Court File No. CV-09-8247-00CL

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

SUPPLEMENTAL BRIEF OF AUTHORITIES
(Motion returnable February 9, 2010)

February 8, 2010

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INDEX

Court File No. CV-09-8247-00CL

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

INDEX

TAB 1

CITATION: Nortel Networks Corporation, 2010 ONSC 126
COURT FILE NO.: 09-CL-7950
DATE: 20100128

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants

BEFORE: MORAWETZ J.

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L. Harmer, for the Superintendent of Financial Services of Ontario

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HEARD: December 2, 2009

ENDORSEMENT

[1] On December 2, 2009, an order was granted approving the sale agreement, dated as of November 24, 2009 among Ciena Corporation as "Purchaser" and various Nortel entities as "Sellers" with respect to certain assets relating to Nortel's Metro Ethernet Network business, in the form attached to the 28th Report of the Monitor.

[2] MEN Acquisition had indicated their intended opposition to the motion.

[3] I denied standing to MEN Acquisition during the course of the hearing with reasons to follow.

[4] MEN Acquisition filed an objection in the U.S. proceedings. The same objection was filed in these proceedings by way of affidavit of Scott Bomhof.

[5] MEN Acquisition participated in the auction which was held from November 20 – 22, 2009.

[6] At the conclusion of the auction, after the bid of Ciena Corporation had been declared as the leading bid, a representative of MEN Acquisition stated that MEN Acquisition would not be submitting another bid.

[7] MEN Acquisition filed its objection in the U.S. proceedings on December 1, 2009.

[8] There is no evidence that MEN Acquisition took exception, at any time, to the auction process right up to its conclusion. MEN Acquisition subsequently submitted a bid for $20 million higher than the bid of Ciena Corporation and sought standing at the motion to approve the sale agreement.

[9] The objection of MEN Acquisition did not rely on the strength of the bid submitted after the auction. Rather, it was directed towards a valuation issue related to the Ciena bid.

[10] In considering whether to grant standing to MEN Acquisition, counsel to Nortel referenced the decision of the Court of Appeal for Ontario in *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 47 O.R. (3d) 234 (C.A.).

[11] The law as set out in *Skyepharma, supra*, is clear. In essence, an unsuccessful purchaser has no interest in a sale approval motion, the purpose of which is to consider the best interests of the parties with a direct interest in the proceeds of sale, primarily the creditors.

[12] In my view, the position of MEN Acquisition is nothing more than that of a disgruntled purchaser.

[13] The circumstances involved in the objection of MEN Acquisition fall directly within the principle set forth in *Skyepharma, supra*, which is the controlling authority.

[14] Accordingly, it follows that MEN Acquisition is denied status to raise objections to the sale process.

MORAWETZ J.

Heard and Decided: December 2, 2009

Supplementary Reasons Released: January 28, 2010

TAB 2

CITATION: Nortel Networks Corporation, 2010 ONSC 136
COURT FILE NO.: 09-CL-7950
DATE: 20100128

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants

BEFORE: MORAWETZ J.

COUNSEL: D. Tay and J. Stam, for Nortel Networks Corporation et al

J. Pasquariello, J. Carfagnini and C. Armstrong, for Ernst & Young, Inc., Monitor

B. Bomhof, for MEN Acquisition

L. Harmer, for the Superintendent of Financial Services of Ontario

A. MacFarlane, for the Official Committee

K. McEachern, for Ericsson

S. Orzy, for the Bondholders

M. Starnino, for Pension Benefit Guarantee Fund

R. Schwill, for Nortel Networks UK Limited (In Administration)

R. Slatterly, for Verizon

A. Taylor, for Ciena Corporation

B. Wadsworth, for CAW-Canada

L. Williams and K. Mahar, for Flextronics

M. Zigler, for the Former Employees

HEARD: December 2, 2009

ENDORSEMENT

[1] In my endorsement approving the sale agreement among Ciena Corporation as Purchaser and various Nortel entities as Sellers with respect to assets relating to Nortel's Metro Ethernet Network Business, I commented at [7] that opposition to the sale agreement was also voiced by counsel on behalf of the Official Committee of Unsecured Creditors (the "Committee") and by the Bondholders. I further indicated that I had considered and declined to give effect to the various objections with supplementary reasons to follow. These are those supplementary reasons.

[2] Neither the Committee nor the Bondholders took exception to the auction process. Rather, the objection was the court should take into account that a subsequent higher bid had been submitted by MEN Acquisition which was some $20 million in excess of the bid of Ciena Corporation. The revised bid of MEN Acquisition was submitted after the auction had closed. The transcript of the auction makes it clear that MEN Acquisition indicated that they would not be submitting another bid.

[3] I considered the *Soundair* and *Crown Trust* tests. At [10], I outlined the duties of the court in reviewing a proposed sale of assets. One part of the test is to consider whether there has been unfairness in the working out of the process.

[4] I indicated at [11] that I was satisfied that the sales process had been conducted in good faith and in accordance with the Bidding Procedures.

[5] The Monitor recommended approval of the Ciena bid.

[6] The revised bid of MEN Acquisition was presented on the day prior to the sale approval motion. The revised bid was not made in accordance with the Bidding Procedures. The bid was presented after the Monitor had prepared its Report for this sale approval motion.

[7] Mr. MacDonald of Ernst & Young Inc. gave evidence at the hearing and was specifically asked whether he had had an opportunity to consider the new or revised offer of MEN Acquisition.

> Question: Would you please state for the court your view on that offer, the benefits and risks that you assessed in forming a recommendation to this court?
>
> Answer: Well, we've looked at the offer. In conjunction with looking at that offer, we've had discussions with the management of the company, we've taken into account the issues that come into play if there's a delay in closing this transaction. The Monitor has made it clear to all of the stakeholders that these businesses need to get into safe hands, get into safe hands quickly. That's where there will be stability. Any delay that comes with this is prejudicial to the Canadian estate. This is an estate that's funded through the stay period through December 15th, and it is going to be an issue that has to be worked as to how this estate is going to be funded after that day, so when we come back, and looking at

getting these businesses sold and getting them sold quickly, we are continuing to recommend the Ciena offer.

[8] In addition, counsel to Nortel also submitted that notwithstanding that the revised MEN Acquisition bid was some $20 million higher, this did not necessarily mean that there would be additional benefits to the Canadian estate. There has been no agreement reached with respect to the allocation of sale proceeds and the Canadian estate continues to lose money on a monthly basis.

[9] Nortel brought forth this motion and, in my view, established that it conducted the auction in accordance with the court-approved process. It has consulted extensively with its stakeholders and has exercised its business judgment in formulating its recommendation. The Monitor also recommended approval of the Ciena transaction and supplemented that recommendation with *viva voce* evidence which commented upon the revised offer from MEN Acquisition. The Monitor continues to support the Ciena offer.

[10] Based on the record before me, I concluded that the objecting parties failed to establish any basis upon which the court should reject the sale approval motion.

[11] As I indicated in my endorsement, I am satisfied that the Applicants complied with the requirements and principles set forth in *Royal Bank, supra*, and *Crown Trust, supra.*

[12] Accordingly, I declined to give effect to the objections as voiced by counsel on behalf of the Official Committee of Unsecured Creditors and by the Bondholders.

MORAWETZ J.

Heard and Decided: December 2, 2010

Supplementary Reasons Released: January 28, 2010

TAB 3

2000 CarswellOnt 466
47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298, [2000] O.J. No. 467

Skyepharma PLC v. Hyal Pharmaceutical Corp.

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Ontario Court of Appeal

Carthy, Goudge, O'Connor JJ.A.

Heard: December 21, 1999
Judgment: February 18, 2000
Docket: CA M25061, C33086

Proceedings: affirmed *Skyepharma PLC v. Hyal Pharmaceutical Corp.* ((1999)), 1999 CarswellOnt 3641, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 ((Ont. S.C.J. [Commercial List]))

Counsel: *James W.E. Doris*, for Skyepharma PLC.
Alan H. Mark, for Appellant/Respondent on the motion, Bioglan Pharma PLC.
Joseph M. Steiner and *Steven G. Golick*, for Price Waterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corp.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under general corporate legislation

Receiver was appointed and authorized to liquidate and realize defendant's assets — In its report, receiver pointed out importance of finalizing sale at early date, as defendant's debt was increasing at rate of $70,000 per week — Court ordered receiver to negotiate exclusively with two prospective purchasers, including plaintiff company, and gave receiver discretion to negotiate with non-exclusive purchasers if parties could not reach agreement — Receiver recommended approval of sale to plaintiff company, which would not necessarily maximize realization of assets, but would minimize risk of not closing and risk of increasing liabilities — Court approved sale of assets to plaintiff company — Unsuccessful, non-exclusive purchaser brought appeal to have order approving sale set aside — Receiver brought motion to quash appeal — Motion granted — As unsuccessful purchaser did not acquire sufficient interest to be added as party, unsuccessful purchaser did not have right that was finally disposed of by approval order — Unsuccessful purchaser had no legal or proprietary right in property being sold and did not have right or interest that was affected by sale approval order — Involvement of unsuccessful purchaser would create potential for delay and uncertainty, possibly giving unsuccessful purchaser leverage, which would be counterproductive — Ordinary meaning of language in order did not require that unsuccessful purchaser extend its outstanding offer — Fact that receiver had discretion to negotiate with non-exclusive buyers did not create duty or right — Fact that court heard submissions from unsuccessful purchaser did not create standing for appeal, because purchaser was heard as creditor and not as unsuccessful purchaser.

Cases considered by *O'Connor J.A.*:

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

> *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 (N.S. C.A.) — considered

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

Halbert v. Netherlands Investment Co., [1945] S.C.R. 329, [1945] 2 D.L.R. 418 (S.C.C.) — referred to

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 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 6(1)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 13.01 — considered

R. 13.01(1)(a) — considered

R. 13.01(1)(b) — considered

MOTION by receiver to quash appeal by unsuccessful prospective purchaser from judgment, reported at (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), ordering approval of sale of assets.

The judgment of the court was delivered by *O'Connor J.A.*:

1 This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to Skyepharma PLC. Bioglan Pharma PLC, a disappointed would be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

2 The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

3 Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding $100,000) and to hold the proceeds of any sales pending further order of the court.

4 On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

5 The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realisation was likely to result from negotiations with Skyepharma and Cangene.

6 In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were

increasing in the amount of approximately $70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

7 On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable to the receiver and that realised the superior value inherent in the offers made by Skyepharma and Cangene.[FN1] The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

8 On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hyal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hyal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realisation for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and timeframes contained in other offers. The receiver said that these risks were not immaterial.

9 At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hyal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

10 It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hyal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hyal in the amount of $40,000.

11 The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hyal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

12 The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

13 This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

14 Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised judicial sale or, alternatively, that the receiver be required to reopen the bidding relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

15 In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy."

Analysis

16 The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

17 Section 6(1)(b) of the *Courts of Justice Act* provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.).

18 The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale approval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

19 First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan maintains, was finally disposed of by the order approving the sale to Skyepharma.

20 A similar issue was considered by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (Ont. H.C.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the *Rules of Civil Procedure*. The relevant portion of that rule, at the time, read 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;
>
> ... the person may move for leave to intervene as an added party.[FN2]

21 Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

22 I adopt both his reasoning and his conclusion. At p. 118, he said:

> 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.

23 The British Columbia Supreme Court reached a similar conclusion in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.). In that case the receiver in a debenture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the Court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon ...". Berger J. dismissed this motion. At p. 30, he said:

> The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in *Gurtner v. Circuit* [cite omitted] goes so far. No order made in this action will result in any legal liability being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra*.

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

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in

itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

28 In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg*. Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

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

30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

31 In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal 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 (N.S. C.A.). In that case, the receiver invited tenders to purchase lands of the debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervener. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision reopening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

33 As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court.

First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to October 29 1999."

34 Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

35 I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

36 Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

> ... No party shall be entitled to retract, withdraw, vary or countermand its offer prior to acceptance or rejection thereof by the vendor (receiver). [My emphasis.]

37 The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of clause 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that Bioglan had assumed when it made its offer.

38 Accordingly I would not give effect to this argument.

39 Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharma agreement.

40 I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

41 Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

42 The motions judge approved the sale based on the recommendation of the receiver that it was in the best interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

43 In the result, I would allow the motion and quash the appeal with costs to the moving party.

Motion granted.

FN1. These offers were superior in that they were the only two that attempted to provide value for the tax loss positions of Hyal.

FN2. The rule as presently worded is not.

END OF DOCUMENT

TAB 4

1986 CarswellOnt 235
60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note)

Crown Trust Co. v. Rosenberg

CROWN TRUST COMPANY, SEAWAY TRUST COMPANY and GREYMAC TRUST COMPANY v. ROSENBERG et al.

Ontario Supreme Court, High Court of Justice

Anderson J.

Judgment: November 6, 1986
Docket: No. 1380/83

Subject: Corporate and Commercial; Insolvency

Receivers — Sale of debtor's assets — Approval by court — Court discussing obligations in determining whether to approve sale.

On a motion by a court appointed receiver and manager to approve the sale of certain properties, the duties of the court are to consider: whether the receiver has made a sufficient effort to get the best price and ensure he has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process.

The court has the power and responsibility to disregard the recommendation of the receiver and to approve another offer or offers. On the other hand, the court ought not to enter into the market place or sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which his decision has been reached. Furthermore, 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 or proceed against the recommendations of its receiver except in special circumstances or where the necessity and propriety of doing so are plain. It is only in exceptional circumstances that a court will intervene and proceed contrary to the receiver's recommendations if satisfied that the receiver has acted reasonably, prudently and fairly, and not arbitrarily.

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. However, the court is not to apply an automatic stamp of approval to the decision of the receiver. The court has power to come to a different decision and a discretion to exercise which must be exercised judicially.

The courts have recognized that they are not making a decision in a vacuum; that they are concerned with the process not only as it affects the case at bar, but as it stands to affect situations of a similar nature in the future. The delicate balance of competing interests is relevant and material.

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TAB 5

C
2009 CarswellOnt 4235

1730960 Ontario Ltd., Re

IN THE MATTER OF THE RECEIVERSHIP OF **1730960** ONTARIO LTD.

Ontario Superior Court of Justice [Commercial List]

Cumming J.

Heard: July 9-10, 2009
Judgment: July 16, 2009
Docket: 31-1159124

Counsel: H. Manis for Receiver, Ira Smith Trustee, Receiver Inc.

G. Benchetrit for Portuguese Canadian Credit Union Limited

David Preger, E. Giacomelli for SF Partners Inc.

David Jackson for Pocrnic Realty Advisers Ltd.

A. Habas for 2148393 Ontario Inc., Rudan Holdings Limited

Brett D. Moldaver, A. Tiberini for 2205305 Ontario Inc.

Subject: Insolvency; Estates and Trusts

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Where highest tender not accepted

Agreement of purchase and sale for three properties of debtor, 173 Ltd., was reached between receiver and P for $3.5 million — After receiver filed motion record with court, offer was made by 220 Inc. to purchase properties for $3.8 million — 220 Inc. previously made offer for purchase which was not accepted by receiver — 220 Inc. took position that sale to P should not be approved by court — Receiver brought motion for order approving sale to P — Motion granted — Receiver properly and diligently considered interests of all stakeholders, including creditors and prospective purchasers, in recommending approval of P purchase — There was no evidence of any unfairness in sales process maintained by approval of P offer — Receiver made significant effort to obtain best price for properties and did not act improvidently — P followed court approved sales process, bargained in good faith, expended time and resources in doing its diligence and engaged professional advisors at considerable cost — There was significant reliance interest in bidder like P submitting offer with belief that if it was accepted, resulting agreement would be approved by court as long as there was proper and fair sales process — There was also reasonable expectation interest to P — 220 Inc.'s offer was not materially higher offer such as to suggest that P offer was not for fair market value — It was unfair and objectionable for party to wait until another bid was made and was accepted by receiver and then to make bid which was marginally higher and ask court not to approve agreement of purchase and sale resulting from accepted bid.

Cases considered by *Cumming 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.) — followed

Statutes considered:

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

s. 47.1 [en. 1992, c. 27, s. 16(1)] — referred to

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

s. 101 — referred to

MOTION by receiver for order approving sale of three properties of debtor company.

***Cumming J.*:**

The Motion

1 The Receiver, appointed pursuant to s. 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as am., and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as am., moved July 9, 2009 for an Order approving, *inter alia*, the sale of three properties of the debtor, **1730960** Ontario Ltd. ("173"), to Pocrnic Realty Advisors Inc. ("Pocrnic") for a total price of $3.5 million.

Background

2 An offer by Pocrnic for $3.4 million was made June 2, 2009, signed back by the Receiver June 3, 2009 for $3.5 million, and accepted by Pocrnic. The waiver of conditions by Pocrnic was received June 22, 2009, resulting in a firm offer and an agreement of purchase and sale between Pocrnic and the Receiver, subject to Court approval, with a closing scheduled for 21 days following Court approval. Section #4 of Schedule "A" to the Agreement of Purchase and Sale provides that the agreement can be terminated by the purchaser if the Court has not granted approval within 21 days of Pocrnic's waiver of conditions by Pocrnic, that is, by July 13, 2009.

3 The Receiver filed the requisite Motion Record which included the Receiver's Second Report in support of its motion. The three properties have adult entertainment businesses operated thereon.

4 Late in the day of July 8, 2009, after the terms of the Pocrnic purchase agreement were a matter of the public record, offers to purchase the three properties (each conditional upon acceptance by the Receiver of all three offers-collectively these offers can be referred to as "220's July 8 offer")) were made by 2205305 Ontario Inc. ("220") to the Receiver for the total purchase price of $3.8 million. 220's July 8 offer had an expiry date of 5:00 pm. July 10, 2009. 220 is affiliated with Romspen Investment Corporation ("Romspen") a large non-bank commercial/ industrial

mortgage lender.

5 Counsel for 220 appeared at the July 9 hearing, handed a deposit cheque in respect of 220's July 8 offer to counsel for the Receiver and requested an adjournment in order to be able to file an affidavit in support of his client's position that the Pocrnic agreement to purchase not be approved by the Court, enabling the offer of 220 to be accepted or, at the least, the sale process to be reactivated to allow new bidding. After submissions, I granted an adjournment to 2:00 pm. July 10, and requested a Supplementary Second Report from the Receiver as to its position given the extraordinary development.

6 220 filed an affidavit of its officer, Mr. Wesley Roitman, at noon the next day, July 10, a Supplementary Second Report was filed by the Receiver and the hearing continued at 2:00pm July 10. In his affidavit Mr. Roitman stated that 220 would deliver revised offers that day, July 10 (referred to hereafter as "220's July 10 offer"), in replacement of 220's July 8 offer (due to expire at 5:00 pm. July 10). Mr. Roitman advised that 220's July 10 offer would be irrevocable until July 14, 2009 and the aggregate offer for the three properties would remain at $3.8 million but there would be a price adjustment within the prices for the three component properties whereby the price of one would be increased by $50,000. with a corresponding decrease in the price of another by $50,000.

7 The issue presented is whether the agreement to sell to Pocrnic should not be approved by the Court given 220's July 10 offer.

8 After extensive submissions I granted the Order requested by the Receiver approving the sale to Pocrnic, with reasons to follow. These are my reasons.

The Evidence

9 The Receiver initially sought a well-advertised auction of the properties. The stakeholders unanimously rejected the Receiver's recommendation and agreed that all of the properties should be listed for sale on the Multiple Listing Service with Coldwell Banker Case Realty ("Coldwell"). The properties were advertised in the Globe & Mail April 23 and 28, 2009. There were extensive web site hits, telephone enquiries and showings in respect of the properties. Some 3 to 5 offers were received on each of the subject properties.

10 220 had participated very actively in the sales process administered by the Receiver in early May, 2009. An offer was made by 220 and signed back by the Receiver May 13, 2009 with an irrevocable time of 3:00 pm. May 14, 2009, the only adjustment being the reduction of the conditional period proposed by 220 from 15 days to 10 days. (The Receiver states that it was later agreed in discussions to return the conditional period back to 15 days but this is disputed by 220.) In any event, 220 allowed the Receiver's counter-offer to lapse.

11 The Receiver states that there were continuing discussions between its counsel and 220 but that 220's financing was dependent upon an equity participation by Mr. H. Varela which was not readily forthcoming. Mr. Varella is reportedly the manager of the current corporate tenants operating the adult entertainment businesses at two of the properties. Although the Receiver says it anticipated that 220 would submit a further offer none was forthcoming until 220's July 8 offer was received. (In answer to a question posed in Court to the representative of Romspen present, it seems Mr. Varella was to have an equity position in 220 in the event of a successful purchase through 220's July 10 offer).

12 In his affidavit, Mr. Roitman is critical of the manner in which the Receiver has conducted the sale process. He complains about the Receiver's realtor, Coldwell, placing marketing signage on one of the subject properties as adversely affecting the operation of the business as a going concern. He complains that in the May negotiations the Receiver was at one point seeking a guarantee from 220 that the substantial rent arrears of the tenant businesses would be paid. He complains that the Receiver allowed only a 10 day period rather than the 15 day period sought by

220 as the conditional period to secure financing. Mr. Roitman questions the commercial sense and efficacy to the Receiver's position on these issues.

13 220 had considerable time to arrange the financing necessary for the making of an offer. Mr. Roitman states that 220 needed an accepted offer to consummate the arrangement with the intended financing party. 220 had the option of making a bid subject to the condition of obtaining a subsequent financing commitment within a given time frame. 220's problems in arranging financing was not the responsibility of the Receiver.

14 In my view, Mr. Roitman's affidavit does not raise any meaningful challenges to the integrity of the sales process as conducted by the Receiver. Obviously, different judgments may be brought by different persons in commercial dealings and negotiations as to conditions and price. Nothing Mr. Roitman raises in his litany of complaints justifies a challenge to the Receiver's conduct and administration of the sales process. The record establishes the Receiver acted properly throughout the sales process seeking a result that was in the best interests of the stakeholders.

15 The Receiver's Supplementary Report does a comparative analysis of Pocrnic's offer and 220's July 8 offer, concluding that the latter has a price advantage of some $213,500. After further analysis during the course of submissions it seems the comparative price advantage of 220's July 10 offer (taking into account chattel sales) vis-à-vis the Pocrnic offer may be about $275,000.

16 History tends to repeat itself. It is noted that there was a previous receivership whereby the present debtor in receivership, 173, acquired the three properties. The Receiver received an offer on the very eve of its application for the approval of the sale of the properties. Wilton-Siegel J. in Reasons delivered October 17, 2007, granted the motion of the Receiver, and approved the sale to the proposed purchaser who had entered into the contract of purchase with the Receiver.

17 There was considerable mention of this previous history in the course of submissions. There were different views as to what had taken place, and why, in that previous receivership sales process. In my view, that history is not really relevant to the present motion. However, it is noted that Romspen was a participant in those historical events. As such, Romspen would be especially aware of the importance of the timeliness of offers to purchase in a receivership sales process and the necessity of maintaining the integrity of the sales process conducted by a receiver.

18 At the hearing July 10 counsel for the secured creditor SF Partners Inc. stated that it now supported the position of 220 in asking the court to not give approval to the proposed Pocrnic purchase. This was a very surprising position for this secured creditor to take as the record indicates that its counsel was active throughout the sales process and had not criticized the process being followed by the Receiver. Moreover, at the hearing July 9 counsel for this secured creditor did not offer any criticism of the sales process.

19 The provision in 220's July 10 offer whereby there would be a shift in $50,000. within the overall $3.8 million price offer by 220 as between the three properties would result in a benefit of $50,000. to SF Partners Inc. with a corresponding loss to the other creditors of the debtor. One can only speculate as to whether this overnight change by 220 between 220's July 8 offer and 220's July 10 offer was designed to gain support for 220's criticism of the sale process. Given the history of participation of counsel for SF Partners Inc. in the sales process and his non-criticism of the Receiver's administration of the sales process at the hearing July 9, I find the position of this secured creditor in supporting the position of 220's July 10 offer to be founded simply upon the potential gain of $50,000. to it through 220's July 10 offer. I find the submissions of this secured creditor criticising the Receiver's handling of the sales process to be of no merit or import.

20 The Receiver in its Supplementary Second Report again asked the Court to approve the sale to Pocrnic.

21 The principles applicable to the sale of assets in a receivership set forth by the Court of Appeal in *Royal Bank v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.) have been met in the proceeding at hand.

22 The Receiver has properly and diligently considered the interests of all stakeholders, including the creditors and prospective purchasers, in recommending approval of the Pocrnic agreement to purchase. There is no real evidence of any unfairness in the working out of the sales process.

23 The integrity of the sales process is maintained by approval of the Pocrnic offer. The Court should not foster uncertainty in the bid process which would only discourage bids from prospective purchasers and lessen the objective of obtaining the highest possible price in the marketplace.

24 On the evidentiary record, the Receiver has made a significant effort to obtain the best price for the three properties and has not acted improvidently.

25 The record indicates the purchaser Pocrnic followed the Court-approved sales process, bargained at length in good faith, expended time and resources in doing its diligence and engaged professional advisors at considerable cost. There is a significant reliance interest (i.e. change of position through out-of-pocket expenditures)) in a bidder such as Pocrnic submitting an offer with the belief that if it is accepted the resulting agreement will be approved by the Court so long as there has been a proper and fair sales process. There is as well, of course, a reasonable expectation interest to Pocrnic with respect to the realization of the bargained-for benefits of the contractual exchange.

26 Neither 220's July 8 offer nor 220's July 10 offer, being some $275, 000 or about 8% higher than the offer of Pocrnic, is a materially higher offer such as to suggest that the Pocrnic offer was not for fair market value. The comparative difference in prices does not imply that the Pocrnic price offer is artificially low. The well-publicized, lengthy marketing process for the properties supports the conclusion the $3.5 million price offered by Pocrnic is fair market value for the properties. It is unfair and objectionable for a party to wait until another bid is made and has been accepted by the Receiver and then to make a bid which is marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid.

Conclusion

27 For the reasons given, the motion of the Receiver was granted.

Motion granted.

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Court File No: CV-09-8247-00CL

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (the "Applicants")

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

SUPPLEMENTAL BRIEF OF AUTHORITIES
(Motion returnable February 9, 2010)

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