Court File No. CV-22-00692309-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

PRICEWATERHOUSECOOPERS INC.
(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Applicant

- and -

SKYMARK FINANCE CORPORATION and MERK INVESTMENTS LTD.

Respondents

BOOK OF AUTHORITIES OF THE RECEIVER
(Motion re: Sale Approval and Ancillary Relief Order)

September 22, 2023

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6
Fax: 416 364 7813

Dylan Chochla (LSO: 62137I)
dchochla@fasken.com
Tel: 416 868 3425

Mitch Stephenson (LSO: 73064H)
mstephenson@fasken.com
Tel: 416 868 3502

Montana Licari (LSO: 85097G)
mlicari@fasken.com
Tel: 416 868 3450

Lawyers for the Receiver, Alvarez & Marsal Canada Inc.

Court File No. CV-22-00692309-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

PRICEWATERHOUSECOOPERS INC.
(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Applicant

- and -

SKYMARK FINANCE CORPORATION and MERK INVESTMENTS LTD.

Respondents

BOOK OF AUTHORITIES OF THE RECEIVER
(Motion re: Sale Approval and Ancillary Relief Order)

TABLE OF CONTENTS

TAB 1

CITATION: Laurentian University of Sudbury, 2021 ONSC 4769
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-07-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc.

Vern W. DaRe, for the DIP Lender

Pamela Huff, for Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for Toronto-Dominion Bank

George Benchetrit, for Bank of Montreal

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel for the Applicant

Andrew J. Hatnay, for Thorneloe University

Tracey Henry, for Laurentian University Staff Union (LUSU)

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association (LUSA)

André Claude, for University of Sudbury

HEARD: July 5, 2021

ENDORSEMENT

[1] Laurentian University of Sudbury (the "Applicant" or "LU") brought this motion for an order authorizing and directing the Applicant to retain Cushman & Wakefield ("C&W") as real estate advisor to the Applicant (in such capacity, the "Real Estate Advisor").

[2] The evidentiary basis for the requested relief is set out in the Fifth Report of the Monitor.

[3] No party opposed the requested relief.

[4] The Applicant is of the view that a Real Estate Advisor with experience and expertise, particularly in the post-secondary and public sectors, will provide critical guidance to the Applicant and be in the best position to advise on developing a strategic plan for the Applicant's real estate portfolio.

[5] The Applicant issued a request for quotations on May 18, 2021 and 32 organizations downloaded the relevant material. The Applicant ultimately received six proposals, which it reviewed with the Monitor. Interviews were then conducted with four potential candidates.

[6] The Applicant notes that the Amended and Restated Initial Order does not require the Applicant to seek court approval when retaining a real estate advisor. The Applicant notes that the process that was undertaken represented a hybrid between: (a) the procurement process that would typically be undertaken by the Applicant within the public sector outside of a CCAA proceeding; and (b) the steps and process that would be undertaken by an Applicant or the Monitor in inviting expressions of interest to act as a real estate advisor in a CCAA proceeding, in communicating with such parties and in reviewing and considering responses received from interested parties. As the process did not strictly follow all terms of a public sector procurement process, and incorporated aspects of a more typical CCAA engagement process, the Applicant decided to seek court approval of same.

[7] In addition, in the proposed draft order, the Applicant inserted language that purports to provide additional protection for those involved in the selection process.

[8] The Monitor comments on certain public sector parameters beginning at para. 22 of the Fifth Report, and concludes at paragraph as follows 33:

> "The Monitor notes that while the process carried out in respect of soliciting and receiving proposals and selecting C&W was carried out within a shortened timeline and did not meet all the requirements of the Public Sector Parameters, the Monitor is satisfied that the process was open, transparent and competitive and similar to processes conducted in other CCAA proceedings. The Monitor also notes that the abbreviated process is necessary in the circumstances to permit LU to advance its restructuring efforts on a timely basis.

[9] The Monitor supported the Applicant's position.

[10] Having reviewed the Fifth Report of the Monitor and hearing submissions, I am satisfied that it is appropriate to authorize and direct LU to retain the services of C&W, as Real Estate Advisor.

[11] The Applicant also seeks, as part of the order, a provision sealing the unredacted proposal of C&W which will be attached as a Confidential Appendix to the Fifth Report. C&W has advised the Applicant that its unredacted proposal contains commercially sensitive and proprietary information that, if disclose publicly and made available to competitors, could jeopardize the business of C&W.

[12] The appropriateness of including a sealing provision in a order was recently addressed by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38.

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[13] Having reviewed the Confidential Appendix, I expressed the view that certain aspects of the appendix did not appear to contain commercially sensitive and proprietary information. Upon receiving further instructions, counsel advised that certain portions of the appendix could form part of the public record and the scope of the sealing provision was narrowed.

[14] In my view, the revised form of Confidential Appendix satisfies the three prerequisites referenced in *Sherman Estate*.

[15] In the result, LU's motion is granted and an order has been signed.

Chief Justice G.B. Morawetz

Date: July 5, 2021

TAB 2

Bank of America Canada v. Willann Investments Ltd.

Ontario Judgments

Ontario Court of Justice - General Division

Farley J.

June 28, 1993.

Action No. B22/91

[1993] O.J. No. 1647 | 20 C.B.R. (3d) 223 | 17 C.P.C. (3d) 296 | 41 A.C.W.S. (3d) 662

Between Bank of America Canada, Plaintiff, and Willann Investments Limited and Cranberry Village, Collingwood Inc., Defendants

(6 pp.)

Harry Underwood, for the Receiver, Coopers & Lybrand Limited. Stephen Schwartz, for Prenor Trust Company of Canada. Frank Bennett and John Spencer, for the Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and in Right of Ontario.

Farley J.

1 This was a motion for an order approving the Receiver's activities and fees (including the fees of its counsel) as set out in the Receiver's sixth report (covering the period October 1, 1992 to April 19, 1993) and seventh report (April 20, 1993 to June 13, 1993). At a previous hearing on May 14, 1993 the Crown had asked for an adjournment concerning the sixth report (the only report outstanding at that time) for the specific purpose of conducting consensual cross-examinations. Mr. Bennett who was fresh on the record (as of mid morning today with no advance notice to other counsel) raised an objection as to my jurisdiction to hear the motion indicating that there was nothing in Blair J's original order establishing the receivership to allow for after-the- fact approval of the Receiver's activities. His position was that the only jurisdiction I had was to pass the accounts of the Receiver and approve its fees. He maintained that there was an inherent difference between passing of accounts and approval of activities.

2 I dealt with this general area in my earlier endorsement in this relating to previous reports (endorsement of May 2, 1993); see pp. 16-8. I again note that Mr. Bennett in his own text: F. Bennett, Receiverships (1985: Carswell, Toronto) said at p. 297:

> One of the purposes of passing accounts is to afford the receiver judicial protection in carrying out his powers and duties. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities to date.

In reply Mr. Bennett referred me to p. 298 of his text without specifying what was contained there; he gave me a copy of that page after the hearing concluded. I could find nothing of assistance on that page. In my view Mr. Bennett's own text supports the position of the Receiver that I have jurisdiction. It seems to me that the nature of a specific approval hearing is much better to review conduct than a passing of accounts which focuses on receipts and disbursements.

3 It does not seem to me that approval of the activities of the Receiver, a court appointee and therefore an officer of the court, requires specific words of authorization in the original order. To the extent that certain approval activities are mentioned in that order, I would regard these references as merely examples of what may take place. In my view this Court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver. I note here that in this instance the activities were well summarized in the two reports; however such approval (if given) would be to the extent that the reports accurately summarized the material activities of the Receiver. As to inherent jurisdiction, see 80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al *(1972), 25 D.L.R. (3d) 386* (Ont CA) at pp. 389-90.

4 I pause to note that it would be unusual and illogical that the Receiver could come to court for prior approval but not post approval. If that were the case, one might well expect the courts to be inundated with prior approval requests for virtually any activity.

5 It seems to me that a receiver should be able to come to court and bare its breast. Having done so, it has exposed itself to the sword of any interested party which may feel aggrieved of any action by that receiver. However, if the court feels that the receiver has met the objective test required of it, then the court may bestow a shield to the receiver for that reviewed and approved activity. If the activity is disapproved, then the receiver is in the unenviable position of watching itself be disembowelled in court with sanctions then or to be dealt with in accordance with arrangements then worked out.

6 I would therefore dismiss the Crown's objection to my jurisdiction (now raised as to the sixth and seventh report but apparently the subject of appeal as to earlier approvals).

7 Having come to that conclusion, I have also concluded that the receiver has met the objective test and that its activities and fees for the period covered by the sixth and seventh report should be approved. I note in this respect while all concerned acknowledged that the fees were "expensive" that Prenor Trust which will ultimately bear the cost was supportive of the receiver. While "expensive", I found the fees in line with the complications and protractions of this receivership.

8 Costs were asked for in this instance. Mr. Bennett submitted that a costs award against the Crown would

discourage creditors in general from appealing and objecting. That should of course be avoided where creditors have taken a reasonable position; in other words, the mere fact that a creditor is not successful in persuading a court of the rightness of its position should not subject that creditor to a costs sanction. However I view this day's events in a different light. In my view much time was wasted in the Crown's several requests for a further adjournment and there was no advance notice that jurisdiction would be challenged. I would also observe that the scheduled time for this matter was therefore greatly exceeded. Counsel on all sides of a matter owe a duty to ensure that the court office is kept up to date with a realistic estimate of time required. This will, of course, require the cooperation of counsel amongst themselves. (In speaking of cooperation, I note in passing that this motion was merely one of six motions dealt with today concerning this project. Unfortunately none of the counsel involved in these six motions (there being other counsel with respect to the other five) was mindful of the practice directions request that in a continuing complex or multiple motion file there be a sorting through and grouping of the materials to be dealt with the next day. In the present situation, this meant that several motion records had to be retrieved from the office once all the files were sorted out. There were as well the to-be-discouraged late filings. I note that Mr. Bennett indicated that his client never gave him a copy of the seventh report to review and that he had only reviewed the sixth report some 5 or 6 weeks ago for another purpose. His submissions with respect to the actual activities being reviewed were therefore rather limited in extent and time. Costs are awarded against the Crown payable forthwith to the Receiver in the amount of $1500 and Prenor Trust $500.

FARLEY J.

End of Document

PRICEWATERHOUSECOOPERS INC. (solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Applicant

-and-

SKYMARK FINANCE CORPORATION et al.

Respondents

Court File No. CV-22-00692309-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at
Toronto

BOOK OF AUTHORITIES OF THE RECEIVER

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Dylan Chochla (LSO: 62137I)
dchochla@fasken.com
Tel: 416 868 3425

Mitch Stephenson (LSO: 73064H)
mstephenson@fasken.com
Tel: 416 868 3502

Montana Licari (LSO: 85097G)
mlicari@fasken.com
Tel: 416 868 3450

Lawyers for the Receiver,
Alvarez & Marsal Canada Inc.