

Vancouver

20-Sep-24

REGISTRY

FORM 33 (RULE 8-1(10))

Court File No.: S-235306
Court Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NATIONAL BANK OF CANADA

PETITIONER

AND:

1239583 B.C. LTD.

RESPONDENT

APPLICATION RESPONSE

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

Application response of: Danielle Watson (“Ms Watson”) and Russell Barnes (“Mr. Barnes”) (the “Application Respondents”)

THIS IS A RESPONSE TO the notice of application of FTI Consulting Canada Inc. (“FTI”) in its capacity as court-appointed receiver and receiver-manager (the “Receiver”) without security, of the assets, property and undertakings of 1239583 B.C. Ltd. (the “Debtor”), (the “applicant”) filed on September 11, 2024 (the “notice of application”).

The Application Respondents estimate that the application will take 25 minutes.

Part 1: ORDERS CONSENTED TO

The Application Respondents consent to the granting of the orders set out in NONE of the paragraphs of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The Application Respondents opposes the granting of the orders set out in ALL of the paragraphs of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents takes no position on the granting of the orders set out in paragraphs NONE of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The Applicant Respondents repeat paragraphs 1 – 12 of the notice of application.

Initial Contact by the Application Respondents

2. In March 2024, Mr. Barnes emailed the listing realtor, Kevin Kittmer (“Mr. Kittmer”), of the property located at 9250 Somers Road, Port Alberni, BC V6B 4N7 (the “Property”) to express interests in the Property.
3. On June 4 2024, Mr. Barnes inquired about records relating to the farm that had been operating on the Property and Mr. Kittmer informed Mr. Barnes that the Property was ordered sale by the court and there was no further information to be provided.
4. On June 10, 2024, Ms Watson and Mr. Barnes viewed the Property on June 10, 2024 with their realtor, Sue Tompkins (“Ms. Tompkins”).
5. On June 25, 2024, Mr. Kittmer informed Mr. Barnes that the price of the Property was reduced and Mr. Barnes told Mr. Kittmer that he and Ms Watson were working with Farm Credit Canada (the “FCC”) to finalize an offer.

Exchange of Offers

6. On August 8, 2024, Ms Tompkins called Kurt Neilson who is another listing agent acting for the Receiver (“Mr. Neilson”) to deliver a notice of intent to write an offer. Mr. Neilson also informed Ms Tompkins that on July 18, 2024 the Receiver has accepted a conditional offer with subject conditions (the “Original Offer”) from another prospective buyer (the “First Buyer”).
7. Immediately after learning the existence of the Original Offer, Ms Tompkins made a request to Mr. Neilson to disclose the price of the accepted offer pursuant to Section 7 of Schedule A of the Contract of Purchase and Sale (the “Contract”), which states “[t]he Buyer agrees the Seller will disclose the purchase price being offered to any prospective buyers indicating an intention to submit an offer to purchase the Property.”
8. Mr. Neilson then told Ms Tompkins that he needed to inquire if he is permitted to release the information to Ms Tompkins.
9. Later on the day of August 8, 2024, the Application Respondents made an offer of 1.6 million dollars with no subject conditions that is open for acceptance until 8 pm on August 12 2024 (the “First Offer”).
10. On August 9, 2024, Mr. Kittmer informed the Application Respondents that the Receiver extended the deadline for the First Buyer to fulfill subject conditions on the Original Offer for a week because the Receiver was not satisfied with the low purchase price offered in the First Offer.
11. On August 12, 2024, Ms Tompkins received the Receiver’s counteroffer of \$1.75 million dollars that is open for acceptance until August 14, 2024.

12. On the same day of August 12, 2024, Ms Tompkins, on behalf of the Application Respondents, responded by changing only the amount of deposit on the Counteroffer while accepting the selling price of \$1.75 million (the “Amended Counteroffer”). The Amended Counteroffer was open for acceptance by the Receiver until August 17, 2024.
13. On August 16, 2024, Mr. Kittmer informed Ms Tompkins that the Receiver had removed the subject conditions from the Original Offer and the Receiver never accepted the Amended Counteroffer.
14. On September 3, 2024, John Barnum (“Mr. Barnum”), the managing broker from Ms. Tompkins’ real estate agency, informed the Application Respondents that he learned from Mr. Kittmer the Receiver is not planning to look at more offers and the Receiver will recommend the court to approve the Original Offer.

Access to the Notice of Application

15. On September 6, 2024, Mr. Kittmer told Mr. Barnum via phone call that he was only contracted by the Receiver to list the Property and was not instructed to offer any details.
16. During the same phone call on September 6, 2024. Mr. Barnum attempted to obtain the date and location of the court hearing from Mr. Kittmer about when the Receiver will seek approval of the court on the Original Offer, but Mr. Kittmer never disclosed the date or the location of the court hearing.
17. On September 13, 2024, the Application Respondents were compelled to pay the court viewing fee charged by Court Services Online before accessing the notice of application filed on September 11, 2024.
18. The Application Respondents, as prospective buyers, were never given notice of the hearing date for the notice of application.
19. After reviewing the notice of application, it was the first time for the Application Respondents to learn that:
 - a. the accepted purchase price by the Receiver was \$1.75 million pursuant to paragraphs 21 and 22 of the Notice; and
 - b. the court is scheduled to decide whether to approve the Original Offer as recommended by the Receiver is on September 25, 2024.

Application Respondent’s Offer

20. On September 17, 2024, the FCC approved financing the purchase of the Property for up to \$1.85 million and the FCC will provide financing for 100% of the purchase price.
21. The Application Respondents are ready and willing to make an offer of \$1.85 million without subject conditions to the court.

Part 5: LEGAL BASIS

Principles for Approving a Receivership Sale

1. Section 243(1) of *Bankruptcy and Insolvency Act* allows the court to appoint a receiver to take any action that the court considers to be just or convenient over the insolvent person's property.
2. The *Supreme Court Civil Rules* Rule 10-2(1) also empowers the court to appoint a receiver in any proceeding either unconditionally or on terms.
3. Paragraph 2(k) of the Receivership Order granted the Receiver the power to:

Market any or all of the Property, include advertising and soliciting offers in respect of the property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate.

4. Paragraph 2(l) of the Receivership Order granted the Receiver the power to:

Sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:

(i) *Without the approval of this Court in respect of a single transaction for consideration up to \$500,000 provided that the aggregate consideration for all such transactions does not exceed \$1,000,000, and*

(ii) *With the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (i) above,*

and in each such case notice under Section 59(10) of the Personal Property Security Act, R.S.B.C. 1996, c. 359 shall not be required.

5. The leading case on the factors for a court to consider to approve a receivership sale provides that:
 - a. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
 - b. It should consider the interests of all parties.
 - c. It should consider the efficacy and integrity of the process by which offers are obtained.
 - d. It should consider whether there has been unfairness in the working out of the process.

Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ONCA) at para 16 ["Soundair"]

6. Applying the factors in *Soundair*, the court should not approve the recommended offer obtained by the Receiver because the Receiver did not act fairly in the process, thereby failing to make sufficient effort to get the best price.
7. First, Ms Tompkins and Mr. Barnum inquired of Mr. Kittmer and Mr. Nielson multiple times as to the accepted purchase price in the Original Offer, but they failed to provide the information. The failure of Mr. Kittmer and Mr. Nielson to provide the accepted purchase price has directly contravened Section 7 of Schedule A of the Contract signed with the First Buyer, which obligates Mr. Kittmer, Mr. Nielson and the Receiver to disclose the First Buyer's offered price so that prospective buyer including the Application Respondent may make a higher offer.
8. The failure to properly inform the Application Respondents of the accepted purchase price of the Original Offer prevented the Application Respondents from making an offer higher than the Original Offer, thus unfairly jeopardizing the interest of both the Petitioner to recover a higher amount of compensation and of the Application Respondents to purchase the Property. Overmore, the failure to notify the Application Respondents of the hearing date of the notice of application prejudices the Debtor from having the Property sold for the highest possible price.
9. Further, the Application Respondents is ready and willing to make an offer of \$1.85 million, an offer \$100,000 higher than the purchase price in the Original Offer, so the Original Offer is not the best price that the Receiver could obtain.
10. In conclusion, Mr. Kittmer and the Receiver engaged in unfair practice in selling the Property and has undermined the interests of all parties involved, resulting in failing to obtain the best price for the Property.

Eligibility of Parties in a Receivership Sale to Apply for a Sealed Bid in Court

11. In the past, this court has ordered sealed bid following a receivership sale in light of a bid with an amount that is higher than the bid recommended to the court by the receiver.

Bank of Montreal v. Renuka Properties Inc., 2015 BCSC 2058 [*"Renuka"*]

12. On August 12, 2022, this court also issued the Practice Direction PD-62 on "Sealed Bid Process for Foreclosures and Other Matters Involving Sales of Land" (the "Practice Direction").
13. The opening summary of the Practice Direction states that it sets out the process for "foreclosures and other matters involving the sale of land" and the Practice Direction does not exclude receivership sale from the category of "other matters involving sales of land" so that parties involved in a receivership sale may not apply for a sealed bid process.
14. As such, the Application Respondents, as prospective buyers who wish to offer a higher purchase price for the Property than the price recommended by the receiver, has standing to apply to the court for a sealed bid.

Court's Discretion to Order Sealed Bid in a Receivership Sale

15. The court in *Renuka* found that there should be deference given to the receiver's judgment and his or her decision ought not to be set aside merely because a later and higher bid is made.
Bank of Montreal v. Renuka Properties Inc., 2015 BCSC 2058 at para 31 [*"Renuka"*]
16. However, the deference is subject to some limits and the deference may only be allowed where the improvement on the price is not significant and, in most cases, where it also appears that the late bid is less firmly secured than the recommended one.
Bank of Montreal v. Renuka Properties Inc., 2015 BCSC 2058 at para 41
17. In considering whether the deference should be given to a receiver's recommendation, a court should also consider the four factors provided in *Soundair*, namely sufficient sale efforts, the interests of all parties, efficacy and integrity of the sale process and possible unfairness.
Bank of Montreal v. Renuka Properties Inc., 2015 BCSC 2058 at para 40
18. The Application Respondents submit that the court should exercise its discretion to order a sealed bid for the sale of the Property due to a combination of unfairness in the process of the Receiver's sale and the ability of the Application Respondents to make a higher offer than the Original Offer.
19. The court in *Renuka* found that when a prospective party offered a price that was 37% higher than the offer recommended by the receiver, the difference in price was adequately substantial to displace the deference given to the receiver.
Bank of Montreal v. Renuka Properties Inc., 2015 BCSC 2058 at paras 38 to 39
20. Although the Application Respondents' offer of \$1.85 million is not as significantly higher than the difference of prices between the offers in *Renuka*, the case at hand is distinct because the court did not find any unfair practice in the receivership sale in *Renuka*.
21. In contrast, the Application Respondents have submitted that Mr. Kittmer and the Application Respondents engaged in unfair practice in the marketing of the Property, jeopardizing the interests of all parties involved and failing to obtain the best price.
22. Therefore, while the lack of an offer that is significantly higher than the Original Offer alone may not be sufficient for the court to order a sealed bid, the consideration of all factors provided in *Soundair* supra. favours the court to order a sealed bid so that parties' interests are preserved and unfairness remedied.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Danielle Louise Watson made on September 20, 2024
- [x] The application response has not filed in this proceeding a document that contains an address for service. The application respondent's address for service is:

Address for Service:

RESOLUTIONS LAW CORPORATION

320 – 4370 Dominion St, Burnaby, B.C.

V5G 4L7, Telephone: 778 – 372 – 7107

Email: andrew@resolutionslawcorp.com and service@resolutionslawcorp.com

(must use both emails for service to be effective and service by email must be reciprocal.)

Date: September 20, 2024



Signature of Andrew Rebane

lawyer for application respondent

THIS APPLICATION RESPONSE is prepared by Andrew Rebane of the law firm of RESOLUTIONS LAW CORPORATION whose place of business and address for delivery is 320 – 4370 Dominion St, Burnaby, B.C., V5G 4L7, Telephone: 778 – 372 – 7107.