SUPREME COURT OF NOVA SCOTIA
Citation: *First National Financial GP Corporation*, 2018 NSSC 235

Date: 20180511
Docket: Hfx No. 474742
Registry: Halifax

Between:

First National Financial GP Corporation and
First National Financial LP

Applicants

v.

3291735 Nova Scotia Limited

Respondent

RECEIVERSHIP AND SALES PROCESS

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 11, 2018, in Halifax, Nova Scotia
Oral Decision:	May 11, 2018
Written Decision:	September 27, 2018
Counsel:	D. Bruce Clarke, Q.C. for the Applicants Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver for the Respondent, 3291735 Nova Scotia Limited) Brian W. Stilwell, Watching Brief

By the Court:

Overview

[1] This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

[2] The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

The Application for a Receivership Order

[3] The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the

affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and evidenced in the court file.

[4] The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

[5] The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

[6] I have reviewed all the materials with regard to the proposed Receivership Order.

[7] I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

[8] I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

[9] Section 243(1) of the BIA provides:

> Subject to subsection (1.1) , on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be, 'just or convenient to do so'.
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

[10] In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just [...].
>
> [emphasis added]

[11] The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

[12] In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

1. First National holds first priority security over the Company's real and personal property;
2. The Company is in default of its obligations to First National;
3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;
4. Both the Demand Letter and the Notice have expired, without payment being made;
5. First National is in a position to enforce its security as against the Company should it choose to do so;
6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and
7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the

> property is handled expeditiously and in a commercially reasonable manner.

[13] I have reviewed the case law and, in particular, ***Bank of Montreal v. Carnival National Leasing Limited et al.***, 2011 ONSC 1007. In that case, the Court noted that under section 243 of the *BIA* and section 101 of the ***Courts of Justice Act***, a Court may appoint a Receiver if it is "just and convenient" to do so. The Court said:

> 23. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[14] In ***Bank of Nova Scotia v. Freure Village on Clair Creek*** (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen.Div.)), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v.

> Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

[15] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007, spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

> 25. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[16] I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

[17] Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

Sale Process Order

[18] Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

[19] The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

[20] First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

[21] KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

[22] KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

[23] On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order

to maximize the value for creditors and to minimize the risk of losing this offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

[24] The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **Purchaser:** 3308
- **Purchased Assets:**
  - (i) The Real Property
  - (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property
  - (iii) plans
  - (iv) contracts
  - (v) permits in connection with the Real Property, to the extent transferable
  - (vi) all intellectual property, if any, owned by the Company with respect to the project
- **Purchase Price:** $3,708,750, including HST
- **Deposit:** $322,500 being 10% of the purchase price (before HST)
- **Excluded Assets:** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds
- **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.
- **Closing:** first business day which is five business days after receipt of Sale Approval Order
- **Material Conditions:**
  - (i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;
  - (ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to

the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

(iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

(iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

. **Termination:**

(i) The Stalking Horse Agreement can be terminated:

- upon mutual written agreement of the Receiver and 3308;
- if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or
- if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

[25] 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the "stalking horse" sales process.

[26] A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in ***CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.***, 2012 ONSC 1750. While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies' Creditors

Arrangement Act proceeding: ***Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited,*** Hfx. No. 454744.

[27] Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

[28] D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd.*, at para 7:

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

[29] I must consider the following factors as set forth in ***CCM Master Qualified Fund, Ltd., supra*:**

> 1. The fairness, transparency and integrity of the proposed process;
> 2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
> 3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[30] In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding

procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

[31] The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

[32] First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

[33] I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

[34] In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

[35] I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

[36] I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Brothers, J.