Court File No.: CV-19-632106-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

ECN FINANCIAL INC.

Applicant

- and -

2345760 ONTARIO INC., RANDO DRUGS LTD., 2275518 ONTARIO INC., FAMILY HEALTH PHARMACY WEST INC. formerly known as M. BLACHER DRUGS LTD., 2501380 ONTARIO INC., 2527218 ONTARIO INC., DUMOPHARM INC., 2527475 ONTARIO INC. and GRACE DIENA

Respondents

FACTUM AND BRIEF OF AUTHORITIES OF THE RECEIVER

(Motion returnable November 9, 2020)

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Lawyers for the Receiver, KSV Restructuring Inc.

TO: THE SERVICE LIST

PART I - INTRODUCTION

1. This factum is filed in support of a motion by KSV Restructuring Inc. (**KSV**), in its capacity as the court-appointed receiver (in such capacity, the **Receiver**), of all of the assets, undertaking and property of 2345760 Ontario Inc. (**2345**), Rando Drugs Ltd. (**Rando**) and the other corporate respondents in the receivership (the **Company** and together with Grace Diena, the **Respondents**), for, among other things, an order:

   (a) approving a sponsorship agreement dated September 16, 2020 (as amended, the **Sponsorship Agreement**) between the Receiver and 2775506 Ontario Inc. (the **Sponsor**);

   (b) authorizing the Receiver to enter into the Sponsorship Agreement and take all steps necessary to give effect to the transactions contemplated by it, including executing any and all documents on behalf of Rando or its board of directors;

   (c) authorizing the Receiver to make and file a proposal with the Official Receiver under section 62 of the *Bankruptcy and Insolvency Act* (**BIA**) (the **Proposal**) on behalf of Rando;

   (d) declaring that the Receiver's charge applies to the fees and expenses of KSV in its capacity as the Proposal Trustee and those of its counsel;

   (e) sealing the confidential appendices to the fourth report of the Receiver dated September 23, 2020 (the **Fourth Report**);[1]

[1] Fourth Report of KSV Restructuring Inc., as the Receiver of the Respondents, dated September 23, 2020 (**Fourth Report**), Motion Record of the Receiver returnable October 2, 2020 (**MR**), Tab 2.

(f) approving the fees and disbursements of the Receiver and those of Goldman Sloan Nash & Haber LLP, the Receiver's counsel, as set out in the fee affidavits filed in connection with the motion; and

(g) approving the Fourth Report and the Receiver's activities described therein.

PART II - THE FACTS

A. BACKGROUND

2. The facts supporting this motion are set out in full detail in the Fourth Report. Capitalized terms used herein and not otherwise defined have the meaning given to them in the Fourth Report.

3. Pursuant to an Order dated December 4, 2019 (the **Receivership Order**), the Court appointed KSV as the Receiver of the property, assets and undertaking of the Respondents (other than Grace Diena who was added to the Receivership Order pursuant to an Order made on February 26, 2020).[2]

4. The principal purpose of the receivership has been to sell the Company's four pharmacies (the **Pharmacies**).[3]

5. Prior to the receivership, KSV had been retained by the Company to conduct a sale process (the **Sale Process**) for the Pharmacies as well as for the "charter" of a related entity, Dedicated National Pharmacies Inc. (**DNPI**). Although no transactions were successfully closed by the Company for the sale of any of the Pharmacies or DNPI's charter, the Sale Process established market value.[4]

[2] Fourth Report, MR, Tab 2, para 1.0(2); Fourth Report, MR, Tab 2, fn 2.

[3] Fourth Report, MR, Tab 2, paras 1.0(3) and 2.0(2).

[4] Fourth Report, MR, Tab 2, para 4.0(5).

6. As set out in the Fourth Report, the Receiver has now sold two of the Pharmacies and the closing of the other two has been approved by this Court although closing is still pending.[5] As such, the most significant remaining asset of the Company is Rando's status as a charter company (the **Rando Charter**).[6]

Rando Charter

7. As a company incorporated prior to or in 1954 that carried on the business of a pharmacy at that time, Rando falls within the exemption provided under section 142(4) (the **Exemption**) of the *Drug and Pharmacies Regulations Act* (Ontario),[7] which allows Rando to own and operate pharmacies without it being majority-owned by pharmacists.[8]

8. Companies with an Exemption are often referred to as having a "charter" or being a "charter company". There is no formal charter document. Rather, it is the corporate entity itself that is entitled to the Exemption.[9]

9. Given its entitlement to the Exemption, there is significant value in the Rando Charter.

Sponsorship Agreement

10. Pursuant to the Sponsorship Agreement, the Sponsor has agreed to provide a capitalization amount (the **Capitalization Amount**) to sponsor the Proposal which will establish a pool of funds to be made available for distribution to Rando's unsecured

[5] Fourth Report, MR, Tab 2, para 3.0(6).

[6] Fourth Report, MR, Tab 2, para 4.0(3).

[7] *Drug and Pharmacies Regulation Act*, R.S.O. 1990, c. H.4, s 142(4).

[8] Fourth Report, MR, Tab 2, para 4.0(1).

[9] Fourth Report, MR, Tab 2, para 4.0(2).

creditors with the balance payable to ECN (net of costs), compromise remaining claims against Rando and provide a corporate reorganization of Rando.[10]

11. In summary, upon implementation:[11]

(a) all claims against Rando will be released, including the claims of ECN;

(b) the Sponsor will receive newly issued shares (the **New Common Shares**) of Rando free and clear of all encumbrances;

(c) the shares of Rando would be diluted such that the shares of Rando outstanding immediately prior to the issuance of the New Common Shares will become a fraction of a share and thereafter eliminated by virtue of the articles of amendment; and

(d) distributions would be made to Rando's creditors.

12. The Sponsorship Agreement is subject to several conditions including approval of the Order sought in this motion, ensuring there are no remaining assets or employees of Rando, approval of the Proposal and approval of the reorganization.[12]

Ownership of Rando

13. Rando is insolvent and as such, until such time as all debt claims are repaid, there is no value in the outstanding equity of Rando. However, in connection with the reorganization, the Receiver has assessed the assertions that have been made by Mr.

[10] Fourth Report, MR, Tab 2, para 4.0(7).

[11] Fourth Report, MR, Tab 2, para 4.0(8).

[12] Fourth Report, MR, Tab 2, para 4.1(1)(e).

Diena and his counsel, Jerome Stanleigh, that substantially all (99%) of Rando's shares are owned by the Grace Family Trust (the **Trust**) and have been since 2013.[13]

14. The overwhelming majority of the evidence, including the evidence filed by Mr. Diena in connection with this motion, indicates that the Existing Shares are owned by 2345, one of the Respondents in this receivership and the borrower under the ECN Facility (as defined below).[14]

15. In particular, the Receiver notes the following:

(a) Share Certificate of Rando. The share certificate filed by Mr. Diena shows 100 common shares being issued to 2345.[15]

(b) Pledge of Existing Shares. 2345 has pledged the Existing Shares to ECN.[16]

(c) Rando Minute Book (provided by Mr. Diena and Mr. Stanleigh):[17]

(i) the summary page, which references that the 100 common shares issued by Rando, being 100% of Rando's share capital, are held by 2345;

(ii) a shareholder registry, which lists 2345 as the sole shareholder;

[13] Fourth Report, MR, Tab 2, para 4.3(1).

[14] Fourth Report, MR, Tab 2, para 4.3(1).

[15] Share Certificate of Rando Drugs dated February 28, 2013, Exhibit "D" to the Affidavit of Dani Diena, affirmed October 16, 2020 (**Diena Affidavit**), Responding Motion Record of the Defendants returnable November 9, 2020 (**RMR**), Tab 1D.

[16] Share Pledge Agreement dated January 15, 2016, Appendix "C" to the Supplement to Fourth Report of KSV Restructuring Inc., as the Receiver of the Respondents, dated November 3, 2020 (**Fourth Report Supplement**).

[17] Fourth Report, MR, Tab 2, para 4.3(4).

(iii) a declaration by Mr. Diena dated January 26, 2018 wherein he states that "2345760 Ontario Inc. is currently the sole shareholder of the Corporation [Rando]";

(iv) an affidavit sworn on January 26, 2018 by Mr. Diena wherein he states that 2345 is the registered and beneficial owner of Rando;

(v) joint resolutions of the sole director and sole shareholder of Rando signed by Ms. Diena on behalf of 2345 as the sole shareholder of Rando dated January 26, 2018; and

(vi) a special resolution signed by Ms. Diena on behalf of 2345 as the sole shareholder of Rando dated January 26, 2018.

(d) Rando Insurance Policy:[18]

(i) Rando's insurance policy indicates that the owner is 2345.

(e) Shareholder's Resolution Signed by 2345:[19]

(i) in 2018, Ms. Diena executed a shareholders' resolution on behalf of 2345 as the sole shareholder of Rando.

Outstanding Debt and Liabilities

16. As of the date of the Receivership Order, 2345 was indebted to ECN Financial Inc. (**ECN**), the Company's principal secured creditor, in the amount of approximately $4.1 million (the **ECN Facility**), plus interest, fees and costs which continue to accrue. The

[18] Fourth Report, MR, Tab 2, para 4.3(6).

[19] Fourth Report, MR, Tab 2, para 4.3(6).

remaining respondents are secured guarantors of 2345's indebtedness under the ECN Facility.[20]

17. The Receiver has obtained security opinions confirming the enforceability of ECN's security with respect to the Respondents.[21] The Receiver has previously indicated that based on timing of registration alone, other than with respect to 2275518 Ontario Limited, no other parties have prior ranking registrations.[22] An order authorizing distribution to ECN was made on September 3, 2020.

18. Although not relevant to this motion, Mr. Diena has asserted that the Trust is owed $1.4 million on a secured basis although he concedes that the personal property registration has lapsed.[23] This assertion is not supported by Rando's financial statements, which do not reflect in any such obligation owing by Rando to the Trust[24].

19. Other than the ECN debt, the estimated unsecured claims against Rando of which the Receiver is aware are approximately $300,000, excluding any litigation claims.[25]

PART III - ISSUES AND THE LAW

20. The only issues being addressed in this factum are:

    (a) whether this Court should approve the Sponsorship Agreement; and

    (b) whether this Court should authorize the Receiver to make and file a Proposal on behalf of Rando.

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[20] Fourth Report, MR, Tab 2, para 2.0(1).

[21] Third Report of the Receiver, MR, Tab 2, Appendix "D", para 5.0(1).

[22] Third Report, MR, Tab 2, Appendix "D", para 5.1(1).

[23] Diena Affidavit, RMR, Tab 1, para 7.

[24] Fourth Report Supplement, para 3.0(1)(b)

[25] Fourth Report, MR, Tab 2, para 4.2(1)(a).

A. Whether the Court should Approve the Sponsorship Agreement

The Receiver has the Authority to Monetize the Charter

21. There is no question that the Receiver has the authority both pursuant to the BIA and the Receivership Order to monetize the property of the Company for the benefit of the Company's creditors. It is trite law that there can be no recovery in respect of equity unless debt claims are repaid in full.[26]

22. The proposed transactions and reorganization contemplated by the Sponsorship Agreement are intended to maximize value related to the Exemption which is an attribute of Rando.

23. The Exemption is not tied to the Existing Shares themselves but to the corporate entity.

24. The Existing Shares themselves are not being conveyed as part of the reorganization but are being restructured as a result of the issuance of the New Common Shares to which the Sponsor is subscribing. As such, details as to the ownership of the Existing Shares are not determinative.

25. However, even if the Existing Shares were being conveyed, it is apparent that they are owned by 2345 and that the Receiver would have the authority pursuant to the Receivership Order to deal with them.

[26] BIA, ss 60(1.7) and 140.1.

The Court Should Approve the Sponsorship Agreement

26. In *Royal Bank of Canada v Soundair Corp*. (***Soundair***), the Court of Appeal for Ontario established the following principles in determining whether a receiver has acted properly in a sale of assets:[27]

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

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

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

27. With respect to the first principle, the courts have clarified that the duty of a receiver is not to obtain the best possible price, but to do everything reasonably possible in the circumstances to obtain the best price.[28]

28. In this case, the transaction contemplated by the Sponsorship Agreement and the Proposal satisfies all of the *Soundair* principles:

(a) the Capitalization Amount is commercially reasonable and reflective of the value of the Rando Charter based on the Sale Process and the earlier offer for the Rando Charter in the receivership;

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[27] *Royal Bank of Canada v Soundair Corp*., 1991 CanLII 2727 (ONCA), Commercial List Authorities Book, pp 8 and 9.

[28] *Skyepharma PLC v Hyal Pharmaceutical Corp.*, 1999 CarswellOnt 3641, Factum and Brief of Authorities of the Receiver returnable November 9, 2020, Tab 1, para 4; affirmed 2000 CanLII 5650 (ONCA).

(b) the Receiver is of the view that a further marketing of the Rando Charter is unlikely to result in a superior transaction, particularly given the complexity, time, effort and costs incurred negotiating this transaction;

(c) the transaction will facilitate a sale of the Rando Charter for the benefit of Rando's creditors;

(d) absent the Sponsorship Agreement and the Proposal, there would be no recoveries for unsecured creditors; and

(e) ECN, the Company's principal secured creditor, supports the transaction.[29]

29. Accordingly, it is the Receiver's view that the Court should (i) approve the Sponsorship Agreement and (ii) authorize the Receiver to enter into the Sponsorship Agreement and take all steps necessary to give effect to the transactions contemplated by it.

B. The Transactions contemplated by the Sponsorship Agreement are Permissible

The BIA Permits a Receiver to File a Proposal on Behalf of a Debtor

30. It is a condition of the Sponsorship Agreement that the claims against Rando be released prior to the New Common Shares being issued to the Sponsor.[30]

31. Section 50(1)(b) of the BIA specifically permits a receiver to make a proposal on behalf of a debtor.[31]

[29] Fourth Report, MR, Tab 2, para 4.4(2).

[30] Fourth Report, MR, Tab 2, para 4.1(1)(c).

[31] BIA, section 50(1)(b).

Who may make a proposal

50(1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

32. The purpose of the Proposal will be to compromise and release all affected claims against Rando.[32] Under the Proposal, a pool of funds will be made available out of the Capitalization Amount for distribution to unsecured creditors who will be entitled to vote on the Proposal in accordance with the provisions of the Proposal and the BIA.[33]

33. Pursuant to, among other things, paragraph 3(g) of the Receivership Order, the Receiver has the clear authority to settle or otherwise compromise any indebtedness of the Company.[34]

The Reorganization is Permissible Under Applicable law

34. The Court has the authority and jurisdiction to approve the articles of amendment pursuant to section 59(4) of the BIA and section 186 of the Ontario *Business Corporations Act*.[35]

35. If this Order is granted and the Proposal is subsequently approved by the required majority at a creditors' meeting, the Receiver will seek approval of the reorganization including the articles of amendment at a subsequent motion.

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[32] Fourth Report, MR, Tab 2, para 4.2(1)(d).

[33] Fourth Report, MR, Tab 2, para 4.2(1)(a).

[34] Fourth Report, MR, Tab 2, Appendix "A".

[35] *Business Corporations Act*, R.S.O. 1990, c. B.16, sections 186, 186(2) and (3).

The Court Should Authorize the Receiver to file the Proposal

36. The powers and duties conferred upon the Receiver in the BIA provide it with wide powers to deal with the property of the Company. Providing the Receiver with the specific authorization to file the Proposal is consistent with the Receiver's mandate and will assist in the Receiver's mandated goal to maximize value for the benefit of creditors.

PART IV - ORDER REQUESTED

37. For the reasons set out above, the Receiver requests that this Court grant an order for the relief sought in its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2020.

Norton Rose Fulbright Canada LLP

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Skyepharma PLC v Hyal Pharmaceutical Corp.,* 1999 CarswellOnt 3641*; affirmed* 2000 CanLII 5650 (ONCA)

SCHEDULE "B"
RELEVANT STATUTES

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

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

[…]

Court may order amendment

59 (4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

[…]

Payment — equity claims

60 (1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[…]

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

[…]

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

2. *Business Corporations Act*, R.S.O. 1990, c. B.16

Reorganization

186 (1) In this section,

"reorganization" means a court order made under section 248, an order made under the *Bankruptcy and Insolvency Act* (Canada) or an order made under the *Companies Creditors Arrangement Act* (Canada) approving a proposal. 2000, c. 26, Sched. B, s. 3 (9).

Articles amended

(2) If a corporation is subject to a reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 168. R.S.O. 1990, c. B.16, s. 186 (2).

Auxiliary powers of court

(3) Where a reorganization is made, the court making the order may also,

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office. R.S.O. 1990, c. B.16, s. 186 (3).

Articles of reorganization

(4) After a reorganization has been made, articles of reorganization in prescribed form shall be sent to the Director. R.S.O. 1990, c. B.16, s. 186 (4).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 186 (4) of the Act is repealed and the following substituted: (See: 2017, c. 20, Sched. 6, s. 25)

Articles of reorganization

(4) After a reorganization has been made, articles of reorganization and any other required documents and information shall be sent to the Director. 2017, c. 20, Sched. 6, s. 25.

Certificate

(5) Upon receipt of articles of reorganization, the Director shall endorse thereon in accordance with section 273 a certificate which shall constitute the certificate of amendment and the articles are amended accordingly. R.S.O. 1990, c. B.16, s. 186 (5).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 186 (5) of the Act is repealed and the following substituted: (See: 2017, c. 20, Sched. 6, s. 25)

Certificate

(5) Upon receipt of articles of reorganization and any other required documents and information, the Director shall endorse the articles, in accordance with section 273, with a certificate which shall constitute the certificate of amendment, and the articles are amended accordingly. 2017, c. 20, Sched. 6, s. 25.

No dissent

(6) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section. R.S.O. 1990, c. B.16, s. 186 (6).

3. *Drug and Pharmacies Regulation Act*, R.S.O. 1990, c. H.4

Operation of pharmacies by corporation

142 (1) No corporation shall own or operate a pharmacy unless the majority of the directors of the corporation are pharmacists. R.S.O. 1990, c. H.4, s. 142 (1).

Same

(2) No corporation shall own or operate a pharmacy unless a majority of each class of shares of the corporation is owned by and registered in the name of pharmacists or in the name of health profession corporations each of which holds a valid certificate of authorization issued by the College. 2000, c. 42, Sched., s. 13; 2007, c. 10, Sched. L, s. 7.

Application of subs. (2)

(3) For the purposes of subsection (2), shares registered in the name of the personal representative of a deceased pharmacist shall, for a period not exceeding four years, be considered to be registered in the name of a pharmacist. R.S.O. 1990, c. H.4, s. 142 (3).

Idem

(4) Subsection (2) does not apply to any corporation operating a pharmacy on the 14th day of May, 1954. R.S.O. 1990, c. H.4, s. 142 (4).

TAB 1

1999 CarswellOnt 3641
Ontario Superior Court of Justice [Commercial List]

Skyepharma PLC v. Hyal Pharmaceutical Corp.

1999 CarswellOnt 3641, [1999] O.J. No. 4300, [2000] B.P.I.R. 531, 12 C.B.R. (4th) 87, 92 A.C.W.S. (3d) 455, 96 O.T.C. 172

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Farley J.

Heard: October 20, 1999
Judgment: October 24, 1999
Docket: 99-CL-3479

Counsel: *Steven Golick* and *Robin Schwill*, for Receivers of Hyal Pharmaceutical Corp., Pricewaterhouse Coopers Incorporation.
Berl Nadler and *James Doris*, for Skyepharma PLC.
S.L. Secord, for Cangene Corporation.
Robert J. Chadwick, for Bioglan Pharma PLC.

Related Abridgment Classifications
Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.i General principles

Headnote
Receivers --- Conduct and liability of receiver — Duties
Receiver obtained order directing process for purchase and sale of assets and shares of debtor, including authorization of exclusive parties permitted to make offers — Receiver accepted offer from one of two exclusive parties — Receiver brought motion for order approving agreement of purchase and sale, for issuance of vesting order to effect closing of transaction, and for grant of authority to take steps necessary to complete transaction — Rejected exclusive party and company not selected as exclusive party raised objections to granting motion — Motion granted — Receiver acted properly in accepting agreement — Receiver took reasonable time to analyse offers — Deadline for making offers to receiver was not also deadline for receiver to sign accepted agreement — Creditors had priority over shareholders in liquidation process and offers made to receiver not obligated to include favourable offer to shareholders — Rejected offer had unacceptable conditions that prevented it from being selected by receiver — Receiver's failure to reveal potential claim for damages to rejected bidder did not materially prejudice bidder — Company not selected as exclusive party voluntarily exited from competition and chose not to attempt to re-enter.

Table of Authorities

Cases considered by *Farley J.*:

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

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, *(*sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161 (Ont. C.A.) — applied

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
Greyvest Leasing Inc. v. Merkur (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) — applied
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.) — applied

***Farley J.*:**

Endorsement

1 PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to understand that Ground, J. did not have available to him the Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context — as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

2 Ground J. ordered that the Confidential Supplement to the Receiver's Third Report be distributed forthwith to the service list. It appears this treatment was also accorded the Confidential Supplement to the Fourth Report. These Confidential Supplements contained specific details of the bids, discussions and the analysis of same by the Receiver and were intended to be sealed pending the completion of the sale process at which time such material would be unsealed. If the bid, auction or other sale process were to be reopened, then while from one aspect the potential bidders would all be on an equal footing, knowing what everyone's then present position was as of the Receiver's motion before Ground J., but from a practical point of view, one or more of the bidders would be put at a disadvantage since the Receiver was presenting what had been advanced as "the best offer" (at least to just before the subject motion) whereas now the others would know what they had as a realistic target. The best offer would have to be improved from a procedural point of view. Conceivably, Skye has shot its bolt completely; Bioglan on the other hand, in effect, declined to put its "best intermediate offer" forward, anticipating that it would be favoured with an opportunity to negotiate further with the Receiver and it now appears that it is willing to up the ante. The Receiver's views of the present offers is now known which would hinder its negotiating ability for a future deal in this case. Unfortunately, this engenders the situation of an unruly courthouse auction with some parties having advantages and others disadvantages in varying degrees, something which is the very opposite of what was advocated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as desirable.

3 Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back-doored in some way. See *Royal Bank v. Soundair* at pp 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.). The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated: see *Royal Bank v. Soundair* of pp.5 and 11. Specifically the court's duty is to consider as per *Royal Bank v. Soundair* at p.6:

(a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the receiver obtained offers; and

(d) whether the working out of the process was unfair.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Royal Bank v. Soundair* at p.7. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Royal Bank v. Soundair* at pp. 9-10.

5 In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopordize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

> The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it.

See also *Royal Bank v. Soundair* at p. 8. Obviously if there are conditions in offers, they must be analyzed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

6 Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Royal Bank v. Soundair* at p. 12 and *Re Central Capital Corp.* (1996), 38 C.B.R. (3d) 1 (Ont. C.A.) at pp.31-41 (per Weiler, J.A.) and pp. 50-53 (Laskin, J.A.).

7 Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Royal Bank v. Soundair* at p. 14 and *Crown Trust Co. v. Rosenberg* at p. 109.

8 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 interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.

9 It appears to me that on first blush the Receiver here conducted itself appropriately in all regards as to the foregoing concerns. However, before confirming that interim conclusion, I will take into account the objections of Bioglan and Cangene as they have shoehorned into this approval motion. I note that Skye and Cangene are substantial creditors of Hyal and this

indebtedness preceded the receivership; Bioglan has acquired by assignment since the receivership a relatively modest debt of approximately $40,000.

10 On September 28, 1999, I granted an order with respect to the sale process from thereon in. In para. 3 of the order there is reference to October 8, 1999 but it appears to me that this is obviously an error and should be the same October 6, 1999 as in para. 2 as in my endorsement I felt "the deadline should not be 5:00 p.m. Friday, October 8/99 but rather 5:00 p.m. Wednesday, October 6/99." Bioglan had not been as forthcoming as Skye and Cangene and it was the Receiver's considered opinion (which I felt was well grounded and therefore accepted) that the Receiver should negotiate with the Exclusive Parties as identified to the court in the Confidential Supplement to the Third Report (with Skye and Cangene as named in the Confidential Supplement). These negotiations were to be with a view to attempting to finalizing with one of these two parties an agreement which the Receiver could recommend to the court. While perhaps inelegantly phrased, the deadline of 5:00 p.m. on October 6, 1999 was as to the offerers putting forward their best and irrevocable offer as to one or more of the combinations and permutations available. Both Cangene and Skye submitted their offers (Cangene one deal and Skye three independent alternatives — all four of which were detailed and complex) immediately before the 5:00 p.m. October 6, 1999 time. It would not seem to me that either of them was under a misimpression as to what was to be accomplished by that time. It would be unreasonable from every business angle to expect that the Receiver would have to rather instantly choose in minutes and therefore without the benefit of reflection as to which of the proposals would be the best choice for acceptance subject to court approval; the Receiver was merely stating the obvious in para. 10 of its Confidential Supplement to the Fourth Report. Para. 31 should not be interpreted as completely boxing in the Receiver; the Receiver could reject all three Skye offers if it felt that appropriate. The Receiver must have a reasonable period to do its analysis and it did (with the intervening Thanksgiving weekend) by October 13, 1999. In my view, it is reasonable and obvious in the context of the receivership and the various proceedings before this court that the finalizing of the agreement by 5:00 p.m. October 6, 1999 did not mean that the Receiver had to select its choice and execute (in the sense of "sign") the agreement by that deadline. Rather the reasonable interpretation of that deadline is as set out above. Bioglan, not being one of the selected and authorized Exclusive Parties did not, of course, present any offer. It had not got over the September 21, 1999 hurdle as a result of the Receiver's reasonable analysis of its proposal before that date. The September 28, 1999 order, authorized and directed the Receiver to go with the two parties which looked as if they were the best bets as candidates to come up with the most favourable deal. As for the question of "realizing the superior value inherent in the respective Exclusive Parties' offers", when viewed in context brings into play the aforesaid concerns about creditors having priority over shareholders and that in a liquidation the creditors must be paid in full before any return to the shareholders can be considered. It was possible that the exclusive parties or one of them may have made an offer which would have discharged all debts and in an "attached" share deal offered something to the shareholders, especially in light of the significant tax losses in Hyal. That did not happen. No one could force the Exclusive Parties to make such a favourable offer if they chose not to. The Receiver operated properly in selecting the Skye C Plan as the most appropriate one in light of the short fall in the total debts. I note that a share deal over and above the Skye C Plan has not been ruled out for future negotiations as such would not be in conflict with that recommended deal and if structured appropriately. Bioglan in my view has in essence voluntarily exited the race and notwithstanding that it could have made a further (and better) offer even in light of the September 28, 1999 order, it chose not to attempt to re-enter the race.

11 I would also note that in the fact situation of this case where Skye is such a substantial creditor of Hyal that the $1 million letter of credit it proposes as a full indemnity as to any applicable clawback appears reasonable in the circumstances as what we are truly looking at is this indemnity to protect the minority creditors. Thus Skye's substantial creditor position in essence supplements the letter of credit amount (or substitutes for a part of the full portion).

12 It is obvious that it would only have been appropriate for the Receiver to have gone back to the well (and canvassed Bioglan) if none of the offers from the Exclusive Parties had been acceptable. However the Skye Plan C one was acceptable and has been recommended by the Receiver for approval by this court.

13 As for Cangene, it has submitted that the Receiver has misunderstood one of its conditions. I note that the Receiver noted that it felt that Cangene may have made an error in too hastily composing its offer. However, the Cangene offer had other unacceptable conditions which would prevent it on the Receiver's analysis from being the Receiver's first choice.

14 Then Cangene submitted that the Receiver erred in not revealing the Nadler letter which threatened a claim for damages in certain circumstances. Clearly it would have been preferable for the Receiver to have made complete disclosure of such a significant contingent liability. However, it seems to me that Cangene can scarcely claim that it was disadvantaged since it was previously directly informed by Mr. Nadler as counsel for Skye of their counterclaim. There being no material prejudice to Cangene, I do not see that this results in the Receiver having blotted its copybook so badly as to taint the process so that it is irretrievably flawed.

15 I therefore see no impediment, and every reason, to approve the Skye Plan C deal and I understand that, notwithstanding the (interim) negative news from the United States FDA process, Skye is prepared to close forthwith. The Receiver's recommendation as to the Skye Plan C is accepted and I approve that transaction.

16 It does not appear that the other aspects of the motion were intended to be dealt with on the Wednesday, October 20, 1999 hearing date. They should be rescheduled at a convenient date.

17 Order to issue accordingly.

Motion granted.

ECN FINANCIAL INC. Applicant	and	2345760 ONTARIO INC., et al. Respondents	Court File No.: CV-19-632106-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **TORONTO**

FACTUM AND BRIEF OF AUTHORITIES OF THE RECEIVER

(Motion returnable November, 9 2020)

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