SUPREME COURT OF NOVA SCOTIA
Citation: *Cushman Estate v. MacEwen*, 2018 NSSC 320

Date: 20181213
Docket: Hfx. No. 471923
Registry: Halifax

Between:

Herb Cohen, Conservator of the Estate and Person of Jocelyn S. Cushman

Applicant

And

Jocelyn S. Cushman

Respondent

And

Peter MacEwen, Elizabeth Rhinelander, and
Erla Laurie

Intervenors

LIBRARY HEADING

Judge: The Honourable Justice Jeffrey R. Hunt
Heard: October 15, 2018, in Halifax, Nova Scotia

Written Decision: December 13, 2018

Subject: Trustees; Sales by; Fiduciary obligations surrounding sale.

Summary: Trustee/Conservator sought Court approval for the sales of two lots of land.

Issues: Whether Trustee/Conservator had complied with all legal duties surrounding sale process.

Result: Trustee/Conservator was found to have acted within his discretion and in accordance with his duties. Sales approved.

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DECISION

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Counsel: Timothy Matthews, Q.C., Solicitor for the Applicant, Herb Cohen

Timothy Hill, Solicitor for the Intervenor, Erla Laura

Richard Norman, Solicitor for the Intervenors, Peter MacEwen and Elizabeth Rhinelander

By the Court:

INTRODUCTION

[1] Courts expect Trustees to realize the best price reasonably available for estate assets. How ought the Court treat a situation where a Trustee, in good faith, accepts the best offer on an asset but, before Court approval is granted, one of the unsuccessful bidders makes a new and apparently higher offer?

[2] Does it matter if the late offer is made "on the Courthouse steps" in an apparent effort to edge out the pending and accepted offer?

[3] What is the correct balance between achieving proper value for Estate assets and maintaining the integrity and orderliness of the process?

[4] The Motion before the Court is advanced by the Trustee for the Estate of Jocelyn Cushman. He seeks Court approval for two sales of real property owned by the Estate:

1. Sale to Erla Laurie ("Laurie") of 317 Stonehurst Road, Lunenburg County, PID No. 60173143 ("317 or 317 Stonehurst"); and
2. Sale to Peter Moser ("Moser") of Lot 2A, Stonehurst Road, Lunenburg County, PID No. 60173168 ("Lot 2A").

[5] Peter MacEwan and Elizabeth Rhinelander ("MacEwan-Rhinelander") have intervened in this matter to oppose the approvals. They say the Trustee ought to be directed to sell the properties to them instead. Laurie also has intervenor status. She supports the position of the Trustee and seeks Court approval of the Agreements of Purchase and Sale with herself and Moser.

Facts

[6] The Court has had the benefit of reviewing a series of affidavits. No party sought to cross-examine any affiant. Accordingly, the Court has proceeded on the basis of the written evidence and arguments.

[7] Many factual and timing issues were not truly in dispute between the parties. There is an issue respecting whether the original MacEwan-Rhinelander offer was put to the Trustee in a timely fashion. The contending parties certainly seek to have the Court draw differing conclusions from the evidence and law. All counsel vigorously and effectively put their arguments on these points.

[8] I do not intend to repeat the contents of the filed affidavits. I will make reference to the central elements and core items of relevance. I have, however, reviewed and weighed all the filings even if I do not make specific reference in these reasons to every individual argument or piece of evidence.

[9] Herb Cohen is a professional fiduciary. He was appointed Conservator of the person and estate of Jocelyn S. Cushman by the Superior Court of California on June 29, 2017. The Nova Scotia Supreme Court subsequently accepted this appointment and declared it to be the same force and effect as a Representation Order under the ***Adult Capacity and Decision-making Act***, S.N.S. 2017, chpt. 4.

[10] As a function of administering the Estate, Cohen listed for sale certain real estate owned by Cushman in Lunenburg County, Nova Scotia. There were a total of four parcels. Two of these are at issue in this proceeding. The properties at issue in this proceeding were each subject to an appraisal and then listed pursuant to a Multiple Listing Agreement through a licensed agent with an active practice in Southwest Nova Scotia. This agent was Patricia Price ("Price").

[11] A complicating factor is that when the Trustee eventually choose between competing offers on 317 Stonehurst, the successful bidder was Erla Laurie, the sister of Price. The MacEwan-Rhinelanders question the legitimacy of these dealings and suggest a degree of collusion. The nature of the family relationship means that the transaction ought to be carefully assessed. If the

process was tainted this could certainly result in a decision to reject the proposed sale.

[12] On March 22, 2018 Cohen signed listing agreements with Patricia Price of KW Select Realty. The properties were desirable parcels. Word spread quickly. Erla Laurie states that she heard via a friend, Chris Oxner, that properties in Stonehurst had gone on the market. Shortly thereafter she connected the listing to her sister.

[13] 319 Stonehurst (not the subject of this Motion) was the first parcel viewed by Laurie. This took place on March 26, 2018. Laurie went on to make an offer which Price forwarded to the Trustee. Price also advised the Trustee that another party would be viewing 319 the following day. Price agreed that in this same time frame she explored with Laurie whether she would be interested in 317 Stonehurst as well. Laurie was interested and the two agreed to a viewing on March 27. This viewing resulted in Laurie having Price prepare an offer at $221,700.00 with no conditions and a closing date of May 9, 2018.

[14] Also, on March 28, 2018 Price heard from the MacEwen-Rhinelanders for the first time. Mr. MacEwen left Price a voicemail in which he indicated he had some questions about the Stonehurst properties. Price returned his call and left

a voice mail asking that he e-mail his inquiry as she was going to be absent from the office in the afternoon. In the course of this same day, March 28, a different agent did a further showing of 317. This resulted in an offer (the "Bamford offer") which Price forwarded to the Trustee.

[15] Price advised both Laurie and MacEwen that there were now other offers on the properties. On March 29, 2018 MacEwen and Price spoke mid morning by telephone. He asked for, and received from her via email, real estate offer forms. The MacEwan-Rhinelanders say they detected what they took to be some lack of enthusiasm from Price. By mid-day on March 29th they had retained their own agent who made contact with Price. An offer was subsequently presented.

[16] Later, on that same day, Laurie contacted Price and indicated she was considering increasing her offer on 317. Price told her there was a competing offer on 319. The evidence of both Laurie and Price is that no details of the competing offer or offers were discussed. Laurie did change her offer for 317, increasing the price from $221,700.00 to $236,111.00. The offer on 319 was also increased from $215,000.00 to $226,111.00.

[17] On March 29 at 5:01 p.m. Price forwarded the Trustee a spreadsheet setting out the then existing offers (and conditions if any) on the various properties. These included the Bamford offer, the MacEwan-Rhinelander and Laurie offers and others. Where an offer contained conditions, these were noted.

[18] The Trustee clearly weighed the existence, or absence, of conditions in making his decision. Reference to this is found throughout his written material. The Laurie offers were free of inspection or financing conditions. For comparison purposes, the Bamford offer on 317 Stonehurst had a financing term and the MacEwan-Rhinelander offer on 317 Stonehurst/Lot 2A had an inspection term as it pertained to 317.

[19] The Court has reviewed the spreadsheet in detail as it was shared with the Trustee at a critical point in time. The Trustee accepted Laurie's unconditional offer on 319 and 317 Stonehurst. The purchase of 319 was not challenged and that deal has closed.

[20] When the Trustee first sought Court approval for the sale of 317 this was challenged by the MacEwen-Rhinelanders. A hearing date was set for October 15, 2018. Events continued to unfold, however. On September 6, 2018 the Trustee accepted an offer on Lot 2A from Peter Moser. This lot had been

appraised at $90,000.00. Moser's offer of $95,000.00 was accepted and Court approval for this sale was also sought.

[21] This development meant that the combined accepted sales figures for 317 Stonehurst and Lot 2A was in excess of the rejected offer from MacEwen-Rhinelander. On September 27, 2018 they responded with a combined revised offer for both parcels at $350,000.00. The total amount of the accepted offers for which the Trustee seeks approval is $331,111.00.

[22] In summary then:

317 Stonehurst

317 was appraised by Kempton appraisals at $195,000.00. The tax assessment was $184,900.00. The offer accepted by the Trustee was from Erla Laurie in the amount of $236,111.00.

2A Stonehurst

2A was appraised by Kempton Appraisals at $90,000.00. The tax assessment was $105,000.00. The offer accepted by the Trustee was from Peter Moser in the amount of $95,000.00

Position of the Trustee

[23] The Trustee takes the position that he adhered to a commercially reasonable process. He obtained professional appraisals and was guided by these valuations in assessing the reasonableness of offers presented to him. The properties were exposed to the market. He submits that he entered into the Agreements of Purchase and Sale in good faith. He accepted what he reasonably concluded was the best overall offers presented to him.

[24] These were unconditional offers which would have resulted in smooth and timely sales with no risk of hold-up due to financing or inspection concerns. He cautions that the endorsement of the process followed by the MacEwan-Rhinelanders would result in an untenable situation.

Position of Erla Laurie

[25] Laurie submits that the Trustee acted reasonably and accepted the best available offers from those presented. The accepted offer from Laurie had no conditions and was for more than the appraised value. It was the best available offer at the time the Trustee was weighing offers. It was a package sale that allowed the Trustee to sell the two most valuable parcels (317 and 319 Stonehurst) together in one unconditional transaction.

[26] Laurie says that the late revision to the MacEwen-Rhinelander offer is a tactic that should not be countenanced.

Position of MacEwen-Rhinelander

[27] The MacEwen-Rhinelanders submit that the sales to Laurie and Moser ought not be approved. While they acknowledge the competing offers on 317 and Lot 2A may initially have been higher, they have now increased their offer. They suggest that the relationship between the listing agent and Erla Laurie gave Laurie an inside edge in what amounted to an irregular process. They seek an Order directing the acceptance of their revised offer.

Issues

1. Were all the existing offers fairly presented to the Trustee? Did the relationship between the listing agent and Erla Laurie result in a "tipping of the scale" which undermined the fairness of the process?
2. Did the Trustee appear to make a reasoned choice among the presented offers?
3. How should the Court treat the revision to the position of the MacEwan-Rhinelanders?

Law

[28] In ***Kidd Family Trust v. Kidd***, 2005 NSSC 209, Justice Moir undertook an analysis of the obligations on a Trustee who has the responsibility to sell estate assets:

> [20] To say that trustees are obligated to get the best price reasonably obtainable is not to say that their judgment is reviewable by some easy measure. As stated in ***Buttler* v. *Saunders***, [1950] 2 All E.R. 193, quoted at p. 90 of ***Re Rudderham*** ". . . trustees have such a discretion in the matter as will allow them to act with proper prudence." The second case to which Mr. Wright referred was ***Re Nicholson Estate*** (2000), 35 E.T.R. (2d) 126 (O.S.C.J.). Para. 8 and part of para. 9 read:
>
> > The standard of care and diligence required of a trustee in administering a trust is that of a person of ordinary prudence in managing their own affairs**.** ***Learoyd* v. *Whiteley*** (1887), 12 App. Cas. 727 (U.K. H.L.). The Trustee is held to a reasonable standard of care, not perfection. Nor is the Trustee required to be omniscient.
> >
> > I am not persuaded by the argument on behalf of the objectors that every sale of property in an estate must be an open sale in the sense of advertising and giving all member[s] of the public an opportunity to purchase every piece of property. What is required is a fair price to be obtained having regard to the market value. When selling homes, farms etc. it would usually require listing the property. That is not an absolute rule. Where a fair market price can be obtained without listings there is no impediment to private sales….
>
> [21] Finally, Mr. Wright referred me to one of the decisions coming out of the litigation over the estate of the colourful Harold Ballard. Para. 38 to 72 of ***Ontario* v. *Ballard Estates*** (1994), 5 E.T.R. (2d) 212 (OCJ) are headed "Fiduciary Obligation to Obtain Fair Market Value". At para. 45 Justice Lederman stated:
>
> > The executors, from beginning to end, are fiduciaries who owe an obligation to the beneficiaries of the estate to achieve for them the maximization of the value of the shares. They must act "prudently" (para. 46).
>
> …

> [22] I take the following from these authorities. The trustees overarching obligation was to market the trust property with the prudence they would reasonably be expected to engage when managing their own affairs. That leads to an obligation to get the best price reasonably obtainable, but the trustees had discretion to act with proper prudence in selecting a mode of marketing and in conducting that effort through to conclusion. On the other hand, they could not determine they had gotten an offer for the best price reasonably obtainable if they had not acquired sufficient information. They could not make that determination in a vacuum.

[29] Interestingly in the ***Kidd Family Trust*** case, Justice Moir approved of the Trustee's decision to sell without having engaged in a formal listing and sale process. He deferred to the discretion of the Trustee, noting:

> [23] In this case, the trustees chose to accept the third offer of the four children rather than to take further measures to market the shares. In my assessment, the trustees had well equipped themselves to make the determination that acceptance of the offer was better than further marketing. They had chosen not to "list" with Price Waterhouse Coopers because of the expense and they had chosen to limit themselves to potential purchasers who had expressed interest because of beating the bushes and because of the publicity generated in the community by Mr. Kidd's death. …

[30] Counsel to the MacEwan-Rhinelanders in his brief cites a number of cases, all of which have been reviewed. One of these is the Nova Scotia Court of Appeal decision in ***Nova Scotia Trust Co. v. Rudderham*** (1970), 3 N.S.R.(2nd) 108 (C.A.).

[31] The decision addresses a Trustee's obligation to seek the best reasonably obtainable price for assets. Of relevance to the present analysis, however, is the Court's reference to instances where a Trustee may receive a late offer.

[32] Cooper, J.A. writing for the Court made reference to the English case of ***Buttle v. Saunders*** (1950), 2 All E.R. 193. In that matter a trustee held property for sale. When negotiations over the sale were at an advanced stage another party made an offer to buy at a higher price. The trustee considered himself bound to complete the transaction with the original purchaser and, therefore, refused what could have amounted to a higher offer. Cooper, J.A. quoted various portions of the judgement included the following [para 22]:

> Wynn-Parry, J. went on to say at p. 195:
>
> > It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resale from the existing offer.
> >
> > For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: 'A bird in the hand is worth two in the bush.'
> >
> > I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts. (emphasis added)

[33] These comments of the Court have direct resonance with our present situation.

[34] Late offer situations, in the context of receiver or trustee in bankruptcy, were considered in the case of ***Parkland Plumbing and Heating Ltd. v. Minaki***, 2005 Carswell Ont. 8022. The Court states as follows:

> [42] This motion, again, deals with the important question of competing principles with regard to the acceptance by a receiver/manager and Trustee of an offer to sell in the face of a late filed offer. I have considered the principles in ***Royal Bank v. Soudair Corp.*** and I understand 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.
>
> As noted by Wilson J. in Toronto-Dominion Bank vs. Crosswinds:
>
> > The law is clear that so long as the receiver meets the criterion confirmed by Galligan J.A. that offers received late in the date, after the method stipulated by the receiver has been followed, are general to be discouraged. I refer to ***Re Selkirk*** (1987), 64 C.B.R. (N.S.) 14 (Ont. S.C.) by McRae J. at p. 142:
> >
> > 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. <u>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.</u> (Emphasis added)

[35] I now intend to address the outstanding issues keeping in mind the caselaw as reviewed.

<u>Did the Actions of Price Skew the Process?</u>

[36] The Court has closely examined the role of Price. The Court could not countenance a situation where the process leading to the Trustee’s acceptance of the successful offers was subverted.

[37] On review of all the evidence the Court concludes that the competing offers were presented to the Trustee at the operative point. The spreadsheet is in evidence and it is compelling. It is evident the Trustee relied upon the information conveyed by the agent in determining what was the best overall package. The Trustee knew of the family relationship between Laurie and Price. He was advised of this fact early on in the process.

[38] I have considered the suggestion that Price must have shared information in a way that was illegitimate. I do not find that this has been demonstrated on a balance of probabilities. It is evident that Price told the various persons involved that there were competing offers. This in itself could cause competing parties to consider revising their offer.

[39] I accept that to the MacEwan-Rhinelanders the process may have appeared rushed and unsatisfactory. They had the disadvantage as well of not being on the ground here in Nova Scotia. They were residents of the United States. No doubt this complicated matters. It is entirely understandable why they included an inspection clause in their offer. Laurie did not include such a term. Neither the MacEwan-Rhinelanders nor Laurie included a financing term.

[40] I cannot conclude on the evidence before me that the process was fixed. The parties were not cross-examined. The Court must operate with the best evidence it has, which in this case is limited to the written documentation. I would be concluding that two persons who were not cross-examined had both given a directly false position in their affidavits. Where the evidence is clear this could be done. I simply do not have sufficient evidence before me to make that determination, even on a balance of probabilities.

Reasonableness of the Trustee

[41] It is clear that this Trustee valued offers which had fewer or no conditions. While a lack of conditions will not make up for a severe price variation, where the numbers are close, a condition free sale can have obvious attractions and did so in this case. The evidence indicates that the Trustee made references to the weighing of such factors (see for example his email to Price at 6:06 PM on March 29, 2018).

[42] It is interesting to note that a lack of conditions appears to have played a role in the Trustee's decision to select the Laurie bid on 319 Stonehurst (a sale which is not challenged). The competing offer in that case was slightly more than the Laurie offer but contained an inspection term. The record reveals that

the Trustee was nervous about the condition of the seasonal structures on these lots. He clearly did not want to get caught up in issues of inspection and deterioration. This is not an irrational position.

[43] While the conditions may have been usual or minor (and may have been waived in the MacEwan-Rhinelander offer of September) they were nonetheless a factor in the Trustee's weighing process when he was considering offers during the real estate process.

[44] It can also be noted that Laurie was not even seeking a Warranty Deed from the Trustee. In a competitive bidding process, a consideration such as this can be a relevant point of differentiation between relatively similar offers. It might also hold attraction for a Trustee.

[45] In summary, while the relationship between the listing agent and the successful bidder for 317 Stonehurst certainly warranted a close examination, I find that the process, while fast moving, was fair. The existing offers were presented in a comprehensive way. The Trustee used reasonable judgment in reaching the decisions he did. He acted as I would have expected him to had he been selling his own property. He valued cash deals with no financing terms and no inspections. This was reasonable as long as he was not unreasonably

sacrificing the value of the properties in order to achieve these objectives. He did not do so, and his actions were in keeping with his obligations.

[46] I do not doubt that the MacEwen-Rhinelanders genuinely feel the relationship between Laurie and Price worked against them. On careful review, however, the evidence of this is lacking.

Implications of MacEwen-Rhinelander Position

[47] If the process followed by the MacEwan-Rhinelanders was to be adopted the implications would be concerning. Where a sale required Court approval presumably an interested party could skip the hurly-burly of the real estate process and simply wait to see what the Court filings revealed to be the offer they had to beat. They would then appear on the eve of court and edge out those who had gone through the real estate exercise.

[48] As was noted in ***Parkland Plumbing***, supra, this would be an untenable situation. The orderly marketing of properties would be disrupted. Interested parties would not be encouraged to put their best foot forward during the real estate process. Why present your best offer when you can simply wait and see if you can save money by learning through the Court approval process the price

you have to beat? The interests of persons we are trying to protect would not be served by such a situation.

[49] Trustees must be permitted to maximize value and reduce costs by being able to engage in an orderly commercial process which maximizes value. In this case the Trustee took those reasonable and proper steps. The Court has examined the actions of the real estate agent to ensure her relationship to Laurie did not result in a tainted process. The circumstances were unusual, but the process and evaluation criteria were reasonable and the actions of the Trustee were in keeping with his obligations.

[50] To reject these two Agreements of Purchase and Sale and to reopen the process could have unintended consequences. As the Trustee has noted, if the MacEwan-Rhinelanders can revisit their positions then presumably the other parties can seek to do the same. The Court is concerned about the implications of a disorderly process that drags on and ultimately dissipates Estate resources.

[51] If the Court were to reject the presented Agreements of Purchase and Sale and allow a new bidding process a number of unintended consequences could flow.

[52] Consider for instance what would occur if a discouraged Mr. Moser decided at that point to take himself out of the bidding process for whatever reason, perhaps frustration, exhaustion or simply a change of mind. The Court would have inadvertently created a situation where only a single bidder was left for Lot 2A. This could certainly impact any offer to be advanced by a remaining party.

[53] It is evident that any rebidding process would have to offer the parcels as separate lots. The fact that the MacEwan-Rhinelander offer of September is a joint offer on both 317 and 2A is a complicating factor. This issue was touched on in argument. It was unclear how the MacEwen-Rhinelanders would react to a scenario where they could win one parcel but not the other.

[54] Any extension of this process would tend to continue to dissipate Estate resources and require the Estate to maintain the properties further into the winter season. The Estate requires certainty. The less than $19,000.00 difference here could be easily eaten up in costs and expenses which can be brought to a halt.

Conclusion

[55] The sale of 317 Stonehurst Road, Stonehurst North, Lunenburg County, PID 60173143 to Erla Laurie at a sale price of $236,111.00 is hereby approved.

[56] The sale of Lot 2A-2, Stonehurst North, Lunenburg County, PID 60173168 to Johannes Peter Moser at a sale price of $95,000.00 is hereby approved.

[57] The Trustee will file a report on the sales no later than 25 days following the respective closing dates.

[58] Counsel to the Applicant is asked to draft the Order. In the event the parties are unable to reach agreement with respect to costs they may make written submissions to the Court within 30 days.

J.