Court File No. CV-22-00691422-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

NATIONAL BANK OF CANADA

Applicant

- and -

RATNAS PROPERTY INVESTMENT INC. and RATNAS GAS INC.

Respondents

FACTUM OF THE RECEIVER

June 8, 2023

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PART I - NATURE OF THE MOTION

1. Grant Thornton Limited ("**Grant Thornto**n"), in its capacity as the Court-appointed receiver (the "**Receiver**") of the assets, property and undertaking (the "**Property**") of Ratnas Property Investment Inc. and Ratnas Gas Inc. (together, the "**Debtors**") seeks the following:

   (a) an Order (the "**Approval and Vesting Order**") vesting title in and to the Property in favour 1000544039 Ontario Inc (the "**Purchaser**");

   (b) an Order (the "**Discharge Order**") that, inter alia:

      (i) temporarily seals the confidential appendices to the Second Report of the Receiver dated June 6, 2023 (the "**Second Report**") until (A) the transaction contemplated by the Approval and Vesting Order closes, or (B) further Order of this Court; and

      (ii) discharges the Receiver after the administration of the remaining matters in these proceedings is complete.

PART II - THE FACTS

2. The Debtors operated a Shell-branded gas station and Tim Hortons franchise from a location owned by them located at 369 Ontario Street, Port Hope, Ontario (the "**Premises**").

3. On December 21, 2022, on application by National Bank of Canada, the Ontario Superior Court of Justice (Commercial List) (the "**Court**") issued an order (the "**Appointment Order**"), *inter alia,* appointing Grant Thornton as receiver and manager of the Property. The Appointment Order also authorized the Receiver to conduct the sale process described in the First Report of the Receiver (the "**Sale Process**").[1]

(b) The Sales Process

4. Pursuant to and in accordance with the Sale Process, the Receiver undertook the following activities to market the Property[2]:

(a) reviewing the Debtors' assets and financial information and preparing a teaser summarizing the opportunity;

(b) drafting a professional Confidential Information Memorandum, to be provided to all prospective purchasers who signed the Receiver's non-disclosure agreement ("**NDA**") summarizing the opportunity, including the location and size of the property, agreements pertaining to the Tim Horton's and Shell commercial relationships, financial history, and other pertinent details of the Sale Process;

(c) compiling a data room containing financial information, any relevant agreements, customer information, real property information, and any other information to be

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[1] Appointment Order – Appendix "A" to the Second Report of the Receiver dated June 6, 2023 (the "**Second Report**"), Motion Record ("**MR**"), Tab 2.
[2] Second Report at para 10, MR, Tab 2.

shared with prospective purchasers subsequent to receiving an executed NDA from a prospective purchaser;

(d) setting a bid deadline of March 27, 2023, two months after the launch of the Sale Process, in order to provide sufficient time for prospective purchasers to consider the opportunity;

(e) contacting 64 potential purchasers identified by Grant Thornton Corporate Finance, the Receiver's corporate finance practice. These included major gasoline retailers, commercial real estate brokerages, private equity firms with experience in commercial real estate or distressed assets and certain law firms with fuel station clients) and reaching out to these parties from January 26, 2023 onward;

(f) sending a reminder to interested parties on March 14, 2023 (approximately two weeks before the bid deadline);

(g) advertising the opportunity in the Financial Post and Toronto Star on February 7, 2023, February 9, 2023, February 14, 2023 and February 16, 2023, in the local Northumberland News on February 9, 2023 and February 16, 2023, and in the Insolvency Insider publication on January 30, 2023; and

(h) answering questions from interested parties.

5. Multiple parties entered into a NDA, expressed an interest in the opportunity and performed due diligence. After the bid deadline passed, the Receiver determined the Purchaser's bid represented the highest and most desirable bid put forward pursuant to the

SISP. Accordingly, the Receiver selected the Purchaser as the successful bidder. On March 31, 2023, the Receiver enter into an initial asset purchase agreement with the Purchaser.[3]

(b) Discovery of Environmental Issues

6. Concurrent with the initiation of the Sale Process, the Receiver engaged Pinchin Ltd. as an independent consultant to perform an environmental assessment of the Premises and prepare a corresponding report (the "**Pinchin Report**").[4]

7. The Pinchin Report identified at the Premises several material exceedances of applicable environmental standards set out by the Ministry of the Environment, Conservation and Parks (MECP) (the "**Environmental Issues**"). The estimated costs to remediate such Environmental Issues are set out in the Pinchin Report.[5]

8. The Receiver understands that the discovery of the Environmental Issues resulted in at least two parties who had indicated an interest in submitting a bid to the Receiver choosing to withdraw from the Sale Process.[6]

9. The original agreement of purchase of sale included a condition in favour of the Purchaser permitting them until April 28, 2023 to conduct due diligence and exercise an option to terminate the agreement. Prior to the expiry of such due diligence period, and after review

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[3] Second Report at paras 14 to 17, MR, Tab 2.
[4] Second Report at para 12, MR, Tab 2.
[5] *Ibid*.
[6] Second Report at para 13, MR, Tab 2.

of the Environmental Issues, the Purchaser sought a purchase price abatement from the Receiver in order to proceed with the proposed transaction.[7]

10. The Purchaser and the Receiver extensively negotiated the quantum of such abatement and ultimately agreed upon a revised purchase price, which continued to be the highest and most desirable bid received pursuant to the Sale Process. The revised purchase price was also higher than what would be achieved in a liquidation. The amended agreement reflecting the revised purchase price was entered into on May 4, 2023 (the "**APS**").[8]

11. The Receiver has determined that the APS purchase price will mean that the Applicant, as the principal senior creditor, will not be repaid in full on the indebtedness owed to it by the Debtors. Second-ranking and below secured creditors are unlikely to recover any payment. The principal senior creditor nevertheless supports the granting of the Approval and Vesting Order.[9]

PART III - THE ISSUES

12. The questions to be decided on this motion are whether this Court should:

    (a) grant the proposed Approval and Vesting Order; and

    (b) seal the confidential appendices to the Second Report.

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[7] Second Report at paras 15 to 17, MR, Tab 2.
[8] *Ibid*
[9] Second Report at para 18, MR, Tab 2.

PART IV - THE LAW

The Approval and Vesting Order Should be Granted

13. In determining whether to approve a proposed sale of assets by a Court-appointed receiver, this Court has consistently applied the principles set out by the Ontario Court of Appeal for Ontario in *Royal Bank of Canada v Soundair Corp*.[10]

14. The *Soundair* principles are as follows:

(a) whether the receiver has made a sufficient effort to get 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 are obtained; and

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

15. First, the Receiver acted providently and made a transparent and robust effort to obtain the highest possible price for the Property in accordance with the Court-approved Sales Process. The Receiver contacted 64 potential purchasers regarding the opportunity to purchase the Property and advertised the opportunity extensively. Multiple bidders were initially interested and the Receiver engaged at depth with several of them in pursuit of a possible transaction. The APS' purchase price and its terms and conditions were

[10] *Royal Bank of Canada v Soundair Corp*, 1991 CanLII 2727 (ONCA) [*Soundair*].

extensively negotiated as between the Receiver, on behalf of the estate, and the Purchaser. The foregoing all weighs in favour of approving the APS.

16. Second, the interests of the parties have been balanced as much as possible. The Ontario Court of Appeal has made it clear that while creditors' interests are primary, they are not the overriding consideration. A purchaser who has engaged in good-faith bargaining with a receiver should not worry that the Court will easily interfere with a *bona fide* purchase agreement. As such, a purchaser is entitled to have their interests considered in the determination of whether a proposed sale of assets should be approved. The Purchaser presented the highest and best bid pursuant to the SISP, and is ready and willing to assume the same Environmental Issues that caused other prospective purchasers to withdraw from the Sales Process. The Purchaser's interests should be considered in favour of granting the Approval and Vesting Order.[11]

17. Ontario courts have indicated that it is not fatal to a proposed sale of assets that a creditor, even a second-ranking secured creditor, will not see a recovery following the transaction. The overall effect of the proposed sale of assets on the creditors and other stakeholders must be considered. This is especially true when the proposed sale reflects the best possible purchase price. Due to the Environmental Issues, which are out of the Receiver's control, the APS was the best possible outcome to maximize recovery for the Debtors' stakeholders. Failure to approve the APS could result in a poorer outcome with less recovery for the

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[11] *Soundair*; *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, 2018 ONCA 713 at para 56.

Debtors' stakeholders as it would mean starting an expensive sale process anew with no certainty of a possible transaction. This weighs in favour of approving the APS.[12]

18. Third, there was integrity and efficiency in the Sales Process**.** The Receiver undertook extensive actions, outlined above, to ensure that the opportunity to purchase the Property was broadly canvassed in the market. This Court has recognized that declining to approve a proposed sale of assets and re-opening a sales process can (1) destroy the integrity of the sales process that has been undertaken, and (2) doom the transaction that has been achieved. Failing to approve the APS would have both negative effects. The initial sale process was thorough and extensive, there is no guarantee of a better offer than the Purchaser's, and the Purchaser may bow out of the opportunity if the APS is not approved. This weighs heavily in favour of approving the APS.[13]

19. Fourth, there has been no unfairness in the Sales Process**.** The Receiver canvassed the sales opportunity broadly in the market and did not prejudice any prospective purchasers over others. The bidding process was transparent, open and public. This weighs in favour of approving the APS.

20. In *Soundair*, the Court emphasized the importance of paying deference to a receiver's business judgement, stating that "the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver." The Court

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[12] *Re Grant Forest Products Inc.*, 2010 ONSC 1846 at paras 49, 83 [*Re Grant Forest*]; *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 65; *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at para 57.

[13] *Re Grant Forest* at para 33.

also emphasized that creditors should not be allowed to supplant their own views for those of a Court-appointed receiver. The point of a Court-appointed receiver is to insulate creditors from the risks of privately-controlled receiverships, but with this comes a degree of lost control that creditors must accept. The Receiver undertook the Sales Process as described in its First Report and as authorized by the Court in the Appointment Order. The APS was borne out of the Sales Process and reflects the best available option in the circumstances. The fact that certain secured creditors will not recover from the proposed transaction is insufficient to deny the APS, thereby prejudicing the Purchaser and the Applicant as the principal secured creditor. The lack of recovery for [is not the result of the Receiver's actions, but rather of the value of the Property, which is partly influenced by the Environmental Issues and is out of the Receiver's control.

21. An application of the *Soundair* principles weighs heavily in favour of approving the APS.

(b) The Sealing Request

22. The applicable legal test for granting a sealing order was set out by the Supreme Court of Canada in *Sherman Estate v Donovan*[14], which sought to re-cast but not alter the existing test previously articulated in *Sierra Club of Canada v Canada (Minister of Finance)*[15]. The party asking a court to grant a sealing order must establish that:

(a) Court openness poses a serious risk to an important public interest, including commercial interests;

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[14] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 53
[15] *Sherman Estate v Donovan,* 2021 SCC 25 at para 38.

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent the risk; and

(c) the benefits of the order outweigh its negative effects.

23. The Receiver's request for a temporary sealing order with respect to the confidential appendices satisfies the *Sherman Estate* test for the following reasons:

(a) Disclosure of the confidential appendices poses a serious risk to two important public interests recognized by the courts:

(i) the public interest in maintaining the confidentiality of commercially sensitive information. The commercial interest in maintaining the integrity of the Sale Process and maximizing the value of the Property and net recovery to creditors in this proceeding is an important public interest that would be jeopardized if the confidential appendices are not sealed. The benefits of sealing these appendices far outweigh the infringement on the open court principle in this case. It is common to seal such commercially sensitive documents in insolvency proceedings.[16]

(ii) The public interest in preserving private confidential financial information. As recognized in *Shell Canada Limited v the Queen*[17], "if the exposure of confidential information would cause a breach of a confidentiality agreement, there is a general commercial interest of preserving confidential

[16] See, for example: *Elleway Acquisitions Ltd v 4358376 Canada Inc*, 2013 ONSC 7009 at paras 47 and 48; and *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173 at para 32.
[17] *Shell Canada Limited v The Queen*, 2022 TCC 39 at para 18.

information.” Several of the confidential appendices were subject to the NDA that was signed by prospective purchasers prior to entering the Sales Process. The confidential appendices were shared with prospective purchasers *under the pretences* that confidentiality would be maintained in order to preserve the integrity of the Sales Process.

(b) There are no reasonable alternatives to sealing in the circumstances. The entirety of the confidential appendices contains commercially sensitive information and is subject to an NDA. Redaction is therefore unfeasible; and

(c) The benefits of a sealing order outweigh its negative effects. A sealing order would protect an important interest as described above, and this is not outweighed by the public’s minimal interest in accessing the details in the confidential appendices. In any event, the requested sealing is temporary, meaning that any negative effects are not permanent.

PART V - RELIEF REQUESTED

24. The Receiver respectfully requests, and recommends, that this Court make the orders substantially in the form of the draft orders enclosed in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June, 2023.

June 8, 2023

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Royal Bank of Canada v Soundair Corp,* 1991 CanLII 2727 (ONCA).
2. *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, 2018 ONCA 713.
3. *Re Grant Forest Products Inc*., 2010 ONSC 1846.
4. *Harte Gold Corp. (Re)*, 2022 ONSC 653.
5. *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al*., 2022 ONSC 6354.
6. *Sherman Estate v Donovan,* 2021 SCC 25.
7. *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41.
8. Ell*eway Acquisitions Ltd v 4358376 Canada Inc*., 2013 ONSC 7009.
9. *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*., 2014 ONSC 1173.
10. Sh*ell Canada Limited v The Queen*, 2022 TCC 39.

IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

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Proceedings commenced at Toronto, Ontario

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