

Clerk's stamp:



Court File Number 1303 06092

Court: COURT OF QUEEN'S BENCH OF ALBERTA

Judicial Centre EDMONTON

Plaintiff ROYAL BANK OF CANADA

Defendants DOWLAND CONTRACTING LTD.,
0849809 B.C. LTD.,
DOWLAND CONSTRUCTION INC. and
6070 N.W.T. LIMITED

Document **BRIEF OF THE RECEIVER
ALVAREZ & MARSAL CANADA INC.**

Hearing **FRIDAY, NOVEMBER 28, 2014**

Address for Service and
Contact Information of
Party Filing this Document MILLER THOMSON LLP
Barristers and Solicitors
2700, Commerce Place
10155-102 Street
Edmonton, AB, Canada T5J 4G8
Phone: 780.429.1751 Fax: 780.424.5866
rreeson@millerthomson.com
Attention: Rick Reeson, Q.C.

File: 182818.1/RTGR

I. NATURE OF THE APPLICATION

1. The applicant, Alvarez & Marsal Canada Inc. ("Alvarez"), applies for the following relief:
 - (a) An Order Approving Sale and Vesting Orders for Real Property;
 - (b) An Order declaring that Division 4 of Part 6 of the *Rules of Court* does not apply to this Application, and that the Receiver's Confidential Offer Summary submitted by the Receiver, to be filed with the Clerk of the Court (the "Offer Summary"), be temporarily sealed until the proposed sales as outlined in the Receiver's Sixth Report are closed in accordance with the Tenders or until further Order of the Court;
 - (c) Alternatively, a direction that the Offer Summary does not have to be filed with the Clerk of the Court unless and until the proposed sale of assets is closed in accordance with the Tenders or until further Order of the Court;
 - (d) Alternatively, a temporary Restricted Court Access Order pursuant Rule 6.28 of *Alberta Rules of Court* sealing the contents of the Offer Summary until the proposed sale of assets is closed; and
 - (e) Such further or other relief as may be requested of the Court by the Receiver.

II. FACTS

Sale of Property

2. On May 21, 2013, Alvarez was appointed as Receiver (the "Receiver") of all the current and future assets, undertakings and properties (the "Property") of Dowland Contracting Ltd., Dowland Industrial Works Ltd. and 6070 N.W.T. Limited (collectively referred to as the "Corporations") by Order of this Honourable Court dated May 6, 2013 with effect on May 21, 2013 (the "Order").
3. Pursuant to sections 3(k) and 3(l) of the Order, the Receiver was authorized to market any or all of the Property, and sell, convey, transfer, lease or assign the Property with the approval of the Court if the disposition is made out of the ordinary course of business of the Debtor.
4. Pursuant to the Order, the Receiver has marketed for sale both real and personal property owned by the various entities which make up the Corporations.
5. Pursuant to Sale Approval and Vesting Orders, both dated August 16, 2013 (collectively called the "August 16th Orders"), the Court approved the sale of most of the real and personal property of the Corporations.
6. Dowland Contracting continues to own certain lands, buildings and improvements and is the Lessee of a Lease with the Commissioner of the Northwest Territories, as more particularly set out in the Sixth Report.

The August 16th Orders

7. Due to the co-mingling of operations and assets, commonality of the assets, creditors and potential buyers for each of the Corporations' assets, in the summer of 2013 the Receiver conducted one sales process by soliciting offers for assets owned by all of the Corporations.
8. As set out in the Third Report of the Receiver dated August 9, 2013, (the "Third Report"), the Receiver made the following efforts to market the Property for sale in preparation for the August 16th Orders:
 - (a) In advance of launching the sales process in the summer of 2013, the Receiver prepared:
 - (i) a two page summary of the opportunity to purchase the Property;
 - (ii) an asset information package detailing the packages for sales and the form of tender terms and conditions; and
 - (iii) a data site containing copies of all process documents, due diligence materials and photographs of all of the Property.
 - (b) The Receiver launched the sales process on June 26, 2013, when a summary of the opportunity to purchase the Property was distributed to potential interested parties.
 - (c) The Receiver initially contacted 264 persons including:
 - (i) 232 construction or construction-related persons;
 - (ii) 15 rental corporations;
 - (iii) 7 liquidators; and

(iv) 10 realtors

who were identified to the Receiver through discussions with the Corporation's principals and employees, independent research by the Receiver and industry associations.

(d) The Receiver advertised the sale in the following local, provincial and national newspapers as follows:

- Globe and Mail - June 22, 2013;
- Edmonton Journal - June 27, 2013;
- Vancouver Sun - June 28, 2013;
- Nunatsiaq News - June 28, 2013;
- The Whitehorse Star - June 25, 2013;
- Kamloops Daily news - June 29, 2013;
- Yellowknifer - June 28, 2013;
- Inuvik Drum - June 27, 2013; and
- Nunavut News - July 21, 2013

and received 11 inquiries as a result of these advertisements.

- (e) 150 individuals from 130 organizations who expressed an interest in receiving further information were provided with access to the data site. Of these, 123 individuals accessed information on the data site.
 - (f) Various interested parties made site visits at various locations where the Property is located.
 - (g) The initial deadline for submitting offers was extended to allow potential purchasers more time to gain access to the Property which is located in remote locations.
 - (h) The Receiver received 35 bids for various parcels of the Property, some being for individual property, or individual or multiple parcels of property.
 - (i) Between July 23, 2013 and July 31, 2013, the Receiver contacted various parties to clarify their bids as a number of tenders contained conditions, and also responded to numerous inquiries from parties who had tendered.
 - (j) On Friday, July 26, 2013, access to the data site was closed down.
 - (k) On July 30, 2013, the Receiver selected a short list of bidders and asked them to submit final bids by 5:00 p.m. on August 2, 2013.
9. Most of the real property and personal property the Receiver marketed for sale was sold, as more particularly set out in Schedules "A" to the August 16th Orders. However, there were a number of properties which did not sell or were not included in the initial marketing efforts of the Receiver.

The Blue Building

10. Parcel “A”, identified at pages 14 and 15 of the Third Report of the Receiver, consisted of Lots 16-20; Block 49, Plan 663; Inuvik, Northwest Territories. It was included in the initial marketing efforts of the Receiver, however, no acceptable bids were received for the following components of Parcel “A”:

 LOT 18, 19 and 20
 BLOCK 49
 PLAN 633
 INUVIK

 (the “Blue Building”)
11. As set out in the Sixth Report, the Receiver made the following additional efforts to market the Blue Building for sale:
 - (a) Negotiating an extension of the commercial lease in place with the tenant, Acklands-Grainger Inc., thereby improving the value of the Blue Building by ensuring that it would continue to generate positive cash flow.
 - (b) Directly negotiating with parties potentially interested in the Blue Building, by soliciting competing bids and rejecting low bids.
 - (c) Facilitating site visits and inspections from parties interested in the Blue Building.
 - (d) On the condition the sale closes, the Purchaser agreeing to assume and pay for the costs associated with remedying safety concerns in relation to the Blue Building, in order to satisfy a closing condition of the prospective Purchaser.
12. The Receiver has accepted the offer (the “Blue Building Offer”) from the party and on the terms set out in the Offer Summary, to purchase the Blue Building, subject to the approval of this Honourable Court. The other offers for the Blue Building are described in the Offer Summary.
13. The Receiver is of the view that the Blue Building Offer is fair and reasonable, and that acceptance of the Blue Building Offer and completion of the transactions contemplated by the Blue Building Offer is in the best interests of Dowland Contracting, its creditors and other stakeholders.

The Tuk Properties and Paulatuk Property

14. There were two properties which were not included in the initial marketing efforts of the Receiver due to the uncertainty surrounding the title to and condition of these properties, including:
 - (a) a fee simple interest in land (including a quonset hut) on lands legally described as Lot 19, Block 21, Plan 3422 and a residence located on lands legally described as Lot 19, Block 34, Plan 1652, both in Tuktoyaktuk, Northwest Territories (the “Tuk Properties”);
 - (b) a leasehold interest in land and a derelict trailer located at Lot 46, Plan of Survey 3529 in Paulatuk, Northwest Territories (the “Paulatuk Property”).
15. The Receiver undertook the following marketing and evaluation efforts with respect to the Tuk Properties and Paulatuk Properties:

- (a) During the original sales process taken by the Receiver in June 2013, the Receiver received an Offer to Purchase the Tuk Properties for \$22,500.00 which the Receiver did not accept. The 2013 Northwest Territories property Tax Assessment relating to both parcels is \$34,000.00. Both buildings on both parcels are in very poor condition and the prospective purchaser at its sole cost and expense and in anticipation of being the successful purchaser, has since made improvements to the residence to make it safe and secure. The Receiver has now accepted the offer (the "Tuk Offer") from the party and on the terms set out in the Offer Summary, to purchase the Tuk Properties, subject to the approval of this Honourable Court. There were no other offers made for the Tuk Properties, and the Receiver is of the view that given the remote location and poor condition of the Tuk Properties, and the low value of the Properties, that the Tuk Offer is fair and reasonable, and that acceptance of the Tuk Offer and completion of the transactions contemplated by the Tuk Offer is in the best interests of Dowland Contracting, its creditors and other stakeholders;
 - (b) The Receiver advertised the Paulatuk Property for sale in December, 2013. Dowland Contracting is the Lessor of approximately .66 of an acre of land under a lease agreement with the Commissioner of the Northwest Territories, with a term expiring 2022. Only one offer was received from the party and on the terms set out in the Offer Summary (the "Paulatuk Offer"), which offer the Receiver has accepted subject to the approval of this Honourable Court. There were no other offers made for the Paulatuk Property, and the Receiver is of the view that given the remote location of the Paulatuk Property and the poor condition of the trailer and quonset hut on the Paulatuk Property, the low value of the Paulatuk Property and the expiry date of the term of the lease, that the Paulatuk Offer received is fair and reasonable, and that acceptance of the Paulatuk Offer and completion of the transactions contemplated by the Paulatuk Offer is in the best interests of Dowland Contracting, its creditors and other stakeholders.
16. The Receiver is seeking the approval of the Offers and, accordingly, in the event this Honourable Court does not grant an order approving the sale or the transaction does not close, the Receiver is of the view that efforts to re-market the Blue Building, the Tuk Properties, or the Paulatuk Property may be impaired if the Offer Summary is made public at this time. The Receiver is of the view that it is preferable for the Offer Summary to remain confidential until such time as the sale transaction closes.

III. APPROVING SALE AND VESTING ORDER

(a) Legislation

17. The Court may appoint a receiver to do the following:
- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;
 - (b) exercise any control that the court considers advisable over the property and over the insolvent corporation's business; and
 - (c) take any other action that the court considers advisable.
- Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), s. 243(1) [Tab A]
18. A receiver has the obligation to deal with the property of an insolvent corporation in a commercially reasonable manner.

BIA, s.247 [Tab B]

(b) Receivership Order

19. The Receiver was granted the following powers pursuant to the Order of Associate Chief Justice J.D. Rooke, dated May 6, 2013:
- (a) To take possession of and exercise control over all of the Debtor's current and future assets, undertakings and property of every nature and kind whatsoever (the "Property") and any and all proceeds, receipts and disbursements arising out of or from the Property;
 - (b) To engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties;
 - (c) To market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
 - (d) To apply for a vesting order to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
 - (e) To report to, meet with and discuss with such affected persons as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable; and
 - (f) To exercise any steps reasonably incidental to the exercise of these powers.

Consent Receivership Order, Associate Chief Justice J.D. Rooke, dated May 6, 2013
[Tab C]

(c) Jurisprudence

20. When reviewing a proposed sale of assets by a receiver the court must consider:
- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
 - (b) the interests of all the parties;
 - (c) the efficacy and integrity of the process by which offers have been obtained; and
 - (d) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16. [Tab D]

Sufficient Effort to Receive the Best Price and Acting Providently

21. When dealing with the property of an insolvent corporation, a receiver's duty is not to obtain the best price possible for the property, but to do everything reasonable in the circumstances to obtain the best price.

Skyepharm PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para. 4 [Tab E]

22. Prices contained in other offers submitted to the receiver only have relevance 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.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 30 [Tab D]

The Interests of the Parties

23. The court's primary concern when reviewing the interests of the parties should be the interests belonging to the creditors of the insolvent corporation.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 39 [Tab D]

The Efficacy and Integrity of the Process

24. The court is not required to scrutinize every element of the process by which the receiver reached its decision to accept the offer.

Crown Trust Co. et al. v. Rosenberg et al. (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pg. 548 [Tab F]

25. When dealing with the property of an insolvent corporation, the court should assume that the receiver has acted properly unless the contrary is clearly demonstrated.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 14 [Tab D]

Unfairness in the Process

26. If the receiver has acted reasonably, prudently, fairly, and not arbitrarily, it is only in exceptional circumstances that the court will find the sale process unfair and proceed contrary to the recommendation of the receiver.

Crown Trust Co. et al. v. Rosenberg et al. (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pg. 548 [Tab F]

IV. TEMPORARY SEALING ORDERS

(a) Legislation

27. On an application to temporarily seal a court file, the court has broad discretion and may make a direction on any matter that the circumstances require, and the court may grant the order notwithstanding the provisions of Division 4 of Part 6 of the *Rules of Court*.

Rules of Court, Alta. Reg. 124/2010, Rule 6.28 [Tab G]

Order, granted by Justice K.M. Eidsvik in *Royal Bank of Canada v. Hannaco (2008) Ltd. O/A Canada Grey Motor Inn, Naheed Zia and Nasreen Zia*, January 14, 2011, at para. 11 [Tab H]

Order, granted by Justice K.D. Yamauchi in *The Matter of Cow Harbour Construction Ltd.*, May 28, 2010, at para. 5 [Tab I]

Order, granted by Justice P. Belzil in *The Matter of the Insolvency of Elaborate Homes Ltd. and Elaborate Developments Inc.*, June 3, 2011, at para. 1 [Tab J]

Order, granted by Justice J. Ross in *Bank of Montreal v. Kallbom Sand & Gravel Ltd., Eagle River Sand & Gravel Ltd., Robert V. Kallbom and Debbie L. Kallbom*, October 7, 2011, at para. 1 [Tab K]

Order, granted by Justice J. Topolniski in *Bank of Montreal v. Kallbom Sand & Gravel Ltd. et al*, May 15, 2012, at para. 1 [Tab L]

(b) Jurisprudence

28. Temporary sealing orders should only be granted when:

- (a) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
- (b) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (S.C.C.) at para. 45 [Tab M]

29. The most appropriate sealing order in a court approval sale situation is that the supporting valuation material remain sealed until such time as the sale transaction has closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab N]

30. Commercial courts have accepted that temporary sealing orders are appropriate in circumstances where the information subject to sealing orders contain sensitive commercial information, the release of which could be prejudicial to the stakeholders of the confidential information.

Nortel Networks Corp. (Re) (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J. [Commercial List]) at para. 39 [Tab O]

Maxtech Manufacturing Inc. (Re) (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J. [Commercial List]) at para. 30 [Tab P]

31. In the context of a receivership and the sale of assets, it is common for the court to seal the Receiver's Offer Summary in case a further bidding process is required if the transaction being approved falls through.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab N]

32. A temporary sealing order is required until the sale is fully executed due to the confidential nature of the accepted offer and the deleterious effect it would have on the integrity of any future sale process should the original sale not close.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab N]

Canrock Venture LLC v. Ambercore Software Inc., 2011 ONSC 2308 (Ont S.C.J. [Commercial List]) at para. 17 [Tab Q]

33. It is extremely rare that an interested party will come back asking that the sealing order be set aside as, ordinarily, all of the assets that are bid on during the court sale process are sold and approved by court order. No one will have a further interest in the confidential information when the transaction is closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab N]

V. USE BY THE RECEIVER OF CONFIDENTIALITY AGREEMENTS

34. It is essential that the contents of the Offer Summary be kept confidential. The purpose is to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab N]

35. There are many cases where a Receiver or Court Officer has utilized a Confidentiality Agreement in these circumstances:

See:

Bank of Montreal v. Dedicated National Pharmacies Ltd.; 2011 CarswellOnt 185, 2011 ONSC 346, 73 CBR (5th) 13 (Ont. S.C.J. [Commercial List])

Pope & Talbot Ltd., Re, 2008 CarswellBC 1726, [2008] B.C.W.L.D. 6657, [2008] B.C.W.L.D. 6618, 46 C.B.R. (5th) 34 (BCSC)

ICICI Bank Canada v. 1539304 Ontario Ltd., 2009 CarswellOnt 6114, 57 C.B.R. (5th) 300 (Ont. S.C.J.).

Canrock Ventures LLC v. Ambercore Software Inc., 2011 CarswellOnt 1069, 2011 ONSC 1138 (Ont. S.C.J. [Commercial List])

Bank of Montreal v. Barber Glass Industries Inc., 2011 CarswellOnt 470, 2011 ONSC 755 (Ont. S.C.J.)

For the sake of brevity, copies of these cases are not attached to this Brief.

VI. RELIEF CLAIMED

36. Based upon the materials filed and the foregoing submissions, Alvarez respectfully requests:

- (a) An Order Approving Sale and Vesting Orders for Real Property;
- (b) An Order declaring that Division 4 of Part 6 of the *Rules of Court* does not apply to this Application, and that the Receiver's Confidential Offer Summary submitted by the Receiver, to be filed with the Clerk of the Court, be temporarily sealed until the proposed sales as outlined in the Receiver's Sixth Report are closed in accordance with the Tenders or until further Order of the Court;
- (c) Alternatively, a direction that the Offer Summary does not have to be filed with the Clerk of the Court unless and until the proposed sale of assets is closed in accordance with the Tenders or until further Order of the Court;

- (d) Alternatively, a temporary Restricted Court Access Order pursuant Rule 6.28 of Alberta *Rules of Court* sealing the contents of the Offer Summary until the proposed sale of assets is closed; and
- (e) Such further or other relief as may be requested of the Court by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF NOVEMBER, 2014.

MILLER THOMSON LLP

Per: _____

RICK T. G. REESON, Q.C.
Legal Counsel for the Applicant,
Alvarez & Marsal Canada Inc.

TABLE OF AUTHORITIES

Legislation

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

Rules of Court, Alta. Reg. 124/2010

Jurisprudence

Bank of Montreal v. Barber Glass Industries Inc., 2011 CarswellOnt 470, 2011 ONSC 755 (Ont. S.C.J.)

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Respec Oilfield Services Ltd., Re, 2010 CarswellAlta 830, 2010 ABQB 277

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