

SUPREME COURT OF NOVA SCOTIA

Citation: *Business Development Bank v. Devine Brokers & Appraisal Ltd.*,
2013 NSSC 435

Date: 20131220

Docket: Hfx No. 418250

Registry: Halifax

Between:

Business Development Bank of Canada

Applicant

v.

Devine Brokers & Appraisal Ltd.

Respondent

Judge: The Honourable Justice Patrick J. Duncan

Heard: December 10 and 20, 2013, in Halifax, Nova Scotia

Written Decision: January 29, 2014

Counsel: John Stringer Q.C. and Chris Lurette (Articled Clerk), for the
Applicant

Louis D'Entremont, for the Respondent

By the Court:

Introduction

[1] The respondent, Devine Brokers & Appraisals Limited (Devine), is a provincially incorporated company which operated in the marine brokerage industry. It is the registered interest holder in properties situated at 250 Main Street, Yarmouth, NS (PIDs 90196379 and 90298498). (“the property”).

[2] In 2004, Devine received financing from the applicant, Business Development Bank of Canada (BDBC), which was secured by a mortgage on the property in the principal amount of \$250,000. Devine defaulted on its obligations to pay BDBC and on July 9, 2013 a demand for payment and Notice of Intention to Enforce Security was issued to the respondent.

[3] On August 22, 2013 an order was made by Coady J. of this court appointing WBLI Inc. as Receiver of the property, pursuant to section 243 of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3, s. 47(1), and section 43(9) of the **Judicature Act**, RSNS 1989, c. 240. Subsequent to the grant of the Order the Receiver gave notice of its appointment to the property owner and to all creditors with recorded encumbrances.

[4] The Receiver now moves for an order to approve the sale by the Receiver of 250 Main Street, Yarmouth, NS to Vladi Private Islands (Canada) Limited (Purchaser) pursuant to paragraph 3(j)(ii) of the Receivership Order. The Receiver also seeks an order to terminate certain leases held by tenants in the property.

[5] The respondent opposes the motion to approve the sale of the property.

Position of Devine Brokers & Appraisers Ltd.

[6] Devine argues that the Receiver has acted improvidently by employing a method of sale that did not achieve the best price possible and thus does not adequately consider the interest of Devine or of the creditors. The respondent also questions whether the integrity of the process was compromised by the decision of

the Receiver to negotiate with Vladi after the close date for offers on the property, and without notice to other potential bidders of the opportunity to negotiate.

Position of the Receiver, WBLI

[7] The Receiver does not agree with the position advanced by the respondent and has filed two reports and various supporting documents outlining the process leading to the proposed sale to Vladi. I will outline the applicant's position in more detail later in this decision.

Law

[8] In *Royal Bank of Canada v. Soundair Corp.* [1991] O.J. No. 1137, Galligan J.A. set out, at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties are summarized as follows:

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.

Analysis

[9] The respondent bases its opposition on the following, that:

1. the time frame in which offers were to be made was too short having regard to the nature of the property and the economic climate of Yarmouth;
2. the extent of the advertising of the property for sale was too limited geographically and in its frequency;

3. the appraisal relied upon by the Receiver as a benchmark for fair market value was fatally flawed;
4. the Receiver failed to factor in news that gave reason to believe that economic conditions would improve shortly thus enhancing opportunity to obtain a better sale price;
5. in failing to achieve the best possible price the Receiver's recommendation is unfair to the respondent and to subsequent encumbrancers;
6. in negotiating price with Vladi, after the advertised date for offers was closed, the Receiver acted unfairly to other potential purchasers who might have presented a better offer had they known of the opportunity.

The appraisal as a measure of the value of the property

[10] In January 2008, the property was appraised for \$582,000. Since that time, the area has become economically depressed. In part this has been attributed to the shutdown of the Yarmouth/Maine ferry service.

[11] Altus Group Ltd. was retained by the Receiver to appraise the property. That appraisal, dated in May 2013, set the fair market value of the property at \$270,000, and if sold in a forced sale then at \$200,000. The appraisal noted that the loss of the ferry service had an economic impact in the area and on property prices. The appraisal used the Direct Comparison and Income Approaches but did not use the Cost Approach.

[12] The respondent provided a report from P.G. Comeau, a qualified appraiser working out of Shelburne. He is critical of the Altus report and of any reliance upon its conclusions, saying that:

1. Altus' conclusions drawn from the Direct Comparison Approach for valuation were undermined by the lack of current sales data for comparable properties;

2. Altus should have, but did not, use a Cost Approach to assess value which he says is more reliable where there is a lack of sales data; and
3. A listing period of a further 6 to 9 months was optimal in view of the proximity of the property to the ferry and the recent announcement that the ferry would be reinstated in May 2014, a factor that was not known to Altus at the time of the appraisal.

[13] The Receiver submits that the appraisal is not determinative of his decision, but is a tool, among others, to assess the value of the property. Ultimately, the market place sets the value and in this case the only offer received was for \$210,000, which is consistent with the range for value arrived at by Altus.

[14] I agree with the Receiver's view, and add that when a property is put on the market in a forced sale it is not unreasonable to expect that the marketplace may see an opportunity to get a bargain and pressure the price down. Altus' report allowed 25% for this factor and the offer received is consistent with that assessment.

[15] A further factor that impacts on sale price where, as here, the property is an income property, is the value and length of leases already in place. In this case the primary tenant has a lease until 2017 which a prospective purchaser has to value as part of their overall assessment of the possible return from investment. There are other leases which I am being asked to terminate as they are not economically reasonable. Potential buyers have to make a business calculation as to the value of the income stream in whether to offer on the property, and if so at what price. Ultimately the Receiver has to assess whether the resulting offer is commercially reasonable.

[16] Similarly, it is a matter for the Receiver to weigh as to whether Altus' failure to use a Cost Approach should influence his assessment of the reasonableness of the offer received. Mr. Comeau suggests it would be valuable to employ this approach, but without indicating how it might change the Altus conclusions. I note that the Cost Approach was not employed by Nova West Appraisals in 2008 which could be an indicator that it is not a useful tool in relation to this property.

[17] Mr. Comeau has not conducted an appraisal. His letter, while instructive, does not tell the Receiver or the court what range of values should be seen as reasonable. Most importantly he does not say that the price offered by Vladi is a commercially unreasonable one given the timing and circumstances of sale. His key point is that the property needs more exposure to maximize its potential sale price, a point I will address separately.

[18] Overall I am not satisfied that the alleged flaws in the appraisal give cause to reject the Receiver's recommendation.

The sale process

[19] There remains the question of whether the process of sale that was employed by the Receiver fulfilled the duties set out in *Soundair*. The complaint of the respondent is that the marketplace did not have a fair opportunity to speak to the true value of the property, to the detriment of the respondent and subsequent encumbrancers. Mr. Comeau's opinion is offered as support for this view.

[20] The Receiver advertised the property in the local Yarmouth newspaper and in the Halifax Chronicle Herald Provincial edition. The ads required persons interested in the property to contact the Receiver for an information package. The offers were open to September 25, 2013.

[21] Fourteen parties requested the package, the last inquiry coming one week before the close for submission of offers. The Information package was detailed and appropriate for its purposes.

[22] Vladi was the only one to present an offer by the close date.

[23] By offering the property in this way the Receiver avoided the commissions that would be paid to a real estate broker, which the applicant reminds me is a relevant fact to consider in assessing the Vladi offer since the cost of disposition will not be reduced by such a cost of sale.

[24] I am satisfied that the decision to advertise the property in the newspapers was reasonable. It generated fairly substantial interest in a rural property during a depressed economy and did so in a very short time frame. It is this latter point that

is the greater concern, that is: Was it too short of a period to achieve a commercially reasonable sale price?

[25] The respondent says that a listing time of 6 to 9 months is necessary to achieve the best value for this property. If that is what is necessary then the question is not whether the offer period was too short, but whether it was a commercially reasonable decision to sell now at the price offered or wait for 6 to 9 months in hopes of getting a greater net proceeds of sale.

[26] The evidence to support a conclusion that a sufficiently better price can be achieved is largely speculative. News of the reinstatement of a Yarmouth to Maine ferry had been announced before the close of the time in which to make offers. It would require some risk taking for a prospective purchaser to assume that this renewed service would kick-start the economy of the area and do so within a matter of months. There is no evidence to suggest that prospective purchasers have come forward to express an interest in the property in the over 2 months since the offer period closed. Given that the sale to Vladi had not been approved as yet, it might be reasonable to think that if there was such interest it might have been brought to the attention of the Receiver.

[27] The Altus appraisal included a number of listings of commercial property in close proximity to the subject property and hence to the ferry terminal. The hoped for economic recovery needs to create a demand for similar properties to generate sales; and it also needs to trigger an escalation of prices for these properties. I have no evidence that says when or even whether the market will have this effect. In just 6 years the value of this property has fallen precipitously from what was appraised to be \$584,000 in 2008 to less than half of that now. How long the market will take to recover and to what values are unknowns.

[28] BDBC is owed a substantial amount of money. When it took over the property it was required to pay \$67,000 to the Municipality to cover arrears of taxes and other municipal charges. It was required to take steps to bring the property into conformance with an order of the Fire Marshall.

[29] If I accept the respondent's argument that the property should be put on offer for another 6 to 9 months then the interest and penalties on the amount outstanding will continue to run. There will be the Receiver's costs, legal fees, and operating costs such as utilities, taxes, maintenance for the building that will all

continue to run. The current income stream may or may not cover those expenses. I cannot say.

The “tender” process

[30] I expressed concern during oral argument that the ads characterized the offer process as a “Tender”. The effect of the ads when read together with the language in the information package would lead potential bidders to believe that there was no opportunity to bid on the property after the close date of September 25. The Receiver did not accept the offer of \$200,000 submitted by Vladi. Instead there was a period of negotiation that culminated a month later in the increased offer of \$210,000. No notice was provided to those who requested the information package that the offer had not been accepted or that further offers would be considered.

[31] At my request, written submissions were made after the hearing. I have considered the authorities cited therein and I am satisfied that the process followed does not negatively impact on the assessment of the Receiver’s exercise of judgment.

[32] I am satisfied that the process adopted for sale of the property was akin to a tender which requires that the Receiver, among other duties, fulfill a duty of fairness to bidders. *See, Port Hawkesbury (Town) v. Borchardt Concrete Products Ltd.* 2008 NSCA 17 at para. 37.

[33] The Receiver received a tender from one bidder, being Vladi. *Chaleur Fertilizers v Mega Blue Inc. (Receiver of)* 2003 NBQB 227 addressed tenders in a Receivership context. It applied the principle that once the highest bidder was eliminated then a Receiver was permitted to negotiate with a second bidder without involving other bidders. In the case before me, there was only one bidder, so there can be no complaint of unfairness to other bidders.

[34] I conclude that any complaint with the tendering process would have to come from other bidders or I suppose, theoretically, from prospective purchasers who feel prejudiced by the process. I have not been presented with a complaint by those parties. This aspect of the sale process does not offer a remedy for the respondent in this case.

Conclusion

[35] The evidence satisfies me that the Receiver has made a sufficient effort to get the best price for the property and has not acted improvidently.

[36] It will not result in full recovery for BDBC and will result in no recovery for the other encumbrancers. I do not accept that the process operated unfairly. To require the Receiver to put the property out for offers for several more months without a reasonable basis to expect a better net result has real potential to negatively impact on Vladi and on Mr. Dane Devine who, I am told, may be called on a personal guarantee of the indebtedness. In short, Mr. Devine may very well find himself called upon for an even greater amount than he might be if this sale is approved.

[37] In *Greyvest Leasing Inc. v. Merkur* [1994] O.J. No. 2465, the Ontario Court of Justice held at paragraph 45 as follows:

Commercial reasonableness depends upon the circumstances of the sale, including a consideration of variables such as the method of sale, the subject matter of the sale, advertising or other methods of exposure to the public, the time and place of the sale, and related expenses. A Receiver is under a particular duty to make a sufficient effort to get the best possible price for the assets. ...[*Soundair*]... This duty is not to obtain the best possible price but to do everything reasonably possible with a view to getting the best possible price.

[38] Certain general principles have been enunciated by the courts which bear repeating here:

- The Receiver's decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of a Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... 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." *see, Anderson J. in Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;
- The primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor

must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. See, *Soundair* at para. 40;

- In *Crown Trust Co. v. Rosenberg, supra*, at page 124, Anderson J. said:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

- A court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. See, *Crown Trust Co., supra*.

[39] In conclusion, the courts place a high degree of reliance on the business judgment of the Receiver. I am satisfied that it is appropriate to do so in this case as well. I do not find evidence of special or exceptional circumstances that cause me to reject his recommendation. Therefore, I approve the sale transaction contemplated by the Agreement of Purchase and Sale to be executed by the Receiver and Vladi Private Islands (Canada) Ltd.

[40] The rights of subsequent encumbrancers and of certain leasehold interests will be expunged or terminated as set out in paragraph 3 of the draft order. I note that these matters have not been the subject of an objection. Having reviewed the material, it is clear that these are appropriate dispositions.

Duncan, J.