

NEGOTIATIONS WITH AIR CANADA

Upon being appointed, the Receiver advised Air Canada that it was prepared to complete a sale of the assets or business of Air Toronto to Air Canada as outlined in the Letter of Intent. To that end, the Receiver entered into an agreement with Air Canada dated April 30, 1991. Pursuant to the terms of that agreement, the Receiver agreed, inter alia, to negotiate exclusively with Air Canada, such agreement being terminable by either party on five day's written notice.

During the negotiations from April to June of 1990, Air Canada conducted due diligence searches with respect to the assets and business of Air Toronto and had unlimited access to financial information relating to Air Toronto. On June 14, 1990, Air Canada lowered its offer for Air Toronto to $8,200,000. The offer was subject to certain conditions and was stated to be open for acceptance by the Receiver until June 29, 1990.

On June 19, 1990, Mr. Raymond Lindsay, Vice President, Corporate Development and Commercial Holdings of Air Canada, wrote to Mr. Tim Prior, Manager of the Special Loans Branch of the Royal Bank of Canada, with a rationale for the reduction in the price Air Canada was willing to pay from $18 million to $8.2 million. The letter attached a formal offer to purchase Air Toronto for $8.2 million. This letter also stated that if Air Canada did not acquire Air Toronto, Air Canada would terminate its existing contractual arrangements with Air Toronto and pursue alternatives to protect or retain connector traffic and revenues now associated with Air Toronto. The letter went on to say that Air Canada would not, except to the extent that it might be contractually obligated, continue to support Air Toronto after the expiry date contained in the offer even in circumstances where Air Toronto either continued to be operated in receivership in a connector relationship with Air Canada, or is sold to third parties not competitive to Air Canada (including Air Toronto employees) who wish to retain a connector relationship with Air Canada.

Contractual arrangements between Air Canada and Air Toronto included a connector agreement, a ground handling agreement and a hangarage agreement. The Receiver was of the view that if Air Canada took steps to terminate these agreements, the operations of Air Toronto would cease immediately and the possibility of a sale of Air Toronto would virtually be eliminated.

The Receiver advised Air Canada that based on the April 30, 1990 agreement, Air Canada had waived defaults, in particular defaults related to the receivership, under its agreements with Air Toronto and that, secondly, under the terms of the Court Order, Air Canada was not entitled to terminate the contractual arrangements without first seeking leave of the Court. The Receiver also advised Air Canada that the Receiver did not think that Air Canada's approach was "a very ethical way to deal".

The Receiver did not accept the Air Canada offer and allowed it to lapse on June 29, 1990.

On July 20, 1990, Air Canada served a Notice of Termination formally terminating the April 30, 1990 agreement. On the same day, by letter dated July 20, 1990 the solicitors for Air Canada formally advised the Receiver that Air Canada would not be participating in any "auction process" to sell Air Toronto. Mr. Lindsay of Air Canada also orally advised the Receiver at a meeting on or about the same date that Air Canada would not consent to the assignment of the Air Toronto connector agreement to any other party. The Receiver was of the opinion that the operations of Air Toronto were such that it required a connector agreement with one of the two main Canadian airlines in order to be a viable operation.

The Receiver had determined that certain conditions in the Air Canada offer of $8.2 million could not be met and that the price would be further reduced and accordingly the Receiver embarked on a process of offering Air Toronto assets for sale generally in order to obtain a price better than the net anticipated in the Air Canada offer of $8.2 million ($8,200,000).

The receivership of Air Toronto had generated publicity in the airline industry as had the breakdown of negotiations with Air Canada. In August 1990 the Receiver contacted a number of potential bidders and those who had expressed an interest. The Receiver allowed interested parties to examine some financial and other information with respect to Air Toronto and advised these parties that expressions of interest were to be received by August 20, 1990.

A variety of offers for the purchase of Air Toronto were solicited and received by the Receiver before August 20, 1990. All of these offers were rejected as inadequate by the Receiver. One of these offers was participated in by Air Canada through Air Ontario, one of Air Canada's connector airlines.

The Receiver also approached a number of large American airlines to inquire about their interest in purchasing Air Toronto. The Receiver found in all cases that these airlines had no interest in acquiring Air Toronto.

The Receiver approached Canadian Airlines through its parent PWA Corporation ("PWA") to determine its interest in acquiring Air Toronto. The Receiver was advised by PWA to deal with OEL on any such transaction since OEL had the "franchise rights for the operation of regional routes in the geographical area served by Air Toronto and had the connector agreement in place with Canadian Airlines.

THE OEL AGREEMENT

OEL was contacted by the Receiver from time to time on matters relating to jet stream aircraft since both OEL and Air Toronto fly the same aircraft. The initial discussions with OEL revolved around the possibility that OEL might enter into a management contract with the receiver pursuant to which OEL would manage Air Toronto while Air Toronto remained in the possession of the Receiver. The Receiver and OEL had discussions on this possibility because it was the Receiver's view that while Air Canada had been forced to continue the connector agreement until it expired in 1992, Air Toronto had no ability to renew it. The Receiver's objective was to prevent Air Toronto from being out of business at the expiry of the Air Canada connector agreement.

The discussions between the Receiver and OEL started off with an evaluation on both sides as to what synergies there might be from a joint operation and how to share the benefit of those synergies. Air Toronto had the routes and a management group that was good. OEL had a maintenance facility. OEL could provide a backstop on a much longer connector agreement and they also had the ability to move other aircraft onto these routes and there would be, as between the two parties, a saving in lease costs and fixed aircraft ownership costs. At some point in mid-January 1991, the Receiver took the position with OEL that it wanted a definitive agreement and did not want to operate in a joint venture for ever. The Receiver wanted to have "an out on these arrangements".

The negotiations led to the delivery of a Letter of Intent dated February 8, 1991 sent by OEL to the Receiver which set forth the terms of a proposed purchase of the assets of Air Toronto by OEL. This Letter of Intent was accepted by the Receiver on February 11, 1991 and it contained the following provision:

> Soundair and the Receiver agree not to negotiate with potential purchasers of, or solicit offers for, the Purchased Assets of Air Toronto from the date hereof to February 20, 1991.

This provision was similar to the provision which the Receiver had agreed to when it was negotiating with Air Canada. The February 20 date was extended from time to time by agreement of the parties. The exclusive negotiation provision was intended to minimize the disruption to the operations of Air Toronto and was agreed to by the Receiver in recognition of the complex and time consuming negotiations which would be necessary and the need for OEL to produce confidential information to the Receiver in the course of the negotiations.

OEL also took the position that it did not want its offer shopped around and used to obtain higher offers.

The question of whether Air Toronto was to be affiliated with Air Canada or affiliated with Canadian Airlines was of some consequence because if Air Toronto operated out of Terminal 2 at Pearson International, the Terminal in which Air Canada operated, passengers flying from American cities via Air Toronto to Canadian cities other than Toronto, such as Winnipeg, Calgary, Vancouver, Ottawa, etc., would automatically fly on connecting Air Canada planes. Conversely, if they went into Terminal 3 where Canadian Airlines operated, they would fly to these other Canadian cites by Canadian Airlines. It was estimated that the connector travellers would generate millions of dollars per year of business for whichever airline was in the same terminal as Air Toronto and operated a connector agreement with them.

The Receiver's reasoning in agreeing to confine its negotiations for the time being to OEL arose from its concern about the disruption to the employees of Air Toronto as a result of a number of the potential bidders seeking information from employees during the due diligence periods and also because it felt that there were only two practical buyers from whom it could obtain the best price - a purchaser affiliated with Air Canada or a purchaser affiliated with Canadian Airlines - since Air Canada had indicated and unwillingness to get into a "auction", it appeared that the only practical alternative was to deal with OEL. The Receiver's assumption about two possible purchasers was consistent with the fact that the present motions involve only two purchasers and each is affiliated with one of the major Canadian airlines.

There were only two creditors concerned with the sale of Air Toronto assets. The Royal Bank was owed in excess of $65 million and CCFL was owed in excess of $9.5 million. The Royal Bank was of the opinion based on the information received from the Receiver that the total recovery from the sale of all of the assets of Soundair would be in the range of $25 million. The expected deficiency therefore would be in the range of $50 million. Consequently, CCFL and the Royal Bank are the only creditors who will directly benefit monetarily from the sale of the Air Toronto assets.

The Royal Bank and CCFL were parties to an agreement (the "Inter Lender Agreement") governing the distribution of funds realized from the security that they both held with regard to Soundair. There was a dispute between CCFL and the Royal Bank as to the division of the proceeds of the sale of Air Toronto. In December 1990 CCFL informed the Receiver that it might be interested in acquiring Air Toronto. Brown of CCFL at first tried to put together a bid with the management of Air Toronto for the assets of Air Toronto. On January 16, 1991 the Receiver provided CCFL with additional information concerning assets and the business of Air Toronto. By late January CCFL was aware that the Receiver was negotiating with OEL for the sale of Air Toronto. On February 8, 1991 the Receiver signed the Letter of Intent with OEL. By February 21, 1991 Brown of CCFL felt that the time frame was too short to deal with any other party and that CCFL should proceed with a bid on its own because of the negotiations between the Receiver and OEL. By February 28, 1991 CCFL was aware that the Receiver was negotiating solely with OEL. On March 1, 1991 Brown attended on Smith of Air Toronto. Smith provided to Brown further current financial information concerning assets and affairs of Air Toronto. Smith also provided Brown with a copy of a draft offering memorandum concerning the sale of Air Toronto which had been prepared at the direction of the Receiver. The memorandum had not been finalized and what was provided was not the latest draft. The latest draft was actually finalized on March 1, 1991. During this meeting Smith also responded to all of the questions of Brown concerning Air Toronto and provided Brown with all of the information which he requested. It was acknowledged by Mr. Berkow, counsel for CCFL, that as of March 1, CCFL had all of the information that it required to submit an offer for Air Toronto. The draft offering memorandum had been given to Brown by Smith contrary to the instructions of the Receiver. Having all the necessary information to submit an offer, CCFL both verbally and in writing advised the Receiver as follows:

> I am writing to confirm my previous verbal advice that we will be submitting an offer to you in regards to the Air Toronto operations and assets no later than noon on Tuesday March 5, 1991. As we discussed this morning, our offer will not contain any conditions other than licence transfer provisions and other customary commercial provisions readily satisfied by you and/or the secured creditors. Our offers will be for the assets of Air Toronto including all of the fixed assets understood to be $2.7 million as of December 31st, 1990 as well as all consumable spares understood to be $900,000 as of December 31, 1990. This, of course, will be detailed more fully in our offer. The purchase price will be $9 million as follows: $6 million in cash on closing; $3 million over five years based on a comprehensive and realistic royalty arrangement - Total $9 million. (Emphasis added).

Counsel for the Receiver answered as follows:

> I have your letter of March 1, 1991 and look forward to receipt of your offer on Tuesday as indicated therein....As a court appointed receiver, Ernst & Young is aware that they have an obligation to consider all offers made for the assets objectively with a view to maximizing realization. Indeed, this obligation extends right up until the time of court approval even if the receiver has agreed to accept another offer. In consequence you can be assured that your offer will be considered and brought to the attention of the court regardless of what recommendation is made.

Whether or not this response is consistent with the Receiver's obligation to OEL, it cannot be interpreted as refusing to consider the CCFL offer at a time when CCFL had all necessary information to submit an offer.

The Receiver received an offer on March 7th from CCFL for the purchase of the assets and undertaking of Air Toronto. The offer was not consistent with the information set forth in CCFL's letter of March 1, 1991. It was subject to conditions which were entirely beyond the control of the Receiver. It required a resolution of the problem with the Inter Lender Agreement between CCFL and the Royal Bank which could not be resolved by the Receiver. CCFL must have been aware when it submitted the offer with this condition that it was in direct contradiction to its letter of March 1, 1991.

In addition to the provision with regard to the Inter Lender Agreement which provided that the proceeds of sale go $3.375 million to CCFL and the balance to the Royal Bank, the Agreement also provided that the purchase price was subject to a downward adjustment by the amount by which the book value of the fixed assets on closing was less than $3.5 million.

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 1st. 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.

On March 26, 1991 this matter came before me on the application of CCFL to require the Receiver to provide additional information concerning Air Toronto and to require the Receiver to receive a further bid from CCFL. I directed that further information be made available subject to certain agreements between counsel. On April 1, Air Canada initiated a site inspection on the premises of Air Toronto at which representatives of Air Canada and legal counsel for both Air Canada and CCFL were present. This on site inspection was not consistent with the agreement between counsel or my order of March 26th.

On March 26th I also ordered that CCFL be given until April 5, 1991 to submit a bid without prejudice to the position of OEL with regard to the approval of the Receiver's acceptance of OEL's bid.

On April 5th, an offer on behalf of 922 was submitted to the Receiver. 922 was incorporated specifically by CCFL and Air Canada to make this bid.

In order to remove the most objectionable condition from the 922 bid, CCFL entered into an agreement with the Royal Bank resolving the Inter Lender dispute in the Royal Bank's favour. In this agreement the Royal Bank agreed to support the 922 bid when it came before the court in preference to not only the OEL bid but any higher and better bid obtained. In addition, by letter supplemental to the agreement settling the Inter Lender dispute, CCFL confirmed to the Royal Bank that certain deductions possible under the agreement with the Receiver would be deducted from CCFL's share of the proceeds.

All of this was done without the participation of or the knowledge of the Receiver. At the time of the hearing the only creditors who would participate in the sale proceeds were in favour of the 922 offer and wanted to reject the OEL offer. These two creditors were prepared to favour the 922 offer regardless of any other offer that might be received.

COMPARISON OF THE TWO OFFERS

It is not possible to accurately compare the two offers. The Receiver's analysis of the two offers favours the OEL offer. Basically the OEL offer is for $2 million cash and an additional amount by way of a share of the gross revenue of Air Toronto. The 922 offer is for $6 million cash and up to

$3 million as a share of the net profit of Air Toronto. The 922 offer includes assets valued at about $525,000 that are not included in the OEL offer. In addition, there are a number of adjustments probable in the 922 offer since the 922 offer requires that the 922 receive all profit and cover all losses from the time that the offer is accepted and also requires certain adjustments with regard to inventory that appear likely to lower the cash available on closing. In analyzing the two offers however, 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 that 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.

After analysis of the arguments from both sides, that of the Receiver and OEL arguing that the OEL offer is better, and, the Royal Bank and CCFL arguing that the 922 offer is better, I have concluded that the 922 offer is marginally superior.

In addition to the fact that the 922 offer is slightly superior and is supported by the only two creditors who share in the proceeds, the offer is also supported by a large group of the employees of Air Toronto who wish to be under the Air Canada sphere of influence as preferred to the Canadian Airlines sphere of influence. I have not considered this aspect as relevant in my deliberations. I do not know the reasons that the pilots, for instance, have come to this conclusion. They may have a misunderstanding of the risk to their employment as a result of an OEL purchase. In any event, I do not consider that the wishes of the employees should influence the decision that has to be made. None of them came forward to testify so that the reasons for their support of the 922 bid could be tested.

DECISION

Mr. Burko on behalf of CCFL argued that CCFL and Air Canada had not been given an even playing field on which to compete and that therefore the process was defective. In my view the process was fair and equitable and reasonable from a business point of view at the time that the OEL offer was accepted. By that time any inequities to CCFL had been erased in that CCFL had all necessary information. They promised an offer and then submitted an offer that was entirely inconsistent with that promise. CCFL conveyed to the Receiver that there was no practical alternative to the OEL offer. Entering into the type of negotiations with CCFL and Air Canada that had taken place in the past was not desirable as the end was not predictable. The OEL offer was in final form and as counsel for the Receiver put it, the Receiver was looking at a fully baked loaf of bread versus some dough that possibly could be fashioned into a loaf of bread that might be marginally superior. On March 8, 1991 when the Receiver accepted the OEL offer, the Receiver had no assurance that the objectionable clauses in the 922 offer could be removed. Having determined that the process leading to the acceptance of the OEL offer and the entering into the contract subject to court approval was proper and further having determined that the interest of the creditors were marginally better served by the 922 offer, it is appropriate to consider the principals established by the case law to determine which offer should be approved by the court.

While the playing field was level and that the process was fair at the time the OEL offer was accepted, the process did not remain fair until the April 5th offer was received from 922. While it was clear when the parties appeared before me in March that the offer of 922 must in some respect be better than or at least arguably be better than the OEL offer, there was no assurance to that effect. However, by the agreement that resolved the Inter Lender dispute between the Royal Bank and

CCFL, CCFL was able to determine that at least from the Royal Bank's point of view if they removed the objectionable condition their offer would be better than the OEL offer.

The Royal Bank knew the details of the OEL offer. By my order the two offers were to be made without either offeror knowing what the other offer's terms were. To this extent 922 received an advantage. For instance, if they had said in the negotiations with Royal Bank - no details of these negotiations were disclosed to the court - that we will remove the conditions and agree to the priorities but we will reduce our offer by $1 million and the Royal Bank had said, "no, that is not satisfactory", then they would have an indication of what was required in the Royal Bank's mind to beat the OEL offer. They had accordingly an assurance that what they were offering was better than the OEL offer from the Royal Bank's point of view. OEL had no equal information with regard to the 922 offer when they started their negotiations in good faith that culminated in a signed offer on March 8th. Accordingly, the process from March 8th to April 5th lacking in fairness and equity was through no fault of the Receivers.

THE LAW

I consider first whether or not the contract between OEL and the Receiver should be approved by the court. In light of my decision in that regard, I do not have to consider the question of the 922 offer being accepted or the third alternative of directing the Receiver as to the Receiver's further activities.

A body of case law has developed with regard to the court's approval of sales by court appointed receivers. A secured creditor has other options. He could appoint a private receiver. That gives the secured creditor such as the Royal Bank a freedom of action but the bank would bear the consequences of doing so directly. By having a court appointed receiver the bank reduces the risk of a suit by a debtor with regard to an allegation of an improvident realization of assets and is relieved from legal liability for failure to close a transaction. Also the bank reduces the possibility of unfavourable publicity but the quid pro quo is that the creditor has a degree of loss of control when the court supervises. The process of a sale by a court appointed receiver has a unique vulnerability. In the intervening time between the contract by the receiver and the court approval there is a window of opportunity to be used by unsuccessful bidders or by creditors or by others to improve on the offer. The case law attempts to balance the process and the credibility of the process against the interest of the creditors and provides that while the interests of the creditors is always the primary consideration of the receiver and the court, it is not the only consideration. The courts have consistently held that they will also consider the fairness and the effectiveness of the process and the role of the receiver.

In the case of Crown Trust Co. et al. v. Rosenberg et al. (1986) 39 D.L.R. (4th) 526, Mr. Justice Anderson considered the bidding process with regard to a bid that was some $15 million higher than the group of bids that the receiver had recommended be accepted. He stated at p. 531:

> The duties of the court I conceive to be the following, and I do not put them in any order of priority:
>
> I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> II. The court should consider the interests of all parties, plaintiffs and defendants alike....

III. The court must consider the efficacy and integrity of the process by which the offers are obtained....

IV. The court should consider whether there has been unfairness in the working out of the process.

In that case Anderson J. refused to allow the bidder to intervene notwithstanding that his bid appeared to be some $15 million higher than the group of bids that were accepted. He found that the $15 million was not a significant increase in light of the total amount involved. In my view the activities of the receiver in this case comply with all four of the duties of the court as defined by Justice Anderson in the Crown Trust case.

The argument put forth by Mr. Berkow on behalf of the 922 offer is supported by the decision of the British Columbia Development Corporation v. Spun Cast Industries Limited et al. 26 C.B.R. (N.S.) at p. 28. Justice Berger held that when everyone with a financial stake in the assets sought approval of the sale the 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.

A leading case with regard to this issue and one often referred to is the case of Cameron v. Bank of Nova Scotia et al. (1981), 38 C.B.R. (N.S.) 1. In that case the court's decision was unanimous, however, the decision delivered by Hart J.A. and agreed with by Pace J.A. included the following:

> ... 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 that 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. (p. 10).

On the other hand, Macdonald J.A. while agreeing in the result saw the matter somewhat differently and stated 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. Once a receiver puts a deadline on bids then he and other interested parties are entitled to assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received

> before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval as above mentioned should not be refused simply because some person after the close of bids makes a higher offer.
>
> 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. It is for such reason that I hold the view that court approval should not be withheld simply because a higher bid has been received after the expiration of the deadline for submitting bids.

On a thorough examination of the relevant case law, I am of the view that the Ontario courts have more consistently followed Macdonald J.A.'s reasoning.

In the case of Salima Investments Ltd. v. Bank of Montreal and Mammoth Developments Ltd. and Bolero Management Ltd. (1985), the Alberta Court of Appeal while refusing to upset a trial judge's finding that the receiver had acted improvidently stated at p. 6 of its oral decision:

> We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an enquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.

In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 Saunders J. stated at p. 246:

> 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. (Emphasis added).

Saunders J. then adopts the statements that I have quoted from the judgment of Macdonald J.A. in the Cameron v. Bank of Nova Scotia case, supra, and added;

> 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.
>
> The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances

> where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.
>
> In this case the price offered by Leung, in my opinion, is not so much greater as to put in question the efforts of the receiver ... (Emphasis added).

In my view the words of Saunders J. are applicable to the case at bar. The 922 offer is not so much greater as to put in question the efforts of the Receiver in obtaining the OEL offer. Had the 922 offer, for example, been $18 million (the original price in the Letter of Intent of Air Canada), then this might have indicated that the Receiver had not properly canvassed the market but such is not the case.

In the case of Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237, Saunders J. enunciated the same principles. In that case he was considering a bid made on the application for approval of the sale to another purchaser. He stated at p. 242:

> As counsel for Noevir pointed out, one or more preferred creditors would benefit to the extent of at least $36,000 and perhaps as much as over $100,000 if the final Noevir offer were to be accepted and the most optimistic view of the realization of the inventory occurred.
>
> I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:
>
> 1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or
>
> 2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

And further 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. 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.

The 922 offer is superior but the difference is not of such a magnitude as to warrant the disruption of the process.

In the Crown Trust v. Rosenberg case, supra, Anderson J. in considering a higher bid than that approved by the receiver made statements that appear to be equally applicable to the case at bar when he stated at p. 547:

> The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful. (Emphasis added).

Applying that reasoning to the present case, the process having been determined to have been appropriate, the difference between the CCFL offer and the OEL offer is only marginal and the difference is not such as to create an inference that the disposition strategy of the Receiver was inadequate or unsuccessful.

Anderson J. further stated:

> In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

Those words are equally applicable to the Receiver's decision on March 8th where he had before it the OEL offer which had not been fully negotiated and reduced to an acceptable agreement and the 922 offer which contained provisions which were not acceptable and beyond the control of the Receiver.

At p. 550 Anderson J. stated:

> 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.

And further on the same page:

> ... In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J.A. in Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests", that is a relevant and material one.

Anderson J. further commented on the balancing of these criteria when he said at p. 551:

> 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....
>
> Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are: as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

In the case of Canadian Commercial Bank et al. v. Pilum Investments Limited, (unreported, released January 14, 1987), Anderson J. again considered a similar situation and repeated very much of the reasoning that he had followed in the Crown Trust case and recited some of his reasoning in that case and further stated at p. 10:

> I add one thing arising out of the circumstances of this case. The court, upon the motion for approval, ought not to be asked to review the entire stewardship of the receiver from the inception of the receivership, and if asked to do so, should decline.

That reasoning commends itself to the circumstances of the case at bar. As of March 1st, 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. They created a situation as of March 8th, 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.

In the case of Re Selkirk (1987), 64 C.B.r. (N.S.) 140 McRae J. stated at p. 142:

> 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.

In a decision of the Manitoba Court of Appeal in the matter of the Winding Up Act, R.S.C. 1970, c. W-10 and in the matter of Northland Bank between Touche Ross Limited (Applicant/ Respondent) and Mauricio Kuperman et al. an unreported decision released April 21, 1989, Kuperman had entered into an agreement with the receiver subject to court approval to purchase certain property in Grande Prairie for $4.58 million. Between the date of the signing and the date when court approval was sought there were some remarkable developments affecting Grande Prairie. Proctor and Gamble announced that it expected to spend $365 million in the expansion of its existing pulp mill that would result in 900 new direct or indirect jobs in the community. Also, the price of oil increased from $15 U.S. a barrel to $18 U.S. a barrel. Both factors materially affected the value of real estate in the Grande Prairie area. Before court approval the liquidator received a further offer from Osgoode Properties for $4.75 million which the liquidator also accepted. Kuperman then revised his offer under protest to $4.8 million. The judge in the lower court then decided that there should be an opportunity given to the two bidders to tender and Kuperman made a tender again under protest for $5,257,000 which was approved by the court, the other tender of Osgoode Properties having been for a lower amount. On appeal the court remarked that Kuperman was bound by his first agreement and the court confirmed the first agreement and price notwithstanding the impact on the creditors by the reduction of the price. The court stated at the bottom of p. 4:

> It is certainly true that the principal function of the court is to obtain as high a price as possible in a liquidation as in a receivership. Nevertheless, where, as in this case, a process is set up with the consent of the major creditors to have a sale procedure which will normally result in the highest price being obtained, it is not reasonable that court discretion should be withheld or that an auction sale should be carried on by the court.

In the present case the Royal Bank who had originally obtained the court appointment of the Receiver was made aware of the process throughout and tacitly approved it. The Royal Bank knew the terms of the Letter of Intent in February 1991 and made no comment although that letter set out the very terms of the OEL offer which it now opposes. To quote from the decision of the Manitoba Court of appeal in the Northland Bank case at p. 6:

> In my opinion the discretion to be exercised by a judge under s. 35(1) of the Winding Up Act in approving or disapproving of a sale made by a liquidator must be exercised fairly. The discretion cannot be used as a means of getting a higher price due to changed circumstances. If the court is satisfied with the process (and here the court itself set up the process or approved of the process), then the discretion should be exercised in favour of the sale where the price was not improvident at the material time. (Emphasis added).

For all of the reasons stated the application of the Receiver is granted and the agreement with OEL is approved by the court. The application of CCFL is dismissed. If the parties cannot agree on the question of costs, written submissions in that regard may be made.

ROSENBERG J.

5

H
1986 CarswellOnt 171, 58 C.B.R. (N.S.) 237

Beauty Counsellors of Canada Ltd., Re

Re BEAUTY COUNSELLORS OF CANADA LTD.

Ontario Supreme Court, In Bankruptcy

Saunders J.

Judgment: February 27, 1986
Docket: No. 31-217871

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: *D.E. Baird, Q.C.*, and *M. Rotsztain*, for Noevir Canada Ltd., appellant.

M.D. O'Reilly, Q.C., for 149129 Canada Ltd., respondent.

J.A. Carfagnini, for trustee.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Sale of assets — Sale by tender — Where highest tender not accep- ted.

Property of bankrupt — Sale of assets — Appellant submitting higher bid than successful purchaser but bid submitted at application for approval of sale to successful purchaser — Trustee not required to lay down precise rules regarding proposed method of disposing of property — Interest of creditors being prime but not only consideration — Allowing bidder to wait to submit bid until application for approval of sale coming before court being undesirable — Appellant given fair opportunity to put in offer eventually submitted late and offer not so significantly higher as to justify refusal of approval of accepted offer — Appeal dismissed.

The trustee was involved in negotiations with two potential purchasers. The trustee failed to get N. Ltd. to agree to add certain conditions to its offer and accepted another offer that was lower, but contained certain beneficial terms and provided immediate payment. On the application for approval of the sale to the other purchaser, N. Ltd. submitted a better offer, although not on a cash basis. The registrar approved the trustee's application for sale to the other purchaser and N. Ltd. appealed.

Held:

Appeal dismissed.

The prime, but not the only consideration, is the interests of the creditors. It is an undesirable situation if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer. However, that 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. However, in this case, while the difference in the two offers might have been significant, the difference was not of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this late stage might be extremely costly and might reduce or even eliminate the difference between the two offers. N. Ltd. was given a fair opportunity to put in the offer it eventually made and did not do so, and there is no requirement that the trustee should lay down precise rules as to how he proposes to dispose of property.

Cases considered:

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.)*applied.*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.)*applied.*

Appeal from order of registrar approving sale by trustee of assets of bankrupt.

***Saunders J.* (orally):**

1 This is an appeal from a decision of the registrar approving the sale of the business assets of a bankrupt by a trustee to a corporate purchaser. The appellant is a competing purchaser.

2 The background facts are as follows:

3 1. The bankrupt, Beauty Counsellors of Canada Ltd., carried on business as a wholesale distributor of cosmetics. It distributed through a sales force of approximately 4,000 persons.

4 2. In 1985 a proposal under the Bankruptcy Act by Beauty Counsellors was approved. The proposal was subsequently annulled by order of the court made on 10th February 1986. Beauty Counsellors was declared a bankrupt and a trustee was appointed.

5 3. Based on material filed with the court on previous matters, the indebtedness of the bankrupt in round figures would appear to be as follows:

secured creditors $303,000

preferred creditors $521,000

unsecured creditors $3,850,000

6 4. Upon taking possession of the undertaking the trustee determined that it would be best if the assets could be sold on an ongoing basis. There was little prospect of there being any moneys available for distribution to the unsecured creditors. It appears from the evidence that the trustee was concerned about the recovery of its fees and disbursements.

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

7 5. The trustee immediately embarked on a course designed to dispose of the assets as soon as possible. It obtained bids from two liquidators. It also negotiated with two prospective purchasers.

8 6. The first prospective purchaser was 149129 Canada Ltd. (the "numbered company"). It is not clear when negotiations began with it. The numbered company submitted an offer on Friday, 14th February 1986. The trustee discussed that offer with representatives of the numbered company. The numbered company submitted a further offer on Monday, 17th February. That offer provided for the purchase of all the assets of the bankrupt with a specified exception. The price was the assumption by the numbered company of certain existing liabilities including the secured indebtedness of the bankrupt together with some cash and a limited indemnity of the trustee's fees.

9 7. The second prospective purchaser was Noevir Canada Ltd. ("Noevir"). It had been considering a possible purchase for some time and as early as December 1985 had discussed the matter with the trustee who was also the trustee under the proposal. Noevir also submitted an offer on 14th February 1986 and, after discussion, a further offer on Monday, 17th February. The Noevir offer provided for payment to the trustee based on the sale of inventory and also provided a limited guarantee for the trustee's fees and disbursements.

10 8. The trustee was able to place a minimum monetary value on the obligations being assumed by the numbered company under its offer which included an undertaking by the numbered company to retire the secured debt on closing. The trustee was concerned that the Noevir offer contained no minimum guarantee on the sale of the inventory. The parent company of Noevir, Groupmark Canada Ltd. ("Groupmark") held an option to acquire some of the secured debt. The trustee felt that it needed an assurance from Noevir or its parent that cash, which it had on hand, would not be subject to a secured claim by Groupmark.

11 9. At the end of the day on 17th February the trustee preferred the offer it had received from the numbered company to that received from Noevir, principally because of the absence of the minimum guarantee in the Noevir offer as opposed to the minimum valuation at which it assessed the offer from the numbered company. It communicated its concern to the solicitor for Noevir and advised him that:

i. It would require a minimum guarantee;

ii. It would need assurance that the cash it held on hand would not be exposed to a secured claim from Groupmark (in a sense that assurance was related to the requirement for the minimum guarantee); and

iii. It wanted to hear from Noevir by 10:00 a.m. the following day, 18th February.

The trustee also advised the solicitor for Noevir that it was considering an offer from another party. In view of that advice it is a reasonable inference that the offer that it was considering would have contained the assurances which the trustee was requesting from Noevir.

12 Later on that day, that is 17th February, the solicitor for Noevir communicated the information he received from the trustee to Mr. Cathcart, who was the principal of Noevir from whom he was taking instructions. The solicitor had assessed the Noevir offer as providing in effect a minimum guaranteed amount and had communicated his opinion to the trustee. The amount as assessed by the solicitor was less than the value attached by the trustee to the then current Noevir offer.

13 10. The following morning, 18th February, Mr. Cathcart instructed his solicitor that he was not prepared

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

to give a minimum guarantee. The solicitor attempted to communicate those instructions to the solicitor for the trustee before 10:00 a.m., but as the solicitor for the trustee was not available, he had to leave a message for a call back before leaving his office to attend another meeting.

14 11. At some time in the morning of 18th February the solicitor for the trustee telephoned the offices of the solicitor for Noevir. He was told that the solicitor in charge was not available. A lawyer in that office who had been assisting the solicitor in charge did not take the call as he felt that he would not have been able, from his knowledge of the matter, to deal with it. The solicitor for the trustee left a message with the office of the solicitors for Noevir that said "we are proceeding". That message was passed on to Mr. Cathcart.

15 12. At about 11:25 a.m. Mr. Cathcart spoke on the telephone with Mr. Holmes and Mr. Clark from the offices of the trustee who were in charge of the estate. The conversation concerned the minimum guarantee and the possibility of a Groupmark claim against the cash on hand. Mr. Cathcart said he could not respond to the trustee without speaking to his solicitor, who was not then available. In his affidavit, which he filed in these proceedings, it is clear that he refused the suggestion of a minimum guarantee but requested time to consider the matter of the secured claim of Groupmark. In his testimony he was not as clear and the testimony of Mr. Holmes does not, in my recollection, clearly establish a division between the two items. However, in all the circumstances, I would prefer to accept what Mr. Cathcart said in his affidavit that he communicated to the trustee that he was not prepared to agree to a minimum purchase price. It is agreed that Mr. Holmes told Mr. Cathcart that the trustee was under pressure and that he had an appointment with the court for the approval of a transaction that afternoon and that he intended to close the sale on the following day. Mr. Holmes said he asked Mr. Cathcart how long he needed to come back to him and Mr. Cathcart said he needed half an hour. Mr. Holmes says, and I accept his evidence, that he told Mr. Cathcart that even if he did come back to him, he could not assure him that he would consider a new offer at that time. Mr. Cathcart said that he told Mr. Holmes he would try and contact his solicitor within half an hour.

16 13. Sometime in the afternoon of 18th February the trustee accepted the offer of the numbered company. Around 1:00 p.m. that day the solicitor for Noevir was advised by the solicitor for the trustee that the trustee valued the numbered company offer at a minimum of $175,000.

17 14. The parties attended before the registrar on the application by the trustee for approval of the sale to the numbered company. Before the commencement of the hearing Noevir agreed to provide a minimum guarantee of $200,000 and to increase its indemnity of the protective expenses guaranteed to the trustee. In the course of the hearing before the registrar, Noevir further agreed to assume the liability for the vacation pay of the employees.

18 15. The registrar approved the sale to the numbered company and gave written reasons. Noevir appealed from that decision and that is the matter that is before me.

19 On the appeal hearing there were further affidavits filed and viva voce evidence was given by five witnesses. All parties agreed that in this appeal I should consider the matter de novo and that my jurisdiction was not confined to reviewing the decision of the registrar. It was also agreed that the bringing of the matter before the court was a proper course of action by the trustee as there had been no meeting of creditors and no inspectors appointed because it was urgent that the assets be disposed of as soon as possible.

20 I do not consider it necessary to analyze or compare the competing offers. The trustee considered that at the time it accepted the offer of the numbered company, it was a better offer than any offer that had been presen-

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

ted by Noevir and there was no argument before me to the contrary. On the other hand, the trustee assessed the amended offer of Noevir made just before the hearing and supplemented in the course of the hearing. The trustee considered the final Noevir offer, if I may call it that, as better than the agreement with the numbered company by about $35,000. Counsel for Noevir submitted that in assessing the two offers, the trustee was taking a conservative view of the Noevir offer and perhaps an optimistic view of the numbered company offer. He submitted that the difference between the two offers might be in excess of $60,000. While a difference of $35,000 or even $75,000 might not be of great importance when compared to the total indebtedness of the bankrupt, the difference may be significant when looked at against the preferred claims.

21 As counsel for Noevir pointed out, one or more preferred creditors would benefit to the extent of at least $35,000 and perhaps as much as over $100,000 if the final Noevir offer were to be accepted and the most optimistic view of the realization of the inventory occurred.

22 I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:

23 1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or

24 2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

25 I had occasion recently to consider the first issue in relation to the matter of the estate of George Selkirk [58 C.B.R. 245], a former bankrupt now deceased. In that case I adopted the remarks of Macdonald J.A. of the Appeal Division of the Nova Scotia Supreme Court 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. Macdonald J.A. said at p. 11 of the report as follows:

> 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. Once a receiver puts a deadline on bids then he and other interested parties are entitled to assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval as above mentioned should not be refused simply because some person after the close of bids makes a higher offer.

26 While Macdonald J.A. may have been referring to a bidding situation, in my opinion the principles expressed by him are equally applicable to the negotiation of a private contract. In my opinion, they are certainly applicable to the situation before me where the trustee negotiated separately with two purchasers and did not disclose the terms of the negotiation other than to broadly state the requirements of the trustee.

27 Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

28 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. 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.

29 In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

30 I have considered whether it would be appropriate to ask each competitor to put in a final bid. If they were willing to do so, and that is a known factor as far as the numbered company is concerned, there would probably be a further benefit to the creditors. If Noevir were left alone in the field the creditors, on the other hand, might suffer. Assuming that both submitted final bids, I consider that any marginal benefit to the creditors that would result from a final bid would be outweighed by the unfairness of such a process in the circumstances of this case to the numbered company. While the interest of creditors is the prime consideration, it is not the only or overriding consideration. I therefore conclude that I would not allow this appeal simply because the trustee has received a significantly better offer after the accepted offer of the numbered company.

31 I turn now to the question of the process and its alleged unfairness to Noevir. All parties and their advisors in this matter acted in good faith and there was no suggestion otherwise. Mr. Cathcart and his advisors were experienced in property acquisitions. There is no requirement, in my opinion, on a vendor (including a trustee in bankruptcy) to lay down precise rules as to how he proposes to dispose of a property. He must not make misrepresentations and I am prepared to assume that in selling a property which requires court approval he must be fair. Here the trustee made abundantly clear to Noevir that a minimum guarantee was required and Mr. Cathcart was consistent up to and including the conference at 11:25 that he would not give such a guarantee. As I have said, I prefer his evidence on this point contained in his affidavit to the evidence that he gave at the hearing. He had been told that there was another offer under consideration and that he was to contact the trustee by 10:00 a.m. Even if his solicitor had managed to reach the trustee before that time, he was instructed to say that the guarantee was refused.

32 In my opinion Noevir was given a fair opportunity to put in the offer it eventually made and did not do so. The appeal therefore ought not to be allowed on that ground. It then follows that the appeal must be dis- missed.

33 [Submissions re costs]

34 This is a somewhat unusual situation. There is remarkably little authority on this type of problem. The parties all acted in good faith and the unsuccessful party, Noevir, did submit before the court an offer which was higher than that submitted by its competing purchaser. In all the circumstances I have endorsed the record as follows: "With costs to all parties out of the estate; those of the trustee and the numbered company in priority to Noevir."

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

Appeal dismissed.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

6

C
2006 CarswellOnt 6419, 25 C.B.R. (5th) 260

1587930 Ontario Ltd., Re

IN THE MATTER OF AN APPLICATION UNDER 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 1587930 ONTARIO LIMITED and 2031903 ONTARIO LIMITED

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: September 26, 2006; October 3, 2006
Judgment: October 6, 2006
Docket: 05-CL-5864

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: Oreste Pasparakis for Monitor

Arhtur O. Jacques for Soorty & Cocov

Scott Bomhof, N. De Cicco for Sagecrest

Melvyn L. Somon for Unsecured Creditor, Cocov et al

Steven Graff, Stephanie Fraser for Applicants

Brian Bellmore for Knob Hill Farms

F. Tayar for Sofon

Joseph Valius for himself

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Debtor was company that owned hotel property — Debtor had one secured creditor that was owed about $36

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

million — Debtor sought protection under Companies' Creditors Arrangement Act — Debtor and secured creditor proposed plan of arrangement involving sale of hotel property to secured creditor but unsecured creditors opposed plan — Some unsecured creditors supported higher offer from proposed purchasers AS and ZC but this offer was not firm because of problems with obtaining information — Debtor's estate was losing about $500,000 per month — Debtor brought motion for approval of plan of arrangement — AS and ZC provided firmer improved offer and brought cross-motion for approval of their offer — Motion dismissed; cross-motion dismissed — Further offer from AS and ZC was taken into consideration since it was elaboration on former offer rather than new offer — Criteria for introduction of fresh evidence did not apply in CCAA proceedings — All parties were provided with opportunity to make further offer on understanding that closing would be within 30 days — Allowing further offers provided potential for much-improved return for unsecured creditors and this was significant factor — Unsecured creditors were prepared to bear risk of adverse impact on debtor's estate — Accepting offer from AS and ZC would have been unfair — Secured creditor should not be prejudiced by last-minute and still somewhat uncertain offer from AS and ZC — Unsecured creditors should not be deprived of possibility of improved offer from secured creditor.

Cases considered by *C. Campbell J.*:

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.) — distinguished

Statutes considered:

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

Generally — considered

MOTION by debtor for approval of plan of arrangement; CROSS-MOTION by proposed purchasers for approval of their offer.

***C. Campbell J.*:**

1 The matter before the Court has had a long and contentious process, being in effect the second insolvency of the asset known as the Constellation Hotel.

2 What is specifically at issue are motions in respect of a plan of arrangement proposed by the Applicants in respect of the sale of the property and building of what was once an operating hotel.

3 The Applicants' Plan is endorsed and supported by the Monitor and the proposed purchaser, which is in effect the only secured creditor by way of assignment to it of previous debt and outstanding mortgages and is as well the Debtor in Possession (DIP) lender with priority for its advances. The proposed purchaser, Sagecrest, is currently owed approximately $36 million.

4 The Applicants' Plan is opposed by unsecured creditors, some of whom request the Court to approve a proposed offer by Al Soorty and Zoran Cocov to purchase the property at a price in excess of the offer of Sagecrest.

5 When this matter was argued on September 26, the Court expressed concern with respect to the certainty of terms and firmness of the Soorty/Cocov offer, as counsel on their behalf requested up to 30 days to do due diligence, citing lack of cooperation on the part of Sagecrest and the Monitor to information considered vital to

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

firming up their offer.

6 The Court was left to render a decision on what can only be described as an uncertain state of the Soorty/ Cocov offer.

7 On Wednesday evening, September 27, the Court was provided with a letter from Mr. Jacques, counsel for Soorty/Cocov, which purported on its face to firm up an improved offer. The Court was asked to consider the confirmation of financing as part of its deliberation.

8 A conference call was convened with counsel on September 28, at which time a direction was made that if there was to be consideration of the additional material, it should be made by way of a motion to introduce new evidence, returnable Tuesday, October 3 before the Court.

9 The motion by Messrs Soorty and Cocov to consider the new evidence and order acceptance of their offer was supported by counsel on behalf of various unsecured creditors and by an alternative offeror, Safron, which was now aligned with Soorty/Cocov. It was opposed by the Applicant, the Monitor and Sagecrest, on the basis that the new material did not meet the test for new material.

10 On the return of the motion on October 3, 2006 with respect to fresh evidence, the parties also made submissions to deal with the issue of what might happen should leave to introduce fresh evidence be granted.

11 Counsel for the Monitor advised that in his view, the Court would have before it three options. The first option would be to accept the Sagecrest offer, either on the basis that the time was past for the introduction of further evidence or even with consideration of fresh evidence, the Sagecrest offer represented the most realistic return for all creditors under the Proposed Plan.

12 The second option would be to accept the new evidence and accept, as urged by Messrs Soorty and Cocov, their offer on the basis that it represents a firm agreement to close by no later than November 3, 2006, with a certain return to Sagecrest of its outstanding debt and an enhanced recovery to the unsecured creditors.

13 The third option would be to in effect re-open the opportunity to any party to put in a further offer on the understanding that the timeframe should be such that there would be a closing within 30 days to reduce the "burn" estimated to now exceed $500,000 per month.

14 Not surprisingly, Sagecrest supported the first option with a request that a closing and vesting order be set immediately.

15 Counsel for Sagecrest further submitted, in the event the first option was not accepted by the Court, that his client be given the opportunity to make a further offer if so advised. In support of that position, Mr. Bomhof submitted that in effect, his client had put its "best foot forward," had made a firm offer that could be closed immediately and reduce further expense and should not be prejudiced if Messrs Soorty/Cocov were permitted to have their offer considered.

16 Mr. Jacques urged that the Court should consider option 2, since his clients' offer was bona fide, was capable of completion within one month and did offer the best return to unsecured creditors. This option was supported by Mr. Tayor for Safron and by counsel for unsecured creditors in preference to option one.

17 Counsel for the Monitor and for the Applicant continued to support option one on the basis that it provided

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

certainty, both as to time and amount. Concern was expressed that given the long history of the background of Messrs Soorty/Cocov with the property, its previous insolvency and default, and the unknown background of the REIT supplying the financing, there was reason to question whether the offer was one that would benefit the Applicant in the way proposed.

18 In the event the Court were willing to consider option 3 as the most appropriate in the circumstances, both the Applicant and the Monitor, though counsel, were of the view that a very short timetable with strict terms should be imposed.

19 It is with some reluctance that I have concluded that in the circumstances, option 3 is the most appropriate at this time. I am mindful that this is a CCAA proceeding, not an auction process. Both sides have pointed to the decision of the Court of Appeal in *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)] as setting out the guiding principles. The factual distinction between this case and the facts in *Soundair* is that here there is at least the potential for a much-improved return for unsecured creditors.

20 The improved return is a factor, which while not necessarily the only consideration, it is a significant one. While I am concerned with the risk to the estate of the company of the cost of the further time involved, I have concluded that it is a risk worth taking, since the unsecured creditors who will bear that risk are prepared to do so.

21 In my view, it is appropriate for the Court to in effect allow what might be called further evidence in this case. There is some merit in the submission that the current offer is nothing more than elaboration on or answering legitimate queries, rather than a new offer in itself.

22 A CCAA proceeding is different from an ordinary civil action and trial. The process itself anticipates dynamic and "real time" process that should only be stifled when to do otherwise would operate as a significant prejudice to a creditor or group of creditors. There is no need to apply the criteria of introduction of new evidence to this proceeding in my view.

23 What is of greater significance is whether the offer process should be allowed to continue. I have concluded that in these somewhat unique circumstances that it should.

24 I do think that it would operate unfairly to Sagecrest to accept they Soorty/Cocov offer outright at this stage. Among other matters, there is an outstanding appeal by Sagecrest of disallowance of part of its claim, which is waived only if its offer is accepted. In addition, Sagecrest has become in effect a "stalking horse" with its firm offer and should not be prejudiced by what is both a last minute and still somewhat uncertain position.

25 In addition, the unsecured creditors should not be deprived of the possibility of Court consideration of an improved Sagecrest offer.

26 For the above reasons, I am satisfied that the process should be re-opened for a very short timeframe. As a result, I do not think it appropriate to comment on the present offers, except to say that the Soorty/Cocov offer does appear on the surface to offer the potential for greater recovery for unsecured creditors — a matter that should receive further airing as against which Sagecrest may or may not do.

27 I am assuming in these circumstances that until replaced with another offer if so advised, the Sagecrest offer will remain in place.

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

28 Counsel were advised that in the event this was the disposition, they should re-attend on Wednesday October 11, 2006, having discussed what further direction would be required to implement the disposition now made.

29 An Order will go accordingly.

Motion dismissed; cross-motion dismissed.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

7

C

1992 CarswellNB 132, 129 N.B.R. (2d) 91, 325 A.P.R. 91

Toronto Dominion Bank v. Eastern Gypsum Inc.

The Toronto-Dominion Bank, Plaintiff, v. Eastern Gypsum Inc. and William Depow Inc., Defendants

New Brunswick Court of Queen's Bench

Stevenson J.

Judgment: August 6, 1992
Docket: Doc. F/C/71/91

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: *D. Leslie Smith, Q.C.* for the plaintiff.

J. Gordon Petrie, Q.C. for Peat Marwick Thorne Inc.

Peter S. Glennie, Q.C. and *R. Gary Faloon* for Universal Industries Inc.

R. Wayne Chapman, Q.C. for 2198674 Nova Scotia Limited.

Robert J. Peters for a lien claimant.

Subject: Corporate and Commercial

Receivers --- Conduct and liability of receiver — Duties.

Competing offers to purchase assets — Duty to obtain best possible price.

Receiver-manager of a company accepted an offer of $2,650,000, in American dollars, for the sale of company's equipment. It then applied for Court approval of the offer. After the application was made, it received a second offer of $3,950,000 in Canadian dollars. Held, the application for approval was denied. Due to the magnitude of the difference between the offers, it would have been improvident to approve the sale for the price proposed in the initial offer.

***Stevenson, J.*:**

DECISION

1 On February 5, 1991, on the application of the plaintiff bank, an order was made appointing Peat Marwick

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

Thorne Inc. ("the receiver") receiver and manager of all the assets, property and undertaking of the defendant Eastern Gypsum Inc. comprised in and subject to certain security documents held by the plaintiff. The receiver was authorized to sell such assets with the approval of the court.

2 The material now filed with the court establishes that the receiver has been diligent in carrying out its duties and has made commendable efforts to find a purchaser or purchasers for the assets. Information was communicated to many potential buyers and expressions of interest were widely solicited. The tendering process was not used and the receiver, wisely I think, did not set a deadline for the submission of offers. The receiver made all possible efforts to get the best prices for the assets and did not act improvidently. None of the parties who appeared at the hearing of the motion suggested otherwise.

3 On June 18 last Universal Industries Inc. offered US$ 2,650,000 for the manufacturing equipment. The receiver accepted the offer subject to court approval. Early in July the receiver applied to the court for approval. A motion was set down for hearing on July 28.

4 On July 22 2198674 Nova Scotia Limited submitted to the receiver an offer to purchase the assets for C$4,190,000. This offer was for the land and buildings, goodwill, trade names and clients lists as well as for the manufacturing equipment. The offer attributed C$ 240,000 to the additional assets. Counsel did not take issue with that breakdown.

5 At current rates of exchange the Universal offer amounts to approximately C$ 3,159,000.

6 The issue therefore is whether the court should approve the sale to Universal in the face of the higher competing offer, or, as counsel for Universal put it in their brief, whether the circumstances are such that the court must deny approval.

7 If one accepts the value of C$ 3,950,000 attributed by 2198674 Nova Scotia Limited to the equipment the difference in the offers for that part of the assets is about C$ 791,000 or 25 per cent.

8 Counsel for the bank, which will be the principal beneficiary of any sale of the assets, concedes that the value of the assets not included in Universal's offer is minimal. He also conceded that a sale of all of the assets could be beneficial to the McAdam community should the purchaser reopen and operate the plant. The material filed suggests that is unlikely and it is not a factor in my decision.

9 Counsel referred me to a number of decisions in which various courts have considered similar issues. The decisions refer to a number of factors that a court should consider on such a motion as this. Some of those cases involved different fact situations - in some cases tenders with a deadline were used. In others the condition of court approval was imposed by the receiver - here that requirement was included, at the suggestion of counsel for the bank, in the order appointing the receiver. The courts concern themselves with the integrity of the process, whether it be the tendering process or one, as here, where the receiver exerts its best efforts toward soliciting and negotiating what it considers an acceptable offer. The court must consider the interests of all parties, creditors, owners and others. Here the magnitude of the debt of Eastern Gypsum Inc. is such that its interests are not really a consideration. That company was servd with the notice of motion but did not appear at the hearing.

10 The issue is whether the court should approve the sale to Universal in the face of the substantially higher competing offer. I conclude that the difference between the offers is so substantial that a sale on the basis of Universal's offer would be improvident.

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

11 The motion for approval of the sale to Universal is therefore dismissed.

12 In some cases where approvals have been refused the courts have directed the filing of sealed bids. Counsel neither requested nor suggested that I should do so if I refused approval of the sale to Universal. I have confidence in the receiver and am satisfied that it is in as good a position as I am to decide what the next steps should be.

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. Govt. Works

Court File No. CV-12-9566-00CL

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 TERRACE BAY PULP INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF BIRCHWOOD TRADING, INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario, M5H 3Y4

Alec Zimmerman
Tel: 416-367-6003
Fax: 416-361-2520
LSUC # 17663W

James Szumski
Tel: 416-367-6310
Fax: 416-682-2811
LSUC # 56958S

Lawyers for Birchwood Trading, Inc.

TOR01: 4965554: v1