Court File No. CV-22-00683167-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

ROYNAT INC.

Applicant

-and-

2796996 ONTARIO INC.

Respondent

FACTUM OF THE RESPONDENT
(on the Receiver's motion for approval and vesting order)

OVERVIEW

1. The respondent opposes the proposed sale of the receivership property, a gas station, and instead asks that the Court order that it be remarketed.

2. The receiver engaged a well-recognized real estate agency to market and sell the property, following the guidance in *Soundair*. Unfortunately, that process yielded an improvidently-low sale price.

3. However, the receiver has not questioned that result. Instead, the receiver simply accepted it, confident that "the market has spoken". And having simply accepted it, now asks this Court now to approve it.

4. With respect, a receiver – as an officer of the Court – is not merely a referee, ensuring that a particular process is followed, and then accepting whatever result emerges. The

process suggested by *Soundair* is not an end unto itself, but merely a means to arrive at a sale which reasonably maximizes the recovery for the benefit of both creditor and debtor.

FACTS

5. The receiver has accurately set out the facts leading up to the receivership, its dealings with MacEwen, and its the marketing process for the Real Property, in paragraphs 3-14 of the receiver's factum.

6. Those facts, however, do not reflect the entire story. They dwell on process only, and ignore the indications, evident on the face of the receiver's own materials, that unquestioningly following that process did not lead to a provident sale price.

Appraisals

7. The Real Property had been purchased by the respondent – and financed by Roynat – in the Spring of 2021 for a purchase price of $5.8 million.

8. That purchase price was supported by an appraisal which confirmed a fair market value of $5,840,000 million.[1]

9. The two appraisals, obtained by the receiver, showed wildly different values:

(a) Colliers determined a value of Redacted[2]; while

(b) Wagner, Andrews, Kovacs determined a value of Redacted.[3]

[1] Stry Appraisal; Responding Motion Record, p. 99 (CL B-1-99)
[2] Confidential Appendices ("***CA***"), p.63
[3] CA, p.142

10. Avison Young ("***AY***"), the real estate brokerage retained by the receiver to sell the Real Property, had its own opinion, which was Redacted Reda:

> Although we do not have up-to-date/accurate fuel sales data from the current, recently built operations, we understand the previous operations had annual fuel sales between Redacted litres. We have assumed that a new, experienced operator will be able to replicate a similar level of annual fuel sales.
>
> Based upon our organization's prior experience in selling and/or appraising gas stations, we would typically see approximate sale prices of similar gas station sites in Redacted range, and recommend a listing price of Redact Redact.[4]

11. Despite receiving such wildly different values, the receiver made no effort to reconcile them or explain them.

12. Instead, the receiver's position is that the appraisals, and their inconsistencies, could be ignored; because the market would answer the valuation question.[5]

13. This approach put a premium on ensuring that the process would actually unlock the maximum reasonable value of the Real Property.

MACEWEN FUEL SUPPLY AGREEMENT

14. The respondent had entered into a fuel supply agreement with MacEwen Petroleum (the "***MFSA***"), which included significant minimum sale volume requirements and a right of first refusal.

[4] CA, p. 157
[5] Receiver's Q/A, #1-2 and follow-up

15. Those were onerous and unattractive burdens, if a new purchaser were to be forced to assume them.

16. AY identified the MFSA as a Redacted Redacted. AY advised that the MFSA was Redacted Redacted".[6]

17. CBRE, the real estate agent not retained by the receiver, was even more blunt; explaining in bold that:

> Redacted
> Redacted
> Redacted
> Redacted
> Redacted
> Redacted
> Redacte[7]

18. Indeed, the receiver knew that the MFSA was an impediment to sale, and considered whether or not it would be prudent to terminate it.[8]

19. The receiver chose not to. While the initial decision to wait and see was a reasonable choice, failing to terminate the MFSA in the face of Redacted Redacted, was not reasonable[9].

20. The existence of the MFSA was disclosed on the MLS listing for the Real Property, and so any potentially-interested party knew about it.[10]

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[6] CA, p.157
[7] CA, p.181
[8] 1st Report of the Receiver, para. 15 et seq.; (CL E366)
[9] Factum, *infra*, para. 42 *et seq*.
[10] CA, p.197

21. Knowledge of the MFSA in fact Redacted, as reported by AY:

> Redacted
> Redacted
> Redacted.[11]

22. In the end, Re different parties were sufficiently interested in the Real Property, as a result of AY's marketing efforts, to seek and obtain access to the "data room" established by the receiver.[12] Neither the receiver nor the Court will ever know how many more potentially-interested parties were deterred from even looking at the data.

23. Of those Re, only Red made offers[13]. The receiver does not appear to have asked, and AY does not appear to have volunteered, whether that "conversion rate" is high or low. If it is low, no consideration appears to have been given on how many potential purchasers did not bother to make offers because of the MFSA.

24. ***All*** of the Red who did make offers were unequivocal; t Redacted Redacted:

(a) Redacted

Redacted

Redacted

Redacted.[14]

[11] CA, p.197
[12] CA, p.194
[13] CA, p.200
[14] CA, p.200

25. The average offer price across all of those offers was Redacted, less than Re% of the price which AY had said was the expected range for sales of properties like the Real Property[15].

26. Clearly, it was necessary to explain such a departure from expectations. AY did so:

> Redacted
> Redacted".[16]

27. The receiver never explored what this meant:

(a) To what extent the Redacted – i.e. the MFSA – had contributed Re Redacted. Because if it was the existing contracts, then the receiver actually had a way to calm those seas: it could terminate those contracts and remarket the Real Property without them.

(b) To what extent AY's observations about Redacted Redacted was hindsight analysis; i.e. Redacted Redacted s, that the latter must be an explanation for the former.

28. The receiver needed that information, because the receiver itself had already concluded that it would need to be sensitive to the detrimental impact of the MFSA on the sales process, and would have to reassess that process if the impediment of the MFSA was "impairing the sale".[17]

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[15] Factum, *supra*, para. 10
[16] CA, p.197
[17] 1st Report of the Receiver, para. 17(c); (CL E367)

29. But the receiver never did that. Instead, the receiver was content that because it had received ***an*** offer of purchase, and because that purchaser was successful in its negotiation with MacEwen, there was nothing else it needed to do.

30. The quantum of the purchase price – i.e. the resulting discount which arose as a result of the MFSA ***not*** having been terminated - does not appear to have been a consideration for the receiver.[18]

31. In the result, instead of designing a sales process to determine the fair market value of the Real Property, the receiver instead embarked on a sales process to determine the fair market value of the Real Property ***encumbered by the MFSA***. And the market has spoken: it is worth Redacted.

ISSUES AND ARGUMENT

OBLIGATIONS ON THE RECEIVER IN A SALES PROCESS

32. It is now trite, in this Court, that *Soundair* governs the approach to be followed when a receiver proposes to sell property which is the subject of its receivership. The familiar four-part test is that the receiver should consider:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

(b) the interests of all parties.

(c) the efficacy and integrity of the process by which offers are obtained.

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

[18] Receiver's Q/A #4 and follow-up

***RBC v. Soundair Corp.*, [1991] O.J. No. 1137 (CA), para. 16**

33. It is also unquestionable that as applied, *Soundair* advises that:

(a) The focus is on whether a fair and effective sales process is followed; and

(b) The business judgment and the advice of the receiver are to be accepted, short of exceptional circumstances.

34. But that does not mean that the receiver is only a referee, that its only job is to ensure that a fair and effective process is run, and then report faithfully on whatever result emerges. If it were otherwise, there would be no need for a motion before a judge to approve such a sale; it could be done before the registrar on the receiver's affidavit, confirming the process.

35. On the contrary, that is the very reason that a receiver – as this one has – reports to the Court on what it has done, and why it has done it. So that the Court can assess not just that a fair and effective process was conducted, but also that the receiver's advice reasonably follows on, and is reasonably supported, by the evidence at hand before the receiver; i.e. is not improvident, notwithstanding an otherwise reasonable sales process.

36. That is because following a fair and effective sales process is not the ***purpose*** of a sale under a receivership. The purpose of a receivership sale is to generate the best return on the sale of the assets reasonably available, so as to protect the interests of both the creditor and the debtor. A sale through MLS is normally a reasonable ***means*** to achieving that purpose, because it tends to:

(a) Reveal the fair market value of the assets; and

(b) Permits any interested party a chance to buy.

37. But an ostensibly neutral sales process can still fail in that purpose. Perhaps because a conscious choice in the design of the sales process proves, in retrospect, to have been the wrong choice. Or perhaps because an unanticipated factor has skewed the process in some fashion.

38. Indeed, *Soundair* itself cautions that where an ostensibly neutral sales process yields a price which makes no sense on its face, the receiver cannot simply proceed, but must instead consider whether some element of the sales process has gone awry:

> 26 In *Crown Trust v. Rosenberg*, *supra*, Anderson J., at [cite omitted], discussed the comparison of offers in the following way:
>
> > No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.
>
> 27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* [cite omitted]:
>
> > If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.
>
> 28 The second is *Re Beauty Counsellors of Canada Ltd*. [cite omitted]:
>
> > If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.
>
> ...
>
> 31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly.

39. In *Soundair*, these observations were in the context of a late bid, and whether it should be considered; the answer was that it should be considered when it is so much larger than the compliant bids as to throw doubt on the integrity of the process which generated the compliant bids.

40. However, the principle is broader than that. It is that where reliable, external evidence reveals that the compliant bids are likely to have generated a price that is substantially lower than the fair market value of the property, then the Court should scrutinize why that is before concluding that the process in fact yielded a bid – and a price - which is provident.

41. Indeed, where on its face the sale price is not provident, it falls to the receiver to explain its own reasoning why, notwithstanding the anomalous result, it persists in its recommendation. Conversely, where it has not done so at all, or the Court is not persuaded by its efforts or reasoning, the Court should be less willing to defer to the advice of the receiver.

THE PROPOSED SALE IS NOT PROVIDENT

42. In the present case, there is no need to speculate:

(a) The receiver knew that the MFSA would likely supress interest in the Real Property and the price to be offered by those few who were not deterred.

(b) In the course of the sales process, AY observed that Redacted Redacted.

(c) The process in fact yielded a Reda number of interested parties.

(d) All of the interested parties Redacted.

(e) The prices offered were less Redacted value that AY estimated was a reasonable sale price.

(f) AY itself was of the opinion that Redacted Redacted.

43. Moreover, the receiver itself had determined, before the process, that if the MFSA was interfering with the sale, it would seek the discharge of the MFSA.

44. It is hard to understand what else could have happened to sway the receiver to act in that regard.

45. Instead, the receiver appears to take the position that it was not necessary to deal with the MFSA because the issue resolved itself:

(a) Purchasers were invited to impose any conditions they wished;

(b) The successful bidder demanded the condition that it be permitted to negotiate a new supply agreement to its satisfaction; and

(c) It satisfied itself.

46. With respect, that was not enough. The receiver needed– exactly as it had planned in advance – to assess the extent to which the persistence of the MFSA had interfered with a sales process designed to reasonably maximize return. Particularly in light of the evidence and professional advice that Redacted

47. Instead, the receiver has made what is, with respect, the inexplicable decision not to deal with the issue at all. The receiver advises as follows:

> Redacted
> Redacted [19]

ORDER SOUGHT

48. That the receiver's motion be dismissed, with direction as to the remarketing process.

June 23, 2023

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jonathan Rosenstein
Lawyer for the debtor

[19] Receiver's Q/A #2