SUPREME COURT OF NOVA SCOTIA
Citation: Bank of Montreal v. Sportsclick Inc., 2010 NSSC 305

Date: 20100608
Docket: Hfx No. 314220
Registry: Halifax

Between:

Bank of Montreal

Plaintiff

and

Sportsclick Inc.

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: May 27 and 28, 2010

Written Decision: August 5, 2010

Counsel: Benjamin Durnford and Stephen Kingston, on behalf of the Plaintiff
Christopher Robinson, on behalf of the Defendant

By the Court:

[1] Ernst & Young Inc. (hereinafter the "Receiver") is the Court appointed Receiver of the property and assets of the defendant, Sportsclick Inc. (hereinafter "Sportsclick").

[2] The Receiver seeks approval of the proposed sale of shares of a company called Kel Bel Inc. (hereinafter "Kel Bel") to one Mr. John Yakopcic. All of Kel Bel's shares are currently owned by Sportsclick. The sale of the shares was conducted by private tender subject to Court approval.

[3] In an earlier ruling the Court refused to grant intervenor status to Pure Sports Inc. (hereinafter "Pure Sports"). Pure Sports was the unsuccessful bidder in the private tender process that resulted in the sale of Kel Bel's shares to Mr. Yakopcic.

[4] Mr. Jack Ross is an officer of Pure Sports. He is also the President and CEO, and a Director of Sportsclick. In this latter capacity he was permitted to present evidence and to have counsel make representations on behalf of Sportsclick.

[5] In the course of giving my ruling I indicated that the fundamental purpose of the sale approval motion is "... to consider the best interests of the parties with a direct interest..." (reference **Skyepharma PLC** v. **Hyal Pharmaceuticals Corp.** 47 O.R. (3rd) 234; [2000] O.J. No. 467 (Ont. C.A.))

[6] I further indicated that, insofar as the examination of the sale process focuses on the integrity of that process, the inquiry may incidentally address the fairness of the process to prospective purchasers. It must not, however, be used for the purpose of protecting or advancing the potential economic advantage of a bidder such as Pure Sports.

[7] In the case of **Royal Bank of Canada** v. **Soundair Corp.**, [1991] O.J. No. 1137; 83 D.L.R. (4th) 76 (Ont. C.A.), Calligan, J.A., in writing for the majority wrote this at para. 16;

> ¶16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:
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> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
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> 2. It should consider the interests of all parties.
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> 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.

[8] Justice Galligan also adopted what was said by MacDonald, J.A., of the Nova Scotia Court of Appeal in the case of **Cameron** v. **Bank of Nova Scotia** (1981), 45 N.S.R. (2d) 303 at p. 314:

> 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.

[9] Like Justice Galligan I, too, adopt as correct these two statements describing the role and duties of a court when deciding whether a Receiver who has sold property acted properly.

[10] Sportsclick's position is that the process used by the Receiver to try and sell the shares of Kel Bel was flawed and unfair. In particular, it was suggested that the invited Private Tender bidders (which included Mr. Ross, Mr. Yakopcic (and/or any company they represent) as well as all secured creditors of Sportsclick with interests in the Kel Bel shares junior to that of the Bank of Montreal) were not placed on a level playing field.

[11] The Receiver's letter inviting potential purchasers to make a bid on the shares was dated 29 March, 2010. The letter makes it clear that an interested party must submit their "...sealed bid by no later than 5:00 p.m. AST on Friday, 9 April 2010 containing your best offer." There were a number of terms and conditions included in the letter and in an attached Schedule "A".

[12] The Receiver reserved the right "to accept any one of the bids received, or if none of the bids received is deemed worthy of acceptance, no bid."

[13] The letter also stated that "Any sale of the Kel Bel Shares would be conditional upon Court approval, ..."

[14] In written submissions filed by counsel for Sportsclick the following overview was presented:

> It is the position of the Defendant that the two bidders who participated in the Private Tender initiated by Ernst and Young (the "Receiver"), did not enter the process on "equal footing" nor were they participating on a "level playing field". On the contrary, due to the actions of the Receiver - unintentional as they may well have been - Yakopcic was left in a position of considerable advantage over pure Sports as they both entered the Private Tender: Yakopcic knew that $17,500 USD had not been accepted by the Receiver; whereas Pure Sports knew only that $4,000 CDN was not a large enough bid. The Receiver was not transparent in its disclosure to the participants with respect to the pretender offers it had considered and rejected. The Receiver allowed Yakopcic to remain in the advantageous position of knowing that its bid needed to exceed $17,500, whereas Pure Sports knew only that it must bid higher than $4,000.

[15] The defendant argues that the Receiver's failure to disclose the amount of the previous bids amounted to misinformation which resulted in a "fixed" or "rigged" bidding process. The rhetoric is toned down a bit by adding "unintentional as that conduct may have been."

[16] The Defendant further submits "that the lack of a level playing field crated by the Receiver deprived the Defendant of a truly competitive tender process which produced an artificial "high-bid" and resulted in less revenue to the Receiver and a lower return for the defendant."

[17] In continuing the analogy to a sporting event, Defendant's counsel wrote: "To not provide potential bidders with the knowledge of what 'ballpark' they ought to be in, is to confer an unfair advantage on that high-private-offer who alone – and to the exclusion of all other bidders – knows the address of the ballpark."

[18] Before getting into the duties of a Court appointed Receiver and the arguments advanced by counsel on its behalf I will summarize the process leading up to the sale of Kel Bel's shares by private tender. I will borrow heavily from the brief submitted by counsel for the Receiver which I believe accurately reflects the information contained in the Fourth Affidavit of George Kinsman, Senior Vice-President of Ernst & Young Inc. which I accept. It states:

> On August 12, 2009 the Receiver sent to all registered creditors, guarantors, stakeholders and persons interested in Sportsclick, a Notice of Disposition pursuant to Section 60 of the *Personal Property Security Act* with respect to certain assets of Sportsclick, including the Kel Bel Shares, which were therein described as follows:

> "All of the shares owned by Sportsclick Inc. in a company known as KelBel Inc., a private U.S. company based in Pennsylvania which is the owner of the patents and trademarks for Aqua Caddy.

On August 12, 2009 the Receiver proceeded with a public tender of certain assets of Sportsclick, including the Kel Bel Shares, and advertised the sale in the Chronicle Herald, providing any interested purchaser with a noon September 9, 2009 deadline for the submission of offers.

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The tender process with respect to the Kel Bel Shares closed at noon on September 9, 2009, but only three bids had been received, none of which exceeded $1,500.

In keeping with the terms and conditions of the public tender process established by the Receiver, pursuant to which the Receiver was free to reject any bid which was not deemed to be acceptable and was not obligated to accept just any bid, the Receiver did not deem any of these token bids to be acceptable, believing that a more favourable price could be obtained by other means. Letters were sent by the Receiver to the three bidders, indicating that the Kel Bel Shares remained available, however the Receiver was not willing to sell the Kel Bel Shares for nominal consideration.

No public tender bidder other than Mr. Yakopcic expressed to the Receiver any subsequent interest in the Kel Bel Shares.

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After the public tender process closed, the Receiver entertained offers from each of Mr. Yakopcic and Jack Ross (by way of Pure Sports Inc., a company he represents), which individuals had emerged as the most interested parties in the asset and also the most logical candidates to submit a favourable bid. These individuals were also in the best position to appreciate the value of the Kel Bel Shares and set the market.

Between November 2009 and February 2010, the Receiver received several offers from each of Mr. Yakopcic and Mr. Ross, however none were deemed worthy of acceptance.....

....the Receiver initiated a private tender process in March 2010.

> Specifically, the Receiver prepared an invitation for offers and information package respecting the Kel Bel Shares and circulated it to Mr. Ross, Mr. Yakopcic, and Sportsclick's secured creditors, Green Swan Capital Corp., Gregory Smith, 900914 Alberta Inc. and Amerisource Funding Inc., on or about March 29, 2010. The invitation for offers stipulated a sealed bud submission deadline of 5:00 p.m. AST on Friday April 9, 2010, and provided that the acceptance of any bid would be conditional upon the approval of this Honourable Court being obtained in an expeditious manner after the bids were opened and considered, and the Receiver's acceptance in principle had been communicated to the successful proponent.
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> Along with the invitation for bids, the aforementioned parties were also provided with a copy of Kel Bel's 2008 U.S. Tax Return and related contents: Kel Bel's Balance Sheet and Loss Statement to December 31, 2008; and a November 30, 2009 Licensing and Distribution Agreement which had been entered into between Kel Bel and Pure Brands Management Inc., and associated Director's Resolution. Bidders were advised that the Kel Bel Shares were being sold on an "*as is, where is*" basis, and that the asset was subject to the aforementioned Licensing and Distribution Agreement.
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> As of 5:00 p.m. on April 9, 2910, only two bids had been delivered to the Receiver, one from Mr. Yakopcic, and one from Pure Sports Inc., a company represented by Mr. Ross. Both bids were unconditional, and the bids were as follows:
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> Mr. Yakopcic: U.S.$ 20,000
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> Pure Sports Inc.: CDN$ 16,250
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> On April 14, 2010 the Receiver communicated provisional acceptance to Mr. Yakopcic, based on his higher bid, subject to the approval of this Honourable Court. Also on April 14, 2010, Mr. Ross was informed by the Receiver that the competing bid he had submitted on behalf of Pure Sports Inc. would not be accepted.

[19] Earlier I accepted what Justice Galligan had adopted in **Royal Bank of Canada** v. **Soundair Corp.**, *supra* describing the role and duties of a court when deciding whether a receiver has acted properly in selling assets.

[20] Justice Galligan also had this to say at para. 21:

> When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court

> should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust v. Rosenberg*, supra, at p. 112 O.R., p. 551 D.L.R.:
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> > 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.
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> > 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 upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[21] In its 29 March 2010 correspondence to potential purchasers, the Receiver clearly indicated at para. 3:

> From September 2009 forward, the Receiver has received various unsolicited offers from Mr. Ross and Mr. Yacopcic to purchase the Receiver's interest in the KelBel Shares; however no offer has thus far been accepted. Since publicly offering the asset for sale, the Receiver has received continuing interest in the subject asset from no parties other than Mr. Ross and Mr. Yacopcic, and/or companies they represent.

[22] The letter encouraged interested purchasers to make "your best offer." (Reference to para. 5, Condition # 1)

[23] On page 2 of the letter, prior to making reference to the materials pertaining to Kel Bel that were being provided to all potential purchasers the Receiver stated this at para. 2:

> The substantive description of the KelBel Shares has not changed, and the condition and operational details of KelBel since that time are, or should be known to the recipients of this letter.

[24] This was particularly true for Mr. Yakopcic, the original founder of the company and creator of the patented golf product known as Aqua Caddy. It was equally true for Mr. Ross – the Vice-President of Pure Sports and President and CEO of Sportsclick. As the guiding mind of Sportsclick, Mr. Ross arranged the purchase of Kel Bel's shares by Sportsclick only about a year or so before.

[25] It was also Mr. Ross on behalf of the Kel Bel who granted "exclusive world wide or global rights without geographical restriction or channel of distribution" to Pure Brands Management Inc., another company owned and controlled by him. This licensing and distribution agreement was dated the 30th day of November, 2009.

[26] The bottom line is that the two bidders who ultimately, and presumably, made their best final offer knew better than anyone else the value of the shares.

[27] Despite what Sportsclick now complains of, the Receiver treated everyone who was invited to participate in the private tender equally. They each received the same information package. As mentioned previously, the information package clearly indicated that it was only Mr. Ross and Mr. Yakopcic that had made various unsolicited offers to purchase the Kel Bel shares after the Public Tender process failed to attract any suitable offers.

[28] On a number of occasions Mr. Ross or his legal counsel attempted to elicit additional information from the Receiver in an effort to try and determine the level of offer the Receiver might entertain. The Receiver wisely did not offer any such information for fear that it might jeopardize the precess. He was content to allow the market to set the price.

[29] It is interesting to note that despite knowing that Mr. Yakopcic had made offers to purchase the shares, a fact that was disclosed to all potential purchasers, Mr. Ross did not insist on having the amount of the previous offers included with the disclosure. It was only after, when the full details of the various unsolicited offers were disclosed as part of the package of documents that were filed seeking Court approval of the sale, that a complaint arose.

[30] The Receiver was under no obligation to disclose the details of the prior bid history. To have done otherwise would have completely altered the process from a private tender to an auction where prospective purchasers, if they were at all interested, could have tried to out-bid one another.

[31] There has been no evidence presented to satisfy the Court that this would have resulted in a higher selling price for the shares. Indeed there is only speculation which could go either way.

[32] Contrary to what the defendant suggests, the process utilized by the Receiver did not result in any unfairness to any of the potential purchasers who received the invitation to participate. Each prospective purchaser was provided with the same information which put everyone on a level playing field.

[33] The Receiver set the ground rules for anyone wishing to enter the competition. The ground rules were designed to be fair to all and as long as they were consistently applied no one should be heard to complain.

[34] I find that the Receiver's efforts produced a result that was fair. It took into consideration the interests of all parties. The efficacy and integrity of the process cannot be challenged.

[35] Therefore, the Receiver's motion to approve the sale of shares of Kel Bel Inc. to Mr. John Yakopcic is approved.

[36] After hearing from both counsel on the issue of costs, the Court orders costs of $500.00 payable by Pure Sports Inc. to the Receiver within 30 days of the date of this decision.

Justice Glen G. McDougall