

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

**MOTION BRIEF OF THE RECEIVER
(NOTRE DAME APPROVAL AND VESTING ORDER)**

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
1700 – 242 Hargrave Street
Winnipeg, MB R3C 0V1
(Matter No. 0173004 GBT)
(G. Bruce Taylor: 204-934-2566)
(Ross A. McFadyen: 204-934-2378)
(Email: gbt@tdslaw.com / ram@tdslaw.com)
(Toll Free: 1-855-483-7529)

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

**IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO
SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY
ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55
OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c.
C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

**NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION
VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES
LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887
CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,**

Respondents.

**MOTION BRIEF OF THE RECEIVER
(NOTRE DAME APPROVAL AND VESTING ORDER)**

	<u>Page No.</u>
I. LIST OF DOCUMENTS	2
II. LIST OF AUTHORITIES	3
III. POINTS TO BE ARGUED	4

I. LIST OF DOCUMENTS

1. The First Report of the Receiver, dated April 20, 2020;
2. The supplementary First Report of the Receiver, dated April 27, 2020;
3. The Second Report of the Receiver, dated May 27, 2020;
4. The Third Report of the Receiver, dated June 22, 2020; and
5. Notice of Motion of the Receiver, filed June 19, 2020, with attached draft form of Notre Dame Approval and Vesting Order

II. LIST OF AUTHORITY

Tab

1. *Shape Foods Inc. (Receiver of), Re*, 2009 MBQB 171

III. POINTS TO BE ARGUED

Introduction

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the “**Receiver**”) over all assets, undertakings and properties of the Respondents, Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd. (“**NEL**”), Nygard Properties Ltd. (“**NPL**”), 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the “**Debtors**”) pursuant to an Order (the “**Receivership Order**”) of this Honourable Court. The Receivership Order was subsequently amended by a General Order made on April 29, 2020, which limited the scope of the Receivership Order in relation to the property, assets and undertakings of the Debtors NEL and NPL.

2. The Receiver has now filed the Third Report of the Receiver, dated June 22, 2020 (the “**Third Report**”). Among other things, the Third Report provides this Honourable Court with an update as to the actions and activities of the Receiver since the filing of the Second Report of the Receiver dated May 27, 2020, including details of the Receiver’s efforts to sell NPL’s real property located at 1300, 1302 and 1340 Notre Dame Avenue and 1440 Clifton Street, Winnipeg, Manitoba (collectively, the “**Notre Dame Property**”). The Third Report also contains the evidentiary basis for certain relief sought by the Receiver. In particular, the Receiver is now seeking an order (the “**Notre Dame Approval and Vesting Order**”):

- (a) abridging the time for service of the Notice of Motion of the Receiver and the materials filed in support thereof, such that the motion is properly returnable on the stated hearing date, and dispensing with further service thereof;
- (b) approving the terms of an accepted Offer to Purchase (the “**Notre Dame Purchase Agreement**”) dated May 22, 2020 between the Receiver and Mist Holdings Inc. (the “**Purchaser**”) for the sale of the Notre Dame Property, which is conditional upon the approval of this Honourable Court (the “**Notre Dame Transaction**”);
- (c) vesting, upon the closing of the Notre Dame Transaction, all of NPL’s right, title and interest in and to the purchased assets as described in the Notre Dame Purchase Agreement in favour of the Purchaser;
- (d) sealing the Confidential Appendices to the Third Report, consisting of: (i) an appraisal report dated December 19, 2019 prepared by CBRE Limited relating to the Notre Dame Property (the “**CBRE Appraisal**”); (ii) an offer summary prepared by the Receiver relating to the Notre Dame Property (the “**Offer Summary**”); and (iii) an un-redacted copy of the Notre Dame Purchase Agreement; and
- (e) approving the Third Report, the Receiver’s update interim statement of receipts and disbursements, and the conduct, activities and accounts of the Receiver and its counsel described therein.

3. This Brief is being filed on behalf of the Receiver so as to outline the legal basis for the requested Notre Dame Approval and Vesting Order, particularly in relation to the approval of the Notre Dame Purchase Agreement and the Notre Dame Transaction.

Notre Dame Purchase Agreement / Notre Dame Transaction

4. Paragraph 5(b) of the Receivership Order permits the Receiver to market and pursue offers for the sale of the Debtors' property. In this case, the Receiver is obligated, under paragraph 6(m)(ii) of the Receivership Order, to obtain this Honourable Court's approval for any sale transaction in which the purchase price exceeds \$250,000. Given the purchase price for the Notre Dame Property as set out in the Notre Dame Purchase Agreement, such approval is required.

5. The factors to be considered by this Honourable Court when assessing a proposed sale of assets by a court-appointed receiver were set by Menzies J. in *Shape Foods Inc. (Receiver of), Re*, (citing *Crown Trust Co. v. Rosenberg*, (1986) 60 O.R. (2d) 87 (Ont. H.C.J.)):

- (a) The court should consider whether the receiver has made a sufficient effort to get the best prices and has not acted improvidently;
- (b) The court should consider the interests of the parties.
- (c) The court should consider the efficacy and integrity of the process by which the offers are obtained.
- (d) The court should consider whether there has been any unfairness in the working out of the process.

6. Menzies J. went on in *Shape Foods*, (citing *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)), to summarize two principles that ought to be applied when a court is reviewing a receiver's conduct in relation to the sale of property. First, the court should place a great deal of confidence in the actions taken and the opinions formed by the receiver. Unless the contrary is shown, the court should assume that the receiver (its officer) is acting properly. Second, the court should be reluctant to second-guess, with the benefit of hindsight, the business decisions of the receiver.

Shape Foods, supra, at para 21 [Tab 1]

7. As noted in the supplementary First Report of the Receiver dated April 27, 2020, the Receiver, the Applicant and Colliers International ("**Colliers**") entered into a listing agreement with respect to the real properties of the Debtors NPL located in Winnipeg, Manitoba, including the Notre Dame Property. The Notre Dame Property was subsequently listed on April 29, 2020 at a listing price of \$5,245,000, with an open offer date.

8. The key aspects of the marketing process undertaken by Colliers with respect to the Notre Dame Property, and its results, are summarized in the Third Report. Those are as follows:

- (a) on or about April 27, 2020, Colliers disseminated an email communication to its database of approximately 200 industrial clients from Manitoba and beyond to advise of the Notre Dame Property transaction opportunity. On April 29, 2020, Colliers' listing team sent direct emails to an additional list of

150 targeted prospective purchasers, including users, developers and investors from Manitoba and beyond;

- (b) four of the parties contact Colliers, including the Purchaser, signed confidentiality agreements and accessed an electronic data room prepared by Colliers to provide interested parties with additional information on the Notre Dame Property;
- (c) Colliers, with the assistance of the Receiver, facilitated due diligence efforts by, among other things, coordinating site visits to view and inspect the Notre Dame Property. Three parties attended the Notre Dame Property for a site tour; and
- (d) on May 16, 2020, the Purchaser submitted a conditional offer to purchase the Notre Dame Property, which was at a significant discount to the listing price. After consultation with the Applicant (and its associated lender, Second Avenue Capital Partners, LLC, together with the Applicant, the "**Lenders**"), the Receiver engaged in negotiations with the Purchase and the parties then executed the Notre Dame Purchase Agreement on May 22, 2020, which included a conditional period of ten (10) business days from the acceptance of the offer to allow the Purchaser to be satisfied with a physical and environmental inspection of the Notre Dame Property.

9. Based on feedback received from prospective purchasers and its own assessment, Colliers noted several concerns and observations with respect to the Notre Dame Property:

- (a) although an offer had been received from the Purchaser, any other prospective user or investors interested in the property would likely require further information as to environmental concerns;
- (b) one of the buildings will need a new roof and HVAC system in the near term, which could cost upwards of \$800,000. This was not factored into the listing price;
- (c) there is approximately 10,000 sqft of un-leaseable space in one of the buildings at the Notre Dame Property (1340 Notre Dame Avenue, "1340"), which serves to lower the value of the overall asset;
- (d) two of the smaller buildings are older, and may not be fully code compliant;
- (e) the apartment residences constructed within 1340 will likely not be of interest to prospective purchasers, and will likely need to be demolished;
- (f) the Notre Dame Property was listed based on its "highest and best use", which is a single tenant industrial user. Unfortunately, the industrial users contacted by Colliers were not interested in the Notre Dame Property due, in part, to the age of the buildings. The majority of interest was received from redevelopment and/or demolition buyers, such as the Purchaser, which buyers require a lower price to justify redevelopment costs.

10. On May 26, 2020 the Purchaser provided the First Deposit (as defined in the Notre Dame Purchase Agreement) to the Receiver's counsel. On June 9, 2020, counsel for the Purchaser confirmed that the property inspection condition had been

waived and that the Purchaser would make arrangements to provide the Second Deposit, which it did on June 11, 2020.

11. On June 9, 2020, an agent representing another prospective purchaser (the “**Second Offeror**”) submitted a conditional offer (the “**Second Offer**”) for the Notre Dame Property. While the Second Offer was higher in value than what was offered pursuant to the Notre Dame Purchase Agreement, it was highly conditional and contained a 45-day conditional period from acceptance of the Second Offer to complete significant due diligence, including the Second Offeror obtaining required financing and finalizing development plans. Further, the Receiver understood through its discussions with Colliers that the Second Offeror’s plan for the Notre Dame Property was to launch a new business venture that would require new business partners and financing.

12. As the Second Offer was submitted with limited due diligence, was highly conditional and was not in accordance with the “Offer to Purchase” form included in the data room, the Receiver was concerned that the Second Offer had significant risk, and pursuing it might jeopardize the Notre Dame Purchase Agreement, which was now binding on the Purchaser, which had waived conditions. In the circumstances, the Receiver instructed Colliers to contact the agent for the Second Offeror to inquire as to whether the Second Offeror would be prepared to submit an unconditional offer in order to determine whether a superior offer could be achieved in a timely manner without risking the loss of the Notre Dame Purchase Agreement.

13. On June 10, 2020, the agent for the Second Offeror advised Colliers that it would not proceed with a subsequent unconditional offer for the Notre Dame Property

and that the Second Offer, with conditions, stood as the only offer the Second Offeror would be prepared to proceed with. As such, the Receiver, in consultation with its advisors, determined that the Second Offer was not feasible and further discussions with the Second Offeror were not justified.

14. The Receiver also notes that on March 27, 2020, Levene Tadman Golub Law Corporation (“**LTGLC**”), as counsel for Mr. Nygard and the Debtors, contacted the Receiver’s legal counsel to inquire about the Receiver’s plans for 1340. At the time, Mr. Nygard occupied certain apartments constructed within a portion of the building at 1340. LTGLC noted that Mr. Nygard was interested in either purchasing the premises in which he resided, or all of 1340, including equipment and leasehold improvements, but not inventory. LTGLC did not communicate a firm offer in respect of 1340, but indicated a value well below the value described in the CBRE Appraisal, and consistent with the price described in the Notre Dame Purchase Agreement. At that time, the Receiver had not retained a commercial property broker to market and sell the Notre Dame Property and, as such, legal counsel for the Receiver advised LTGLC that the Receiver would consider the property and respond in due course.

15. In due course, the Receiver’s legal counsel communicated to LTGLC that the Receiver intended to list all of NPL’s real properties in Winnipeg, including the Notre Dame Property, for sale and would follow up with details of the listing agent contact once a listing agreement had been concluded. Subsequent to the retainer of Colliers, the Receiver’s legal counsel contacted LTGLC to provide contact details for Colliers. As of the date of the Third Report, the Receiver understands that neither LTGLC nor Mr. Nygard

(nor anyone on his behalf) contacted Colliers to express interest in the Notre Dame Property, and LTGLC confirmed that Mr. Nygard was not interested in acquiring the Notre Dame Property.

16. The Receiver is of the view that the Notre Dame Transaction represents the best recovery for the Notre Dame Property, for the following reasons:

- (a) the marketing process undertaken by the Receiver, with the assistance of Colliers, and the activities undertaken by the Receiver leading to the Notre Dame Transaction were designed to solicit interest from a number of *bona fide* parties that would be interested in and familiar with industrial real property assets;
- (b) there is a limited market for the Notre Dame Property. The market has been extensively canvassed in the process leading up to the Notre Dame Transaction and all likely bidders have already been provided with an opportunity to bid on the Notre Dame Property;
- (c) the further marketing of the Notre Dame Property would, in the Receiver's view, not likely result in greater realizations and may put the Notre Dame Transaction at risk impairing recoveries;
- (d) the COVID-19 pandemic has created significant economic uncertainty, which is likely to continue for an extended period of time, and which has adversely affected commercial real property prices and transactions as users, investors and developers continue to assess and focus on their own operations and develop contingency plans to preserve capital;

- (e) the Purchaser assumes the risk of further environmental liabilities that may be associated with the Notre Dame Property, which could be significant;
- (f) the Notre Dame Purchas Agreement represents the only binding offer received for the Notre Dame Property;
- (g) the Lenders support the Notre Dame Transaction; and
- (h) the Purchaser is able to close within 30 days of issuance of the Notre Dame Approval and Vesting Order, the proceeds of which would result in a meaningful repayment of the Lenders' outstanding advances.

17. In all the circumstances, the Receiver submits the Notre Dame Purchase Agreement and the Notre Dame Transaction satisfy the conditions for approval as set out in the *Shape Foods* decision and therefore ought to be approved by this Honourable Court. In particular, the Receiver states that the process that it undertook with respect to the sale of the Notre Dame Property was commercially fair and reasonable, and was carried out with efficacy and integrity. The evidence provided indicates the Receiver made a reasonable effort to obtain the best price for the Notre Dame Property for the benefit of all stakeholders. The Lenders, as the primary secured creditors of the Debtors, are also supportive of the Notre Dame Transaction.

18. Further, there is no evidence that the Receiver acted improvidently in connection with efforts to sell the Notre Dame Property. In the absence of such evidence, it must be assumed that the Receiver acted properly, and there is no basis to second guess the business decisions of the Receiver.

Shape Foods, supra, at para 27 [Tab 1]

19. The draft form of Notre Dame Approval and Vesting Order also provides for the sealing of the CBRE Appraisal, the Offer Summary and the un-redacted Notre Dame Purchase Agreement. Relevant authorities relating to the sealing of confidential information in the context of insolvency proceeding were provided to this Honourable Court in the previous Motion Brief of the Receiver dated April 21, 2020 filed in connection with, *inter alia*, obtaining the Sale Approval Order.

20. For obvious reasons, the Receiver is of the view that if the Notre Dame Transaction does not close for any reason, efforts to re-market the Notre Dame Property may be significantly impaired if the CBE Appraisal, the Offer Summary and/or the un-redacted Notre Dame Purchase Agreement are made public at this time. Thus, the Receiver submits that an order sealing these documents (which are each attached as Confidential Appendices to the Third Report of the Receiver) ought to be granted.

21. Accordingly, the Receiver submits that this Honourable Court should grant the Notre Dame Approval and Vesting Order in the form attached as Schedule "A" to the Receiver's Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of June,
2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: "Ross A. McFadyen"
G. Bruce Taylor / Ross A. McFadyen
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

2009 MBQB 171

Manitoba Court of Queen's Bench

Shape Foods Inc. (Receiver of), Re

2009 CarswellMan 312, 2009 MBQB 171, [2009] M.J. No. 240,
178 A.C.W.S. (3d) 570, 241 Man. R. (2d) 235, 54 C.B.R. (5th) 224

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.

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

Related Abridgment Classifications

Debtors and creditors

[VII Receivers](#)

[VII.6 Conduct and liability of receiver](#)

[VII.6.a General conduct of receiver](#)

Debtors and creditors

[XIV Miscellaneous](#)

Headnote

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.

Table of Authorities

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 purchaser 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 *Skyepharm 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 is 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 Ltd., 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 responsibly 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 884498 Alberta 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 *Skyepharm* 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 than 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 than 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

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.