Court File No. CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and –

EBERSOLE EXCAVATING INC. and D&S RAILWAY CONSTRUCTION INC.

Respondent

THIRD AFFIDAVIT OF STUART DETSKY
(Sworn April 9, 2015)

I, **STUART DETSKY**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS.**

1. I am Assistant Vice President, Surety and Warranty Claims at Trisura Guarantee Insurance Company ("**Trisura**") and as such I have personal knowledge of the matters deposed to below, save and except where stated to be based on information and belief, in which case I do verily believe the same to be true.

2. This affidavit is filed specifically to reply to paragraphs 46 and 55 to 57 of the affidavit of Michael B. McIntosh herein, sworn April 1, 2015 (the "**McIntosh Affidavit**") and the affidavit of Joel D. Farber sworn April 2, 2015 (the "**Farber Affidavit**"), both of

which have been filed on behalf of Maynards Industries Ltd. ("**Maynards**") in connection with the Receiver's distribution motion.

3. The Farber Affidavit and the above noted paragraphs of the McIntosh Affidavit relate to an alleged agreement among the interested parties as to the treatment of an expense charged by Bidspotter to Maynards, with respect to the sale of certain of the assets sold pursuant to the Maynards' auction authorized by the Interim Receivership Order. Bidspotter is an online auction service retained by Maynards that facilitated auction bids online from interested purchasers who could not physically attend the auction.

4. Neither Trisura nor its lawyer, Roger Jaipargas, agreed to the conditions suggested in the MacIntosh and Farber Affidavits. I am advised by Mr. Jaipargas and do verily believe that at no time did he agree to the conditions suggested in the MacIntosh and Farber Affidavits.

5. On November 26, 2014, the day when Trisura's interim receivership application was to be heard by the Court at 2:15PM, counsel for each of Maynards, Trisura and the proposed interim receiver, Grant Thornton Limited ("**GTL**"), had several discussions, as well as email exchanges, regarding the terms of the proposed interim receivership order. One of the issues the parties agreed upon was that Maynards would be authorized to conduct an auction of the assets in issue in order to monetize them with a view to arguing about entitlement to the proceeds of sale on a further Court hearing after the auction.

6. On November 24, 2014 Joel D. Farber at Fogler Rubinoff LLP, ("**Fogler**"), counsel to Maynards, sent a letter (the "**Fogler Letter**") to Borden Ladner Gervais LLP ("**BLG**"), counsel to Trisura, which set out the terms upon which Maynards would conduct an auction to monetize the assets. The Fogler Letter provided for a number terms, including the payment of expenses for the Auction. This proposal was completely unacceptable to Trisura. Attached hereto and marked as Exhibit "**A**" is a copy of the Fogler Letter.

7. It was Trisura's position, as communicated by Mr. Jaipargas to Maynards' counsel, that Maynards' compensation on the auction should be limited to a commission of 12% of the proceeds of sale and that Maynards would be responsible for all of the expenses it incurred in connection with the auction process. This commission was to be equivalent to the "Buyers' Premium" charged by Maynards on the purchase price paid by the purchasers on the auction. Maynards agreed that it would be responsible for its expenses but was insisting that its commission be increased from 12% to 15%. Mr. Farber set forth Maynards' position in this regard in his email to Mr. Jaipargas dated November 26, 2014 at 10:50 a.m. which is attached at Exhibit "C" to the Farber Affidavit (p.408 Maynards Record). Specifically, Mr. Farber suggested that the order provide that Maynards be entitled to "collect and receive a buyer's premium of up to 15% (the Buyer's Premium") … of the selling price of each individual piece of Equipment that is included in the Auction." (Emphasis added). The distinction between the words "collect" and "receive" were important. "Collect" referred to what Maynards could charge the purchasers and "receive" referred to what Maynards could take for itself from the premiums.

8. Mr. Jaipargas, with Trisura's concurrence, agreed to increase the Buyer's Premium percentage from 12% to 15%.

9. However, following the aforementioned email exchange, I am informed by Mr. Jaipargas that Mr. Farber informed him that on any sales completed online through Bidspotter, the latter typically charged purchasers a buyer's premium of 18%, as opposed to the 15% agreed to by Maynards. As this increased premium would potentially increase the net proceeds of sale of the assets, Trisura agreed to revise the terms of the Interim Receivership Order to permit Maynards to "collect a buyer's premium of up to 18%". This agreement was confirmed in Mr. Jaipargas' email to Mr. Farber dated November 26, 2014 at 11:38 a.m. attached at Exhibit "C" of the Farber Affidavit (p. 407 Maynards Record). That email also made it clear, however, that while Maynards was entitled to *collect* a buyer's premium of up to 18%, Maynards "shall only be entitled to *receive* an amount that is equal to 15% plus HST of the selling price of each individual piece of Equipment that is included in the Auction (the Maynards Portion of the Buyer's Premium ...."). In other words, it was always clearly agreed that any premium above the 15% payable to Maynards was to be paid to the Interim Receiver as part of the balance of the sale proceeds.

10. The wording of paragraphs 28 (a) and (b) of the Interim Receivership Order as issued exactly tracks the wording of the agreement set forth in the email from Mr. Jaipargas referred to in paragraph 9 above. It was never intended, or agreed, that any additional buyer's premium above 15% would be paid to either to Maynards or Bidspotter from the proceeds of sale of the assets. Any liability for such a premium or

commission was to be part of Maynards' expenses of the auction and its sole responsibility and that is what the Interim Receivership Order provides.

11. I have spoken to Jake Wiebe at GTL and he has confirmed that it is his understanding that Maynards would only be entitled to receive an amount equal to 15% plus HST.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 9th day of April, 2015

STUART DETSKY

A Commissioner of Oaths, etc.

Arthur Nahas, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 10, 2016.

Fogler, Rubinoff LLP
Lawyers

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Reply To: Joel D. Farber
Direct Dial: 416.365.3707
E-mail: jfarber@foglers.com
Our File No. 14/7455

November 24, 2014

VIA EMAIL

WITHOUT PREJUDICE

Borden Ladner Gervais LLP
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

This is Exhibit "A" referred to in the affidavit of Stuart Actsky sworn before me, this 9th day of April 2015

A Commissioner, etc. Arthur Nahas, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires May 10, 2016.

Attention: Roger Jaipargas

Dear Sir:

Re: Maynards/Trisura/D&S Railway Construction Inc.

We are the solicitors for Maynards Industries Ltd. As discussed, we have your correspondence dated November 14, 2014 addressed to Messrs. McIntosh and Hodder and your Application Record served today.

As you are aware, our client purchased certain assets (the "Assets") from D&S pursuant to an Purchase and Sale Agreement dated October 31, 2014 (the "APS"), a copy of which has been provided to you as per your request. As you will note from the APS, the Assets were to be conveyed to Maynards free and clear of all security interests.

As we advised, when Maynards took delivery of the Assets, it was not aware of the Trisura security interest. As we also advised, D&S and its principals appear to have delivered the Assets knowing of Trisura's security interest and thereafter knowingly disbursed or dissipated the proceeds of the sale fraudulently and in breach of the express or implied trust attaching to the proceeds. In particular, the proceeds were initially to be paid to JMA Accounting Professional Corporation in trust, on the provision that payouts to the secured creditors would be completed prior to any balance being directed to D&S. As these instructions subsequently changed, it appears Mr. MacDonald played some part in enabling D&S in its breach of contract and dissipation of the proceeds, the nature and extent of which will have to be fully investigated. Nonetheless we take it from your correspondence that Mr. MacDonald undoubtedly knew of the existence of the Trisura security claim but did not disclose that information to our client.

As we also discussed, it is abundantly clear from the facts that approximately $750,000 of the sale proceeds were directed to the Bank of Montreal to discharge its security in accordance with the Bank's payout statement with Mr. Van Klink's letter of October 29, 2014, a copy of which we sent to you yesterday. The Bank's security appears to have ranked in priority to any security interest of Trisura.

We are of course taking all reasonable steps to trace and preserve the balance of the funds from D&S and its principals including pursuing such extraordinary remedies as may be available to our client.

Through our discussions it would appear that both of our respective clients believe that monetizing the assets in the currently scheduled auction process represents the best opportunity to maximize recovery, whatever the outcome may be of the competing claims. We therefore confirm our instructions to proceed on the following basis:

1. Maynards will conduct the auction as currently scheduled;

2. All auction proceeds arising from the sale of the Assets will be paid to Fogler, Rubinoff LLP in trust (FR) to be held in accordance with the terms hereof;

3. FR shall be entitled to pay to Maynards the sum of $100,000 representing its total costs and expenses in conducting the auction sale;

4. FR shall be entitled to pay to Maynards the further sum of 18% plus HST of the gross proceeds of the auction sales for the Assets, subject to confirmation by Trisura of the said gross proceeds amount;

5. The balance of the proceeds remaining in trust shall be held by FR pending agreement between Trisura and Maynards, or otherwise by Court order;

6. In the event that it is ultimately determined, whether by agreement or Court order, that Trisura is entitled to any part of the gross proceeds based on its claimed security interest in the Assets (the "Trisura Proceeds"), then FR shall pay such amount to Trisura or as it may direct, less a pro-rated share (based on total auction gross proceeds) of the total auction expense amount of $100,000 and less 18% of the Trisura Proceeds representing commissions for Maynards plus HST thereon.

7. The foregoing arrangements are agreed to as between Maynards and Trisura and shall be construed as strictly without prejudice to their respective legal positions vis a vis each other or any third party, save and except that Trisura shall not make any allegation of an improvident sale.

fogler rubinoff

We look forward to hearing from you.

Yours truly,

FOGLER, RUBINOFF LLP

JRF per Joel D. Farber
JDF/ay

cc. client

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PROCEEDING COMMENCED AT TORONTO

THIRD AFFIDAVIT OF STUART DETSKY

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