Most Negative Treatment: Distinguished
Most Recent Distinguished: Denison Environmental Services v. Cantera Mining Ltd. | 2005 CarswellOnt 1846, [2005] O.J. No. 1862, 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 | (Ont. S.C.J., Apr 29, 2005)

2002 CarswellOnt 1149
Ontario Superior Court of Justice

Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd.

2002 CarswellOnt 1149, [2002] O.J. No. 1398, [2002] O.T.C. 248, 113 A.C.W.S. (3d) 762, 21 C.L.R. (3d) 38, 59 O.R. (3d) 376

The Toronto-Dominion Bank and TD Asset Finance Corp., Applicants and Crosswinds Golf & Country Club Ltd., Crosswinds Properties Ltd. and Caslar Capital Limited, Respondents

Wilson J.

Heard: April 8, 2002
Judgment: April 9, 2002
Docket: 02-CL-4376

Counsel: None given

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
Debtors and creditors

VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.ii To act in reasonable manner

Headnote
Receivers --- Conduct and liability of receiver — Duties

Accounting firm was appointed receiver/manager trustee of golf course at request of applicant bank pursuant to Construction Lien Act — Receiver sought court approval of agreement for sale of golf course for $8,550,000 ("first offer") — Shortly before hearing, arm's length third party made offer of $9,500,000 ("second offer") for golf course — Lien claimants opposed approval of first offer since if it was accepted, there would be little or no funds left against which lien claimants could claim — Lien claimants alleged they had not been given proper notice of proceedings or proper disclosure of information and that, given appraisal of golf course at between $9,000,000 and $10,000,000, first offer was improvident — Approval of first offer refused at this time subject to parties filing further material — Certainty, credibility and predictability were required to ensure negotiations conducted by receiver/trustees could be relied on without undue interference from court — However, there was also requirement that procedures adopted by receiver were commercially reasonable and fair from perspective of potential purchasers, creditors and debtors alike — Furthermore, court appointed receiver stood as officer of court and owed fiduciary duties to all parties and all classes of creditors — Notice of proceedings was fundamental prerequisite to ensure all participants had opportunity to satisfy themselves as to fairness and impartiality of process — Evidence indicated that sufficient

efforts may not have been made by receiver to market golf course — Matter was time sensitive as objective was to have golf course in limited operation by summer 2002 but 28 day time limit for sale of such property in middle of winter may not have been reasonable — Also significantly larger second offer may be indication that price in first offer, on its face, was improvident, especially given appraisal figures — In all circumstances, given absence of notice and very short time limits, concerns existed as to whether interests of all creditors had been adequately protected — Counsel were to be given one further opportunity to file material but if they did not wish to do so, it followed that receiver's motion for approval would then be dismissed and mechanism would be established to determine highest and best price for property — Construction Lien Act, R.S.O. 1990, c. C.30.

Table of Authorities

Cases considered by *Wilson J.*:

Crown Trust Co. v. Rosenberg, 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), 1986 CarswellOnt 235 (Ont. H.C.) — considered

Ostrander v. Niagara Helicopters Ltd., 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161, 1973 CarswellOnt 89 (Ont. H.C.) — referred to

Royal Bank v. Soundair Corp., 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.) — considered

Selkirk, Re, 64 C.B.R. (N.S.) 140, 1987 CarswellOnt 177 (Ont. S.C.) — considered

Toronto Dominion Bank v. Eastern Gypsum Inc., 129 N.B.R. (2d) 91, 325 A.P.R. 91, 1992 CarswellNB 132 (N.B. Q.B.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
Generally — referred to

s. 68 — referred to

APPLICATION by receiver/manager trustee for approval of agreement for purchase and sale of golf course.

***Wilson J.*:**

1 The receiver/manager trustee seeks approval of the agreement dated March 12, 2002 with 1097739 Ontario Limited (the Agreement) for the purchase of the land, buildings and assets of the golf course known as Crosswinds Golf and Country Club (Crosswinds). The process became unexpectedly complicated when a last minute, more favorable offer was received the Friday before the motion was scheduled to be heard.

2 The Agreement is a clean offer for $8,550,000.00 (the First Offer). A recent offer has been received from an arm's length third party that did not receive the information package prepared by Ernst & Young. It too is a clean offer and is for $9,500,000.00 (the Second Offer).

3 Ernst & Young were appointed by the court as receiver/manager at the request of the applicant bank and as trustee pursuant to section 68 of the *Construction Lien Act* by order of Greer, J. dated January 17, 2002. Ernst & Young urge that I approve the Agreement and accept the First Offer. They assert that the court must respect the integrity of the sale

process embarked upon by them that is the subject of two court orders. The lien claimants oppose the approval of the Agreement. They criticize the fairness and integrity of the process of the proceeding *vis a vis* the lien claimants. They question the providence of the sale. They urge me to allow the receiver a reasonable but short period of time to canvass with potential purchasers, the optimal price for the sale of Crosswinds.

4 The applicant bank stands as the first secured creditor and was not separately represented at the motion. The submissions of counsel for Ernst & Young appear to represent their position. Regardless of which offer is accepted, the bank will be paid in full. Counsel for the second secured creditor does not take any position on this motion. It appears from the material presently before me that the outcome of the motion will not affect their recovery. There are approximately two million dollars outstanding in lien claims. Given the apparent priority of the secured creditors, unless the Second Offer is accepted, it appears that there will be little no funds against which the lien claimants may claim.

The Lien Claimants' concerns

5 Counsel for the lien claimants allege that in the manner of conducting the sale, that Ernst & Young have not acted in an even handed manner with respect to all creditors. They allege that the process is tainted by unfairness. It is their assertion that Ernst & Young have in essence acted for the applicant bank with respect to the procedures and timelines chosen for the sale of Crosswinds, to the detriment of the lien claimants. Counsel for the debtors echo the lien holders concerns. Counsel for the lien holders alleges that the fiduciary duties owed to the lien claimants have not been met, with respect to notice of the proceeding, the disclosure of information, and the lack of opportunity for the lien claimants to be informed and to participate in the legal process. As well, they allege that the sale price for the First Offer is improvident. They rely upon the existence of the significantly higher Second Offer, the capital expended on Crosswinds [in excess of $16,000,000.00] and in light of the information in the appraisal [which confirms an opinion of value as at February 15, 2002 for a discounted sale of between $9,000,000.00 and $10,000,000.00].

Status of the Motion

6 None of the parties were completely prepared for the motion, and motion material was handed to me at the opening of Court. Time limits imposed by the receiver have been very tight.

7 Ernst & Young were appointed on January 17, 2002. The information packages were sent to potential buyers with a deadline for offers of February 15, 2002. The order for exclusive negotiations with four potential purchasers was obtained on February 26, 2002. The Agreement was signed March 18, 2002. The motion material was served on April 3, 2002. The lien claimants had an opportunity to consider matters in a telephone conference call on April 4, 2002 with their counsel, and counsel for Ernst & Young. As a result of the telephone call, one of the lien claimants contacted a person that he knew that may be interested in purchasing Crosswinds. As a result of that contact, the Second Offer was presented on Friday April 5, 2002. The motion was argued on Monday April 8, 2002. The closing of the transaction is scheduled for today, April 9, 2002. There are provisions in the Agreement for extensions.

8 I do not want to add unnecessary costs and delay to this action. This is a time sensitive matter, as the objective is to have Crosswinds in limited operation by July or August 2002. However, this is an important matter for all parties, particularly the lien claimants.

9 Serious allegations were made by counsel recently appointed to act on behalf of the lien claimants, without the benefit of filing any written materials. Counsel for the receiver did not object to the facts being suggested by counsel, but chose to rely upon the law. Counsel for the lien claimants took the position that they had not been informed in any meaningful way of the status of this proceeding before Thursday April 4, 2002. His submissions were uncomfortably close to being evidence. Ernst & Young did not prepare their material with a view to a challenge of their whether their conduct *vis a vis* the lien claimants was fair, and whether the sale suggested was improvident, having regard to the appraisal obtained, as well as the facts.

10 I have carefully read, and re-read the entire file, including the earlier motion materials in support of the motions before Greer, J. and Cumming, J.. This material was not originally before me. The lien claimants did not have notice of, or participate in either *pro forma* motion. I have not had the benefit of reading the motion material that was presented before Herold, J. in the contested motion brought by the lien claimants in Kitchener on March 28, 2002. The relevant facts with respect to the history in this matter are not entirely clear. I am hesitant to rely upon the facts that were provided to me by counsel for the lien claimants, without the benefit of an affidavit, unless confirmed by counsel for Ernst & Young. I wish to give the lien claimants an opportunity to clarify facts with respect to service of the materials upon the lien claimants, as well as their actual knowledge and opportunity to participate in the conduct of this proceeding. As well, I wish to afford Ernst & Young a chance to respond to all issues raised.

11 I have concerns with respect to the process and time lines followed by the receiver. The following are matters of concern to me:

1) It appears that the lien claimants did not have notice of this proceeding in as they were not served with the motion materials, either before Greer, J. or before Cumming, J., They complain that Ernst & Young as trustee and fiduciary has not been representing their interests. At what point did they have formal notice of this proceeding?

2) At the lien holders meeting on Feb 1, 2002 scheduled without notice of this proceeding, what disclosure was made with respect to the conduct of this proceeding? In spite of not being served with the motion materials, did the lien holders obtain informal notice with respect to the conduct of this proceeding?

3) Counsel for the lien claimants indicates that he had difficulty obtaining the pleadings and disclosure with respect to this matter. What are the specific facts?

4) Several of the creditors allege that the time line for the presentation of offers to purchase Crosswinds appears to be very short [i.e. 28 days from the date of the appointment of the trustee when selling a golf course in the dead of winter. The receiver is appointed January 17, 2002 and the deadline for receipt of offers is February 15, 2002.] What was the rationale for this deadline having regard to all of the parties?

5) Who comprised the list of potential purchasers, and what criteria were used? How was a local person with a prior history in the golf course industry missed as a potential purchaser?

6) Is there any response to the affidavit of Mr. Grant, particularly paragraphs 3 to 5? Were there other potential purchasers that expressed an interest in the property in or around February or March, 2002, but were told that it was too late? If so did the receiver keep a list of those individuals?

7) When was the appraisal or opinion of value requested? Did the receiver tell those at the meeting of lien claimants that there would be no appraisal?

8) I request a copy of the motion material before Herold, J. both to allow me to have the entire factual background, and as well to respond to the request of Ernst & Young to provide directions with respect to their role as trustee pursuant to the *Construction Lien Act* in light of the order of Herold, J.

9) Counsel for the lien claimants suggest that different factors and considerations apply when the receiver/manager is also appointed as trustee for lien claimants pursuant to the *Construction Lien Act*. This potential argument was suggested simply as a bald allegation. Particulars of this argument, if it is being advanced would be appreciated.

10) Ernst & Yonge request that I order vacant possession of two residential premises on the Crosswinds property. Former employees and shareholders are presently living in the premises with their families. Proceedings have been initiated with respect to these matters before the Ontario Rental Housing Tribunal. No authority was provided that it would be appropriate for this court to intervene, given the proceedings that have been instituted in the forum

designated to deal with residential tenancies. In my view the motion material before Greer, J. and paragraph 20 of her order do not address this issue.

The Law

12 This motion raises important questions of competing principles with respect to the appointment of a receiver/manager and trustee.

13 The oft quoted decision *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) outlines the need for deference by the court for the receiver's decisions to safeguard the integrity and fairness of the bidding process adopted by the receiver. The nightmare of courtroom auctions and commercial chaos must be avoided. Gallighan J.J.A. adopts the principles outlined in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at page 6 with respect to the duties of the court when reviewing a receiver's decision:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

14 The law is clear that so long as the receiver meets the criterion confirmed by Gallighan, J.J.A. that offers received late in the day, after the method stipulated by the receiver has been followed, are generally to be discouraged. I refer to *Selkirk, Re* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) by McRae, J. at page 6:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. 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. [emphasis added]

15 Certainty, credibility and predictability are required to ensure that negotiations conducted with receiver/trustees can be relied upon and adhered to without undue interference from the court. There must at times be rigidity in the application of the approach taken by the receiver to protect the integrity of the process. the counterpoint to this deference to the decisions made by the receiver, is the requirement that the procedures adopted by the receiver must be commercially reasonable and fair from the perspective of potential purchasers, creditors and debtors alike. The procedures must be both fair and reasonable, and be seen to be fair and reasonable by all those participating in the process. It must not be lightly forgotten that the court appointed receiver stands as an officer of the court, and owes fiduciary duties to all parties, and all classes of creditors see: *Ostrander v. Niagara Helicopters Ltd.* (1973), 40 D.L.R. (3d) 161 (Ont. H.C.).

16 Notice of the proceedings is in my view a fundamental prerequisite to ensure that participants have an opportunity to satisfy themselves as to the fairness and impartiality of the process. Objections may be made to the court to an approach taken by the receiver before those steps become written in stone. If participants chose not to participate and have been given an opportunity to be heard, they cannot later complain about the fairness or reasonableness of the procedures.

17 The lien claimants take the position that until this motion, they have not had an opportunity to have their concerns addressed.

Preliminary Conclusions

18 At this point in time, based upon the material before me I am not prepared to approve the proposed sale of Crosswinds in accordance with the First Offer, having regard to the criteria outlined in the four-part test adopted in *Soundair Corp.*. I have serious concerns with respect to whether sufficient efforts have been made by the receiver to market Crosswinds. Of particular concern was the 28-day time limit for the sale of a golf course in the middle of winter. The significantly larger Second Offer may be an indication that the price in the first offer, on its face is improvident. The decision of *Toronto Dominion Bank v. Eastern Gypsum Inc.* (1992), 129 N.B.R. (2d) 91 (N.B. Q.B.) provides helpful guidance on what constitutes improvidence. As well, the appraisal contemplates an offer in the range of the Second Offer, rather than the first offer. As well, I have concerns as to whether the interests of all creditors have been adequately protected given the absence of notice of the proceedings, coupled with the very short time limits imposed.

19 In light of the time sensitive aspect of this motion, I request that counsel appear before me at 9:30 on April 10, 2002 in courtroom 802 at 393 University Ave. to determine whether counsel wish to file further materials, and to establish a timetable.. If counsel do not wish to file further materials, then I accept as correct the facts that have been provided by counsel for the lien claimants, as outlined in this endorsement. It follows that I would dismiss the receiver's motion for approval, and will meet with counsel to establish a mechanism and timetable to establish the highest and best price for Crosswinds. It is important to ensure that all potential purchasers are on an equal footing, with access to equal information, including the material on this motion which was shared with some, but not all potential purchasers.

Order accordingly.

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