Court File No. CV-12-9622-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, . B-3, AS AMENDED

B E T W E E N:

CCM MASTER QUALIFIED FUND, LTD.

Applicant

-and-

BLUTIP POWER TECHNOLOGIES LTD.

Respondent

BOOK OF AUTHORITIES
(Motion Returnable April 26, 2012)

April 24, 2012

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2007 CarswellOnt 89, **27 C.B.R. (5th) 1**

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.

TEXTRON FINANCIAL CANADA LIMITED (Applicant) v. BETA LIMITEE/BETA BRANDS LIMITED (Respondent)

Ontario Superior Court of Justice

Lax J.

Heard: January 3, 5, 2007
Oral reasons: January 5, 2007
Written reasons: January 12, 2007
Docket: 06-CL-6820

Counsel: Patrick E. Shea for Applicant, Textron Financial Canada Limited

Jeffrey J. Simpson for Proposed Receiver, Mintz & Partners Limited

Steven Weisz for Sun Beta LLC, Sole Shareholder, Beta Brands Limited

Sam Babe, Steven Graff for Proposed Purchaser, Bremner, Inc.

Michael Klug, Steven Bosnick for Bakery, Confectionary, Tobacco & Grain Millers International Union, Local 242G

Subject: Corporate and Commercial; Insolvency

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Debtor manufactured bakery and confectionary products — Debtor was in continual default on its financial covenants — Secured creditor applied for order appointing receiver and authorizing sale of portion of bakery business assets — Application granted — Application was opposed only by union representing debtor's workers on basis that its purpose was to avoid severance and termination pay obligations — Private receiver could not effectively carry out its duties in face of union opposition — Appointment of court-supervised receiver was necessary to protect interests of creditors — Proposed sale was result of fair and reasonable marketing process, considered interests of all parties, and was provident — Time was of essence given perishable inventory — Sale of company as going concern was not feasible — Court must place great deal of confidence in business judgment of receiver.

Cases considered by *Lax J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 2006 CarswellOnt 2541, 9 P.P.S.A.C. (3d) 185, 21 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 244 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 100 — referred to

s. 101 — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

s. 69 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 67 — referred to

APPLICATION by secured creditor for order appointing receiver and authorizing sale of portion of debtor company's assets.

***Lax J.*:**

1 The applicant, Textron Financial Canada Limited ("Textron") is the major secured creditor and operating lender of the respondent, Beta Limitee/Beta Brands Limited ("Beta Brands"). It moved under sections 100 and 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 and section 67 of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 for an order appointing Mintz & Partners Limited ("Mintz") as receiver and receiver manager of the assets of Beta Brands and for an order authorizing the Receiver to complete a sale of a portion of its assets ("the bakery business") to a purchaser, Bremner, Inc. and vesting the assets in Bremner. The Bakery, Confectionary, Tobacco and

Grain Millers International Union, Local 242G ("the Union") strenuously opposed both orders. At the end of a lengthy hearing on January 3, I granted the receivership order, substantially in the form of the Commercial List standard form Order.

2 The Bremner transaction was scheduled to close on January 4. During the course of the hearing on January 3, I was advised that the closing had been extended to January 5. On January 4 and 5, the parties attempted to negotiate terms of an order approving the sale. These negotiations were unsuccessful and commencing on the late afternoon of January 5 and extending well into the evening, I heard the motion for approval. At its conclusion, I indicated that I was satisfied that the proposed sale was in accordance with the principles in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) and granted the requested order with reasons to follow.

Background

3 Beta Brands is a manufacturer of bakery and confectionary products for the Canadian and U.S. markets with its head office and manufacturing facilities located in a 5-storey building on Dundas Street East in London, Ontario. The company has operated from these premises since 1913, originally as the McCormick Manufacturing Co. Ltd and from 1997, by Beta Brands. Its sole shareholder is Sun Beta, LLC., a Delaware corporation. The company's assets consist of the Dundas Street plant and land, intellectual property, including various trademarks and formulas, accounts receivable, and inventory and equipment. The company currently has about 295 unionized employees and 30 salaried employees.

4 Beta Brands carries on three distinct manufacturing, marketing and sales businesses: (a) baked goods; (b) confectionary goods; and (c) panned chocolate products. Beta Brands also manufactured Breath Savers brand hard candies, but this division was sold in May 2006. A subsidiary, Beta Brands U.S.A. Ltd., carries on business in the United States marketing Beta Brands' products to U.S. customers, but Beta USA does not have assets or carry on business in Canada.

5 Pursuant to a Loan and Security Agreement dated as of December 17, 2004, Textron and Beta Brands entered into financing arrangements, which were amended as of August 29, 2005 and June 20, 2006. Pursuant to a Participation Agreement made as of August 29, 2005 and amended as of June 20, 2006, Sun Beta, LLC purchased from Textron an interest in certain of the advances made by Textron to Beta Brands. Almost from the beginning of the relationship between Textron and Beta Brands, the company found it difficult to operate within the Loan Facilities. The amendments and the Participation Agreement were intended to assist Beta Brands in overcoming its financial difficulties, but it continued to default on the financial covenants contained in the Loan and Security Agreements.

6 In August 2005, Beta Brands, in consultation with Sun Beta, determined that it needed to restructure its operations and considered the possibilities of selling its business to a third party in whole or parts, completing a strategic acquisition, moving to leased premises using existing or new equipment, or an orderly liquidation of the assets of the company. On September 19, 2005, it engaged Capitalink, L.C. of Coral Gables, Florida to investigate several of these options, most notably, marketing the business and/or each of its divisions to potential acquirers throughout North America and Europe.

7 The efforts of Capitalink resulted in the sale of the Breath Savers business in May 2006 for about $1.2 million. It was also successful in generating a proposal in March 2006 from Ralcorp Holdings, Inc. of St. Louis, Missouri, to purchase certain of the assets of the bakery business at a purchase price of US$3 million. The Ralcorp proposal was not pursued at that time as the company decided to focus on a restructuring in an attempt to preserve the business and continue operations. Several restructuring alternatives were explored, but none were completed. No further proposals were received for the bakery business or for the other divisions.

8 In November 2006 and in the face of a pending liquidity crisis, company management resurrected discussions

with Ralcorp with respect to the sale of the bakery business. Ralcorp was prepared to honour its March 2006 proposal and to complete the transaction through its subsidiary, Bremner. Also in November 2006, the company retained Mintz as its consultant to review the company's financial position, its short-term cash flow forecasts and to conduct a security position review. Mintz concluded that the realizations from the company's assets would be significantly lower if the Bremner transaction was not completed.

9 Textron has valid, perfected security over the property of the company and delivered the notices required under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 in late November. On December 13, 2006, an Asset Purchase Agreement ("APA") was executed between Beta Brands and Bremner. On the same day, the company entered into a Forbearance Agreement with Textron whereby Textron agreed to forbear on enforcing its security and provide Beta Brands with financing to complete the sale to Bremner.

Appointment of Receiver

10 The subordinated creditors did not appear and take no position. The Union opposed the appointment of the Receiver and submitted that its true purpose was to avoid or eliminate the contractual and/or legislative obligations for severance and termination pay, which are substantial.

11 In its materials, the Union indicated its intention to exercise its rights under the collective agreement and in the event of a sale to Bremner, to file an application before the Ontario Labour Relations Board under section 69 of the *Labour Relations Act, 1995*, alleging that there has been a "sale of a business" to the Receiver and/or Bremner and to confirm that the current collective agreement is binding on them. There is no reasonable prospect that a privately-appointed receiver could effectively and efficiently carry out its duties and obligations in the face of this. The Union will exercise its rights as it sees fit, but the appointment of a receiver whose activities will be supervised by the court is necessary to protect the interests of all creditors. It provides the greatest likelihood of maximizing the recovery for all creditors and will permit all stakeholders to have input into the best process to achieve this: see, *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) at paras. 11 and 13.

Sale to Bremner

12 Bremner is purchasing the trademarks associated with the bakery business, customer lists, and some, but not all of the equipment involved in bakery production. As well, the APA requires that Beta Brands deliver approximately $750,000 of inventory at cost to permit Bremner to service bakery customers while equipment is moved and production re-established at Bremner's facilities. Bremner is not purchasing the accounts receivable, any assets associated with the candy or panned chocolate businesses, the remaining equipment for the bakery business, the land or building.

13 The Union opposed the sale to Bremner on the basis that it eliminates or curtails the possibility of the sale of the entire business as a going concern and the prospect of recovery for the substantial severance and termination pay claims of its members. It objected to what it described as the "quick flip" nature of the transaction and the fact that it was left out of the process that culminated in the Bremner offer on December 13.

14 I accept that the Union was brought into this late in the day. It was short-served with notice of the application, but once served, it was provided with documentation and information regarding the company's attempts to restructure and market its divisions in an attempt to satisfy the Union that the sale process was the best option available to all parties. Before returning to court on January 5 for an order approving the sale, considerable efforts were made to achieve a resolution on terms acceptable to the Union, the purchaser and the secured creditors whose funds are at risk. The secured creditors were not prepared to forego the Bremner sale in the faint hope that a third party purchaser can be found who is willing to operate the business and continue the employment relationship. The Re-

ceiver and the purchaser do not plan to fulfill this role. The gap could not be bridged.

15 The Union has received assurances that it will have a place at the table in formulating a strategy for the company's remaining assets. Beta Brands no longer has any ability to carry on operations or to fund a marketing effort. The proposed sale to Bremner will generate cash proceeds, some portion of which can be allocated to fund future marketing efforts. The Receiver intends to explore every reasonable option to market the remaining assets of Beta Brands and to maximize recovery for its creditors, and, will attempt to realize sufficient proceeds such that unsecured creditors, including employees, receive some payments of amounts owing to them. There is no evidence that any alternative purchaser for the bakery division or the company as a whole exists. Capitalink's marketing process, discussed more fully below, demonstrates that one is unlikely to surface. The employees stand the best chance of recovering as creditors if the Bremner sale is approved. Without it, there will be a shortfall in the millions of dollars.

16 Courts have looked to the four-part test in *Soundair* for guidance where the court is being asked to approve a realization process, whether or not there is a marketing process and sale conducted by a receiver: *Fund 321 Ltd. Partnership v. Samsys Technologies Inc.*, 2006 CarswellOnt 2541 (Ont. S.C.J. [Commercial List]) at para. 37; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List]) at para.47. The court's duty is to consider:

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

(b) whether the interests of all parties have been considered;

(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.

17 From approximately September 2005 until November or December 2006, Capitalink engaged in a marketing process of the company's assets, including the bakery division. Potential purchasers were solicited for offers to purchase the entire company, but Capitalink also prepared separate confidential information memoranda ("CIM") for each division. Attached as an Appendix to the Receiver's First Report is a schedule provided to the Receiver by Capitalink that describes the parties Capitalink contacted and the discussions and meetings it held in its efforts to seek purchasers for Beta Brands, including its bakery business. The strategy employed by Capitalink was no different than the strategy typically utilized by receivers in selling assets of a business. As a result of its initial targeting of potentially interested parties, the bakery division CIM was distributed to nine different interested parties. The Ralcorp proposal in March 2006 was the only offer received.

18 The Receiver was not in a position to verify the recorded entries in the schedule provided by Capitalink and it was pointed out that two of the nine potentially interested parties who are believed to have received CIM'S are not referred to at all in the schedule, which is otherwise quite detailed. Nonetheless, based on its review of the schedule as well as other documents provided to it by the company and/or Capitalink and on the basis of discussions with company management, the Receiver believes that the marketing process as a whole conducted by Capitalink was fair and reasonable and that the assets were exposed to the market for a sufficient period of time.

19 The purchase price of $US3 million in the Bremner transaction is the same as proposed by its parent corporation in March 2006. This suggests that the purchase price is closer to true going concern rather than liquidation value. The equipment being purchased appears to be above appraised value. The Receiver is not satisfied that further marketing of the bakery division assets will result in higher net realizations or result in a reasonable chance of locating alternative willing purchasers or what alternative marketing efforts have not already been undertaken by Capitalink. I am satisfied that the Receiver would have proceeded no differently than Capitalink did and a further marketing effort would not be productive. I conclude that sufficient efforts were made to obtain the best price following a

marketing process that was fair and reasonable and that it produced a provident sale.

20 Apart from the Union, all parties support the proposed sale. The Receiver recommends it. As the major secured creditors, Textron and Sun Beta have the largest financial stake and their support for the transaction is highly significant, even though Sun Beta *qua* shareholder may not see a penny from it. The realization schedules prepared by Mintz in its consulting capacity show that there is the potential to pay a portion of the unsecured claims with the Bremner sale and none without it. The company explored reasonable alternatives over a six-month period before reviving the Bremner transaction. I am satisfied that there was proper consideration of the interests of all parties and that there was no unfairness in the process.

21 It is true that the Union was given little time to attempt to bring forward other options, but it is also true that it brought forward no concrete proposals or offered any protection to the secured creditors in the event the sale was not approved and the purchaser walked away. There was some suggestion that a Brazilian candy company was prepared to purchase the entire business. When the Receiver investigated this suggestion, the Receiver learned that the possible purchaser had never presented an offer and in discussions with Capitalink, had indicated that it might be interested in purchasing the entire company, but for the same amount that Bremner was prepared to pay for only the bakery business.

22 The terms of the Bremner transaction contemplate an uninterrupted flow of products to assist in an orderly transition of the business. If the transaction is not completed and the company's operations are shut down, the perishable inventory, valued at approximately $750,000, is at risk of spoilage. More importantly, any interruption in supply will likely result in customers sourcing products from other suppliers, thereby significantly impairing value for the bakery trademarks and customer supply relationships in any potential future purchase as well as jeopardizing the value of the accounts receivable. Time is therefore of the essence. Any disruption to the timely and orderly removal of the purchased equipment and inventory will harm the creditors and seriously impair the best chance of maximizing value for all stakeholders.

23 While a going concern sale of Beta Brands would undeniably be in the best interests of the company's employees, a secured creditor is not required to continue to fund a business to satisfy a union's need for an employer. Embarking on a process to attempt to locate one is, in the opinion of the Receiver, not in the interest of creditors and the Receiver does not recommend this for reasons I have already discussed. The court must place a great deal of confidence in the Receiver's expert business judgment for reasons elaborated by Farley J. in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]) at paras. 3-8. On this basis, the material filed and the comprehensive submissions of counsel, I am satisfied that all of the *Soundair* principles are met in this case, that the sale is advantageous to the creditors and other stakeholders of Beta Brands and that it should be approved.

24 A final comment on procedure. On the initial attendance, the Union disputed that the application should be heard on the Commercial List in Toronto. In my view, there was sufficient connection to Toronto to make it appropriate to hear it, particularly in view of its urgency. A number of members of the Union travelled from London to Toronto on January 3 and again on January 5. Textron acknowledged the burden this placed on them, on the Union and on the Union's counsel who are all from London. While consent, unopposed, and purely administrative matters in this receivership will continue to be heard on the Commercial List in Toronto, any proceeding that involves the Union and is opposed by it is to be heard in London. I appreciate the co-operation of the Regional Senior Justice in West Region for facilitating this. Counsel have been informed how to schedule these matters.

Application granted.

END OF DOCUMENT

TAB 2

2009 CarswellMan 312, 2009 MBQB 171, 54 C.B.R. (5th) 224, 241 Man. R. (2d) 235

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2009 CarswellMan 312, 2009 MBQB 171, 54 C.B.R. (5th) 224, 241 Man. R. (2d) 235

Shape Foods Inc. (Receiver of), Re

In the Matter of The Receivership of Shape Foods Inc.

And In the Matter of The Receivership of 0767623 B.C. Ltd.

Deloitte & Touche Inc. in its capacity as receiver and manager of Shape Foods Inc. and 0767623 B.C. Ltd.

Manitoba Court of Queen's Bench

Menzies J.

Judgment: June 22, 2009
Docket: Brandon Centre CI 09-02-02233

Counsel: D. Swayze for Deloitte & Touche

B. Filyk for Vanguard Credit Union

W. Leslie for 884498 Alberta Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks, Richard Brugger

J. Hirsch for 5842264 Manitoba Ltd. (watching brief)

R. Paterson for City of Brandon (watching brief)

Subject: Corporate and Commercial; Insolvency; Property; Intellectual Property

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Receiver manager made reasonable efforts to achieve best deal and its recommendation should not be rejected — Fact that one potential bidder did not meet requirements or deadline did not mean sale was improvident — Process of sale was fair and receiver manager was able to obtain higher price than tender — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.

Debtors and creditors --- Miscellaneous issues

Standing to oppose sale by receiver manager — Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Unsuccessful purchasers did not have standing to oppose application — Prospective purchasers did not have rights in property — Minority shareholders did not have standing to oppose sale — Sale to another entity would not effect shareholder's capacity as unsecured creditors — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.

Cases considered by *Menzies J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Selkirk, Re (1987), 1987 CarswellOnt 177, 64 C.B.R. (N.S.) 140 (Ont. S.C.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Statutes considered:

Corporations Act, R.S.M. 1987, c. C225

s. 94 — referred to

APPLICATION by receiver manager for approval of sale of property.

***Menzies J.*:**

1 Shape Foods Inc. ('Shape') operated a food processing business in the City of Brandon. 0767623 B.C. Ltd. ('B.C.') was a related corporation which held ownership to the intellectual property (patents and trademarks) associated with Shape's food processing business. Both corporations executed a security agreement in favor of Vanguard Credit Union ('Vanguard') as security for a loan. The security agreement provided that in the event of default on the loan, Vanguard had the right to appoint a receiver-manager to realize on its security.

2 On October 23, 2008, Vanguard appointed Deloitte & Touche ('the Receiver') as receiver-manager of Shape Foods Inc.

3 Subsequently on December 10, 2008, Vanguard, appointed Deloitte & Touche receiver-manager of 0767623 B.C. Ltd.

4 On April 14, 2009, the Receiver accepted an offer to purchase the assets of Shape and B.C. in the amount of $5.1 million from 5842664 Manitoba Ltd. ('the purchaser'). A formal agreement was executed on May 6, 2009 which required the Receiver to provide a vesting order of the property in the name of the purchaser on or before June 5, 2009.

5 The Receiver-manager brought an application is for a vesting order to complete the transaction with the pur-

chaser and for a declaration that the sale of the corporate assets is not reviewable by the remaining creditors of Shape or B.C. or by any subsequent trustee in bankruptcy.

The Standing of Parties on the Application

6 The application by the Receiver-manager is opposed by 884498 Manitoba Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks and Richard Brugger. The Receiver-manager argues these parties do not enjoy standing before the court as they are not interested parties in the outcome of the application.

7 Before deciding the issue of standing, I allowed Todd Hicks on behalf of 884498 Manitoba Ltd. and Nick Mashin on behalf of Canrex Biofuels Ltd. to file affidavits as to their attempts to purchase the assets of Shape and B.C. My decision was based on the premise the evidence was relevant to the issue of the integrity of the Receiver-manager's actions taken to sell the security.

8 The Receiver-manager brought the application for the vesting order shortly before the closing date of June 5, 2009. A decision as to whether or not the vesting order would issue was required in a timely fashion or the sale agreement would be in jeopardy. With some misgivings, I reserved my decision on the issue of standing and heard the arguments of the opposing parties to allow the ultimate application to proceed. While this is not the best procedure in which to consider an application, the process did allow me to render a decision on the issue of the vesting order within the time constraints of the purchase agreement.

Interested Parties

9 884498 Manitoba Ltd. and Canrex Biofuels Ltd. attempted unsuccessfully to purchase the assets of Shape and B.C. from the Receiver-manager. Barry Comis, Ben Comis, Todd Hicks and Richard Brugger are shareholders of 884498 Manitoba Ltd.

10 I have concluded an unsuccessful purchaser does not have standing to challenge a proposed sale. In coming to this conclusion I rely upon the reasons of O'Connor J. A. of the Ontario Court of Appeal in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467, 47 O.R. (3d) 234 (Ont. C.A.) beginning at para 25:

> There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold...The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H. C. J.).
>
> Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.
>
> In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of the process: *Crown Trust v. Rosenberg*, supra; Royal *Bank of Canada v. Soundair Corp.* (1991), 4 O. R. (3d) 1, 83 D. L. R. (4th) 76 (C. A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process

> to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.
>
> [para. 29] In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest in not sufficient.

11 As prospective purchasers, none of the opposing parties have a legal right or interest in the assets arising out of the circumstances of the sale process. Although I have considered their evidence in assessing the integrity of the sale process, they are not interested parties merely due to their status of unsuccessful purchasers.

12 Barry Comis and Ben Comis claim standing as interested parties by virtue of being shareholders of Shape. Richard Brugger and Todd Hicks claim standing as shareholders of Falcon Creek Holdings Inc., a corporation which is a shareholder in Shape. The extent of their holdings in Shape were not disclosed except to the extent of an admission by their counsel that they are minority shareholders in Shape. They were not appearing on behalf of Shape, but simply in their capacity as minority shareholders.

13 Ben Comis also claims status as an interested party by virtue of being a creditor of Shape in the amount of $6,300.00.

14 I am not satisfied that the status of shareholder, in and of itself, or the status of creditor gives one the status of an interested party. In my opinion, more is required. In this case the assets of Shape and B. C. are secured by three secured creditors. Vanguard is the first secured creditor. As of May 19, 2009, Vanguard was owed $4,711,865.50 with daily interest accruing at the rate of $822.26. The Manitoba Development Corporation ('MDC') is the second secured creditor. The debt owed to MDC as of May 1, 2009 was $4,145,541.82 with interest accruing at the daily rate of $868.14. In addition, MDC had guaranteed repayment of Vanguard's debt. The third debtor is RAB Special Situation (Master) Fund Ltd. with a debt in the approximate amount of $2,000,000.00.

15 The completion of the agreement between the Receiver and the successful purchaser will result in Vanguard being paid in full and MDC receiving only partial payment. In addition, MDC will be relieved of any obligation under its guarantee of the Vanguard debt.

16 The two prospective offers not accepted by the Receiver will result in Vanguard being paid in full, and MDC receiving an increased partial payment on its debt. The acceptance or the rejection of the Receiver-manager's recommended sale in favor of one of the unsuccessful purchasers will not affect the position of Ben Comis, Barry Comis, Todd Hicks or Richard Brugger in their capacity as minority shareholders or Ben Comis in his capacity as an unsecured creditor.

17 As receiverships often affect numerous parties, I am of the opinion that a party requesting to appear to oppose a proposed sale by a receiver-manager must minimally show an interest to the extent that any alleged failure of the receiver-manager to act in a commercially reasonable manner may affect their interests in a material fashion.

18 I am not satisfied that 884498 Manitoba Lyd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks or Richard Brugger have proven they are interested parties to this application.

The Duty of the Receiver

19 S. 94 of *The Corporations Act* (Manitoba) provides that a receiver or receiver-manager of a corporation appointed under an instrument shall act honestly and in good faith; and deal with any property of the corporation in his

possession or control in a commercially reasonable manner.

20 On considering a proposed sale of a debtor's property by a receiver-manager, there are four criteria for the court to consider. (See: *Crown Trust Co. v. Rosenberg*, supra; Bennett on Receiverships, (2nd Ed.) (1999) Carswell at p. 251 et seq.)

> 1) The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2) The court should consider the interests of the parties.
>
> 3) The court should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4) The court should consider whether there has been unfairness in the working out of the process.

21 In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), the Ontario Court of Appeal outlined two principles for a court to consider in reviewing a sale of property. The first principle is that a court should place a great deal of confidence in the actions taken and the opinions formed by the receiver-manager. Unless the contrary is clearly shown, the court should assume that the receiver-manager is acting properly. The second principle is a court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager. I will now consider the relevant criteria in this transaction.

Did the Receiver Make a Sufficient Effort to Get the Best Price and Did It Act Providently?

22 In this instance the Receiver-manager was appointed to take control of the assets of Shape in October 2008. The Receiver-manager advertised the sale of the assets of Shape and B. C, by way of tender with the advertisements being published in the Brandon Sun, the Winnipeg Free Press and the Globe and Mail on November 26, 2008. Tenders closed on December 17, 2008 with the highest bid being in the amount of $750,000.00.

23 Following the attempt to sell by tender, a sales and information package was distributed to potential purchasers and interested parties on April 16, 2009. By March 31, 2009, the Receiver-manager had received five additional proposals with the highest being $4.5 million.

24 The Receiver-manager advised the interested parties to reconsider their bids and that no bid under $5 million would be considered. The Receiver-manager maintains that all parties were advised that bids would require either a deposit or a letter from a financial institution confirming financing.

25 Two bids were received which complied with the conditions as set out by the Receiver-manager. The highest bid was received from the purchaser and was accepted.

26 The evidence establishes the Receiver-manager put considerable effort into obtaining the best price for the assets of Shape and B. C.

27 The real issue to be determined is whether the Receiver-manager acted improvidently. I am guided by the comments of Anderson J. in the decision of *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 responsi-

bly 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 on the motion for approval.

28 I repeat that a court should be reluctant to reject the recommendation of the Receiver-manager based upon information which comes to light after the decision was made. Evidence as to the value of competing bids was placed before me on this application. This evidence is relevant only to the extent it allows me to evaluate the reasonableness of the price obtained by the Receiver-manager. (See: *Crown Trust Co. v. Rosenberg*, supra)

29 Evidence of the value of competing bids was considered by McRae J. in *Selkirk, Re* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at 142:

Only in a case where there seems to be some unfairness, in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

30 The evidence alleging improvident behavior on behalf of the Receiver-manager comes from two sources. One such source is the affidavit of Nick Mashin, the President of Canrex Biofuels Ltd, who submitted a proposal of $6.25 million for the assets of Shape and B.C. In brief, the evidence of Mashin was that although he forwarded the proposal to the Receiver-manager on March 13, 2009, he was not prepared to provide either a deposit or a letter of commitment for financing by the date on which the Receiver-manager accepted the purchaser's offer. These allegations do not amount to evidence of improvident behavior by the Receiver-manager.

31 The other source is the affidavit of Todd Hicks. According to Hicks, 884498 Alberta Ltd. submitted a proposal in the amount of $6.51 million on April 9, 2009. On April 14, 2009, Hicks was advised that a 7% deposit *and* a letter of commitment for financing would need to be provided to the Receiver-manager by 1:00 p.m. that day. Hicks forwarded the letter confirming financing to their Manitoba lawyer but instructed him not to forward it on to the Receiver-manager until he received further instructions.

32 At 3:04 p.m. on April 14, 2009, the lawyer for 884498Alberta Ltd. emailed the Receiver advising that his client was aware the confirmation of financing letter must be provided and that the 7% deposit was being raised. This was two hours after the deadline as advised by the Receiver. On April 15, 2009, the Receiver advised 884498 Alberta Ltd. that another offer had been accepted.

33 Hicks provides much evidence as to conversations he had with respect to the purchase of the property. However, Hicks knew of the April 14, 2009 at 1:00 p.m. deadline and did not meet it. There is no evidence of a request for an extension of time to raise the deposit. The letter of commitment for financing was available but not forwarded until after the deadline.

34 Business negotiations take many interesting and varied approaches. 884498 Alberta Ltd. decided not to forward the available letter of commitment for financing which is their right to do. However, as of April 14, 2009 at 1:00 p.m., the Receiver did not have a deposit or a letter of commitment of financing to back up the offer of $6.5 million. The Receiver-manager, with the information it had, made his decision. He accepted the purchaser's proposal. I am not persuaded the Receiver-manager acted improvidently.

The Interests of the Parties

35 No one appeared on behalf of Shape and B. C. on this application.

36 There are three major creditors holding security against the assets the Receiver-manager proposes to sell. The first secured creditor in priority is Vanguard who as of May 19, 2009 was owed $4,711,865.50 with interest continuing to accrue at the per diem rate of $882.26.

37 The second secured creditor in priority is MDC. As of May 1, 2009, MDC was owed $4,145,541.82 with interest accruing at the rate of $868.14 daily. In addition to its own loan to Sharpe and B.C., MDC has guaranteed the loan held by Vanguard.

38 The third secured creditor in priority is RAB Special Situations (Master) Fund Ltd. whose loan is in the approximate amount of $2,000,000.00. This creditor took no part in these proceedings.

39 Vanguard supports the Receiver-manager's proposal in favor of the purchaser. Vanguard will be paid in full by the Receiver-manager's proposal.

40 MDC also supports the Receiver-manager's proposal. With the closing of the transaction with the purchaser, Vanguard will be paid off and MDC will be released of any liability under their guarantee. It is anticipated that there will also be some monies available to reduce the amount of indebtedness on the MDC loan. RAB will get nothing.

41 MDC does not support the position of 884498 Manitoba Ltd. Although 884498 Manitoba Ltd.'s bid exceeds the purchaser's offer by $1.5 million, the bid is subject to the completion of a due diligence review. It is not a guaranteed transaction. MDC supports the Receiver-manager's proposal as it is to close imminently.

42 Neither scenario will result in MDC being paid in full. RAB will not receive any payment on account of their debt no matter which proposal is accepted.

43 It is in the interests of the interested parties that approval to the Receiver-manager's proposal be given.

Consideration of the Efficacy and Integrity of the Process

44 It is important that the potential purchasers in a receivership situation have confidence that if they act in good faith, undertake bona fide negotiations with a receiver-manager and enter into an agreement for purchase of the assets that a court will not lightly interfere with the negotiated agreement. Potential purchasers must have some degree of confidence in the efficacy and integrity of the process. The comments of Saunders J. in *Re: Selkirk*, supra, at p. 246 [C. B. R.] are of assistance:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J. A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N. S.* (1981), 38 C. B. R. (N. S.) 1, 45 N. S. R. (2d) 303, 86 A. P. R. 303 (C. A.), where he said at p.11:
>
> > 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. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

45 Hicks and Mashin attack the process used by the Receiver-manager in their affidavits. They claim they were unable to obtain information in a timely manner and their bids were made subject to conditions that the ultimate purchaser did not have to comply with, notably the provision of a deposit. I do know that the purchaser did ultimately provide a deposit but I do not know when and under what circumstances. Although their allegations raise some concern, I am unable to adjudicate if the procedures required of Mashin or Hicks were substantially different than the procedure for the purchaser based solely on the affidavit evidence before the court.

46 It is true that there were strict timelines under which parties were expected to comply with conditions of the receiver's process, but that does not affect the integrity of the process.

47 As far as efficacy of the process, the Receiver-manager began with a tendering process which resulted in an offer of $750,000.00 and was able to negotiate a proposal from the purchaser in the amount of $5,100,000.00. The efforts of the receiver-manager obtained positive results for the debtor and creditors. As was stated earlier in the *Skyepharma* decision, supra, the integrity of the process should be analyzed from the perspective of those for whose benefit it has been conducted. In that regard, the proposal accepted by the Receiver-manager was considerably higher that the initial tenders at the beginning of the process.

Consideration of Unfairness in the Process

48 The Receiver-manager undertook to sell the assets with a tendering process which was unsuccessful. The Receiver moved on to a second bidding process which once again was unsuccessful. Finally the Receiver followed up with who he considered to be serious buyers and accepted a proposal from the purchaser. All parties were provided with notice of what constituted an acceptable tender by the Receiver and all potential bidders were aware of the time guidelines. The only unfairness alleged is that the conditions of a tender were not the same for all parties. As I have already said I am unable on the evidence before me to conclude whether this allegation has been made out or not. However, other that that one allegation, the process undertaken was a fair process to all concerned.

Decision

49 The court should accept the recommendation of the Receiver except in circumstances where the necessity of rejection of the Receiver-manager's recommendation is clear (See *Crown Trust and Rosenberg*, supra.).

50 Receiver-manager has made a considered effort to obtain the best price and has not acted improvidently. In light of the position of MDC, I have no hesitation in finding that the approval of the proposed sale to the purchaser would be in the best interests of the interested parties.

51 I am unsure if there has been any unfairness in the working of the process with respect to the conditions imposed on the final purchase bids on the property. The evidence is somewhat contradictory and I am unable to resolve the credibility issues on the basis of affidavits alone. However, a decision was required as of the date of the hearing or the sale agreement with the purchaser would have been breached.

52 Due consideration must be given to preserving the efficacy and integrity of the sale process undertaken by the Receiver-manager.

53 After consideration of all the criteria set out in the case law, I have concluded the proposed sale should be approved as requested by the Receiver-manager. To not do so would put any potential sale of the assets at jeopardy and place the parties back into a situation of uncertainty.

54 The vesting orders as requested by the Receiver will be granted.

55 Because I was unable to resolve the issue of unfairness with any degree of certainty, I am not prepared to grant the declaratory relief as requested by the Receiver and that portion of the application is dismissed.

Order accordingly.

END OF DOCUMENT

TAB 3

2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298, [2000] O.J. No. 467

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2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298, [2000] O.J. No. 467

Skyepharma PLC v. Hyal Pharmaceutical Corp.

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Ontario Court of Appeal

Carthy, Goudge, O'Connor JJ.A.

Heard: December 21, 1999
Judgment: February 18, 2000
Docket: CA M25061, C33086

Proceedings: affirmed *Skyepharma PLC v. Hyal Pharmaceutical Corp.* ((1999)), 1999 CarswellOnt 3641, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 ((Ont. S.C.J. [Commercial List]))

Counsel: *James W.E. Doris*, for Skyepharma PLC.

Alan H. Mark, for Appellant/Respondent on the motion, Bioglan Pharma PLC.

Joseph M. Steiner and *Steven G. Golick*, for Price Waterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corp.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under general corporate legislation

Receiver was appointed and authorized to liquidate and realize defendant's assets — In its report, receiver pointed out importance of finalizing sale at early date, as defendant's debt was increasing at rate of $70,000 per week — Court ordered receiver to negotiate exclusively with two prospective purchasers, including plaintiff company, and gave receiver discretion to negotiate with non-exclusive purchasers if parties could not reach agreement — Receiver recommended approval of sale to plaintiff company, which would not necessarily maximize realization of assets, but would minimize risk of not closing and risk of increasing liabilities — Court approved sale of assets to plaintiff company — Unsuccessful, non-exclusive purchaser brought appeal to have order approving sale set aside — Receiver brought motion to quash appeal — Motion granted — As unsuccessful purchaser did not acquire sufficient interest to be added as party, unsuccessful purchaser did not have right that was finally disposed of by approval order — Unsuccessful purchaser had no legal or proprietary right in property being sold and did not have right or interest that was affected by sale approval order — Involvement of unsuccessful purchaser would create potential for delay and uncertainty, possibly giving unsuccessful purchaser leverage, which would be counterproductive — Ordi-

nary meaning of language in order did not require that unsuccessful purchaser extend its outstanding offer — Fact that receiver had discretion to negotiate with non-exclusive buyers did not create duty or right — Fact that court heard submissions from unsuccessful purchaser did not create standing for appeal, because purchaser was heard as creditor and not as unsuccessful purchaser.

Cases considered by *O'Connor J.A.*:

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (B.C. S.C.) — applied

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 (N.S. C.A.) — considered

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — applied

Halbert v. Netherlands Investment Co., [1945] S.C.R. 329, [1945] 2 D.L.R. 418 (S.C.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 6(1)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 13.01 — considered

R. 13.01(1)(a) — considered

R. 13.01(1)(b) — considered

MOTION by receiver to quash appeal by unsuccessful prospective purchaser from judgment, reported at (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), ordering approval of sale of assets.

The judgment of the court was delivered by *O'Connor J.A.*:

1 This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to Skyepharma PLC. Bioglan Pharma PLC, a disappointed would be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

2 The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any

rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

3 Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding $100,000) and to hold the proceeds of any sales pending further order of the court.

4 On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

5 The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realisation was likely to result from negotiations with Skyepharma and Cangene.

6 In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were increasing in the amount of approximately $70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

7 On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable to the receiver and that realised the superior value inherent in the offers made by Skyepharma and Cangene.[FN1] The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

8 On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hyal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hyal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realisation for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and timeframes contained in other offers. The receiver said that these risks were not immaterial.

9 At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hyal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

10 It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hyal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hyal in the amount of $40,000.

11 The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hyal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

12 The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

13 This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

14 Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised judicial sale or, alternatively, that the receiver be required to reopen the bidding relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

15 In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy."

Analysis

16 The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

17 Section 6(1)(b) of the *Courts of Justice Act* provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.).

18 The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale approval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

19 First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan main-

tains, was finally disposed of by the order approving the sale to Skyepharma.

20 A similar issue was considered by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (Ont. H.C.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the *Rules of Civil Procedure*. The relevant portion of that rule, at the time, read as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;
>
> ... the person may move for leave to intervene as an added party.[FN2]

21 Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

22 I adopt both his reasoning and his conclusion. At p. 118, he said:

> The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.
>
> Nor, in my view, can Larco resort successfully to cl. (*b*) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

23 The British Columbia Supreme Court reached a similar conclusion in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.). In that case the receiver in a debenture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the Court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon ...". Berger J. dismissed this motion. At p. 30, he said:

> The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in *Gurtner v. Circuit* [cite omitted] goes so far. No order made in this action will result in any legal liability being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra.*

26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

28 In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg.* Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be

purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

31 In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal 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 (N.S. C.A.). In that case, the receiver invited tenders to purchase lands of the debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervener. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision reopening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

33 As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court. First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to October 29 1999."

34 Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

35 I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

36 Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

> ... No party shall be entitled to retract, withdraw, vary or countermand its offer prior to acceptance or rejection thereof by the vendor (receiver). [My emphasis.]

37 The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of clause 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that

Bioglan had assumed when it made its offer.

38 Accordingly I would not give effect to this argument.

39 Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharma agreement.

40 I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

41 Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

42 The motions judge approved the sale based on the recommendation of the receiver that it was in the best interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

43 In the result, I would allow the motion and quash the appeal with costs to the moving party.

Motion granted.

FN1 These offers were superior in that they were the only two that attempted to provide value for the tax loss positions of Hyal.

FN2 The rule as presently worded is not.

END OF DOCUMENT

TAB 4

2012 CarswellOnt 3158, 2012 ONSC 1750

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

CCM Master Qualified Fund, Ltd., Applicant and blutip Power Technologies Ltd., Respondent

Ontario Superior Court of Justice [Commercial List]

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. **Burr**, for Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb, A. Lockhart, for Applicant

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency.

***D.M. Brown J.*:**

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[FN1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

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,[FN2] *BIA* proposals,[FN3] and *CCAA* proceedings.[FN4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding

whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[FN5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[FN6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[FN7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as re-

quired by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[FN8]

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

FN1 (1991), 7 C.B.R. (3d) 1 (C.A.).

FN2 *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.

FN3 *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.

FN4 *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.).

FN5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

FN6 *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

FN7 *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

FN8 2012 ONSC 1299 (CanLII).

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CCM MASTER QUALIFIED FUND, LTD. Applicants	-and-	BLUTIP POWER TECHNOLOGIES LTD. Respondents	Court File No. CV-12-9622-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
(RETURNABLE APRIL 26, 2012)

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