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COURT FILE NUMBER	2401-02438
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	BANK OF MONTREAL
RESPONDENTS	AMC&F PROPERTIES LTD. and LYNCORP MANUFACTURING LTD.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place, Suite 2700 225 6 Ave SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Julie Treleaven Telephone: (403) 260-7000 / 7048 Email: RVandemosselaer@osler.com / JTreleaven@osler.com File Number: 1253712

APPLICATION BEFORE THE HONOURABLE JUSTICE JOHNSTON ON OCTOBER 2, 2024 AT 11:00 AM ON THE COMMERCIAL LIST

Table of Contents

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Alvarez & Marsal Canada Inc., in its capacity as Court-appointed receiver and manager (the "**Receiver**") of AMC&F Properties Ltd. ("**AMC&F**") and Lyncorp Manufacturing Ltd. ("**Lyncorp**", and together with AMC&F, the "**Debtors**"),[1] in support of its application returnable at 11am on October 2, 2024 (the "**Application**") for approval of a sale and vesting order in respect of a sale transaction (the "**Transaction**") contemplated by an Asset Purchase Agreement dated September 4, 2024 (the "**Sale Agreement**") between the Receiver and Erick Zampini (the "**Purchaser**"). The facts in support of the Receiver's Application are set out in the Second Report of the Receiver dated and filed September 23, 2024 (the "**Second Report**").

2. This receivership (the "**Receivership Proceedings**") was commenced by the Bank of Montreal ("**BMO**") after the Debtors advised BMO that efforts to obtain refinancing had stalled, and that AMC&F would not be in a position to pay amounts owing under the Loan Documents (as defined in BMO's Application (Appointment of Receiver), filed February 16, 2024) until certain lands and buildings municipally described as 402086 – 81 Street E in Aldersyde, Alberta (the "**Property**") held and marketed for sale by the Debtors sold. At the time, the total debt owing by the Debtors to BMO was approximately $7.6 million, exclusive of accrued interest and other fees owing under the Loan Documents.[2]

3. On May 28, 2024, the Receiver obtained approval of a sales process (the "**Sales Process**"), pursuant to the Sales Process Order granted by the Honourable Justice R.A. Neufeld. With the assistance of CDN Global Advisors Ltd. (the "**Sales Agent**"), the Receiver commenced the Sales Process in respect of the Property. The Receiver has now entered into the Sale Agreement with the Purchaser, subject to Court approval.[3]

4. The Sale Agreement and Transaction contemplated therein is supported by BMO, will result in the transfer of the Property to a responsible party, will generate distributions to certain stakeholders, satisfy the *Soundair* principles and should be approved.

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[1] See the Order pronounced by the Honourable Justice M.H. Hollins on February 26, 2024.
[2] Application (Appointment of Receiver), filed February 16, 2024 at paras 12-13.
[3] Second Report at para 20.

II. SALE APPROVAL AND VESTING ORDER

A. The *Soundair* Principles

5. This Court's decision to approve a sale by a receiver is a matter of discretion.[4] In exercising its discretion, the Court applies the well-established principles in *Royal Bank v Soundair Corp.*,[5] namely:

(a) whether the receiver has made 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 offers were obtained; and

(d) whether there has been unfairness in the working out of the process.[6]

6. The *Soundair* criteria have been thoroughly incorporated into Alberta insolvency law, and should not be applied formulaically.[7] Rather, the Court should consider the facts and circumstances of each case, including such things as the prevailing economic environment and the risk/reward associated with an extended or additional sales process.[8]

7. Furthermore, this Court should defer to the commercial judgment of a receiver in respect of a proposed sale transaction and exercise "considerable caution" before intervening in a sale transaction.[9] Were the Court to substitute its own view in place of the receiver's commercial expertise and authority, the court-supervised insolvency sales process would be undermined.[10]

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[4] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 at para 20 **[TAB 3]**.
[5] *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA) ("**Soundair**") **[TAB 5]**.
[6] *Sydco Energy Inc (Re)*, 2018 ABQB 75 at para 50 **[TAB 7]**, citing *Soundair* at para 16 **[TAB 5]**.
[7] *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726 at para 3 **[TAB 2]**.
[8] See *Sanjel Corp, Re*, 2016 ABQB 257 at paras 70–71, 112 **[TAB 6]**.
[9] *Soundair* at paras 21, 46 **[TAB 5]**; *B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581 at para 43 **[TAB 1]**.
[10] *Soundair* at paras 21, 46 **[TAB 5]**; *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433 at para 14 **[TAB 4]**.

B. The Transaction Meets the *Soundair* Test

8. Between June 2022 and February 2024, the Debtors worked closely with three large real estate brokerage firms, Colliers, Royal LePage and Cushman & Wakefield, in an effort to market and sell the Property. As described above, following the Debtors' unsuccessful efforts and AMC&F's failure to settle its debts, BMO commenced the Receivership Proceedings wherein the Receiver and Sales Agent were authorized and directed to implement the Sales Process.

9. Beginning on June 3, 2024, the Receiver, with assistance from the Sales Agent, undertook an extensive marketing campaign for the Property. In particular, the Receiver and/or Sales Agent:

(a) developed a teaser package (the "**Teaser Package**") including, among other things, an overview of the Property, sample photos of the Property, and key information and dates of the Sales Process;[11]

(b) delivered the Teaser Package and a confidentiality agreement (the "**Confidentiality Agreement**") to 974 industrial and capital market commercial real estate professionals in western Canada;[12]

(c) prepared and disseminated notices of the Sales Process in various news media and digital platforms used to market and communicate commercial real estate opportunities to commercial real estate professionals, prospective buyers, prospective tenants, space users (private and public companies), investors and the public, namely: CoStar, Realtor.ca, Pillar9 Matrix (MLS) System, CDN Global Advisors Website, Spacelist, and the Alberta Government's Regional Dashboard site; [13]

(d) arranged to market the Sales Process in Insolvency Insider, a national subscription email service targeted to insolvency professionals;[14]

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[11] Second Report at para 21.
[12] Second Report at paras 21, 24(a).
[13] Second Report at paras 23, 24(b).
[14] Second Report at para 24(c).

(e) contacted, via email & telephone, members of the commercial real estate community that have successfully transacted on properties comparable to the Property and the primary individuals responsible for corporate decision making in industries with properties exhibiting the same essential features as the Property, or whose industries were the most inclined to recognize the Property's worth and utility;[15] and

(f) provided parties who returned executed Confidentiality Agreements access to a virtual data room ("**VDR**") containing additional confidential due diligence information.[16]

10. As a result of these marketing activities, the Sales Process resulted in:

(a) eleven interested parties executing a Confidentiality Agreement and in turn, access to the VDR;

(b) five interested parties conducting tours of the Property (three parties had previously toured the Property prior to these Receivership Proceedings); and

(c) two offers being received by the Sales Agent and the Receiver by July 5, 2024.[17]

11. After 61 days of conducting a comprehensive analysis of the two proposals (wherein the Sales Agent continued to market the Property for other potentially interested parties), the Receiver negotiated the Sale Agreement with the Purchaser. Ultimately, the Sale Agreement had a more favourable purchase price, fewer closing conditions and a significant non-refundable deposit.[18]

12. Accordingly, the Sale Agreement meets the *Soundair* principles and should be approved, since, *inter alia*:

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[15] Second Report at para 24(d).
[16] Second Report at para 23.
[17] Second Report at para 25.
[18] Second Report at paras 26-27.

(a) the Property was widely marketed to real estate professionals, prospective buyers, prospective tenants, private and public companies, investors and the public;[19]

(b) the Property was marketed for a total of approximately 818 days, or just over 2 years (approximately 725 days for the Debtors' marketing efforts prior to these Receivership Proceedings and approximately 93 days for the Receiver and Sales Agent's marketing during these Receivership Proceedings);[20]

(c) the Receiver undertook extensive negotiations with arm's length purchasers in good faith and with due diligence to obtain the best available price and has not acted improvidently;[21]

(d) the Sale Agreement provides the highest negotiated purchase price and is within the range of value provided within the January 2024 Appraisal (as defined in the Second Report) and well above the 2024 property tax assessment value;[22]

(e) in light of the marketing efforts made before and during the Receivership Proceedings, the costs and delays associated with any further marketing efforts are highly unlikely to generate any more favourable transactions;[23]

(f) BMO, as fulcrum creditor, is supportive of the Transaction;[24] and

(g) the Transaction was generated as a result of the Sales Process, which was a fair and robust process, and approved by this Court.[25]

13. Simply stated, the Transaction is value maximizing, in the interests of stakeholders as a whole, and should be approved.

[19] Second Report at paras 23, 24(b).
[20] Second Report at paras 21-22, 27.
[21] Second Report at para 32(d).
[22] Second Report at paras 29-30, 32(c).
[23] Second Report at para 32.
[24] Second Report at para 32(e).
[25] Second Report at para 32(a).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF SEPTEMBER, 2024.

Randal Van de Mosselaer / Julie Treleaven
Osler, Hoskin & Harcourt LLP
Counsel for the Applicants

TABLE OF AUTHORITIES

TAB	AUTHORITY
Jurisprudence	
1.	*B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581
2.	*Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726
3.	*Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47
4.	*Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433
5.	*Royal Bank v Soundair Corp*, 1991 CarswellOnt 205
6.	*Sanjel Corp, Re*, 2016 ABQB 257
7.	*Sydco Energy Inc (Re)*, 2018 ABQB 75

TAB 1

COURT OF APPEAL FOR ONTARIO

CITATION: B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581
DATE: 20180625
DOCKET: M49307 (C65474)

Paciocco J.A. (Motion Judge)

In the Matter of the Bankruptcy of Christine Drotos, of the City of Toronto, in the Province of Ontario

BETWEEN

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc.

Applicants (Responding Party)

and

Christine Drotos

Respondent

Eric Golden, for the moving party, Rosen Goldberg Inc.

P. James Zibarras, Leslie Dizgun, and Caitlin Fell, for the responding party, World Finance Corporation

David Preger, for the responding party, B&M Handelman Investments Limited

Adam J. Wygodny, for the responding party, Money Gate Investment Corp.

Miranda Spence, for the purchaser, Frederic P. Kielburger

Heard: June 13, 2018

On a motion for directions and leave to appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated June 1, 2018.

Paciocco J.A.:

OVERVIEW

[1] Rosen Goldberg Inc. is the receiver (the "Receiver") of property known municipally as 4 Birchmount Avenue, Toronto (the "Birchmount Property"). At all material times, the Birchmount Property was registered to Ms. Christine Drotos (the "Debtor").

[2] On June 1, 2018, Dunphy J. made an Approval and Vesting Order approving the Receiver's sale of the Birchmount Property (the "Order"). The Order authorizes the transfer of the Birchmount Property to Mr. Frederic P. Kielburger (the "Purchaser") free and clear of all mortgages.

[3] On June 7, 2018, World Finance Corporation ("World Finance"), a mortgagee of the Birchmount Property, filed a notice of appeal challenging the Order. In its notice of appeal, World Finance asserts that its appeal was as of right pursuant to s. 193(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In the alternative, it sought leave to appeal the Order pursuant to s. 193(e).

[4] If World Finance was appealing as of right, the Order would have automatically been stayed pending World Finance's appeal pursuant to *BIA*, s. 195. This stay would have prevented the Receiver from completing the sale of the Birchmount Property, which was set to close on June 14, 2018.

[5] On June 11, 2018, the Receiver brought the instant motion on an urgent basis seeking directions regarding World Finance's appeal. The Receiver took the position that s. 193(b) did not apply and that no leave to appeal should be granted under s. 193(e). The Receiver sought an order declaring that the Order was not stayed by World Finance's notice of appeal and approving the closing of the sale on June 14, 2018.

[6] After denying an adjournment motion brought by World Finance, I abridged the time for service and heard the Receiver's motion on June 13, 2018. At the conclusion of the hearing, I held that World Finance does not have an appeal as of right pursuant to s. 193(b). I denied leave to appeal pursuant to s. 193(e). And I also approved the sale pursuant to the Order. I indicated that reasons for my decision would follow in writing. These are my reasons.

THE RECEIVERSHIP AND THE APPLICATION FOR THE APPROVAL AND VESTING ORDER

[7] The Birchmount Property is a partially constructed 12,900 square-foot home located in the Scarborough Bluffs neighborhood. At all material times, the Birchmount Property was vacant, in need of repairs, and unfit for occupancy. There were three mortgages on title

[8] The first mortgagee, Pillar Capital Corporation ("Pillar"), claims that as of May 29, 2018 it was owed $2,534,582.27 under its mortgage.

[9] The second mortgage is held by a group of corporations comprising the applicants in the proceedings below. B&M Handelman Investments Limited ("B&M") is one of the second mortgagees. It claims that as of June 11, 2018, $1,164,755.78 was owing under the second mortgage, excluding legal fees.

[10] The third mortgage is held 69.9% and 30.1% by World Finance and Money Gate Mortgage Investment Corporation ("Money Gate"), respectively. World Finance alleges that the total amount owing under this third mortgage was approximately $6.7 million as of May 14, 2018.

[11] On April 10, 2018, B & M applied, pursuant to BIA s. 243(1), for the appointment of a receiver. On April 13, 2018, the requested Appointment Order was made, appointing the Rosen Goldberg Inc. as receiver over the Debtor's lands and premises, including the Birchmount Property.

[12] The Appointment Order contains the usual Model Order clauses granting the Receiver the power to engage consultants and appraisers, market the property, and negotiate the terms and conditions of sale. The Appointment Order also permits the Receiver to report to, meet with, and discuss with affected Persons (as defined in the Appointment Order) "as the Receiver deems appropriate" and to share information subject to confidentiality terms. It permits the Receiver to sell the Birchmount Property with court approval and to apply for

a vesting order to convey the property to a purchaser free and clear of encumbrances.

[13] After obtaining the Appointment Order, the Receiver secured an appraisal of the Birchmount Property which set the value at $3.2 million. The Receiver considered different sale options and determined that an MLS listing process was the optimal method. After reviewing various listing proposals, it entered into a 90-day listing agreement with Chris Kelos of Re/Max Corbo & Kelos Realty Ltd. ("Kelos"). Kelos listed the Birchmount Property on the MLS on April 30, 2018 at a sale price of $3.8 million.

[14] On May 3, 2018, an unconditional offer to purchase for $2.5 million was submitted. The Receiver did not accept this offer.

[15] On May 8, 2018, the Receiver received an unconditional offer to purchase from the Purchaser. Following negotiations, the Purchaser increased his offer to $3.45 million, an amount higher than the appraised value. Nonetheless, it was evident that insufficient proceeds of sale would be generated by this offer to fully retire the encumbrances. In fact, B&M would suffer a shortfall and World Finance would recover nothing. The Receiver accepted this offer subject to court approval.

[16] The Receiver then brought an application before Dunphy J. in the instant Debtor's bankruptcy proceedings, seeking approval of the sale of the Birchmount

Property. At the same time, the Receiver also applied for approval of the sale of four other properties from the separate bankruptcy proceeding of Comfort Capital. The sale approvals raised similar issues, but the two bankruptcies involve different debtors and different subsequent mortgagees. World Finance claims to be interested in both of the bankruptcies. Although the Receiver brought both applications at the same time, no formal consolidation order was made linking or joining the two applications. The form of receivership order in both cases is effectively identical.

[17] With respect to the instant Debtor's bankruptcy proceedings, the parties disputed who had the authority to speak in respect of the third mortgage on the Birchmount Property. World Finance appeared and opposed the Receiver's application. Money Gate appeared and supported the Receiver's position.

[18] World Finance's key complaint before Dunphy J. was that the Receiver failed to consult World Finance about the sale and marketing process and the listing price. In its view, had the Receiver discharged its duty, a higher purchase price would have resulted. In support of its assertion that the property was undervalued, World Finance relied on the opinion of a realtor who states that he would have listed the Birchmount Property at between $4 million to $4.5 million, and would not have accepted an offer of $3.4 million.

THE DECISION OF DUNPHY J.

[19] Dunphy J. granted the Order respecting the Birchmount Property. He considered the criteria in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), [1991] O.J. No. 1137 and the procedure adopted by the Receiver in selling the property:

> …In each case, the first step the Receiver took was to seek appraisals. These are a necessary pre-condition to a Receiver having a sense of what the property being marketed is worth. The Receiver obtained two appraisals in respect of the High Point property, one appraisal in respect of the Bridge property, one appraisal for the Loyalist property, two for the Caldwell property, and one for the Birchmount property.
>
> The Receiver also consider [*sic*] how best to market these properties. In considering that question, the Receiver had to have regard to the state of these properties. At least two of them were in a very challenging state […] The Birchmount property is a partially constructed shell with a roof that has a hole in it and has become a home for wild animals.
>
> Among other things, the Receiver also had to consider the carrying costs of these properties in terms of accrued reality [*sic*] taxes, which are in arrears on many of the properties, and the state of the market and other relevant considerations.
>
> After considering the matter, the Receiver determined that proceeding to market through the MLS process was the optimal process to follow in relation to the five properties that are the subject matter of these motions.
>
> The Receiver also considered possible listing agents and in considering that question looked at the experience of the brokers considered, looked at their experience in the areas, considered their recommendations as to listing price and considered that in relation to appraisals…

> […]
>
> In the case of the B&M receivership, which is to say the Birchmount property, an information package was prepared, there were online and advertising and email blasts, open houses, newspaper coverage was arranged…

[20] Justice Dunphy concluded that fair market value had been obtained. He referred to the realtor's opinion of value that World Finance relied upon to support its position that a higher value could be obtained, stating that while this report had some helpful comments, it did "not have any solid valuation evidence that I can attach weight to in it." Justice Dunphy concluded that the Receiver's business judgment had been applied and informed by the appraisals responsibly sought.

[21] He applied the *Soundair* principles to the argument that the Receiver failed to consult World Finance. He was not prepared to accept the criticism that the Receiver acted too quickly. In his view, the MLS marketing process was designed to obtain offers as soon as reasonably practicable and in each case multiple offers were received. Nor was Dunphy J. persuaded that the Receiver failed to consider the interests of all parties. He stated:

> There has been some confusion about who those other parties are and how much their claims are. Who is entitled to speak for them has also been an issue in this case. Ultimately, however, the interests of all of the parties is the same. Their interest is in obtaining the highest and best price reasonably available.

[22] Justice Dunphy dismissed the specific complaint that World Finance ought to have been consulted on the marketing process and given a greater degree of input, concluding as follows:

> This objection runs into a number of factual walls. Firstly, the appraisals were obtained in this case and they were available to the creditors if they chose. The receivership order allowed the Receiver to share information with creditors subject to appropriate NDAs. At least some of the stakeholders did obtain the appraisals and signed NDAs. I cannot say that this was not available to others. Nobody in this case contacted the Receiver until the time came to begin the process of seeking court approval, which does not speak well for the level of interest they had in seeking to shape the process.

THE ISSUES

[23] The issues on this motion are: (1) whether the proposed appeal of the Order is as of right pursuant to s. 193(b);[1] and (2) alternatively, whether leave to appeal should be granted pursuant to s. 193(e). If the appeal is not as of right, and leave is not appropriate, the Receiver asks this court to approve the sale to the Purchaser, as provided for in the agreement of purchase and sale.

[24] Section 193 of the *BIA* provides, in relevant part:

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[1] While World Finance raised the potential application of s. 193(c) in its factum, it did not seek to rely on that subsection in oral argument. In any event, reliance on that subsection would not have been tenable given World Finance's emphasis on process-related errors: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 54.

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> […]
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> […]
>
> (e) in any other case by leave of a judge of the Court of Appeal.

ANALYSIS

(1) Subsection 193(b) does not apply

[25] World Finance contends that it has the right to appeal the Order under s. 193(b). It claims that any order made in connection with its appeal of the Approval and Vesting Order related to the Birchmount Property will likely affect other cases of a similar nature relating to Approval and Vesting Orders made in the Comfort Capital bankruptcy.

[26] World Finance contends that although there are two separate bankruptcies involved, in substance the application to approve the sale of the five properties was only one bankruptcy proceeding within the meaning of s. 193(b). It notes that the Receiver brought the applications together before the same judge. Each application raised the same course of conduct by the Receiver. And one set of

reasons was provided. World Finance argues that it would be met with an issue estoppel argument if it raises the same issues in subsequent proceedings to approve vesting orders on other properties. It contends that s. 193(b) should be interpreted purposively, giving World Finance an appeal as of right so that it is not left, unfairly, without an avenue to challenge the Order.

[27] First, I do not agree that s. 193(b) should be interpreted in the expansive manner that World Finance submits. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, at para. 20, Tulloch J.A. described the "clear direction in recent case law in favour of a narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*", citing *Re En Route Imports Inc.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. This "narrow construal" is incompatible with World Finance's position, and there are good reasons for it.

[28] In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 49, Brown J.A. explained that initially the *BIA* provided only for appeals as of right. The inclusion in 1949 of a leave to appeal provision removed the need for a broad interpretive approach to ss. 193(a) to (d). More importantly, the appeal as of right provisions should be read harmoniously with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which

requires leave for all appeals from orders made under the statute.[2] Reading s. 193's appeal as of right subsections narrowly avoids disharmony between the two insolvency regimes.

[29] In *Bending Lake*, Brown J.A. explained at para. 32 that s. 193(b) applies where there is a real dispute that is likely to affect another case in the <u>same</u> bankruptcy proceedings. The Order that World Finance proposes to appeal was made in the instant Debtor's bankruptcy and pertains only to this bankruptcy proceeding. The fact that the outcome of the proposed appeal could affect cases arising out of the Comfort Capital bankruptcy is insufficient to give rise to an appeal as of right. There is no appeal as of right in this case under s. 193(b).

[30] Second, this outcome does not operate to unfairly deny World Finance an opportunity to challenge the Order that it says will likely affect other cases it will be involved in. This is because a party whose interest are likely to be affected in other case of a similar nature arising in other bankruptcy proceedings can move to protect those interests by seeking leave to appeal, where an appeal as of right is not available. Where leave is warranted in the circumstances, it will be granted.

[31] I turn, then, to World Finance's alternative position that leave to appeal should be granted under s. 193(e) in this case.

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2 See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 24, where a majority of the Supreme Court held that the *BIA* and the *CCAA* should be read harmoniously to the extent possible.

(2) Leave to appeal should not be granted

[32] The granting of leave to appeal under s. 193(e) is discretionary and contextual. The test for leave described by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, was adopted by a panel of this court in *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697, at para. 3. The proposed appeal must:

> a) raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this [c]ourt should therefore consider and address;
>
> b) be *prima facie* meritorious; and
>
> c) [not] unduly hinder the progress of the bankruptcy/insolvency proceedings.

[33] As Doherty J.A. noted in *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 (C.A.), 24 C.B.R. (5th) 256, at para. 28, the leave inquiry should begin with some consideration of the merits of the proposed appeal, for if the appeal cannot possibly succeed, "there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal."

[34] World Finance argues that its proposed appeal is *prima facie* meritorious. It contends that the Receiver failed to consider World Finance's interests, and that the process used was unfair because the Receiver did not consult with

World Finance on the marketing process, or the price at which the Birchmount Property would be listed. It urges that Dunphy J. misapplied the *Soundair* principles in finding otherwise.

[35] Specifically, World Finance claims that Dunphy J. erred in law when finding that the Receiver had considered World Finance's interests by assuming that all parties had the same interest, namely, obtaining a higher sale price. It further submits that he erred in law in finding the process to have been fair by considering irrelevant or improper explanations for the Receiver's failure to consult with World Finance about the marketing process and listing price.

[36] In my view, World Finance's grounds of appeal are not legitimately arguable points. They do not present a realistic possibility of success and therefore lack *prima facie* merit.

[37] First, there is no reasonable prospect that fault could be found in Dunphy J.'s conclusion that, in seeking the highest and best price reasonably available, the Receiver was considering the shared interest of all of the parties. World Finance's argument that, as a fulcrum creditor, it had unique interests in the marketing strategy and list price that were not considered has no traction. Marketing strategy and list price are means to an end, namely, achieving the highest and best price reasonably available, the very thing that Dunphy J. considered.

[38] World Finance's claim that Dunphy J. considered irrelevant and improper explanations for the Receiver's failure to consult directly with World Finance about the marketing and listing price for the Birchmount Property is also without merit.

[39] World Finance has not presented any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price.

[40] Indeed, the Appointment Order in this case expressly permits the Receiver to report to, meet with, and discuss with affected Persons "as the Receiver deems appropriate" and to share information subject to confidentiality terms. The Receiver had discretion under the order to proceed as it did.

[41] Moreover, even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed.

[42] As he pointed out, in this case there was confusion as to the secured creditors' true identities and who represented their interests. There were also fraud allegations at play, which explained why the Receiver was not more proactive in its dealings with certain creditors. Moreover, those creditors previously showed a low level of interest in seeking to shape the process. In these circumstances, Dunphy J. found that making the appraisals available to those creditors who chose to consult them was sufficient.

[43] None of these factors are irrelevant or improper considerations. Dunphy J. was entitled to consider them. As Blair J.A. pointed out in *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), [2004] O.J. No. 2744, at para. 23, courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances. Moreover, defence is owed to the decision Dunphy J. made: 22.

[44] Finally, I accept the Receiver's submission that World Finance's proposed appeal lacks merit for the simple reason that even if the Birchmount Property were to sell for the amount World Finance claims it could have achieved, World Finance would still receive nothing. World Finance's process-based complaint is therefore an idle appeal. There is no material wrong it can complain of.

[45] Even if World Finance's proposed appeal had *prima facie* merit, I still would have denied leave to appeal, as neither of the other two leave to appeal requirements are satisfied.

[46] World Finance's proposed appeal does not raise an issue that is of general importance to the practice in bankruptcy matters or to the administration of justice as a whole. It is a fact-specific dispute about the propriety of this particular sale transaction.

[47] In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs

payable on the first mortgage would have continued to accrue, serving only to further denude the second mortgagee's position.

[48] Moreover, the agreement of purchase and sale provided specific timelines for the obtaining of court approval and for the closing of the sale. It permitted postponement of the closing date for only 60 days after the original closing date. The sale transaction was originally scheduled to close on June 11, 2018 and was postponed until June 14, 2018. If leave to appeal had been granted, the additional delay required for the disposition of the appeal could have resulted in the loss of this transaction.

[49] Accordingly, I denied leave to appeal pursuant to s. 193(e).

[50] I granted the Receiver's request to approve the sale under the agreement of purchase and sale because Dunphy J. found that the Receiver made efforts to obtain the best price and achieved the offer to purchase after considering the interests of all parties in a fair process that had integrity. Moreover, postponement of the sale would have created the prejudice described above.

DISPOSITION

[51] For these reasons, I granted the Receiver's motion. I declare that World Finance does not have an appeal as of right pursuant to s. 193(b) and hold that leave to appeal pursuant to s. 193(e) of the *BIA* should not be granted. The

Order approving the closing of the sale to the Purchaser on June 14, 2018 is also approved.

[52] Costs are assessed by a judge of the Superior Court of Justice, Commercial List in insolvency proceedings. I will not interfere with that judge's discretion to do so, and therefore will make no costs order relating to the costs claimed by the Receiver and B&M.

[53] Money Gate was not served with the motion but appeared and exercised its right of standing, as its interests were at stake. World Finance will pay costs, on a partial indemnity basis, to Money Gate in the amount of $2,000, inclusive of HST and disbursements.

[54] The Purchaser also requested nominal costs. It did not play an active role in the proceedings. In my view, a costs award in favour of the purchaser is not warranted so I decline to make one.

Released: June 25, 2018 ("D.M.P.")

"David M. Paciocco J.A."

TAB 2

Court of Queen’s Bench of Alberta

Citation: Computershare Trust Company of Canada v. Venti Investment Corporation, 2011 ABQB 726

Date: 20111125
Docket: 1101 03154
Registry: Calgary

Between:

Computershare Trust Company of Canada

Plaintiff

- and -

Venti Investments Corporation, Shariff Chandran and Qualia Real Estate Investment Fund VI Limited Partnership

Defendants

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

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[1] This was an application to approve a sale of property brought by the Receiver of the assets and property of Venti Investment Corporation and Qualia Real Estate Investment Fund VI Limited Partnership. Venti cross-applied for an order rejecting any agreement of sale, directing that it is entitled to redeem the arrears on a mortgage on the property in question or make such payments as are necessary to bring the mortgage back into good standing, directing a hearing to set the amount of the arrears and discharging the Receiver.

[2] Despite efforts to characterize the application as a sale in foreclosure proceedings, this was a sale within a receivership that resulted from a consent order granted on March 4, 201l. I find that the consent order is correctly characterized as a liquidating order. This order first appointed MNP Ltd. as a Monitor to oversee the sale of the property under an existing agreement of sale and purchase. When the proposed sale terminated in April, 2011, MNP became the

Receiver under the order, authorized by its terms to complete the sale of the property and to enter into a replacement agreement of purchase and sale. It has now done so.

[3] The criteria to be applied when considering the approval of a sale recommended by a receiver were first set out by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) The *Soundair* principles have been applied many times by this Court.

[4] When deciding whether a receiver who has sold a property has acted properly, a court is to consider and determine:

(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 offers were obtained; and

(d) whether there has been unfairness in the working out of the process.

[5] In considering whether the Receiver has made a sufficient effort to get the best price, I note that there has been a thorough and extensive process undertaken to sell the property, and the agreement of purchase and sale finally executed by the Receiver represents a sale at or above fair market value. However, Venti submits in essence that the Receiver acted improvidently on the basis of information Mr. Chandran, the principle of Venti, says was obtained from the sale and leasing agent retained by the Receiver that the Receiver's report in support of the application failed to include material information. Mr. Chandran submits through his counsel that there have been two undisclosed written offers to lease the property in question that would affect approximately half of the vacant space in the building and that could dramatically affect its appraised value.

[6] Given the nature of the application, its urgency and the allegations made, I took the unusual step of inviting counsel for the Receiver to respond to this allegation by having the Receiver testify and be subject to cross-examination on this limited issue. I accept the Receiver's testimony, corroborated by that of the Receiver's leasing agent, that he was informed the morning of the application that an existing tenant was expressing some unwritten, informal interest in leasing approximately 2,000 to 4,000 additional square feet. This is not material information that either should have been disclosed in the report or that would affect fair market value. At any rate, the Receiver's conduct is to be examined in light of the information the Receiver had at the time it agreed to accept the offer, which was November 8, 2011. I find that the Receiver made more than a sufficient effort to get the best price for the property and has not

acted improvidently. The sale price is not low in relation to the appraised value, there was plenty of time for bids and adequate notice of the sale process.

[7] With respect to the interests of the parties, the sale is supported by the major creditor, Computershare Trust Company of Canada. Venti submits that it should not matter to Computershare if a sale of the property is the result of this application or if Venti is able to bring the mortgage into good standing, but Computershare has made it clear that it has lost faith in Venti and that it has a reasonable and valid preference for a sale rather than merely allowing Venti to extinguish the arrears. It points out that the cash flow from the property is insufficient to cover the monthly mortgage payments, and Venti has offered no more than to bring the arrears up to date and cover future mortgage payments for an indeterminate period.

[8] It is also important and appropriate to note the interests of the proposed purchaser of the property, which tendered its bid in good faith and presumably at some expense and which opposes Venti's cross-application: *Soundair* at para. 40.

[9] There is no issue with respect to the efficacy and integrity of the process by which offers were obtained.

[10] With respect to the possibility of unfairness in the working out of the process, Venti suggests that the Receiver was deficient in failing to control or intervene with respect to what it characterizes as unfair behaviour by Computershare in communicating to Venti the amount it would cost to bring the arrears up to date.

[11] This objection must be viewed in context. This became a receivership on April 12, 2011. On August 31, 2011, Venti enquired of the Receiver through counsel as to amount necessary to bring the mortgage back into good standing, and "in theory" discharge the Receiver.

[12] On September 2, 2011, the Receiver's counsel advised of a figure of about $850,000, subject to adjustment, additional interest, additional legal and other expenses, implementation of a realty tax reserve and payment of all receivership costs.

[13] On September 29, 2011, in anticipation of a meeting requested by Venti to discuss a possible reorganization, Computershare notified Venti that the amount required to bring the mortgage into good standing would be $1.07 million, plus certain processing and assumption fees, plus additional costs with respect to the receivership, the listing of the property, the property manager and the lender's counsel and subject to additional interest, the implementation of a monthly tax escrow amount and payment of the Silvercrest lease obligation.

[14] It was only on October 24, 2011, having received the September 29, 2011 estimate (which was clearly characterized as an estimate) and advice from the Receiver on that date that the Receiver was dealing with interested parties and expected a binding agreement of sale shortly, that Venti's counsel expressed the intention of bringing the mortgage up to date "this

week". This email from Venti's counsel repeats the September 29, 2011 estimate, with its references to additional costs.

[15] On October 26, 2011, Computershare provided its revised estimate, which incorporated the items that had previously been referenced, including the costs of the receivership, the Silvercrest lease obligation, the costs of the listing and leasing agent, the immediate amount of tax escrow and updated payments due.

[16] Computershare advised that Venti should confirm that it would pay these amounts that week. Instead, on October 27, 2011, Venti disputed the amount payable. On November 3, 2011, Computershare provided its explanation of the amounts owing, and reduced the previous amount said to be immediately owing by $65,000.

[17] On November 7, 2011, the Receiver received a reorganization proposal from a third party which included the concept of bringing the mortgage into good standing, and considered this proposal together with the two other proposals it had received. On November 8, 2011, the Receiver executed a purchase and sale agreement with the proposed Purchaser.

[18] It was not until November 10, 2011 that Venti sent Computershare's counsel $1 million towards the arrears, and then only under unacceptable trust conditions. While another $700,000 was promised to be available during the course of the hearing, it did not materialize.

[19] There is nothing in this history that casts doubt on the fairness of the process or the role of the Receiver. The first estimate of payout cost was clearly subject to upward adjustment, and subsequent estimates identified why the payout figure increased over time. Venti had the opportunity to payout the mortgage prior to the Receiver entering into a binding offer subject only to court approval on November 8, 2011, and plenty of warning that the sales process was unfolding and nearing completion.

[20] At page 19 of *Soundair*, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers". That concern for the integrity of the process has been expressed in many cases in Alberta, including by our Court of Appeal: *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, [210] A.J. No. 12 at para. 18.

[21] While the concern for the integrity of the process is often expressed in terms of whether it is appropriate to consider a last-minute higher offer to purchase, it is equally important here, where the debtor is not offering a higher amount for the property, nor even to redeem the entire debt, but only to bring the arrears up to date. Venti does not even accept the amount of arrears set by the mortgagee, but asks that there be a subsequent hearing to establish that amount. To accept Venti's proposal would be unfair to the parties who participated in the bidding process in good faith, and the Proposed Purchaser who entered *bona fide* into an agreement with the Receiver. It would lead to the kind of chaos referred to in *Soundair* at para. 30 and would be an

unwarranted interference with a properly-run process conducted by the Receiver. Venti had plenty of time in the last 21 months to bring the arrears up to date and avoid the sale, and what it offers now is too little and too late.

[22] Venti submits that there is no urgency about this application. I must disagree. As I indicated when I refused an adjournment, I agree with Computershare that there is no reason to delay the application, and considerable prejudice in terms of mounting arrears, a limited recourse loan and little or no equity.

[23] Given the decision I have reached, it is not necessary that I consider whether Venti is in effect seeking relief from forfeiture, and if so, whether it is entitled to such relief.

[24] The Receiver's application is granted and Venti's cross-application is dismissed.

[25] This decision was originally scheduled to be delivered orally the day after the application was heard. At that time, counsel for Venti indicated that his client had changed his position and was prepared to consent to the application. I advised the parties that I would grant an order of sale and would issue subsequent written reasons.

[26] If the parties are unable to agree on costs, they may make submissions on that issue.

Dated at the City of Calgary, Alberta this 25th day of November, 2011.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Kevin E. Barr of Macleod Dixon LLP
for MNP Ltd. in its capacity as Court-appointed Receiver

Ryan P. Pelletier and Richard Billingston, Q.C. of Billington Barristers
for Venti Investment Corporation

David Wood and Jared Spindel of Stikeman Elliott LLP
for Computershare Trust Company of Canada

Terry L. Czechowskyj of Miles Davison LLP
for the Proposed Purchaser

Michael B. Niven, Q.C. of Carscallen LLP
for Durum Real Estate Holdings Inc.

TAB 3

In the Court of Appeal of Alberta

Citation: Jaycap Financial Ltd v Snowdon Block Inc, 2019 ABCA 47

Date: 20190204
Docket: 1701-0314-AC
Registry: Calgary

Between:

Jaycap Financial Ltd.

Respondent
(Plaintiff)

- and -

**Snowdon Block Inc., Neil John Richardson,
Hugh Daryl Richardson and Heritage Property Corporation**

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice B.E.C. Romaine
Dated the 2nd day of November, 2017
Filed on the 2nd day of November, 2017
(Docket: 1601-01658)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal arises in the context of insolvency proceedings. The guarantors appeal a chambers judge's decision vacating an earlier order and approving an agreement between the receiver and a nominee of the main secured creditor for the purchase of the debtor's assets. These parties had earlier entered into an agreement for the same assets and obtained a court order approving that sale. However, they terminated this agreement after court approval on the basis of a mistake about the purchase price. The parties then entered into a second asset purchase agreement for a lower purchase price, which exposed the guarantors to a significant deficiency judgment. The guarantors (and as discussed below, the court) were provided very little information about what transpired between the execution of first and second agreements. The guarantors were unsuccessful before the chambers judge in arguing that the first asset purchase agreement should not be rectified because mutual mistake was not established on the record. The guarantors appeal to this Court alleging errors with the chambers judge's finding of mutual mistake and that the receiver's conduct challenged the integrity of the process.

[2] We agree with the guarantors that there are some significant deficiencies with how the receiver proceeded and that the integrity of the process was seriously compromised. As a result, we allow the appeal.

Background

[3] MNP Ltd. (the Receiver) was appointed receiver and manager of the debtor company, Snowdon Block Inc. (Snowdon) in February 2016. The only material asset of Snowdon was a parcel of land and a building in Calgary. In July 2016 the Receiver commenced a sales process to solicit offers for the assets. In October 2016 the Receiver finally received two offers for the assets and accepted a conditional offer from a third party. After months of extensions and negotiations, the would-be purchaser was unable to remove its conditions and the sale did not proceed.

[4] Jaycap Financial Ltd. (Jaycap) was the primary creditor of Snowdon and was financing the Receiver's costs. Over time Jaycap became concerned with the increasing costs and protecting its investment. The Receiver advised Jaycap that a credit bid would be a viable option to obtain title to the assets and bring the receivership to an end. On July 5, 2017 Jaycap emailed the Receiver that it would credit bid its "current costs" noted to be a certain amount. Jaycap arranged for a numbered company it controlled to be the purchaser, but for simplicity, we will refer to Jaycap's nominee as Jaycap.

[5] An asset purchase agreement was prepared and executed by Jaycap and the Receiver on August 2, 2017. The total debt was defined to be the amount contained in the July 5, 2017 email and that amount was also the purchase price.

[6] On August 2, 2017 a representative of the Receiver and a representative of Jaycap also emailed about a request from one of the guarantors, the appellant Mr. Richardson, about the pending transaction. As part of this exchange, the two sides set out their understanding of the purchase price and the impact on the guarantors' liability. This was their exchange:

> Reid [*Jaycap's representative*]. Neil Richardson [*one of the appellants*] has contacted us asking for an adjournment of the application next week as he is out of town. His concern is that he does not have any idea of what #Co's offer is and is concerned about his personal guarantee. As #Co is offering Jaycap's total indebtedness, Neil would not be exposed to any shortfall payable under his guarantee. We can't be giving him any legal or other advice but should you wish you could let Neil know that you would not be going after him for any amount. Otherwise we will likely have to adjourn the application until such time as he is available.
>
> Please let us know what you wish to do.
>
> Best regards,
>
> Vic [*Receiver's representative*]
>
> ….
>
> Vic, [*Receiver's representative*]
>
> I believe that is incorrect actually.
>
> Neil Richardson[*one of the appellants*] has guaranteed the debt which has been accruing.
>
> Our Numbered Co is offering our full debt (carrying value) *NOT everything* we are legally entitled to.
>
> Please don't adjourn and please don't communicate anything to [N]eil, we will do that.
>
> Thanks,
>
> Reid [*Jaycap's representative*]

[7] It appears from the record that the Receiver did not respond to this email nor did it obtain any clarification from Jaycap about what exactly was incorrect about its understanding of the purchase price and resulting impact on the guarantors.

[8] On August 21, 2017 the Receiver obtained an approval and vesting order approving the first asset purchase agreement. The guarantors did not oppose this application as they were not facing a deficiency.

[9] What happened next is a little unclear because of the lack of evidence and the Receiver's reliance on evidence from legal counsel about legal conclusions instead of the facts underlying those conclusions. The Receiver states in its third report that on August 28, 2017 counsel for Jaycap indicated that there was an error in the purchase price. The report then goes on to state that the Receiver was advised by its legal counsel that a common mistake occurred regarding the purchase price as set out in the first asset purchase agreement and that court approval was required to amend the mistake.

[10] It appears from the evidence of Jaycap that the asset purchase agreement was incorrect when it equated the purchase price (the amount contained in the July 5, 2017 email) to the total debt. The total debt was $1.3 million higher than the purchase price, and continued to accrue with interest and costs.

[11] The first asset purchase agreement did not close at the end of August 2017. On September 6, 2017 the Receiver and Jaycap entered into a second asset purchase agreement, which reduced the purchase price. On September 8, 2017 the Receiver filed an application to vacate the first approval and vesting order and sought approval of the second asset purchase agreement.

[12] The guarantors were served with this application and the appellant, Mr. Richardson, sent a series of letters to the Receiver's counsel asking for information and documents to support that a mistake had occurred. The Receiver's legal counsel provided answers to some, but not all, of these requests.

[13] The application was set for September 19, 2017 but adjourned and heard on October 26, 2017. The chambers judge reserved to consider the submissions and to review Mr. Richardson's materials which had not made it to the court file before the hearing. She issued her decision a week later and granted the second approval and vesting order. She found that she was not precluded from vacating the first order and issuing another. The first approval and vesting order did not direct the Receiver to close the transaction, but approved the terms of the asset purchase agreement and its execution by the Receiver. Pursuant to the termination clause, the agreement could be terminated by the parties if certain conditions were met.

[14] The chambers judge also found that the Receiver and Jaycap terminated the first asset purchase agreement since they had, by error, failed to revise the purchase price in the agreement in accordance with earlier correspondence. The chambers judge found that the parties met the

requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

[15] The chambers judge then considered the merits of the second asset purchase agreement and whether it met the criteria established in *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 83 DLR (4th) 76. She was satisfied the second asset purchase agreement was reasonable in the circumstances, and that the Receiver had made sufficient efforts to obtain the best price and was not acting improvidently. She noted the lack of offers, the inability to close an earlier conditional offer, the earlier order approving the sale, and the revised purchase price, which was still higher than the asset's appraised value.

[16] The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

[17] Jaycap responds that the only real issue is whether the exercise of the court's discretion to accept the second asset purchase agreement was reasonable in the circumstances. Jaycap argues that notwithstanding the lengthy marketing process for the debtor's assets, there were no foreseeable offers. Further, there was no indication that relisting the assets would benefit either the secured creditors or the guarantors and that the chambers judge properly relied upon the Receiver's expertise in this regard.

[18] Jaycap also raises a number of contractual law difficulties with the guarantors' position. First, the termination provisions were duly exercised and the first asset purchase agreement no longer exists. Jaycap submits that neither this Court nor the court below can revive or reinstate a contract against the wishes of the actual parties or create a contract on their behalf. As a result, whether there was a mutual mistake or an error in finding mutual mistake is irrelevant. Second, the guarantors do not have standing to force a rectification as strangers to the contract.

Standard of Review

[19] The grounds of appeal that challenge facts and inferences are subject to palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 and 23, [2002] 2 SCR 235. Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36-37.

[20] The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came

to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125.

Analysis

There was no mutual mistake

[21] We agree with the guarantors that the evidence does not establish mutual mistake and it was a palpable and overriding error for the chambers judge to conclude that the test was met. The evidence establishes that on August 2, 2017, the day the first asset purchase agreement was signed, the parties may have had *different* understandings about the purchase price and the Receiver's understanding of the purchase price was incorporated into the agreement. A different understanding is not a common misapprehension as to the facts: *Beazer v Tollestrup Estate*, 2017 ABCA 429 at para 28, [2018] 4 WWR 513.

[22] This difference was due, in part, to the imprecise language used by Jaycap in its communications with the Receiver about the amount. Jaycap described the purchase price as its "current cost" in July 2017, and later as the "full debt" and "carrying value" in August 2017. Jaycap's counsel could not explain the differences among these terms to this Court nor was he able to explain how the amounts were determined or what the $1.3 million difference was comprised of. As the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the $1.3 million difference cried out for an explanation before this Court and the court below.

[23] While the guarantors are successful on this ground of appeal, this does not end the matter as mutual mistake was an alternative argument. The appeal cannot succeed unless the guarantors establish a reviewable error in the chambers judge's *Soundair* analysis.

Lack of fairness and integrity of the process

[24] The guarantors raise two issues supporting their allegation that the integrity of the process was compromised. First, the Receiver failed to disclose relevant and material documents about what transpired after August 2, 2017. Second, the Receiver did not appear to be acting independently of Jaycap.

[25] We agree that the Receiver's evidence about what transpired after August 2, 2017 is not satisfactory, even considering the evidence contained in the confidential supplement to the third report. Legal counsel's conclusion that there was a common mistake does not provide the evidentiary foundation to establish mutual mistake. That is for the court to decide.

[26] A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase

price was put forward as a reason why the first transaction did not close. However, because the Receiver was seeking to vacate an earlier court order, some information about why the order needed to be vacated was required.

[27] Further, the Receiver provided little information about the critical August 2, 2017 email and why no further clarification was sought from Jaycap about what it meant before the court order approving the first transaction was obtained. There was enough information in that email to put the Receiver on notice that there was a misunderstanding. Had the Receiver been more diligent, this whole situation may well have been avoided.

[28] While insolvency proceedings are subject to special procedural rules and are understandably time sensitive in nature, these considerations do not relieve the Receiver from its basic obligations to the parties and the court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application that it brings. As summarized by the court in *Ravelston Corporation Limited (Re)*, 2007 CanLII 2663, 29 CBR (5th) 1 (ON SC):

> [60] A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, 1912 CanLII 365 (UK JCPC), [1913] A.C. 160 at 167 (J.C.P.C.).
>
> [61] When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 1978 CanLII 1934 (BC SC), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.
>
> [62] It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1973 CanLII 467 (ON SC), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].
>
> [63] A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

[29] The Receiver's materials on their own do not provide the evidentiary basis to support the relief it was seeking. It was only several weeks later, when faced with serious opposition from Mr.

Richardson, that Jaycap filed an affidavit with more, although still incomplete, information about what transpired.

[30] The lack of information about what happened and the way the Receiver and Jaycap skirted around the issue in its application materials certainly did not help the perception of the Receiver's independence. The optics of the situation likely contributed to the guarantors' suspicion that what transpired merited further inquiries and that the Receiver was following Jaycap's instructions to conceal from the guarantors the true state of affairs. Jaycap and the Receiver were jointly represented before this Court, which was also unusual and unhelpful particularly when counsel for Jaycap could not answer questions the Receiver would be expected to know. During the hearing, the panel found that the guarantors' submissions were persuasive.

[31] The termination of the first asset purchase agreement was also left unexplained by the Receiver. Jaycap's evidence is that the Receiver failed to deliver closing documents, which allowed Jaycap to terminate. Jaycap signed a unilateral termination notice and the parties executed a mutual termination notice several weeks after the second asset purchase agreement was signed, and after Mr. Richardson launched his opposition. The chambers judge found that the first asset purchase agreement was terminated, but she did not explain in her reasons which termination was valid or why. Termination in these circumstances is not merely a matter between the parties as suggested by Jaycap. The circumstances surrounding the termination of the first asset agreement ought to have been canvassed as this remained a court-supervised sales process where the Receiver owed fiduciary duties to the parties to act fairly.

[32] The Receiver provided no evidence about termination nor did it explain why it failed to deliver the final closing documents, giving rise to termination, when the first asset purchase agreement reflected its understanding of the purchase price. Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with the assistance of their legal counsel, will be held to their bargain. Had the Receiver sought to compel Jaycap to close the first asset purchase agreement, instead of abandoning it, its application may well have been successful.

[33] What is missing here is transparency. The process should be transparent. It should enable the court and interested parties to make an informed decision as to whether the sale can be considered fair and reasonable in the circumstances: *Toronto Dominion Bank v Canadian Starter Drives Inc*, 2011 ONSC 8004 at para 5, 2011 CarswellOnt 15140. Given the significant questions left unanswered by the Receiver, we have serious concerns about the efficacy, fairness and integrity of the process the Receiver followed between August 2, 2017 and the hearing of the application to approve the second asset purchase agreement. As a result, we disagree with the chambers judge that the Receiver met the requirements of *Soundair*.

Conclusion

[34] As an aside, and as a further indication of the parties' approach to procedure was the parties' approach to the sealing orders. The court record demonstrates that the parties failed to file

a sealing order, failed to file an affidavit they undertook to file, and failed to ensure that the Receiver's certificate met the requirements to release the bans and restore public access to the proceedings if that was the Receiver's intention in filing it.

[35] After the hearing concluded, and in preparation for filing this judgment, this Court was unable to discern the scope of the sealing orders, in part because of the missing information and the patchwork of numerous blanket orders that were taken over information that probably should not have been sealed. We asked for assistance from the parties and were provided with very little useful information.

[36] A review of the transcripts suggests to this Court that the parties ought to be more thoughtful in drafting their materials, in seeking bans, and in drafting those ban orders carefully, limiting public access to what is truly sensitive confidential information that could prejudice the insolvency process. The test for a sealing ban is set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 and is not merely the consent or non-objection of the parties. Sealing bans are the exception and not the rule because they engage *Charter* interests and materially impact the court's work. Better practices are required.

[37] The appeal is allowed, the order is set aside and the matter returned to Queen's Bench for a rehearing before a different judge.

Appeal heard on November 7, 2018

Written submissions received December 12, 2018 (re sealing orders)

Memorandum filed at Calgary, Alberta
this 4th day of February, 2019

O'Ferrall J.A.

Veldhuis J.A.

Khullar J.A.

Appearances:

A. Henderson
for the Respondent

K.W. Jesse
for the Appellants

TAB 4

In the Court of Appeal of Alberta

Citation: Pricewaterhousecoopers Inc v 1905393 Alberta Ltd, 2019 ABCA 433

Date: 20191114
Docket: 1903-0134-AC
Registry: Edmonton

Between:

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd.

Respondent/Cross-Appellants
(Applicant)

- and -

1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd.

Appellants/Cross-Respondents
(Respondents)

- and -

Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd.

Respondents
(Interested Parties)

The Court:

The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Dawn Pentelechuk
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 21st day of May, 2019
Filed on the 22nd day of May, 2019
(Docket: 1803 13229)

Memorandum of Judgment

The Court:

[1] The appellants appeal an Approval and Vesting Order granted on May 21, 2019 which approved a sale proposed in the May 3, 2019 Asset Purchase Agreement between the Receiver, PriceWaterhouseCoopers, and the respondent, Ducor Properties Ltd ("Ducor"). The assets consist primarily of lands and buildings in Grande Prairie, Alberta described as a partially constructed 169 room full service hotel not currently open for business (the "Development Hotel") and a 63 room extended stay hotel ("Extended Stay Hotel") currently operating on the same parcel of land (collectively the "Hotels"). The Hotels are owned by the appellant, 1905393 Alberta Ltd. ("190") whose shareholder is the appellant, Stellar One Holdings Ltd, and whose president and sole director is the appellant, David Podollan.

[2] The respondent, Servus Credit Union Ltd ("Servus"), is 190's largest secured creditor. Servus provided financing to 190 for construction of the Hotels. On May 16, 2018, Servus issued a demand for payment of its outstanding debt. As of June 29, 2018, 190 owed Servus approximately $23.9 million. That debt remains outstanding and, in fact, continues to increase because of interest, property taxes and ongoing carrying costs for the Hotels incurred by the Receiver.

[3] On July 20, 2018, the Receiver was appointed over all of 190's current and future assets, undertakings and properties. The appellants opposed the Receiver's appointment primarily on the basis that 190 was seeking to re-finance the Hotels. That re-financing has never materialized.

[4] As a result, the Receiver sought in October 2018 to liquidate the Hotels. In typical fashion, the Receiver obtained an appraisal of the Hotels, as did the respondents. After consulting with three national real estate brokers, the Receiver engaged the services of Colliers International ("Colliers"), which recommended a structured sales process with no listing price and a fixed bid submission date. While the sales process contemplated an exposure period of approximately six weeks between market launch and offer submission deadline, Colliers had contacted over 1,290 prospective purchasers and agents using a variety of mediums in the months prior to market launch, exposing the Hotels to national hotel groups and individuals in the industry, and conducted site visits and answered inquiries posed by prospective buyers. Prospective purchasers provided feedback to Colliers but that included concerns about the quality of construction on the Development Hotel.

[5] The Receiver also engaged the services of an independent construction consultant, Entuitive Corporation, to provide an estimate of the cost to complete construction on the Development Hotel and to assist in decision-making on whether to complete the Development Hotel. In addition, the Receiver contacted a major international hotel franchise brand to obtain input on prospective franchisees' views of the design and fixturing of the Development Hotel. The ability to brand the Hotels is a significant factor affecting their marketability. Moreover, some of

the feedback confirmed that energy exploration and development in Grande Prairie is down, resulting in downward pressure on hotel-room demand.

[6] Parties that requested further information in response to the listing were asked to execute a confidentiality agreement whereupon they were granted access to a “data-room” containing information on the Hotels and offering related documents and photos. Colliers provided confidential information regarding 190’s assets to 27 interested parties.

[7] The deadline for offer submission yielded only four offers, each of which was far below the appraised valued of the Hotels. Three of the four offers were extremely close in respect of their stated price; the fourth offer was significantly lower than the others. As a result, the Receiver went back to the three prospective purchasers that had similar offers and asked them to re-submit better offers. None, however, varied their respective purchase prices in a meaningful manner when invited to do so. The Receiver ultimately accepted and obtained approval for Ducor’s offer to purchase which, as the appellants correctly point out, is substantially less than the appraised value of the Hotels.

[8] The primary thrust of the appellants’ argument is that an abbreviated sale process resulted in an offer which is unreasonably low having regard to the appraisals. They argue that the Receiver was improvident in accepting such an offer and the chambers judge erred by approving it. Approving the sale, they argue, would eliminate the substantial equity in the property evidenced by the appraised value and that the “massive prejudice” caused to them as a result materially outweighs any further time and cost associated with requiring the Receiver to re-market the Hotels with a longer exposure time. Mr. Podollan joins in this argument as he is potentially liable for any shortfall under personal guarantees to Servus for all amounts owed to Servus by 190. The other respondents, Fancy Doors & Mouldings Ltd and Northern Electric Ltd, similarly echo the appellants’ arguments as the shortfall may deprive them both from collecting on their builders’ liens which, collectively, total approximately $340,000.

[9] The appellants obtained both a stay of the Approval and Vesting Order and leave to appeal pursuant to s 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: ***1905393 Alberta Ltd v 1905393 Alberta Ltd (Receiver of),*** [2019] AJ No 895, 2019 ABCA 269. The issues around which leave was granted generally coalesce around two questions. First, whether the chambers judge applied the correct test in deciding whether to approve of the Receiver recommended sale; and second, whether the chambers judge erred in her application of the legal test to the facts in deciding whether to approve the sale and, in particular, erred in her exercise of discretion by failing to consider or provide sufficient weight to a relevant factor. The standard of review is correctness on the first question and palpable and overriding error on the second: ***Northstone Power Corp v RJK Power Systems Ltd***, 2002 ABCA 201 at para 4, 317 AR 192.

[10] As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in ***Royal Bank of Canada v Soundair Corporation***, [1991] OJ No 1137 at para 16, 46 OAC 321 ("***Soundair***"). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

[11] The appellants suggest that ***Soundair*** has been modified by our Court in ***Bank of Montreal v River Rentals Group Ltd,*** 2010 ABCA 16 at para 13, 469 AR 333, to require an additional four factors in assessing whether a receiver has complied with its duties: (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic; (b) whether the circumstances indicate that insufficient time was allowed for the making of bids; (c) whether inadequate notice of sale by bid was given; and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner. The appellants argue that, although the chambers judge considered the ***Soundair*** factors, she erred by failing to consider the additional ***River Rentals*** factors and, in so doing, in effect applied the "wrong law".

[12] We disagree. The chambers judge expressly referred to the ***River Rentals*** case. ***River Rentals***, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the ***Soundair*** test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: ***Salima Investments Ltd v Bank of Montreal*** (1985), 65 AR 372 at paras 12-13. At its core, ***River Rentals*** highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the ***Soundair*** test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

[13] At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: ***Skyepharma PLC v Hyal Pharmaceutical Corp*** (1999), 12 CBR (4^{th}) 84 at para 4, [1999] OJ No 4300, aff'd on appeal 15 CBR (4^{th}) 298 (ONCA).

[14] Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not

the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: ***Soundair*** at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": ***Soundair*** at para 22.

[15] The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers – of which there is absolutely none – the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 at para 13.

[16] Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": ***Romspen Mortgage Corp v Lantzville Foothills Estates Inc***, 2013 BCSC 222 at para 20.

[17] The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.

[18] We see no reviewable error. This ground of appeal is also dismissed.

[19] Finally, leave to appeal was also granted on whether s 193 of the *Bankruptcy and Insolvency Act***,** and specifically s 193(a) or (c) of the Act, creates a leave to appeal as of right in these circumstances or whether leave to appeal is required pursuant to s 193(e). As the appeal was also authorized under s 193(e), we find it unnecessary to address whether this case meets the criteria for leave as of right in s 193(a)-(d) of the Act.

Appeal heard on September 3, 2019

Memorandum filed at Edmonton, Alberta
this 14th day of November, 2019

Wakeling J.A.

Pentelechuk J.A.

Authorized to sign for Antonio J.A.

Appearances:

D.M. Nowak/J.M. Lee, Q.C.
for the Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393 Alberta Ltd.

D.R. Peskett/C.M. Young
for the Appellants

C.P. Russell, Q.C./R.T. Trainer
for the Respondent, Servus Credit Union Ltd.

S.A. Wanke
for the Respondent, Ducor Properties Ltd.

S.T. Fitzgerald (no appearance)
for the Respondent, Northern Electric Ltd.

H.S. Kandola
for the Respondent, Fancy Doors & Mouldings Ltd.

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

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

Goodman, McKinlay and Galligan JJ.A.

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

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

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 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?

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 do ing 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.

[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

[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 or der 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 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

TAB 6

Court of Queen's Bench of Alberta

Citation: Sanjel Corporation (Re), 2016 ABQB 257

Date: 05162016
Docket: 1601 03143
Registry: Calgary

In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

[2] The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

[3] After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

II. Facts

[4] On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.

[5] Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the *Alberta Business Corporations Act* in 1980, and its principal executive and registered office is located in Calgary. Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

[6] The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

[7] Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately $415.5 million. The Syndicate has perfected security interests over substantially all of the assets of the Sanjel Group, and is the principal secured creditor of the Sanjel Group in these CCAA proceedings.

[8] On June 18, 2014, Sanjel Corporation issued US $300 million 7.5% Callable Bonds due June 19, 2019. Interest is payable on the Bonds semi-annually on June 19 and December 19. The Bonds are unsecured. Nordic Trust ASA (the "Trustee") is the trustee under the Bond Agreement.

[9] The Sanjel Group has been severely impacted by the catastrophic drop in global oil and gas prices since mid-2014. Over the last 18 months, the Sanjel Group has taken aggressive steps to cut costs, including by reducing staffing levels by more than half. However, by late October, 2015, Sanjel Corporation was in breach of certain covenants under the Bank Credit Facility. By late December, 2016, the Syndicate was in a position to exercise enforcement rights. In addition, an interest payment of USD $11,250,000 was due on the Bonds on December 19, 2015. Since late 2015, the Sanjel Group has been in negotiations with both the Syndicate and two bondholders, Ascribe Capital LLC and Clearlake Capital Group L.P., (the "Ad Hoc Bondholders"). The Ad Hoc Bondholders hold over 45% of the Bonds.

[10] In the fall of 2015, Sanjel Corporation engaged Bank of America Merrill Lynch ("BAML") to identify strategic partners and attempt to raise additional capital for the Sanjel Group. BAML contacted 28 private equity firms; 19 non-disclosure agreements were executed and 9 management presentations were made. However, the BAML process did not result in a successful transaction.

[11] In December, 2015, the Ad Hoc Bondholders retained a New York law firm, Fried Frank, as their legal advisor and Moelis & Company as their financial advisor.

[12] On December 10, 2015, Fried Frank conveyed a proposal from the Ad Hoc Bondholders to Sanjel. Under this proposal, Sanjel would be required to pay the USD $11,250,000 interest payment. Provided that the interest payment was made, the bondholders would agree to a standstill agreement for the same period as may be agreed with the Syndicate. In return, the Ad Hoc Bondholders would lend back their pro rata share of that interest payment to Sanjel in return for secured notes ranking *pari passu* with the Bank Credit Facility, bearing interest at the same rate as the Bank Credit Facility plus 2%. The new notes would not be repaid until the Bank Credit Facility was repaid.

[13] The Ad Hoc Bondholders indicated that they would consider acting as standby lenders to Sanjel for the remainder of the interest payment and would offer the other bondholders the option of lending back their pro-rata share to Sanjel on the same basis. If they agreed to be standby lenders, the Ad Hoc Bondholders would receive a commitment fee equal to 10% of their standby commitment, payable in new notes.

[14] The proposal letter indicated that the Ad Hoc Bondholders were aware that Sanjel had been engaged in a process to address liquidity and leverage issues over the past few months, including attempting to raise equity to sell assets. In their view, Sanjel had exhausted those efforts, and the only remaining option was a deal negotiated with the bondholders. However, the Ad Hoc Bondholders would only embark on such a process if the December 19, 2015 interest payment was made.

[15] Sanjel rejected the proposal on December 14, 2015. It is noteworthy that the Bank Credit Facility includes a negative covenant prohibiting Sanjel from granting a security interest over its assets. The Syndicate advised Sanjel that the Ad Hoc Bondholders' proposal to have their existing unsecured position elevated to rank *pari passu* with the Bank Credit Facility was unacceptable, and that it would not provide its consent.

[16] On December 15, 2015, the Ad Hoc Bondholders advised counsel to the Syndicate that they wished to work towards a restructuring, which they envisaged would involve paying down a portion of the Syndicate's debt "in an amount to be mutually agreed on". They also suggested that Sanjel would implement a rights offering to holders of Bonds and then to existing equity, with a conversion of the Bonds into new debt and equity.

[17] On or about December 15, 2015, the Ad Hoc Bondholders sent Sanjel a draft waiver and standstill agreement, which required the payment of part of the December 19 interest payment by December 23, 2015 and the payment of the fees and disbursements of Fried Frank and Moelis in return for arranging for a bondholder meeting to be called to consider a period of forbearance to March 31, 2016.

[18] Fried Frank and Moelis executed Non-Disclosure Agreements ("NDAs") on December 24, 2015, but the Ad Hoc Bondholders did not, thus not restricting their right to trade the Bonds. Fried Frank and Moelis were granted access to a Sanjel virtual database ("VDR") on January 9, 2016.

[19] By January, 2016, given the prolonged downturn in oil and gas prices, Sanjel's liquidity was limited. Events of default under the Bank Credit Facility that had occurred as of October 31, 2015 were exacerbated by a cross-default based on the non-payment of interest under the Bond

Agreement. As of January 31, 2016, the Sanjel Group had total consolidated liabilities of approximately $1.064 billion.

[20] Sanjel was facing very significant negative cash flow projections over the next few months. As of early January, 2016, Sanjel's projected cash flows showed that its cash position would deteriorate by more than half as of the first week of April, 2016, and would be further reduced by anticipated forbearance payments.

[21] In the circumstances, Sanjel agreed with the Syndicate to implement a Sales and Investment Solicitation Process ("SISP"). Sanjel states that it hoped that if a SISP was implemented, it might find a transaction that preserved the business as a going concern, which would maximize stakeholder value and preserve goodwill and jobs.

[22] In mid-January, 2016, Sanjel engaged PWC as a proposed Monitor in the event it would become necessary to file under the CCAA.

[23] The SISP was commenced on behalf of Sanjel by its financial advisors, PJT Partners Inc. ("PJT") and Credit Suisse Securities (CANADA), Inc. ("CS") on January 17, 2016. The advisors contacted prospective bidders, many of whom had already been identified through the BAML process of late 2015.

[24] The process of soliciting non-bidding indications of interest ran from January 17, 2016 to February 22, 2016. On January 26, 2016, the advisers updated and opened a VDR available to anyone who had signed a NDA. A teaser letter was distributed and meetings and conference calls were held with bidders. A process letter was distributed on January 28, 2016. Nine indications of interest were submitted on or about February 22, 2016.

[25] Before and during the SISP process, Sanjel was negotiating with both the Syndicate and the Ad Hoc Bondholders with respect to separate forbearance agreements, and with the Ad Hoc Bondholders with respect to NDAs to be signed by the Ad Hoc Bondholders. The Ad Hoc Bondholders complain that there was a delay of almost a month before Sanjel's counsel responded to a mark-up of a NDA provided by Fried Frank, but negotiations were stymied by the Ad Hoc Bondholders' insistence that the December interest payment be paid. Until this issue was settled, there was no reason to finalize the NDAs. In addition, it was not until January 29, 2016 that representatives of the Ad Hoc Bondholders advised Sanjel that they were prepared to be restricted from trading and therefore able to receive confidential information. During this period of time, the Ad Hoc Bondholders refused to meet with Sanjel management when they travelled to New York on January 20, 2016.

[26] On February 1, 2016, counsel to Sanjel sent counsel to the Ad Hoc Bondholders a copy of the draft forbearance agreement between the Syndicate and Sanjel, which set out the key dates of the SISP, including the completion of definitive purchase and sales agreements by March 24, 2016. It would have been clear to the Ad Hoc Bondholders from this draft that Sanjel was proceeding on a dual track basis, considering both a potential stand-alone restructuring of the company and a sales process.

[27] The Ad Hoc Bondholders made a second proposal to Sanjel on February 2, 2016, very shortly after the NDAs were signed. This proposal involved the Syndicate recovering a portion of its loan from Sanjel's existing cash reserves and a rights offering backstopped by the Ad Hoc Bondholders. A portion of the Bonds would be converted into equity. The December interest payment would have to be paid. Sanjel's management team met with the Ad Hoc Bondholders

and their advisors in New York on February 3, 2016 and Sanjel's team, the Syndicate and its advisors and the Ad Hoc Bondholders met on February 8, 2016.

[28] Sanjel delivered an indicative restructuring term sheet to the Ad Hoc Bondholders on February 12, 2016, as required by the forbearance agreement that the parties were negotiating. The restructuring term sheet emphasized that a bondholder-led restructuring would require significant new money, a significant capital commitment and ongoing capital, with a significant pay-down of the Syndicate's debt.

[29] Commencing on February 15, 2016, Sanjel allowed representatives of Alverez and Marsal ("A&M"), advisors to the Ad Hoc Bondholders, to attend in Calgary and conduct due diligence.

[30] On February 18, 2016, Sanjel uploaded to its VDR the final, unsigned versions of the Syndicate Amending and Forbearance Agreement and the Bondholders Forbearance Agreement.

[31] Under the SISP, preliminary, non-binding indications of interest were delivered to the advisors and the company by February 22, 2016. Six such indications of interest were received, all of which were materially superior to the Ad Hoc Bondholders proposal of February 2, 2016. The Ad Hoc Bondholders have admitted that they were aware of the milestones under the SISP and the Bank Forbearance Agreement by mid-February, 2016, although it is clear that their advisors would have been aware of these milestones from February 1, 2016.

[32] As part of finalizing the form of Bond Forbearance Agreement, counsel for Sanjel and for the Ad Hoc Bondholders had negotiated a form of summons that would be used to call a bondholder meeting to consider the agreement. The only item for consideration to be considered at the meeting was to be the Bond Forbearance Agreement. The plan was to have 2/3 of the bondholders approve and execute the Bond Forbearance Agreement, and then to hold a bondholders meeting.

[33] Instead, on February 25, 2016, the Ad Hoc Bondholders caused the Trustee to issue a summons for a meeting on March 10, 2016 to consider and vote on a) whether to declare the Bonds in default, accelerate them and exercise remedies, including commencing involuntary bankruptcy proceedings against Sanjel under Chapter 11 of the *United States Bankruptcy Code*, including claims against the MacDonald family and MacBain Properties Ltd., which owns the business premises that are leased by the Sanjel Group or b) approve the Bond Forbearance Agreement.

[34] On March 2, 2016, the Ad Hoc Bondholders submitted a restructuring proposal to Sanjel. This proposal provided no cash recovery to the Syndicate. Instead, a portion of the debt owed to the Syndicate would be converted to a new loan and the remainder extinguished, with the Syndicate receiving warrants in a reorganized company. There would be a Chapter 11 filing and the bondholders would provide a debtor-in-possession ("DIP") facility to rank *pari passu* with the Syndicate debt. Bondholders who contributed to the DIP would receive new 2nd lien notes for part of their previous notes, the remainder being extinguished. The DIP facility would be converted into 100% of the equity of the reorganized company. Sanjel would be required to appoint a Chief Restructuring Officer ("CRO") designated by the Ad Hoc Bondholders.

[35] On March 4, 2016, in a follow-up letter to a telephone meeting on March 3, 2016, US counsel to the Syndicate wrote to Fried Frank requesting that the March 10 bondholders meeting

be adjourned to March 31, 2016. Canadian counsel to Sanjel made the same request of the Trustee.

[36] Also on March 4, 2016, a template Asset Purchase Agreement ("APA") for SISP bidders was posted on the VDRs, which disclosed a CCAA/Chapter 15 filing with PWC as designated Monitor. This template agreement was available to the Ad Hoc Bondholders and their advisors.

[37] Counsel for the Ad Hoc Bondholders replied on March 5, 2016 that they would advise the Trustee to postpone the March 10 meeting subject to:

a) a response to their March 2 proposal by March 10, 2016;
b) full disclosure of company records for A&M's representative, "so that [that representative] is ready and best positioned to commence his duties as Chief Restructuring Officer for the Company".
c) payment by March 7, 2016 of roughly USD $2.2 million in fees and disbursements for the Ad Hoc Bondholders' legal and financial advisors.

[38] After some negotiation, Sanjel agreed to these terms for an adjournment, other than with respect to a small deduction in fees and disbursements. Sanjel made it clear that it reserved all rights with respect to the appointment of a CRO and a filing under Chapter 11, which it would not agree to at that time. On March 8, 2016 the Trustee confirmed that the meeting would be postponed to March 31.

[39] On March 9, 2016, second round bids under the SISP were received. Five bids were received, all of which were materially superior to the Ad Hoc Bondholders' March 2, 2016 proposal in terms of cash recovery for the Syndicate.

[40] An information update conference for bondholders was scheduled to be held on March 11, 2016, at which Sanjel, the Trustee and the Ad Hoc Bondholders would provide an update to any bondholder that wished to call in. This was rescheduled by the Trustee to March 31, 2016.

[41] On March 11, 2016, the Syndicate sent the counter-offer required by the postponement of meeting agreement to the Ad Hoc Bondholders. This counter-proposal made it clear that there would be a CCAA/Chapter 15 process, rather than a Chapter 11 process. While this counter-proposal is confidential, it is fair to say that the parties were far apart in their negotiations, particularly with respect to treatment of the Syndicate indebtedness.

[42] Also on March 11, 2016, a representative of Sanjel met with A&M's representative and discussed Sanjel's intention to disclaim certain leases in the anticipated CCAA proceedings.

[43] Following receipt of the second round bids, Sanjel and its advisors identified the top three bidders and began negotiations with them with the goal of finalizing due diligence and being in a position to execute final APAs on March 24, 2016, as indicated in the Bank Forbearance Agreement.

[44] In the meantime, Sanjel continued meetings with the A&M representative, who asked for, and was provided with:

a) access to the newly created VDR for second stage bidders/investors in the SISP on March 12, 2016.

b) draft materials relating to the CCAA filing, including current drafts of cash flow projections and drafts of stakeholder communication regarding the CCAA, on March 21, 2016.

[45] On March 20, 2016, the Ad Hoc Bondholders provided Sanjel and the Syndicate with a third restructuring proposal. This one provided for some paydown of the Syndicate's debt, but involved less than half of that recovery in new money, about the same amount in debt secured by accounts receivable and a substantial amount of bank debt rolled over into a new loan. It also provided for a DIP facility to rank *pari passu* with a new bank credit facility in the event of a liquidation and the conversion of some bondholder debt into secured notes.

[46] On March 23, 2016, counsel for Sanjel requested that the Trustee postpone the bondholder meeting scheduled for March 31, 2016 to April 14, 2016. He also proposed to set up the requested informational update on March 31, 2016. On March 25, 2016, counsel for the Trustee consented to this request.

[47] In the SISP, final bids were received from the three top bidders on March 24, 2016, with negotiations to continue on final APAs. On the same day, Sanjel and its advisors hosted a call with A&M and Moelis, during which they walked through a 13 week cash forecast.

[48] On March 31, 2016 the Syndicate and the Ad Hoc Bondholders had discussions with respect to the Ad Hoc Bondholders' March 20 proposal. In previous correspondence, the Syndicate's counsel had questioned the adequacy of the proposed DIP financing in the proposal and noted Sanjel's significant cash needs following exit from an insolvency proceeding, as opposed to the proposal's assumption that there would be better cash flow. At the conclusion of the call, the Ad Hoc Bondholders indicated that they would provide further modelling with respect to their proposal.

[49] On April 3, 2016, Sanjel entered into final APAs with the proposed purchasers, STEP and Liberty. On April 4, 2016, the Sanjel Group filed for CCAA protection. Counsel for Sanjel Group disclosed that the application was made without notice to the Ad Hoc Bondholders He submitted that notice would imperil the CCAA proceedings as the bondholders may, with notice, have pre-empted the CCAA filing by an involuntary filing under Chapter 11. There is no requirement to give notice to unsecured creditors of a CCAA filing. There are circumstances, and this was one of them, where it is appropriate to seek an initial order on an ex parte basis:

> This may be an appropriate – even necessary – step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("Rescue!"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7

[50] On April 11, 2016, the Ad Hoc Bondholders presented their fourth proposal for restructuring, not to Sanjel but to the Syndicate. This proposal increases the amount the bondholders would contribute to Sanjel for new equity, which would be used to repay a portion of the Syndicate's loan.

[51] According to Fried Frank, the Syndicate's counsel responded on April 13, 2016 advising that while they appreciated the work done by the Ad Hoc Bondholders, the Syndicate preferred the sale route. The Syndicate proposed alternatives that it might consider involving a higher pay-

out of the Syndicate's debt than offered by the April 11, 2016 proposal. The Ad Hoc Bondholders have not responded.

[52] The Sanjel Group apply for an order approving the sales transactions generated through the SISP, being a sales agreement between Sanjel and STEP Energy Services Ltd., including an assignment of the sale of the debtor's cementing assets in favour of 1961531 Alberta Ltd., and a sales agreement between Sanjel and Liberty.

[53] The Trustee applied for an order dismissing the application for approval of these transactions, allowing the Ad Hoc Bondholders to propose a plan of arrangement, lifting the stay to allow the Trustee to commence a Chapter 11 filing and directing a new Court-monitored SISP, among other applications

III. Applicable Law

[54] Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

(a) whether the process leading to the proposed sale was reasonable in the circumstances;
(b) whether the Monitor approved the process leading to the proposed sale;
(c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
(d) the extent to which the creditors were consulted;
(e) the effects of the proposed sale on creditors and other interested parties; and
(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[55] In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

[56] Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?

b) Were the interests of all parties considered?

c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?

d) Was there unfairness in the working out of the process?

Royal Bank v Soundair, 1991 Carswell Ont (Ont CA) at para 20.

[57] Gascon, J. (as he then was) suggested in *Re AbitibiBowater, Inc*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and

b) the weight to be given to the recommendation of the monitor.

[58] As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

IV. Analysis

[59] The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

A. The Trustee submits that the CCAA can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the CCAA provides scope for greater recoveries than would be available on a bankruptcy.

[60] Most of the cases relied upon by the Trustee with respect to this submission predate the 2009 enactment of section 36 of the CCAA. While prior to this change to the CCAA, there was some authority that questioned whether the CCAA should be used to carry out a liquidation of a debtors' assets, there was also authority that accepted this as a proper use of the statute .

[61] An analysis of the pre-section 36 state of the law on this issue, and support for the latter view, is well summarized in *Re Nortel Networks Corp*., [2009] O.J. No. 3169. As noted by Morawetz, J. at para 28 of that decision, the CCAA is a flexible statute, particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests. This is such a case.

[62] Section 36 now provides that a CCAA court may authorize the sale or disposition of assets outside the ordinary course of business if authorized to do so by court order. There is thus no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement.

[63] Morawetz, J in *Re Target Canada Co*., 2015 ONSC 303 at paras 32 and 33, describes the change brought about by section 36:

> Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.
>
> The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

See also *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 at para 15.

[64] Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

[65] What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

[66] As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

[67] The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

[68] In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

[69] It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

[70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

[71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in

advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[72] Similar issues were considered in *Re Nelson Education Ltd*., 2015 ONSC 5557 at paras 31-32, and in *Re Bloom Lake*, [p.1], 2015 QCCS 1920 at para 21.

[73] The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

[74] While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

[75] The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

[76] Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

[77] While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

[78] I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

[79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

[80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am

satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

[81] These are serious allegations, but they are not supported by the evidence.

[82] As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

[83] These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

[84] The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

[85] The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

[86] The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate. It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

[87] In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all

unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defendable justifications.

[88] The Ad Hoc Bondholders describe their proposal as a "germ" of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISP.

[89] The Trustee also submits that the Court should not be deterred by the Syndicate's rejection of the proposal, insisting on its value and citing cases where a creditor's stated intention not to accept a plan did not prevent a CCAA filing from proceeding. This is a different situation: the Ad Hoc Bondholder's proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate's rejection of such a plan, even if inclined to do so.

[90] The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the "Demand Acceleration and NOI") on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

[91] This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

[92] The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group's revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure and the integration of its business in its initial filing, including the fact that the Sanjel Group's "nerve centre", management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group's COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

[93] The Trustee's most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders' meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA .

[94] Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the

Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

[95] The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of "prospective enforcement action as proposed for consideration at the scheduled bondholders meeting," as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

[96] The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

[97] The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate "to the serious and material prejudice of the Bondholders" and other unsecured creditors.

[98] The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

[99] The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Limited (Re),* 2009 CarswellOnt 4471 (SCJ) at para 43.

[100] Section 6 of the CCAA requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective "veto" over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co, Re***,** 2009 ABQB 490 at para 22.

[101] A noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no, agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

[102] The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder's proposals would even provide sufficient

operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

[103] The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the *United States Bankruptcy Code*, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

[104] While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

(a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;

(b) Sanjel could confirm a plan without the consent of the Syndicate; and

(c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

[105] Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

[106] This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

[107] The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

[108] What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

[109] The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

[110] The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct

negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

[111] The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

[112] I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbable that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

[113] On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

[114] The letter asserts the following:

a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;

b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;

c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;

d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";

e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

[115] The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients herby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

c) "... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts."

[116] The letter comments that "(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order."

[117] The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

[118] On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

[119] The Monitor was satisfied by its rapid but thorough investigations that:

a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;

b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC's fundraising efforts or fund deployment and he has no ownership interest in ARC;

c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;

d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;

e) The senior Mr. MacDonald has not had an active role in Sanjel's management for years, was not involved in the SISP and does not own shares in STEP or ARC;

f) Mr. Hooker's involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;

g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;

i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

[120] This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

[121] When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

[122] The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

[123] The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

[124] This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

[125] Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

[126] With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

[127] Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

[128] I accept the Monitor's advice on this issue.

[129] With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

[130] The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

[131] A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

[132] There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

[133] Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

[134] In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

[135] The issue of who should bear the cost of the investigation into these allegations is reserved.

Heard on the 28th day of April, 2016.

Dated at the City of Calgary, Alberta this 16th day of May, 2016.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Chris Simard/Alexis Teasdale
for the Sanjel Group

Robert Anderson Q.C./Emily Paplawski
for the Trustee

Josef Kruger Q.C./Robyn Gurofsky/Jessie Cameron
for the Monitor

Kelly Bourassa/Kelly Peters
for the Syndicate

David Mann
for the Canadian Purchasers

Sean Collins/Walker Macleod
for the US Purchasers

Daniel Gilborn
for the TR Transport Inc.

Katherine Reiffenstein
for Aspen Air Corp. and Aspen Air US Corp.

Brian Davison/Ryan Algar/Karen Fellowes
for MacBain Properties Ltd. and MacBain Group

Melanie Gaston
for TAQA

Caireen Hanert
for Weir Group PLC

Heather Ferris
for GCC of America Inc.

Jennifer Davis
for CT Logics

Mary Buttery
for ARI Fuel Services

TAB 7

Court of Queen's Bench of Alberta

Citation: Sydco Energy Inc (Re), 2018 ABQB 75

Date: 20180131
Docket: 1701 02520
Registry: Calgary

In the matter of the Receivership of Sydco Energy Inc

MNP Ltd, in its capacity as the Court-Appointed Receiver and Manager of Sydco Energy Inc

Applicant

Memorandum of Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] In this application, the Receiver of Sydco Energy Inc sought an order approving a sale of assets. The approval and vesting order proposed by the Receiver departed from the usual order of its kind by specifically including certain declarations relating to the Alberta Energy Regulator ("AER") arising from the decisions in *Re Redwater Energy Corporation* and the Receiver's experiences and communications with the AER leading up to the application. I approved the sale of assets, and allowed the order to include the specific provisions sought by the Receiver, given the conduct of the AER lending up to the sale application, the evidence of AER's intentions with respect to the sale and its view of the scope of its regulatory authority. These are my reasons.

II. Facts

[2] The history of this receivership is relevant to the issues that were before me.

[3] Rothwell Development Corporation is a major shareholder of Sydco Energy Inc, holding, in combination with the principals of Rothwell, about 65% of its shares. It is also Sydco's major secured creditor. As at February 10, 2017, Sydco owed Rothwell in excess of $15.9 million.

[4] In 2016, it had been apparent for some time to Rothwell that Sydco was in financial difficulty. In October 2016, Rothwell engaged James Catherwood and Warren Coles to become employees of Sydco in order to perform an operational review and to determine whether Sydco could be continued as a long-term going concern business. Mr. Catherwood and Mr. Coles had not had any relationship with Sydco prior to this and were not shareholders of Sydco. They were retained because of their knowledge of and experience in the oil and gas industry. In early February 2017, Rothwell, in consultation with its legal and financial advisors, Mr. Catherwood and Mr. Coles, determined that Sydco was no longer viable as a going concern. Rothwell obtained an order putting Sydco into receivership on February 23, 2017. At the time, Sydco had 443 wells, 108 producing, 117 suspended, 143 abandoned, and the remaining shut-in or special status.

[5] Mr. Catherwood and Mr. Coles were engaged by the Receiver to continue managing Sydco's business under the Receiver's direction, and to assist with the sale of Sydco's assets. The Court approved a sales process on February 23, 2017.

[6] In advance of the receivership application, Rothwell's counsel communicated with Patricia Johnston Q.C., the Executive Vice President and General Counsel of the AER. He sent her a draft of the proposed sales process order, which included a provision permitting the submission of a credit bid. Ms. Johnston advised that she required a condition in the order that the successful bidder be at arm's length to Sydco. Rothwell's counsel did not agree to the proposed condition, indicating that the proposed Receiver was concerned that it would be "an improper fetter on the ability of the Receiver to conduct a sales process in a commercially reasonable manner for the benefit of all creditors and stakeholders" and also that the term "arm's length" was vague. Ms. Johnston responded that:

> ... the AER will typically not approve the transfer of assets from a Licensee to a Purchaser that is non-arm's length in insolvency situations unless <u>both</u> parties have <u>zero</u> non-compliances.
>
> If this caveat is not included in the sales process ... prospective non-arm's length purchasers of Sydco AER licensed assets might be in store for an ugly surprise when they come to the AER for approval of related AER licenses if Sydco has any non-compliances.

[7] Ms. Johnston followed this email with the advice that:

> ... if the seller (Sydco) has a liability management rating of less than 1.0 before or after the transaction, it is considered to be non-compliant with AER requirements. In that scenario, it is extremely unlikely the AER would permit a transfer of licenses to a non-arm's length transferee.

[8] Five parties submitted bids in response to the sales process, which was thorough and conducted through an experienced sales agent. Unfortunately, none of the bids were for the purchase of all of the assets. The best bid by far was a credit bid submitted by Rothwell through 2032951 Alberta Ltd, a company incorporated for the purpose by Wayne Hekle, the President and one of the principals of Rothwell (the "203 bid").

[9] The Receiver determined that the 203 bid provided the best possible recovery for the receivership estate of Sydco for, among others, the following reasons:

a) the bid submitted by 203 included many more petroleum and natural gas assets of Sydco than any of the competing bids, with the result that:

   i. the impact on the Orphan Well Fund would be significantly less as a result of the proposed sale to 203; and

   ii. a larger portion of Sydco's arrears of pre-receivership municipal realty taxes would be assumed by 203 than by the competing bidders;

b) the consideration offered by 203 exceeded that offered by any other bidder; and

c) 203 represented that it would be able to obtain a BA Code, which is necessary for a corporation to hold AER issued licences to operate wells, facilities and pipelines, from the AER, and that, upon completion of the purchase and sale transaction, would have a liability management rating in excess of 2.0 as required by AER Bulletin Nos. 2016-16 and 2016-21. 203 had applied for a BA Code on April 13, 2017, before its bid was accepted by the Receiver.

[10] After 203 was selected as the successful bidder, the Receiver renounced those Sydco assets for which no bids had been submitted, including over 300 non-producing wells. Based on the decisions in *Re Redwater Energy Corporation*, 2016 ABQB 278 ("*Redwater Trial Decision*") and *Orphan Well Association v Grant Thornton Ltd*, 2017 ABCA 124, leave to appeal to SCC granted, [2017] SCCA No 231 ("*Redwater Appeal Decision*"), which upheld the *Redwater Trial Decision*, the Receiver excluded the renounced assets from its calculation of Sydco's liability management rating, leaving Sydco with a rating of 2.02. Thus, Sydco met the requirement of AER Bulletin 2016-21, which requires that as a condition for obtaining the AER's approval to transfers of licenses, both the transferee and the transferor must have a liability management ratio of 2.0 or higher immediately following the transfer.

[11] There is little dispute that, in the normal course, the AER would inform an applicant for a BA Code of its decision on an application within 30 days. However, in this case, it took 109 days for 203 to receive a decision.

[12] In the meantime, since the AER had indicated that at least one officer of 203 had to be resident in Alberta, Mr. Catherwood became President and CEO of 203. The AER was informed that Rothwell was the sole shareholder of 203 and that Mr. Hekle was the only director.

[13] Mr. Catherwood's affidavit details a record of 203's frequent inquiries of the AER as to the status of its application for a BA Code in the months that followed, with only one response on June 20, 2017, indicating that :

> [a]s set out in Bulletin 2016-21, the AER will consider and process all applications for license eligibility under Directive 067 as non-routine. Non-routine applications require a minimum of 30 days to

> complete our review and are subject to longer timelines depending on the complexity of the application. ... Please be advised that we are experiencing an unusually high volume of applications and endeavor to process within the 30 days.

[14] The next day, Mr. Hekle received a letter from an "Insolvency Management Specialist" at the AER indicating the following:

> James Catherwood and yourself are listed as directors in Section D of *Directive 067 - Schedule 1 AER Business Associate Code License Eligibility Type* and/or the Alberta Corporate Registry for 2032951 AB. Further to this, you and Mr. Catherwood have been associated with another company, namely Sydco Energy Inc. (Sydco) that is currently in receivership proceedings and has disclaimed assets. Please submit a written explanation detailing why Sydco failed to meet its end-of-life obligations while under your control and direction, and why it would be appropriate for the AER to consider approval of this application.
>
> AER may request additional security as deemed appropriate in order to offset the estimated costs of suspending, abandoning or reclaiming a well, facility, well site or facility site and as otherwise provided for in Part 1.1 of the *Oil and Gas Conservation Rules.*
>
> Failure to provide the required information by July 7, 2017 will result in the application being closed without further notice.

[15] Mr. Catherwood responded on June 27, 2017, advising the AER that Mr. Hekle was the sole director of 203. Mr. Catherwood also attached a lengthy chronology of events from Sydco's incorporation to its receivership. This chronology included the following details:

a) In September 2012, Grant and Wayne Hekle, together with their corporation Rothwell, owned in excess of 83% of the shares of Sydco. The Hekles reside in Manitoba. The principals of Sydco were Bruce Curlock and Ron Gerlitz, who managed the company.

b) In November 2012, the Canadian Western Bank called Sydco's operating loan of approximately $6.25 million.

c) In December 2012, Rothwell acquired $4 million of the Sydco debt from the Canadian Western Bank. In 2013, Rothwell bought out the remainder of the debt and advanced additional funds to Sydco in 2013 and 2014.

d) In March, 2016, Rothwell commissioned a forensic financial audit of Sydco. PriceWaterhouseCoopers LLP recommended that Mr. Coles, as an experienced chief financial officer in the oil and gas business, perform the audit.

e) In July 2016, upon completion of the audit, Rothwell removed Mr. Curlock as a director and officer of Sydco, and asked the remaining directors to resign.

[16] Mr. Catherwood advised the AER that neither he nor Mr. Hekle had control or direction over Sydco prior to the fall of 2016, and thus were not responsible for Sydco's insolvency or its failure to meet its end-of-life obligations.

[17] With respect to the AER’s reference to “additional security” in the June 21, 2017 letter, Mr. Catherwood wrote:

> With respect, any arbitrary and unlimited additional security deposit to the AER pursuant to AER Bulletin 2016-21 is not reasonable under the circumstances, as is the AER's request that the Corporation agree in advance to whatever presently unknown security deposit may in future be requested by the AER. The Corporation does not yet have any oil and gas assets and it would be unreasonable to expect the Corporation to agree to such terms given that it would be highly prejudicial and put the Corporation at a competitive disadvantage to the rest of industry. Furthermore, given the experience of the management team of the Corporation and that they did not control or direct Sydco at the relevant time, there should be no requirement for any additional security deposit.

[18] On July 11, 2017, Mr. Catherwood, Mr. Coles, and their counsel met with Ms. Johnston and two other AER employees. Mr. Catherwood described the meeting in his affidavit. According to this affidavit, one of the AER employees confirmed that the AER tries to achieve a 30-day turnaround on Directive 067 applications and that the employee had no explanation for the delay with respect to 203’s application.

[19] Mr. Catherwood deposes that he explained the involvement of the Hekles and Rothwell with Sydco in detail, including how Rothwell had bought the Canadian Western Bank debt in an attempt to avoid a receivership. He also explained the Hekles’ reliance on Sydco’s former management until the fall of 2016.

[20] According to Mr. Catherwood’s affidavit, Ms. Johnston advised the 203 delegation that:

a) because Mr. Coles and Mr. Catherwood had become part of Sydco, the AER would use its discretion to refuse to issue BA Codes to any company in which either of them were involved in future; and

b) the situation was different from a situation where the lender was a traditional lender, like the ATB, because traditional lenders do not apply for BA Codes.

[21] Mr. Catherwood was not cross-examined on his affidavit. At the hearing, Ms. Johnston stated that she did not believe she would have said this.

[22] In response to his comment at the meeting that, if a credit bid did not proceed, there may be unintended consequences that would be worse for the Orphan Well Fund, Mr. Catherwood deposes that Ms. Johnston said that the AER “would not give second chances to principals who were associated with entities that have disclaimed assets to the Orphan Well Association.”

[23] On July 31, 2017, the AER granted 203’s application for a BA Code with the following conditions:

a) 203 would only be permitted to acquire AER licensed assets “from arm’s length transferors”; and

b) 203 “must post full security for all liabilities associated with any AER licenses it acquires regardless of [203’s] post transaction liability management rating”.

[24] The decision letter states that the conditions imposed were directly related to the fact that the principals of 203 and Sydco were virtually the same and to Sydco's outstanding non-compliances. The AER in its brief states that the "fact that the outstanding non-compliances related to unpaid levies and outstanding end of life liabilities" is irrelevant.

[25] As Mr. Catherwood notes, these conditions made the BA Code approval useless to 203. The security requirement would require 203 to post security of about $19.4 million, which is far more than the amount of the credit bid, and the requirement that such a full security provision would apply to future licenses would leave 203 unable to compete in the oil and gas industry in Alberta. 203 advised the Receiver that it could not meet the condition that it obtain a BA Code that would allow it to purchase the Sydco assets.

[26] On August 11, 2017, counsel for Rothwell and 203 advised the Receiver's counsel that Wormwood Resources Ltd, a corporation wholly owned by Fred Rumak, might be willing to step into the shoes of 203 and complete the purchase, provided that the 203 purchase and sale agreement was amended to make Wormwood the purchaser, reduce the purchase price slightly, exclude certain assets that Wormwood was not interested in purchasing, and make certain other inconsequential amendments. Wormwood is a newly incorporated corporation that had been seeking acquisition opportunities. It holds an unconditional BA Code.

[27] On August 22, 2017, Wormwood, by assignment agreement, agreed to purchase a portion of the Rothwell secured debt equivalent to the agreed purchase price for the Sydco assets, an interest in the Rothwell loan agreement and the security to govern and secure such purchased debt. 203 assigned its interest in the purchase and sale agreement for the Sydco assets to Wormwood with the Receiver's consent. Rothwell financed Wormwood's acquisition of the Rothwell debt security and the purchase and sale agreement in return for a debenture from Wormwood.

III. Positions of the Parties

[28] The Receiver recommended the Wormwood transaction for, among others, the following reasons:

a) all other bids submitted in the sale process had expired;

b) the amendment to the purchase price was relatively minor and the amended purchase price was still greater than the purchase prices offered in the bids submitted by any of the bidders other than 203;

c) Wormwood has a BA Code that is not subject to conditions imposed by the AER that would have the effect of preventing the completion of the transaction;

d) based on the calculations of the Receiver's consultants, the post-closing liability management rating of Wormwood, excluding the assets that have been renounced by the Receiver, would be 2.27, and therefore Wormwood would be in compliance with the requirements of AER Bulletin 2016-21;

e) the proposed transaction results in a significantly larger proportion of the assets being sold than any of the competing bids;

f) the negative impact of Sydco's insolvency upon the Orphan Well Fund and the municipalities in which the assets are located is less as a result of the completion of the Wormwood transaction than it would have been had the Receiver accepted any of the bids submitted by the parties other than 203 in the sale process;

g) it is not known whether, had the Receiver accepted any of the competing bids, the AER would have approved an application to transfer licenses in respect thereof; and

h) given that Rothwell only assigned a portion of the Rothwell debt to Wormwood, after the completion of the Wormwood transaction, it would still be Sydco's only primary secured creditor. Although Rothwell will suffer a significant shortfall in recovery of the indebtedness owing to it, it supports the transaction.

[29] However, given the history of the matter, and the fear that the AER would delay or place conditions upon an application by the Receiver requesting a transfer of the licenses, the Receiver requested an approval and vesting order that departs from the usual form of order, in that it includes the following specific paragraphs taken in large part from the May 19, 2016 Order issued as a result of the *Redwater Trial Decision*:

> 18. The Court declares that the Receiver is not required to comply with or perform and is not liable for abandonment, reclamation and remediation obligations in relation to those PNG Assets that were renounced by the Receiver, ... (the "**Renounced PNG Assets**").
>
> 19. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Sydco's AER licenses ... shall not consider the deemed asset values and deemed liabilities associated with the Renounced PNG Assets for the purpose of calculating the liability management rating ("**LMR**") of Sydco either before or after the transfer, and shall not consider any of the following:
>
> (a) any obligation of Sydco to pay a security deposit ...;
>
> (b) any failure of Sydco, or the Receiver to fail to comply with orders, including abandonment orders, issued from time to time by the AER with respect to the Renounced PNG Assets or provide security deposits therefor;
>
> (c) the renunciation by the Receiver of the Renounced PNG Assets, or any other renunciation by the Receiver of the assets of Sydco pursuant to section 14.06(4) of the *BIA*;
>
> (d) the compliance record of Sydco, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order;
>
> (e) Sydco's status under the AER's *Directive 019 – Compliance Assurance* or any successor thereof, prior to the pronouncement of the Receivership Order;

(f) any outstanding debt owed by Sydco to the Crown, the AER, or to the AER to the account of the "orphan fund"... including but not limited to any administrative fees, any orphan well fund levy, the costs of suspension, abandonment or reclamation, or any other fee, levy, deposit, find, penalty or charge of any kind whatsoever (collectively, the "**Sydco Characteristics**"); or

(g) the imposition of any condition to approving such transfer requiring the payment or rectification of any of the above.

20. The Court directs the AER to not deny applications to transfer licenses based on the Sydco Characteristics, and to not impose conditions on such transfer requiring the posting of security for any and all liabilities associated with those licenses.

21. The Court declares that the provisions of the *OGCA [Oil and Gas Conservation Act]*, the *Pipeline Act* and Directive 006 are inapplicable to the extent they require or permit the AER to deny applications by the Receiver to transfer licenses based on the Sydco Characteristics or impose conditions on such transfer requiring that they be paid or complied with.

22. The Court directs that, in determining whether to approve or deny any application to transfer licenses under the *OGCA* and/or *Pipeline Act*, the AER shall not consider or take into account the Sydco Characteristics or any other factors that are similar in form and/or substance to them, or impose as a condition to any approval of said applications an obligation that Sydco or the Receiver make payments or take actions to rectify the Sydco Characteristics, or any conditions similar in form or substance to them.

23. The Court directs that the AER shall make a determination on any application for license transfers pursuant to the Sales Process (provided the purchaser meets all of the requirements of the AER to hold the applicable licenses) promptly after receipt of a duly accepted electronic license transfer request from the Receiver or Purchaser and in any event within thirty (30) days of the submission of the application by the Receiver or the Purchaser.

24. The Court directs that any refusal by AER to process or approve a license transfer request pursuant to the Sales Process shall be accompanied by written reasons, explaining in reasonable detail the basis for such refusal.

[30] The AER responded to the application materials on August 28, 2017 by indicating that these paragraphs were unnecessary and inappropriate, in that the AER was well aware of the *Redwater* decisions, and that:

> Should the Receiver and Wormwood submit license transfer applications, the AER will consider same in accordance with the

> laws in effect without the need of a court order. In considering license transfer applications, the AER would primarily focus its review on the compliance history of Wormwood as transferee of licenses and its directors and officers and ensuring that Wormwood satisfies AER requirements at the time of the license transfer going forward. This is consistent with the AER's current and past practice in reviewing license transfer applications both before and since the issuance of the *Redwater* decision [emphasis added]
>
> In specific response to proposed paragraph 23 of the draft [approval and vesting order], the AER advises that as per section 31 of the *Responsible Energy Development Act*, section 5.2 of the *AER Rules of Practice* ... and AER Bulletin No. 2017-13, the AER now publishes notice of license transfers applications for a minimum period of 30 days. Accordingly, the AER cannot disposition license transfer applications prior to 30 days following publication, or later if the AER receives statements of concern relating to the application. However, the AER can advise that it will make best efforts to issue a decision as soon as possible following expiry of the 30 day period and would encourage the receiver to submit the applicable transfer applications as soon as possible in order to commence the notice period and address any timing concerns. However, it bears reiterating that, if the AER receives any statements of concern in response to the applications, it must consider and follow its process regarding same. Should you choose to submit a license transfer application now, the AER can confirm it will not issue a decision on the matter until such time as it receives an order confirming court approval of the proposed sale.

[31] The Receiver's counsel attempted to reach agreement with the AER on a time period in which the AER would respond to an application to transfer, and attempted to explain its concerns about whether the AER was respecting the *Redwater* decisions, citing issues that have arisen with the AER in connection with various receivership proceedings since the release of the decision. The Receiver also questioned why the AER continued to include renounced assets in its monthly calculation of Sydco's liability management ratings. In response, the AER indicated that "in each and every case where the AER has appeared before the court to object to the various matters outlined in your letter, it has done so in a manner consistent with its position in its current and outstanding appeal in the *Redwater* proceedings."

[32] Ms. Johnston attempted to explain why the AER continued to include renounced assets in the calculation of Sydco's liability management rating, and indicated that the AER was prepared to agree to language requiring it to dispose of an application within five business days of the expiration of the 30-day public notice period of any application for transfer of AER licenses held by Sydco, provided the AER is not in receipt of any statements of concern in response to such application. She noted, however, that in the event that the AER received one or more statements of concern, it would process the applications and related statements as per its normal process.

[33] The AER continued to take the position that paragraphs 18 through 24 were "self serving and completely irrelevant to the proposed transferee" and requested their deletion. Ms. Johnston

noted, however, that “based and in reliance on representations by counsel for Wormwood”, the AER was prepared to confirm that Wormwood was arm’s length with respect to 203.

[34] The representation referred to by Ms. Johnston was an e-mail from Wormwood’s counsel that stated that “Fred Rumak owns 100% of the issued and outstanding shares in Wormwood Resources, and that he is the sole director of that company.” That e-mail also confirmed that the only legal relationship as between [203] and Wormwood relates to the assignment of the purchase and sale agreement to Wormwood by 203 and ancillary matters necessary to implement the asset purchase.

[35] In a letter dated August 30, 2017, the Receiver repeated its concerns about the AER’s interpretation of the *Redwater* decisions, and asked for guidance on how the AER interprets “arm’s length”. The Receiver advised that, in its view, paragraphs 18 to 24 of the draft order were consistent with the *Redwater* decisions.

[36] Ms. Johnston responded on August 31, 2017 that

> ... the AER considers a party to be non-arm’s length if it has common directors, officers, insiders or controlling shareholders, consistent with the *Securities Act* Multi-lateral Instrument 61-101, [the “Securities Instrument definition”] ... the definition of “related party” in that instrument excludes a person that is “solely a bona fide lender” from the definition.

[37] She also indicated that, if the AER receives a response to a public notice of application, it must determine whether an objecting party may be directly and adversely affected by the application and, if so, may decide that a hearing is appropriate.

[38] The Receiver submitted that the AER’s opposition to the proposed form of order was of concern and added force to its submission that the paragraphs are necessary and would avoid the necessity for further applications to deal with rejections of, or conditions placed upon, transfer applications that are inconsistent with the *Redwater* decisions. The Receiver also submitted that the AER’s insistence that it will only approve license transfers to parties that are arm’s length to Sydco is contrary to the *Redwater* decisions, and was further evidence of a need to include the special provisions in the order.

[39] The Receiver noted that Wormwood is not a related party to Rothwell, Sydco or 203 under the Securities Instrument definition of control. However, the Receiver remained concerned that the arm’s length requirement was an attempt to force the payment of abandonment obligations with respect to assets that have been renounced under section 14.06(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3 (*BIA)*, for the following reasons:

a) although none of the officers, directors or shareholders of Sydco have been named under section 106(1) of the *Oil and Gas Conservation Act*, RSA 2000, C O-6 *[“OGCA”]*, or charged with or convicted of offences under section 108 of the *OGCA* or section 52 of the *Pipeline Act*, RSA 2000, cP-15, the AER appears to be intent on “piercing the corporate veil” of Sydco;

b) in justifying its decision, the AER referred to the unpaid abandonment liabilities of Sydco and therefore, the “contravention” of these officers, directors and shareholders is simply that they were officers, directors and shareholders of an entity that, as a result of its insolvency, had insufficient funds to pay all of its abandonment, reclamation and remediation liabilities;

c) the AER's conduct in imposing conditions on the grant of a BA Code as it did with 203 has the appearance of contravening the single proceeding model of insolvency legislation by essentially preventing such officers, directors and shareholders from investing in other oil and gas producers in Alberta if abandonment, reclamation and remediation obligations remain unpaid;

d) in these proceedings, the direct effect of the AER's actions was to prevent the completion of a purchase and sale transaction between the Receiver and 203, notwithstanding that the transaction was clearly to the benefit of the creditors and other stakeholders of Sydco; and

e) it stretches credulity to suggest there is any reason for the AER's actions other than to ensure the abandonment, reclamation and remediation obligations of Sydco are repaid, notwithstanding that there are insufficient funds in the estate to do so in accordance with the AER's priority ranking under the *BIA.*

[40] The Receiver described a number of recent receivership applications where it submits that the AER took positions contrary to the *Redwater Trial Decision*, including *Re Verity Energy Ltd.* (Action No 1501-04191); *Nordegg Resources Inc*. (Action No. 1601-07435); *Regent Resources Ltd.* (Action No. 1601-16147);and *Alberta Treasury Branches v COGI Limited Partnership, et al* (Action No. 1501-12220).

[41] The Receiver also noted that, after the *Redwater Appeal Decision*, the AER changed its decision process for transfer applications to provide for a longer standardized review period of 30 days, and to provide that, if within that 30-day period, a statement of concern is filed, the AER has the discretion to require a hearing, all of which has the potential of being an impediment to transactions.

[42] The AER in its brief submitted that an application for court approval of a sales and vesting order is not the appropriate forum to challenge the AER's legislation and potential exercise of discretion should a license transfer application be submitted. The AER conceded that it took positions inconsistent with the *Redwater Trial Decision* in previous applications, but said that its positions in the *Verity, Regent, Nordegg* and *COGI* matters were consistent with its position on the *Redwater* appeal, on the basis that, since it had an outstanding appeal and a stay application, it "must act consistent with its position in those proceedings and take steps to mitigate the harm arising from [the *Redwater Trial Decision*]."

[43] The AER noted that the order arising from the *Redwater Trial Decision* provides the AER with discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, but it did not refer to the entirety of the provision in question, which reads:

> 11. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Redwater's AER licenses ... <u>shall not consider any of the following:</u>

> (d) The compliance record of Redwater, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order (but not including any legitimate health, safety and environmental matters associated with the specific Retained Licensed Assets ... that are the subject of a particular license transfer application) provided that the AER shall have the discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, as the term "control" is defined in the *Securities Act* RSA 2000, c S-4. [emphasis added]

[44] The AER submitted that, to the extent that Wormwood is not arm's length to Sydco, the AER was entitled to consider that fact "as it goes to the risk associated with permitting Wormwood to be a licensee", and should be allowed to condition approval accordingly "to mitigate such harm". It submitted that if Wormwood is arm's length, the Receiver should not have a problem amending the approval order to achieve the AER's objective, which it describes as follows:

> The Receiver has refused to amend the [approval order] to address the AER's concerns that the amendments prohibit the AER from considering the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to the proposed transfer of Sydco's licenses ...

[45] The AER made it clear at the hearing that it seeks continuing discretion with respect to license transfers, including the right to deny or approve with conditions a license transfer where the AER has concerns regarding the past conduct of the principals of the holder of a current AER license. In other words, the AER takes the position that, despite the wording of section 11(d) of the *Redwater* order, which prohibits the AER from considering the compliance record of directors, officers, employees, security holders and agents of the debtor company in approving a transfer of a license, the language at the end of section 11(d) allows the AER to do so where the transferee is non-arm's length to any of those parties that are caught by the definition of non-arm's length adopted by the AER.

[46] The AER submitted that this case was the type of situation described in the dissent of Martin, J.A. in the *Redwater Appeal Decision*, where she commented on the unfairness of allowing an insolvent entity to preserve any assets and avoid the costs of public obligations. It submitted that "(p)arties should not be permitted to place themselves into insolvency proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

[47] The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

[48] The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

[49] It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decision)* specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

IV. Analysis

A. Approval of the Wormwood Transaction

[50] The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank of Canada v Soundair Corp,* (1991) 4 OR (3d) 1 (CA) at 6, and endorsed in *River Rentals Group Ltd v Hutterian Brethren Church of Codesa,* 2010 ABCA 16 at para 12, are as follows:

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 offers are obtained; and

d) whether there has been unfairness in the working out of the process.

[51] The only issue with respect to the whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

[52] Counsel for the Receiver, who was involved in the *Redwater* decisions and in the drafting of the order that arose from the trial decision, submits that the *Redwater* order, which was consensual, does not have precedential effect. He argues that the Respondents in *Redwater* consented to the exception set out in section 11(d) of the order because it was unlikely to be a factor in the Redwater situation. However, I must consider the wording of the order on its face,

interpreted in context and in accordance with the *Redwater* decisions, which have precedential effect.

C. Should the Approval Order Include the *Redwater* Provisions?

[53] Given the history of this matter, I find that it is both reasonable and prudent for the Receiver to seek to include the specific declarations set out in the *Redwater* order in this approval and vesting order.

[54] The original winning bidder, 203, chosen by the Receiver as being in the best interests of stakeholders, encountered lengthy and inexplicable delay in the consideration of its application for a BA Code. Inquiries were left unanswered, meetings with AER staff were tense and confrontational and the conditions attached to the approval of 203's application prevented it from completing its credit bid.

[55] The relationship between the AER, the Receiver and Wormwood, the new bidder, has also been fraught with conflict and uncertainty over the AER's position and its stated intentions.

[56] It is no secret that the AER disagrees with the *Redwater* decisions, and its conduct in this receivership illustrates its resistance to the principles set out in these decisions. However, as noted by Wakeling, J.A. in refusing the AER's application for a stay of enforcement of the *Redwater Appeal Decision* pending appeal to the Supreme Court of Canada, 2017 ABCA 278 at paras 11 and 121:

> A Court of Appeal judgment resolves not only the dispute that the parties presented to a court for resolution but the basis for resolution provides a principle that governs all future similar disputes. I cannot stay the precedential effect of a Court of Appeal opinion and create a new legal regime that affects other receivers and trustees in bankruptcy and other secured creditors who pursue their rights in different and future debt enforcement proceedings. To do so would mean that similar cases are adjudged differently. This [is] not an attribute of the legal system committed to the rule of law ...
>
> The rights of receivers and bankruptcy trustees, secured creditors and the Alberta Energy Regulator whose interests are juxtaposed will in the future be adjudged according to the principles set out in *Grant Thornton Ltd v Alberta Energy Regulator* unless the Supreme Court of Canada grants leave to appeal and allows the appeal. It is inconsequential what the law was three, five or twenty-five years ago.

[57] The AER naturally has concerns about the impact of orphaned and abandoned wells on the public purse, but it must, in insolvency situations as in all others, act in accordance with the law of Alberta, which now includes the principles and declarations set out in the *Redwater* decisions.

[58] This receivership has already encountered many obstacles, from the lack of a market for most of Sydco's assets to the delay caused by the now-abandoned 203 bid, and it is reasonable for the Receiver to attempt to control further delay and cost by having the *Redwater* provisions spelled out in the vesting and approval order.

[59] Eventually, the parties were able to agree to some minor modifications in the order requested by the Receiver. The final order provisions that refer to the AER are set out in Appendix A to this decision.

D. What Do Sections 11(d) of the *Redwater* Order and Section 19(d)] of the Sydco Order Mean?

[60] Does section 11(d) of the *Redwater* order, now included as section 19(d) in the Sydco order, allow the AER to take the compliance record of a debtor's directors, officers, employees, security holders and agents into account when exercising its authority to approve, deny or impose conditions upon any transfer of a debtor's AER licenses?

[61] The AER clearly takes the position that it can do so if a shareholder of a debtor has control of the transferee of such license within the meaning of "control" under the *Securities Act* definition. In fact, it submits that it has the power to do so with respect to a debtor's directors and officers as well. This interpretation of Section 11(d) would mean that, although the AER could not take the compliance record of such individuals or entities into account when considering the granting or transfer of licences to an arm's length entity, it could do so if the transferee is non-arm's length. In other words, the AER takes the position that the exception that ends the declaration in section 11(d) of the order allows it to take into account the prohibited factor of what occurred as a result of the receivership if the transferee is a non-arm's length party. This position is set out clearly in the AER's August 28, 2017 letter and in its stated objective in argument that it should be allowed to consider the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to a proposed transferee.

[62] This interpretation of section 11(d) cannot succeed.

[63] First, it is inconsistent with and contrary to the *Redwater* decisions and the decision of the Supreme Court of Canada in *Alberta (AG) v. Moloney*, 2015 SCC 51, and contrary to the rehabilitation goals of insolvency legislation. Second, the AER's interpretation of section 11(d) of the *Redwater* provisions would preclude receivers from accepting credit bids from parties who fall within the AER's definition of non-arm's length, and thus interfere with a valid tool in insolvency that enables the Receiver to obtain the best outcome for stakeholders and creditors.

[64] With respect to the inconsistency of the AER's interpretation of Section 11(d) with the *Redwater* decisions, the Court of Appeal in *Redwater* recognized that the purpose of the BIA includes providing the bankrupt with a "fresh start", free of the burden of crushing debt: para 42. It noted that the fresh start is subject to some limits, including that any regulatory or environmental obligations that are not provable in bankruptcy will continue to bind the bankrupt. However, with respect to whether such obligations can be transferred to third parties, Slatter, J.A. commented that, while the fresh start concept does not apply to corporations that cease to exist after a bankruptcy, "(a)ny regulatory or environmental obligations that were not provable in bankruptcy may exist in theory, but there is no entity against which they could be enforced:" para 44. Even if any of the AER claims could be considered to have survived the bankruptcy, they cannot be enforced against the directors, officers, security holders or agents of Sydco when it ceases to exist. However, it is clear that the claims of the AER at issue in this proceeding are all claims provable in bankruptcy. Thus, they cannot be revived and enforced against a third party, even if that third party is non-arm's length to the debtor. What the AER is attempting to do by considering the compliance record of officers, directors, shareholders and agents of insolvent

companies before granting them, or corporations associated with them, new licences is to seek to enforce the claims against third parties, rather than the debtor who was responsible for the abandonment. This is contrary to the polluter-pay principle endorsed by the Supreme Court in *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 at para 40, contrary to the fresh start objective of the *BIA* and contrary to the single proceeding model of insolvency legislation.

[65] The Court of Appeal also described what the AER was trying to do in the *Redwater Appeal Decision* at para 82:

> Therefore, what the Regulator is attempting to do is attach conditions on the 20 AER licences that might be transferred, which really relate to the 107 wells that have been disclaimed by the Trustee and are not being transferred. The effect is to transfer economic value from the producing wells to the non-producing wells in order to enforce the environmental obligations attached to the latter. This clearly has the effect of disrupting the distribution scheme under the *BIA*. Even if the Trustee must take the licences "warts and all", there is no justification for the Regulator transferring warts from one licence to another. [emphasis added]

[66] Any attempt to connect eligibility for future licences to environmental obligations provable in a bankruptcy, or assets renounced as part of an insolvency proceeding, is another attempt to transfer "warts from one licence to another," again with the effect of frustrating the rehabilitative objectives of the *BIA* and disrupting the distribution scheme.

[67] The Court of Appeal's position on the AER's submission that it is entitled to consider the compliance record of individuals associated with an insolvent corporation is made clear in para 88 of the *Redwater Appeal Decision*:

> In this appeal, the regulatory regime controlling the transfer of AER licences is also premised on the assumption that there is no obligation outstanding. That obligation is the actual or potential cost of abandoning the well. However, if the environmental obligation is provable in bankruptcy, it cannot be enforced indirectly outside the bankruptcy regime under the Regulator's licensing scheme: *Moloney; 407 ETR*. The Alberta Energy Regulator's licensing scheme depends on the enforcement of environmental liabilities outside the bankruptcy regime, in violation of the "single proceeding" model. The Regulator cannot sidestep the problem by artificially distinguishing between "managing obligations" and "recovering claims". The Regulator cannot establish a parallel process to collect claims. [emphasis added]

[68] Slatter, JA conceded at paragraph 84 that the Regulator can control the transfer of AER licenses of bankrupt companies, but, he said, not by placing financial conditions on transfer that disrupt priorities under the *BIA*. He noted that the Regulator can limit transfers to qualified transferees, but cannot, however, indirectly interfere with the disposition of the value of the assets in bankruptcy by placing financial preconditions on the transfer of permissive AER licenses.

[69] It could be argued that this is what the AER in effect did by placing draconian financial conditions on 203's application for a BA Code. As Slatter, J A commented at para 76 of the *Redwater Appeal Decision* "the reality of the Regulator's position should prevail over any narrow and technical interpretation". As a result of these restrictions, the AER stymied a credit bid by a related party that would have been better for both creditors and the Orphan Well Fund. That issue, however, is not before me. Rather than appealing the 203 decision, the bidder found an acceptable way to credit bid through an arm's length third party.

[70] However, the reality of the AER's stated intention to consider the compliance record of principals, directors, employees and agents of insolvent companies in making decisions with respect to the transfer of licences is that it is an impermissible, after-the-fact method of attempting to collect debts discharged in bankruptcy not from the debtors but from third parties associated with the debtor.

[71] The AER's position that it remains free to exercise its discretion to deny BA Codes or the transfer of licenses to the directors, officers, controlling shareholders or "agents" of a debtor that, as a result of its insolvency, had insufficient funds to pay all of its abandonment and remediation liabilities is doing exactly what the Court of Appeal in *Redwater* said it could not do: indirectly enforcing outside the bankruptcy regime an environmental obligation that has been, or will be, compromised in the bankruptcy and can no longer be enforced.

[72] In *Moloney*, Gascon, J noted at para 28:

> Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly ...

[73] In *Moloney*, a provision of the Alberta *Traffic Safety Act* allowed the Registrar to suspend the debtor's driver's license and vehicle permits until a judgment debt that had been released in bankruptcy was paid. The Province submitted that this was not a debt enforcement scheme, but merely an additional monetary condition to obtain the privilege of driving, that it was "inherently regulatory in nature". The Supreme Court disagreed, noting that the distinction Alberta sought to make was irrelevant, that the section was clearly aimed at the repayment of a judgment debt, and that "even if it were aimed at recovering of the resulting regulatory charge, such charge would nonetheless be a claim provable in bankruptcy, and as such, it would remain a debt subject to the bankruptcy process": para 50.

[74] Gascon, J. noted at para 56:

> Therefore, whether one considers the province's claim as a judgment debt or as the resulting regulatory charge, it is still provable in bankruptcy. It follows that the effect of s. 102 is to allow a judgment creditor to deprive the debtor of his or her driving privileges until the debt is paid. In the end, the provision thus compels the payment of a provable claim. Driving is unlike other activities. For many, it is necessary to function meaningfully in society. As such, driving often cannot be seen as a genuine "choice": *R. v White*, [1999], 2 S.C.R. 417, at para. 55. The effect of the provincial scheme undoubtedly amounts to coercion in that regard.

[75] The enhanced scrutiny proposed by the AER has equally severe consequences for its subjects: a serious interference with their ability to work or invest in the oil and gas industry. Mr. Catherwood justifiably describes this in his affidavit as “blackballing”. The effect is coercive and intimidating. It is also a tool that is focused not on the debtor but on individuals who were involved with the debtor, whether or not they had any personal responsibility for the debtor’s insolvency. In this case it is clear that Mr. Catherwood and Mr. Coles could have had no such responsibility, yet it appears that they would be caught by the policy. Rothwell, as a shareholder of Sydco attempted by assuming the Canadian Western Bank debt and investing more money in Sydco to prevent an insolvency, yet it would appear to be caught by the policy.

[76] The Supreme Court in *Moloney* found that the impugned provision of the *Traffic Safety Act* created an operational conflict between the provincial and federal provisions, and thus was constitutionally inoperative by reason of the doctrine of federal paramountcy. However, Gascon, J went further to consider whether the provision fell within the frustration of federal purpose category, noting at para 77 that the effect of the provision directly contradicted and defeated the financial rehabilitation of the debtor, and that the province’s use of the provision undermined that purpose. He cited *Houlden, LW , B Morawetz and Janis Sarra, Bankruptcy and Insolvency Law of Canada*, 4th ed (rev), Toronto: Carswell, 2013 as follows:

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order that he or she may be able to integrate into business life of the country as a useful citizen free from the crushing burden of debts ...

[77] He commented further at para 82 on the Province’s submission that Parliament’s power over bankruptcy does not extend to the regulation of driving privileges:

> The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person’s driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province’s condition conflicts with s. 178(2) of the *BIA* and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

[78] Thus, section 11(d) of the *Redwater* order and section 19(d) of the Sydco order, read in context and in accordance with the law as established in the *Redwater* decisions and by the Supreme Court in *Moloney*, does not entitle the AER to refuse to grant a BA Code or to transfer licenses on the basis of the compliance record of Sydco, its directors, officers, employees, security holders and agents as such compliance record relates to claims provable in bankruptcy, or on the basis of the Receiver’s renouncement of Sydco assets during the course of the receivership, as this would be an indirect method of enforcing a debt discharged on bankruptcy.

[79] Second, the AER's interpretation of section 11(d) of the *Redwater* provisions and section 19(d) of the Sydco order would preclude receivers from allowing credit bids from parties who fall within the AER's definition of non-arm's length.

[80] In addition to being an interference with one of the ways in which the Receiver can fulfil its duties to maximize the return to creditors of the estate, the policy would discourage any efforts made by non-arm's length parties, such as occurred here with Rothwell, to invest further in a debtor in an attempt to save the debtor from insolvency, to preserve employment and to continue to pay unsecured creditors. This is contrary to the goals of the insolvency regime and crosses the boundary between legitimate regulatory function and interference in the insolvency process. This presumably unintended consequence creates a trap for the unwary, and eliminates a common-sense solution that preserves value that is in frequent use in receiverships and reorganizations.

[81] In summary section 11(d) of the *Redwater* order and section 19(d) of the Sydco order, properly interpreted, do not give the AER the authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in an insolvency. Likewise, the AER may not consider the compliance record of the debtor, its directors, officers, employees, security holders and agents in determining their eligibility for future license grants or transfers if such compliance record refers to debts discharged or assets renounced through bankruptcy. Thus, the provisions of Directive 006 that appear to allow the AER to do so are inoperative by reason of the *Redwater* and *Moloney* decisions. While the AER continues to have discretion to review transfer applications, it must exercise that discretion in accordance with the law in force in this Province. This does not prevent the AER from reviewing such applications in accordance with non-prohibited factors.

[82] It follows that, in deciding whether or not concerns expressed by third parties during the 30 day review process warrant any further delay in the approval process, the AER cannot take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require a hearing.

V. Conclusion

[83] The AER submits that it is concerned that the Wormwood bid is an example of the unfairness of allowing an insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid the costs of public obligations. There is no evidence that this is a valid concern in this case: the evidence is to the contrary. Rothwell purchased the bank debt of Sydco in an attempt to rescue the company. It sent in new management to determine whether a receivership could be avoided. None of the individuals or entities that are the subject of the AER's focus in this proceeding can be said to have been responsible for Sydco's insolvency. Rothwell may have been acting in its own interests in attempting to salvage Sydco, but it still stands to lose a substantial amount of its investment.

[84] If this was one of those proceedings where receivership was a voluntary step to avoid environmental liabilities, which, as the Court of Appeal notes in *Redwater* is not an easy solution to financial problems, "there is enough judicial discretion in the insolvency regime to prevent

abuses": para 105. It is the Court's responsibility to deal with this type of abuse of the insolvency regime. The AER has the power to object to a sale by the Receiver to a control party in a situation where it alleges that this kind of abuse is present, and the Court has the authority to consider the possibility of abuse in determining whether to grant orders in the process. Much of the relief that may be granted to insolvent entities under the *BIA* or the *CCAA* is dependent upon evidence of good faith or fairness in the process and can be denied upon evidence of abuse.

[85] With respect to whether this Court has the jurisdiction to restrain the AER from exercising its discretion regarding licence transfer applications, the Supreme Court in *AbitibiBowater* made it clear that, while generally a regulatory body has discretion to decide how best to ensure that regulatory obligations are met, and the court should avoid interfering with that discretion, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings": *AbitibiBowater* at para 48.

[86] The current environmental regulatory regime in Alberta allows oil and gas companies to defer the financial consequences of addressing environmental liabilities relating to individual wells as long as their portfolio of assets is able to achieve a positive liability management rating. It is clear that, while this may not have caused difficulties when energy prices were high, in this period of economic downturn in Alberta caused primarily by the substantial and sustained drop in energy prices, the result has been a greatly increased number of abandoned and orphaned wells. There are hard choices to make at the intersection of insolvency law with environmental, pension and employment law, and attempting to balance competing public interest objectives is a difficult task for an insolvency court. The pain of insolvency trickles down to many stakeholders, including unresolved environmental conditions, unfunded or underfunded pension plans, terminated employees, affected trades-people and small businesses, shareholders large and small and even entire communities that may rely on an insolvent industry for their financial welfare.

[87] There are compelling arguments for super priority for many of these stakeholder groups, but, as pointed out in the *Redwater Appeal Decision*, Parliament considered the competing policies and "undoubtedly was concerned that giving environmental claims a super priority would drive away lenders, and deprive highly leverage industries (like the oil and gas industry) of necessary financing": para 96.

[88] Parliament in the most recent amendments to insolvency legislation, the Supreme Court in its decision in *AbitibiBowater* and now the Alberta Court of Queen's Bench and the Court of Appeal in *Redwater* have tried to delineate the boundary between creditor and regulatory claims in the environmental sphere, but there are still difficult issues that must be determined. This decision attempts to address one of them.

Dated at the City of Calgary, Alberta this 31st day of January, 2018.

B.E. Romaine
J.C.Q.B.A.

Appearances:

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Patrick Fitzpatrick
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Patricia M. Johnston Q.C. & Keely R. Cameron
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Ryan Algar
DLA Piper (Canada) LLP
for Trican Partnership & Trican Well Service Ltd.

Gregory Plester
Brownlee LLP
For Clear Hills County

APPENDIX A

LICENSE TRANSFER PROCESS

1. The Court declares that the Receiver is not required to comply with or perform and is not liable for abandonment, reclamation and remediation obligations under the *Oil and Gas Conservation Act*, RSA 200, c 0-6 ("***OGCA***") or the *Pipeline Act*, RSA 2000, c P-15 in relation to any wells, pipelines, facilities and sites in which Sydco has an interest that were renounced by the Receiver pursuant to section 14.06(4)(c) of the *BIA* the (the "**Renounced PNG Assets**").
2. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Sydco's AER licenses pursuant to sections 24(1), 24(2), and 106(3) of the *OGCA*, sections 18(1), 18(3) and 51 of the *Pipeline Act*, Article 6 of *Directive 006: Licencee Liability Rating (LLR) Program and License Transfer Process* ("**Directive 006**"), and Articles 4, 8 and 10 of Directive 006, shall not consider the deemed asset values and deemed liabilities associated with the Renounced PNG Assets for the purposes of calculating the liability management rating ("**LMR**") of Sydco either before or after the transfer, and shall not consider any of the following:

    (a) any obligation of Sydco to pay a security deposit under section 5 of Directive 006 or section 8 of Appendix II to Directive 006 or under the *OGCA* or *Pipeline Act;*

    (b) any failure of Sydco, or the Receiver to fail to comply with orders, including abandonment orders, issued from time to time by the AER with respect to the Renounced PNG Assets or provide security deposits therefor;

    (c) the renunciation by the Receiver pursuant to section 14.06(4) of the *BIA* of Renounced PNG Assets;

    (d) the compliance record of Sydco, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order, other than with respect to any legitimate health, safety and environmental matters associated with the Purchased Assets licensed under the *OGCA* or *Pipeline Act* that are subject to a license transfer application by the Receiver and/or Purchaser pursuant to the Sale Agreement, provided that nothing herein shall prevent the AER from exercising a discretion to deny, or to place conditions on any approval of, an application to transfer licenses in respect of Purchased Assets where, as of the effective date of transfer, a control person (as such term is defined in section 1(1) of the *Securities Act*, RSA 2000, Chapter S-4) of Sydco is also a control person of the Purchaser;

    (e) Sydco's status under the AER's *Directive 019 – Compliance Assurance* or any successor thereof, including whether or not Sydco is in a "Global Refer" or "Refer" status; or

(f) any outstanding debt owed by Sydco to the Crown, the AER, or to the AER to the account of the "orphan fund" (as that term is defined in the *OCGA)*, including but not limited to any administrative fees, any orphan well fund levy, the costs of suspension, abandonment or reclamation, or any other fee, levy, deposit, fine, penalty or charge of any kind whatsoever

(collectively, the "**Sydco Characteristics**"), provided that section 19(d) shall not have precedential effect on or bind this Court with respect to any application by the Receiver for an approval and vesting order other than with respect to the Transaction.

3. The Court directs that, in determining whether to approve or deny any application to transfer licenses under the *OGCA* and/or *Pipeline Act*, the AER shall not consider or take into account the Sydco Characteristics or any other factors that are similar in form and/or substance to them, or impose as a condition to any approval of said applications an obligation that Sydco or the Receiver make payments or take actions to rectify the Sydco Characteristics, or any conditions similar in form or substance to them.

4. The Court directs that the AER shall make a determination on any application to it to approve transfers of licenses by the Receiver or the Purchaser in connection with the Transaction (a "**License Transfer Application**") within five (5) business days following the expiry of the thirty (30) day notice of application period in respect of such License Transfer Application, provided that in the event that a party files a statement of concern in respect of such License Transfer Application, then the AER will communicate to the Receiver and Purchaser within five (5) business days following a final determination by the AER or any other body contemplated by the *Alberta Energy Regulator Rules of Practice*, AR 99/2013 of the determination on the License Transfer Application.

5. The Court directs that any refusal by the AER to process or approve a license transfer request pursuant to the Sales Process shall be accompanied by written reasons, explaining in reasonable detail the basis for such refusal.