COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation,* 2024 BCCA 318

Date: 20240909
Docket: CA50020

Between:

QRD (Willoughby) Holdings Inc., QRD (Willoughby) Limited Partnership, QRD (Willoughby) GP Inc., Quarry Rock Developments Inc., Richard Lawson and Matthew Weber

Appellants
(Respondents)

And

MCAP Financial Corporation

Respondent
(Petitioner)

And

Canadian Mortgage Servicing Corporation, Overland Capital Canada Inc., Wubs Investments Ltd., and Steelcrest Construction Inc.

Respondents
(Respondents)

And

MNP Ltd.

Respondent
(Receiver)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated July 9, 2024 (*MCAP Financial Corporation v. QRD (Willoughby) Holdings Inc.*, Vancouver Docket S237489).

Counsel for the Appellants: D.A.T. Moseley

Counsel for the Respondent, MCAP Financial Corporation: C.D. Brousson

Counsel for the Respondent, Canadian Mortgage Servicing Corporation:	H.D. Powell
Counsel for the Respondents, MNP Ltd.:	W.L. Roberts S.B. Hannigan B. Hunt
Place and Date of Hearing:	Vancouver, British Columbia August 14, 2024
Place and Date of Judgment, with Written Reasons to Follow:	Vancouver, British Columbia August 16, 2024
Place and Date of Written Reasons:	Vancouver, British Columbia September 9, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

Summary:

Appellants are debtors under and personal guarantors of mortgages related to a suspended real estate development project in Langley. In proceedings pursuant to the Bankruptcy and Insolvency Act ("BIA"), court below appointed respondent "MNP" receiver of the assets. Receiver did not obtain an appraisal of the property. After less than 2.5 months of marketing efforts, receiver appeared before the chambers judge and presented two bids, and advised that one of the bids, despite being lower, offered better value to creditors owing to the earlier closing date. The result would be to pay out the first mortgagee and only part of the amount owing to the second. Appellants opposed the sale on the grounds that another purported bidder was prepared to offer substantially more for the property, if given time to 'firm up' its bid. Chambers judge was ultimately not satisfied that this potential bid was anything beyond speculative, and approved the sale on the receiver's advice.

Appeal, heard by right under s. 193(c) of the BIA, dismissed. The chambers judge erred in balancing the Soundair factors in a way that was fair, or could be seen to be fair, by all parties. The judge ought to have concluded that the possibility of a significantly higher bid, in these circumstances, warranted a reasonable extension of time. However, time has since passed and in the absence of new or fresh evidence demonstrating the progression of the possible bid, it would not be provident to delay the sale any further. Discussion of 'stalking horse' bids.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal and application for leave were heard on an expedited basis and arise from an Approval and Vesting Order made by a judge in chambers in the Supreme Court of British Columbia on July 9, 2024. Leave to appeal was sought before a justice in chambers in this court on July 30, but because of time constraints, that application was deferred to be heard by the division that, if leave were granted, would hear the appeal.

[2] Following the hearing in this court on August 14, we notified counsel in writing of our decision that the appellants were entitled to appeal as a matter of right but that the appeal was dismissed, for reasons to follow. These are our reasons.

Factual Background

[3] The respondent QRD (Willoughby) Holdings Inc. ("QRD") is the owner of a large parcel of land in Langley, British Columbia, on which it planned to construct 87 three-storey townhouse units in three phases. The first mortgagee of the property

was the petitioner (respondent in this court) MCAP Financial Corporation ("MCAP"), which was owed some $33.6 million by the time of the hearing below. MCAP also holds security over the personal property comprising the project. QRD's indebtedness to MCAP was guaranteed personally by the respondents Messrs. Weber and Lawson.

[4] The Langley property is also subject to a second mortgage in favour of the respondent Canadian Mortgage Servicing Corporation ("CMSC") under which more than $8 million is outstanding, and later mortgages in favour of the respondents Overland Capital Canada Inc. ("Overland") and Wubs Investments Ltd. ("Wubs"). (I understand the two later mortgages are being challenged in other proceedings.) All four mortgages were duly registered against the property, as was a builder's lien filed by the main contractor, Steelcrest Construction Inc. ("Steelcrest").

[5] Unfortunately, construction of QRD's planned project came to a halt in the fall of 2023, due, the appellants say, to development approval delays and high interest and construction costs. QRD defaulted under the mortgages and other security instruments. By this time, two of the seven buildings comprising Phase 1 of the project were complete or nearing completion.

[6] On October 23, MCAP issued a demand letter and Notice of Intention to Enforce Security under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and a demand letter to the guarantors. When payment was not received, MCAP petitioned in the Supreme Court on November 3, 2023 for, *inter alia*, a declaration of indebtedness (said to be $29,521,907.02 on October 23 plus interest accruing at the rate of $6,842.13 per day), and the foreclosure of the mortgage and other security. Rules 20-4, 21-7 and 13-5 of the *Supreme Court Civil Rules*, and s. 55(6) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, were cited in the petition as the legal bases for the relief sought.

[7] The Court granted an order appointing MNP as the receiver of all the assets and undertakings of QRD, QRD (Willoughby) Limited Partnership and QRD (Willoughby) GP Inc. on November 8, 2023. (I will refer to these entities collectively

as the “Debtors”.) The order was granted pursuant to s. 243(1) of the *BIA* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. After receiving the receiver’s First Report dated December 6, the Court gave the receiver authority on December 15 to borrow the funds necessary to ‘winterize’ the existing buildings and complete construction of the unfinished buildings in Phase 1. This work was carried out by Steelcrest.

[8] In April 2024, the receiver told the Court in its Second Report that it estimated total interest costs of some $317,000 per month were accruing on the debt and that MCAP and CMSC were the only creditors likely to recover some or all of their loans. No appraisal of the property was suggested or provided to the Court, although the receiver did state that it had obtained “marketing proposals and opinions of value from commercial and residential real estate brokerages.” By order dated April 19, the Court granted MNP the authority to market all or any of the property for sale on an “as is” basis, subject to court approval. According to MNP, it began marketing the property on or about April 24, through a real estate agency, Colliers International.

[9] Also in April, Mr. Weber advised the receiver about the possibility of a sale to “BC Builds”, a program of the provincial government that “partners” with developers to increase the availability of rental homes in the Province. According to Mr. Weber’s affidavit, the BC Builds program had launched in February 2024. He had met in March with an official of the program who recommended that he contact a non-profit organization that might be interested in purchasing the property with BC Builds’ assistance. Mr. Weber assembled a package of information requested by Mr. Kwong of BC Builds “as part of Step 01 of the Application Process” for consideration by the governmental body. On the same day, Mr. Weber told the receiver that he had submitted that application, suggesting that it would not be necessary for Colliers to market the project given Mr. Weber’s expectation that the project would be “accepted as part of the BC Builds program and that a non-profit would purchase the Lands.” According to its later Supplemental Report, MNP responded that it was open to any solution that would provide “superior recovery” to creditors, but that unless

and until the proposed transaction became "sufficiently certain as to present a viable solution", it would carry on with the existing marketing plan.

[10] On June 24, 2024, the receiver filed an Application for orders approving the sale to, and vesting title to the property in, Redekop Ferrario Properties (DD) Corp. ("Redekop") free and clear of all liens and encumbrances; an order approving the receiver's activities since April 4 (as set out in MNP's Third Report dated June 21); and increasing the receiver's borrowing to a total of $2,589,000 and increasing its secured charge accordingly. MNP cited ss. 31 and 235 of the *BIA* in support of the orders, as well as the *Law and Equity Act* and Rules 13-5 and 21-7 of the *Civil Rules.* The Report made no mention of the BC Builds proposal.

[11] In its Application, the receiver stated that there had been "relatively strong interest" in the property, mainly from developers or builders who would purchase the property "as is" and take on the costs of completing the project. Between 10 and 15 parties had completed detailed due diligence and had calculated the costs of completing the project. Colliers had circulated a copy of *Practice Direction No. 62* of the Supreme Court to interested parties, together with notice of MNP's Application. (The *Practice Direction* sets out the 'default' procedure for obtaining and managing sealed bids for court-ordered sales of real property.)

[12] On May 30, Redekop had made a "no subjects" offer to purchase the property. After some negotiation, the receiver and Redekop had entered into an agreement of sale and purchase for the price of $35,000,000, subject to court approval. (As I understand it, this then became the "Original Bid" as defined in the *Practice Direction*.) The agreement provided for a "break fee" of $200,000 payable to Redekop in the event a higher offer was ultimately approved. Redekop was also amenable to structuring the deal as a reverse vesting order ("RVO"), which was expected to increase the net amount available for the second mortgagee by some $800,000.

[13] In its Application, the receiver acknowledged the well-known "factors" set out by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* (1991) 4

O.R. (3d) 1 for consideration by courts in motions of this kind, including the "interests of all parties" and whether the receiver has made a sufficient effort to obtain the price and has not acted improvidently. The Application continued:

> 21. In consideration of the *Soundair* principles and section 243(1)(c) of the *BIA*, this Court has the authority to (a) approve the sale of, and vest title in, the Property to the Purchaser free and clear of all claims and encumbrances.
>
> 22. The Receiver used an efficient process with integrity to market each parcel for sale. In particular, the Receiver engaged Colliers to market the Property for sale, who listed and marketed each parcel on an "as is, where is" basis, starting in April 2024. To ensure maximum exposure of the Real Property to interested parties, Colliers maintained a dedicated webpage, engaged a professional photographer to prepare advertisements, conducted tours of the Property, and engaged in direct discussions with prospective purchasers.
>
> 23. The Receiver made a sufficient effort to get the best price by way of the broad and open marketing process described above. As of the date of the Second Report, the Receiver has received one offer to purchase the Property. Based on its review and analysis of the offer received, the Receiver concluded that the Offer was the best given the circumstances. There was no unfairness in the working out of the sale process, which was fair, open and transparent. Finally, the Receiver considered the interests of all parties, including the Debtors and their primary secured creditor in determining to recommend the Offer to this Honourable Court for approval.
>
> 24. Ultimately, the Receiver has acted prudently and in a commercially reasonable manner with respect to the sale process for the Property. The processes followed by the Receiver had integrity, were fair and transparent, and took into account the interests of all parties. [Emphasis added.]

I note that the "break fee" in Redekop's bid was not mentioned in the receiver's Application itself, but was contained in the form of agreement between MNP and Redekop that was attached to MNP's Third Report. It was of course disclosed to the chambers judge by counsel at the later hearing.

[14] MNP's Application was heard by a judge in chambers on July 9. Counsel for the receiver told the judge that aside from Redekop's offer, two other parties had expressed interest in the property. One of them, from a numbered company, failed to materialize at the hearing. The second had been received on the day before the hearing and contemplated a price of $37 million. In the receiver's opinion, it had too

long a closing date given the significant 'burn' rate involved in maintaining the property. It also assumed an RVO structure for the deal. Counsel estimated that on an asset purchase, this offeror's bid would equate to about $35.4 million.

[15] The Debtors brought forward another proposal — this one from the Foundation Residence Society ("FRS"), a non-profit society reportedly backed by the provincial government through the BC Builds program. At the time of the hearing, it contemplated a purchase price of $64 million, of which $21 million would be accounted for by a mortgage back to the vendor. It also contemplated a long closing date and required the satisfaction of many conditions, including a funding commitment from the Province, via BC Builds, in favour of FRS. Counsel for the receiver described this proposal as "incredibly speculative" in his submissions to the chambers judge. There was no evidence as to how the purchase price of $64 million had been arrived at.

[16] The Debtors and guarantors Messrs. Lawson and Weber opposed MNP's Application and supported the FRS deal. Their Application Response and the supporting affidavit of Mr. Weber emphasized that acceptance of the Redekop offer would result in a shortfall of over $18 million. Indeed, it would provide for payment out to MCAP and up to $2 million for CMSC as the next charge holder, but would "wipe out all subsequent charge holders and equity in the Lands." On the other hand, the proposed sale to FRS for $64 million would, according to the Debtors, "make all stakeholders whole." The transaction would be carried out under the auspices of BC Builds, which the Response described as follows:

> 14. BC Builds is a new provincially operated program that partners with developers and housing operators to speed-up the delivery of lower cost rental homes in BC. The program encourages non-profit that would own and operate buildings to team up with a developer/builder and submit an application and can provide:
>
> a. low-cost construction financing for buildings owned and operated by both for-profit and non-profit developers;
>
> b. direct access to CMHC construction and financing;
>
> c. low-cost take-out financing; and

d. grants of up to $225,000 per unit for buildings owned and operated by co-operative or non-profit developers and First Nations controlled development corporations.

[17] In his affidavit, Mr. Weber recounted that despite his bringing the potential FRS offer to MNP's attention in early April, the receiver had proceeded to appear in court on April 19, 2024 to obtain the order approving the marketing of the property for sale to Redekop. In his words:

> There was no mention of my various communications with Mr. Kwong of the Application in the Receiver's Second Report to the court. My understanding is this information was not before the Court when it made the Further Amended and Restated Receivership Order, although I was not in attendance when it was made. …
>
> The Application was reviewed by BC Builds, and on or about April 22, 2024, it was moved to Step 02 of the Application Process. …
>
> As a result of discussions I was having with non-profit organizations introduced by my MLA and by others, on or about April 23, 2024, I reached a verbal agreement with Augustino Duminuco ("Mr. Duminuco") who is a director of a non-profit organization called Foundation Residence Society ("FRS") whereby FRS will purchase the Lands for $64 million, which amounted to the cost base of the Project at the proposed closing date to make all stakeholders whole.
>
> The Receiver was kept appraised of this development and it is my understanding from what the Receiver has told me that the marketing of the Lands commenced the following day on or about April 24, 2024. [Emphasis added.]

[18] Mr. Weber went on to depose that on or about May 15, a written "agreement" for the sale of the property to FRS had been "completed". This document appears to have been signed by Mr. Weber on behalf of QRD and by Messrs. Duminuco and Wong on behalf of FRS. (Of course, it is highly doubtful QRD had the authority to enter such a contract once it was in receivership.) It contemplated that the purchase price of $64 million would be paid in part by the vendor's taking back a mortgage of $15 million — i.e., that the sale would realize cash of about $49 million. FRS's obligation to complete was described as subject to review and approval of project documents, state of title, inspection and condition reports, the environmental condition of the property, approval through

the BC Builds program and a feasibility study on or before June 28. A completion date of August 29 was contemplated.

[19] On May 22, a telephone meeting of representatives of QRD, the receiver, MCAP, and CMSC (represented by "Atrium") had been held. The Application Response recounted:

> 26. On or about May 22, 2024, the Owners hosted a … call with the Receiver, MCAP, and Atrium to provide further details and answer questions with respect to the FRS CPS [contract of purchase and sale] and the status of the Application.
>
> 27. On or about May 30, 2024, the Receiver received the Redekop Offer.
>
> 28. On or about June 5, 2024, the Owners hosted a … call with Mr. Kwong and with the Receiver, MCAP, and Atrium with a view to providing not only an update but instilling confidence in the status and viability of the Application.
>
> 29. The Owners continued working with Mr. Kwong and his team at BC Builds and with FRS with respect to the Application and provided substantiation of rental numbers to assist with conditional budget approval as part of Step 02 of the Application Process on or about June 11, 2024, given that when asked for assistance from the Receiver, the Receiver refused assistance, but also advised that it would not oppose or take issue with it.
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> 30. On or about June 11, 2024, the Receiver accepted the Redekop Offer.
>
> 31. On or about June 25, 2024, an Addendum to the FRS CPS [contract of purchase and sale] was entered into with the following changes: a. subject removal was changed to the later of 60 days after the issuance of a Commitment Letter from BC Builds or July 31, 2024; b. completion was changed to be 60 days following subject removal; c. the VTB mortgage was changed to be a loan from the seller to the buyer in an amount up to $21,500,000.00 repayable over ten years and bearing interest at 0.0%; d. the deposit was changed to $250,000.00 to be paid by certified cheque, bank draft, or wire transfer no later than 5:00 pm on the 5th business day after the Letter of Intent from BC Builds is received and is refundable up until subject removal.
>
> (the "Addendum to the CPS").
>
> 32. The Owners have continued with the Application Process and expect approval imminently and have reached out to BC Builds for confirmation of same. [Emphasis added.]

[20] In terms of certainty of completion, then, Redekop's "no subjects" agreement and the CPS were polar opposites — the latter transaction could collapse if no commitment letter was issued by BC Builds and if BC Builds did not do so for

several months, the subject removal date would be extended indefinitely. Completion would not occur until 60 days after removal of the subjects. Even greater uncertainty revolved around FRS's requirement of funding from BC Builds. This was the subject of a "Letter of Interest" from Mr. Kwong of BC Builds to the Society dated July 5, in which he stated:

> Before moving forward with the application approval process, we still require completion of the following:
>
> 1. A review of any potential conflicts of interest between the vendor/QRD and your organization;
> 2. Confirmation before July 8 court event of amendments to the contract of purchase and sale with the vendor/QRD, including industry-standard representations and warranties for delivery of the construction and improvements on the Project free of defects or deficiencies;
> 3. Proof of your organization's history and capacity in asset management.
>
> The above items, once provided, can be completed by BC Builds within a short timeline. Once these items are addressed, we can proceed with the application approval process through our various approving authorities:
>
> 1) Project Steering Committee; internal committee of BC Housing; meetings occur on a weekly basis.
> 2) Executive Committee; internal committee of BC Housing; meetings occur on a weekly basis unless a quorum is not established.
> 3) Board of Commissioners; external approving committee; meetings occur on a monthly basis unless a quorum is not established.
> 4) Ministry of Housing/ Treasury Board; meeting occurrences are uncertain as the schedules are not dictated by BC Housing.
>
> The above only describes the meeting times and do not describe the timing of getting the recommendations and submission reports to these approving bodies which may require several weeks to be vetted and included onto meeting agendas. We also want to note that because of the Provincial election that is anticipated to occur in Fall 2024, the approvals from the Ministry or Treasury Board may be further delayed due to the election process and government not in session. BC Builds is also prepared to move forward with seeking approvals from our internal committees as well as our Board of Commissioners and will seek Provincial approvals when we are able and when government is in session. [Emphasis added.]

[21] In their Responses to the receiver's application, MCAP and CMSC adopted the receiver's submissions, emphasizing what they referred to as the speculative

nature of the FRS agreement and the significant monthly 'burn' rate. At the hearing, counsel for CMSC acknowledged that his client was concerned primarily with closing certainty and the minimization of delay, even though the FRS transaction might, if realized, result in greater recovery for this creditor. MCAP went further, suggesting that if more delay was encountered, even *it* might not be paid out in full if the Redekop deal were not approved.

[22] Application Responses were also filed by Overland, to which approximately $8 million was owing in July 2024, and by Wubs, to which some $4.5 million was owing. Both would come away empty-handed after the sale to Redekop and both opposed the granting of the order sought by MNP. Overland noted in particular that the receiver had failed to disclose the BC Builds proposal to the Court in its Application and in its Reports to the Court. Wubs contended that the large disparity between the price of $35 million offered by Redekop and the FRS price of $64 million and the "very short window" of marketing by the receiver, militated in favor of rejecting the Application. In its words:

> These facts tend to discolour the process by which the Receiver has proceeded with the result that the Court cannot reasonably have confidence that the offer being brought is the best one, especially given another offer in the wings for nearly 50% more.
>
> Again, without a fulsome explanation backed up with market/appraisal evidence, the Court is left to its own devices to determine if the Redekop offer presents the best path forward. This is unfair not only to the Court, but also to all chargeholders save the Petitioner and the second charge holder, albeit with a shortfall to them as well.

[23] I also note the "Supplemental Report to Receiver's Third Report to Court" dated July 6, which we were told had been accepted for filing, although it is not stamped. In general terms, the Report advanced the receiver's arguments made before the chambers judge on July 9. I will not rehearse those arguments here except to note that the receiver supported the conversion of Redekop's offer to an RVO if ultimately approved by the Court.

[24] Finally, I note that a representative of Steelcrest appeared before the chambers judge to express opposition to the proposed transaction with Redekop. He

told the Court there was mould in the buildings that could be remediated for about $225,000 and thus "eliminate the concern that some people have with regards to the timeliness of coming to a resolution today." He described the mould as "far from untreatable at this time" but offered on behalf of Steelcrest to oversee the remediation. No actual *evidence* regarding mould was provided to the Court, but as will be seen, the chambers judge accepted that a mould problem did exist. (This fact is borne out in an affidavit that the receiver sought to introduce as fresh evidence in this court.)

Chambers Judge's Reasons

[25] The receiver's Application was heard at length on July 9 and the chambers judge was able to give oral reasons the same day. They were brief and to the point. The judge found first that the sale process engaged in by the receiver had been "fair and appropriate". He noted that the receiver had led a process of approximately 2.5 months in which some 5,700 emails had been sent to potential purchasers, of which 30 had responded and asked for access to the data room. Eight had followed up with a tour and the receiver "ended up…with two valid competing bids." (At para. 2). As for the offer from BC Builds, the chambers judge stated:

> The potential for an offer from BC Builds (the provincial government program aimed at building affordable rental housing) is, with respect, speculative. I do not doubt the *bona fides* of their intention to move the matter forward. However, the evidence before me shows that the length of time that it would take to even get a potential offer before the legislature for approval is inordinate (not through any fault of BC Builds). [At para. 3.]

[26] The judge noted that there was urgency to complete a "favourable transaction" because of the economic 'burn' rate and the possible mould contamination in the buildings, which needed to be remediated in the summer months. The cost of doing so, he suggested, could be determined at a later date. Based on the evidence, however, he was satisfied that putting off the application until the end of August was unlikely to generate any greater offers. (At para. 5.) In his view, the "only real competition" to Redekop's offer was the bid from the

numbered company that had declined to provide any information sought by the receiver, including the identity of its principals.

[27] In the result, the chambers judge approved Redekop's offer as commercially reasonable and one that should be approved. The orders sought by MNP were granted.

[28] The Debtors filed a Notice of Appeal in this court on July 18, 2024. In that Notice, the Debtors did not seek leave to appeal. MNP filed an urgent application on July 23 seeking, *inter alia*, an order striking out the notice of appeal as null and void, or alternatively, denying leave if the notice of appeal was converted to an application for leave. In turn, the appellants sought the dismissal of that application or an order converting their notice of appeal to an application for leave and an extension of time. The motions could not be heard until July 30, at which time the chambers judge in this court deferred the question of leave to this division in light of the short time-frames involved.

Leave to Appeal

[29] Before us, MNP continued its preliminary objection to the appeal on the ground that it was not properly brought as an appeal as of right because s. 193 of the *BIA* required that leave be obtained. Section 193 provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[30] In my view, it is highly unlikely that subparagraph (b) has any application in this instance. As Ms. Hannigan submitted, the phrase "the bankruptcy proceedings"

appears to limit the court to considering only "cases" of a similar nature in *this* proceeding, and the Debtors have not identified any other such "cases" in this proceeding. (See *Forjay Management Ltd. v. Peeverconn Properties Inc.* 2018 BCCA 188 at paras. 39–43.) In any event, the parties seem to agree that if this appeal is to proceed as of right, it is most likely by operation of subparagraph (c). This provision was the subject of discussion in *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.* 2022 BCCA 158, a decision of myself in chambers, at paras. 35–56.

[31] Like the applicants in *Crowe Mackay*, the receiver in the case at bar takes the position that s. 193(c) should be applied narrowly. The receiver relies on an Ontario line of cases exemplified by *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* 2016 ONCA 225. There, Mr. Justice Brown in chambers stated that despite its broad language, the provision did not apply to orders that were procedural in nature, orders that did not bring into play the value of the debtor's property, or orders that did not result in a loss to creditors. (At para. 53.) He ruled that the asset vesting order before him simply "marked the final step in the Receiver's monetization of the debtor's assets" and did not "bring into play" the value of the property. (At para. 60.) Thus despite the debtor's submission that the sale had been improvident, the debtor's notice of appeal was set aside as null and void.

[32] In more general terms, Brown J.A. acknowledged that the history of s. 193(c) was "unusual". He continued:

> Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation. However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c) – or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings. [At para. 47; emphasis added.]

(See also *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation* 2021 ONCA 581; *Cardillo v. MedCap Real Estate Holdings Inc.* 2023 ONCA 852; *Re Harmon International Industries Inc.* 2020 SKCA 95.)

[33] As against the relatively narrow approach taken in *Bending Lake*, I note first *Fallis and Deacon v. United Fuel Investments Ltd.* [1962] S.C.R. 771. In *Fallis*, the Court was asked to quash an appeal taken from an order granting the winding-up of a company under the *Winding-up Act* of Ontario. Speaking for the Court, Cartwright J., as he then was, reasoned:

> In my opinion the test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen v. Roberts et al.* [[1925] S.C.R. 364], upholding the judgment of the Registrar affirming jurisdiction. The action was for an injunction to restrain the defendant from erecting a building nearer to the street line than 25 feet and to restrain the municipality from granting a permit for the erection of the proposed building. The report at page 367 reads as follows:
>
> > The Court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.
>
> Applying this test to the facts of the case at bar, the evidence shows that if the winding-up proceeds the appellant Fallis will suffer a loss greatly in excess of $2000. [At 774; emphasis added.]

It will be apparent that the Court looked to what the appellant would suffer or gain if the winding-up proceeded. The Court also disapproved an earlier case, *Cushing Sulphite-Fibre Co. v. Cushing* (1906) 37 S.C.R. 427, where it had held that a judgment refusing a winding-up order *did not involve any amount* and therefore no right of appeal lay from it. In the opinion of Cartwright J., *Cushing* had to be reconsidered in light of the enactment of s. 43 of the *Supreme Court Act* in 1913, which stated that where a right of appeal is dependent on the amount in question, the amount may be proven by affidavit. (See R.S.C. 1952, c. 259.)

[34] The *Fallis* reasoning was adopted and followed by Finch J.A., as he then was, in *McNeill v. Roe, Hoops & Wong* (1996) 20 B.C.L.R (3d) 274 (C.A.), in connection

with a debtor's application for an absolute discharge from bankruptcy. Finch J.A. noted at the outset that what is now s. 193(c) had come into force in November 1992. Until then, the provision had authorized appeals if the property involved in the appeal exceeded $500. He reviewed *Fallis* and *Orpen v. Roberts* [1925] S.C.R. 364, and continued:

> The "property involved in the appeal" which the bankrupt wishes to pursue may be determined by comparing the order appealed against with the remedy sought in the notice of appeal. Here, Mr. Justice Thackray's order required the bankrupt to pay $168,750 by monthly instalments. The notice of appeal seeks an order "to discharge the Appellant from bankruptcy on such terms and conditions as the Court may deem just." In his submissions, counsel for the bankrupt suggested that reasonable conditions for discharge might include payment of monthly sums up to a total of about $40,000. Applying the test set out in *Fallis* and adopted by other judges of this Court, it is clear that if the appellant is granted the relief sought on appeal, the loss to the creditors would far exceed the sum of $10,000. I am therefore of the view that the bankrupt had an appeal as of right under s. 193(c). [At para. 13; emphasis granted.]

[35] In a more recent case, *MNP Ltd. v. Wilkes* 2020 SKCA 66, the Court reviewed what it described as two different approaches to the interpretation of s. 193(c) — first, the *Orpen-Fallis* line of authority and cases following it (including *McNeill*, *Galaxy Sports Inc. v. Abakhan & Associates Inc.* 2003 BCCA 322, *Re Kostiuk* 2006 BCCA 371 and *Farm Credit Canada v. Gidda* 2014 BCCA 501, as well as a few cases from other provinces), and the "*Alternative Fuel-Bending Lake* approach". In connection with the first group, Madam Justice Jackson for the Court in *Wilkes* quoted the following passage from an annotation in the *Canadian Bankruptcy Reports* at 4 C.B.R. (n.s.) 209:

> [*Fallis*] has important implications so far as the *Bankruptcy Act* is concerned. Under s. 150(c) of the *Bankruptcy Act* an appeal lies to the Court of Appeal in bankruptcy matters if the property involved in the appeal exceeds in value $500. Section 108 of the *Winding-up Act* refers to "amount involved" rather than "property involved" but the meaning would appear to be substantially the same. Prior to the 1949 amendment the *Bankruptcy Act* also used the phrase "amount involved". See R.S.C. 1927, c. 11, s. 174(1)(c).
>
> In the case of *In re Andrew Motherwell Ltd.*, 5 C.B.R. 107, 55 O.L.R. 294, 3 Can. Abr. 594 the Ontario Court of Appeal following the *Cushing-Sulphite* [(1906), 37 SCR 427] case held that a monetary sum must be involved. In a number of subsequent cases it was decided that it was not necessary that the amount involved be represented by dollars but it was sufficient if the appellant

> could show that his rights might be affected in an amount exceeding $500: *Re Maple Leaf Brewery Ltd.* (1938), 20 C.B.R. 137, 65 Que. K.B. 304, 1 Abr. Con. (2nd) 448; *In re Succession Pierre Tetreault* (1947), 28 C.B.R. 224, 1 Abr. Con. (2nd) 448. On this basis "amount involved" or "property involved" means "amount in jeopardy" not that a monetary sum of $500 must be involved: *Fogel v. Grobstein*, 26 C.B.R. 248, [1945] Que. K.B. 571, 1 Abr. Con. (2nd) 447; *Deslauriers v. Brunet (Vermette)*, 30 C.B.R. 77, [1949] Que. K.B. 629, 1 Abr. Con. (2nd) 443.
>
> In Duncan & Honsberger "Bankruptcy in Canada" 3rd ed., at p. 853, it is stated: "The decisions in which it has been held that there is jurisdiction under this subsection cannot all be reconciled." [*Fallis*] would appear to have overcome this difficulty. It would seem that the *Andrew Motherwell* and *Cushing* cases are no longer good law. If the loss, which the granting or refusing of the right claimed, exceeds $500 then there will be an appeal. [At para. 34; emphasis added.]

[36] The Court in *Wilkes* expressed the view that subparas. 193(c) and (e) should not be interpreted in either a narrow or expansive way, but "according to their terms and within their context." In Jackson J.A.'s analysis:

> In the annotation to *Fallis*, above-mentioned, and in *Dominion Foundry* and *McNeil*, it is stated that the *property involved* in the appeal means the same thing as the *amount involved* in the appeal. If this means that the change brought about by the *1949 Act* was of no consequence, I would respectfully disagree. The changes to the *Bankruptcy Act* in 1949, to provide a right of appeal when the property, rather than the amount, exceeds $500 (but currently $10,000), aligned itself with the balance of the Act, which had from the enactment of the first *Bankruptcy Act* turned on a definition of *property* in the English version and *bien* in the French (see *The Bankruptcy Act*, SC 1919, c 36, s 2(dd), and *Loi concernant la faillite*, SC 1919, c 36).
>
> On this point, L.W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2020-03) 4th ed (Toronto: Carswell, 2005) (WL), commented on the amendment: "Presumably the amendment was made to make it clear that it is unnecessary to have a monetary sum involved for an appellant to be entitled to appeal under s. 193(c)" (at para I§60). I agree. At the very least, the change from the *amount involved* to the *property involved* signalled that the law that had been developing with respect to access to the Supreme Court of Canada, i.e., in the 1925 decision of *Orpen*, was intended to apply to statutes that were *in pari materia*. The change was not intended to be a reversion to the law that existed prior to *Orpen*, i.e., *Cushing Sulphite-Fibre Company v. Cushing* (1906), 37 SCR 427, which was expressly overruled by *Fallis*, albeit after the 1949 amendments.
>
> This interpretation is supported by comments made before the Standing Committee of the House of Commons that was struck to review the proposed *1949 Act* (on December 1, 1949, nine days prior to the *1949 Act* receiving royal assent). ... [At paras. 50–52; emphasis added.]

[37] Ultimately, the Court concluded that the mere fact that the question on an appeal is procedural should not *by itself* determine whether it falls within s. 193(c). In Jackson J.A.'s words:

> According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction. [At para. 64; emphasis added.]

[38] On this point I note as well the recent decision of *Peakhill Capital Inc. v. 1000093910 Ontario Inc.* 2024 ONCA 59, in which one of the issues before the Court was whether an order approving a sale process was "merely procedural", such that the purported appeal did not (on the authority of *Bending Lake*) fall within s. 193(c). The receiver relied on *Re Harmon*, *supra*, where the Court had ruled that a similar order was "merely an order as to the manner of sale" and that "no value was in jeopardy". The Court in *Peakhill*, however, found that in the particular circumstances of the case, the decision of the court below not to entertain the debtor's cross motion (for the approval of an agreement of sale entered into by it before the receivership began), although procedural in nature, also had the effect of putting into play, and jeopardizing, the value of property by an amount exceeding $10,000. In the words of Madam Justice Simmons in chambers:

> ... Although no loss was crystallized by the refusal decision or the Order, given the circumstances of a receivership sale and the terms of the Stalking Horse APS, which established a floor price of $24,455,000 and required payment of up to $250,00 to 255 if a superior bid was obtained, the likelihood of loss in excess of $10,000, as compared to completion or enforcement of the unconditional original APS at a sale price of $31,000,000 appears inevitable.
>
> The refusal decision deprived the Debtor of any right it may have had to enforce the unconditional original APS at a price of $31,000,000 and instead required that the Property be sold, subject to the uncertainties of the market, based on a floor price of almost $7,000,000 less and a guarantee to the

> stalking horse purchaser of a payment of up to $250,000 in the event of a superior bid. The Debtor asserts that, because the original APS has not been terminated, either it or the Receiver can still enforce it. Whether that is so remains to be seen. In the circumstances, I conclude that the property involved on the appeal exceeds $10,000 as required under s. 193(c) of the *BIA*. [At paras. 37–8; emphasis added.]

[39] Returning to the case at bar, the receiver submits that s. 193(c) is not engaged given that the Debtors are opposing not only the sale to Redekop but any and all other offers tabled in the court below. Thus it is said they are effectively seeking an adjournment of the application brought below. MNP characterizes this as a purely procedural matter and submits there is no "property involved in the appeal" valued over $10,000 when the effect of the orders appealed (i.e., the liquidation of the property) is compared to the remedy sought (i.e., additional time to pursue that objective.)

[40] With respect, this argument not only runs contrary to *Fallis*, but seems to put form over substance. In my view, the purported appeal does put the value of the property 'in play', and by an amount exceeding $10,000. The substance of the parties' dispute is whether it was fair and appropriate in the circumstances of this case for the receiver to sell the subject property for $34 million or to delay further in hopes of receiving a final and binding commitment to purchase from FRS for $64 million less the amount taken back by the mortgage in favour of the vendor, or any other offer that might arise. Looked at in this way, several millions of dollars are "in jeopardy" in this appeal.

[41] This interpretation also seems to me to be consistent with the plain and ordinary grammatical meaning of the words "property involved in the appeal" in s. 193(c). Certainly if one were describing in normal conversation the appeal sought to be brought by QRD, one would say that it "involves" more than $10,000.

[42] Finally, I note that the role of evidence must be emphasized in this analysis. While the appellant does not bear the burden to show a certain or automatic change in value should the appeal be allowed, courts should remain wary of granting leave on overly speculative grounds. As Jackson J.A. put it, "the claim must be sufficiently

grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal." (*Wilkes*, at para. 64.) In the case at bar, the appellants have provided affidavit and documentary evidence to support the details of the potential FRS bid. While the chambers judge concluded that the bid itself was "speculative" given the various hurdles to its closing, this is not a case where the appellant brings only a bald assertion of an improvident sale. The evidence supports a conclusion that FRS was a serious suitor, and that should the appeal be allowed, a change in value of over $10,000 would be squarely in play.

[43] In the result, I conclude that QRD's purported appeal comes within s. 193(c) and that it was not necessary to obtain leave.

[44] I would have granted leave, moreover, had I not been satisfied that s. 193(c) applies. It seems clear that the "usual" factors applicable to leave applications in civil cases are to be considered in this context: see *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005) 10 C.B.R. (5th) 201 (Ont. C.A.); *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.* 2021 ABCA 66; *Menzies Lawyers Professional Corporation v. Morton* 2015 ONCA 553. The issues raised by this appeal, involving as they do the proper management of stalking horse bids or arrangements akin thereto and questions of fairness to all parties involved in the proceeding, are of interest to practitioners in the area of receivership and commercial law generally. It would not in my opinion be consistent with the interests of justice to withhold leave had s.193(c) not applied.

[45] I turn next to the substantive appeal.

The Main Appeal

Grounds of Appeal

[46] The appellants — namely the Debtors and Messrs. Lawson and Weber — advanced four rather lengthy grounds of appeal in their factum, which may be summarized as follows:

i) the chambers judge erred in "not applying, misapplying, and/or departing from" the test for the approval of asset sales by receivers set forth in *Soundair*;

ii) the judge erred in making certain findings of fact despite the lack of an evidentiary basis for doing so and/or misapplying the evidence presented;

iii) the judge erred in granting the orders it did despite a dearth of evidence regarding fair market value of the property and various other matters;

iv) the judge erred in disregarding and/or not giving sufficient weight to the "potential" that BC Builds would provide approval of the FRS Agreement, the request of one other possible bidder for more time, and the possibility that other bidders "if given sufficient opportunity, would submit competing bids on the basis of an RVO structure."

The appellants seek an order that the appeal be allowed, the orders made July 9 be set aside in their entirety, and that the receiver's application be remitted to the chambers judge to "start again from square one."

Standard of Review

[47] The appellants acknowledge in their factum that in order to succeed on an appeal from a discretionary decision such as that of the chambers judge below, an appellant must show that the Court materially misconstrued the law or gave no, or

insufficient, weight to relevant considerations. In support, the appellants referred to *Perrier v. Canada (Revenue Agency)* 2021 BCCA 269, where this court stated:

> Discretionary decisions may, of course, be overturned if a judge has materially misconstrued the law or made a palpable and overriding error in respect of the facts underlying the exercise of discretion. Discretionary decisions may also be overturned, however, where the judge has made no manifest error of law or fact, but has failed to apply the discretion in a principled and reasonable manner. In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27, the Court described the standard as follows:
>
> > [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.
>
> [At para. 45.]

General Principles

[48] It may be worthwhile at the outset to restate some of the general principles applicable to receivers, court orders of sale, and the particular process followed in this case. As Madam Justice Fitzpatrick observed in *Forjay Management Ltd. v. 0981478 B.C. Ltd.* 2018 BCSC 527, "it is trite law that a court-appointed receiver is an officer of the court and not beholden to the secured creditor or creditors who caused its appointment". (At para. 21.) As such, a receiver owes fiduciary duties to all parties, including the debtor and all classes of creditors. (See *Parsons v. Sovereign Bank of Canada* [1913] A.C. 160 (U.K. J.C.P.C.) at 167; *Ostrander v. Niagara Helicopters Ltd.* (1973) 1 O.R. (2d) 280 (H.C.J.); and Frank Bennett, *Bennett on Receiverships* (3rd ed., 2011) at 38–40.) Bennett adds that the receiver has a duty to exercise reasonable care and control of the debtor's property as an ordinary person would give to his or her own, failing which it may be liable in negligence. (At 39, citing *Plisson v. Duncan* [1905] 36 S.C.R. 647.)

[49] Where the sale of the debtor's property is to be authorized by the court, the receiver must consider possible methods of sale, make its recommendation to the

court and proceed with the method chosen by the court. According to the well-known case of *Re Nortel Networks Corporation* (2009) 55 C.B.R. (5th) 229 (Ont. S.C.J.), the court generally considers:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
>
> (d) is there a better viable alternative? [At para. 49]

[50] Bennett notes that where the debtor's equity is not enough to satisfy the security holder's debt, the court must favour the security holder. However, he continues:

> … if there is a possibility that the debtor' s equity may be sufficient to retire the debt to the security holder and other security holders, then the court must protect the debtor's real equity for other security holders. The court must rely on qualified and reputable appraisals as well as the receiver's recommendations in making these decisions. This is an area ripe for litigation. [At vii.]

He goes on to observe that where the receiver does not obtain an valuation or appraisal of the asset(s) being sold, the court might not approve the sale as it will have no indication of market value. (At 316, citing *Canrock Ventures LLC v. Ambercore Software, Inc.* 2011 ONSC 1138.)

[51] All counsel in the case at bar referred in their submissions to the much-quoted description of the duties of court-appointed receivers formulated by Galligan J.A. in *Soundair*:

> 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 …, of the duties which a court must perform when deciding whether a receiver who has sold the property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I.
>
> 1. It should consider whether the receiver has made a sufficient effort to get the best price and is 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. [At 6.]

[52] In *Soundair* itself, the assets in question constituted the entire business of a small airline as a going concern — an unusual asset to be selling. The receiver had rejected an offer from Air Canada and another to purchase the assets and then entered into negotiations with two other airlines, subsidiaries of Canadian Airlines, who made an offer. The Air Canada group then made another offer, which the receiver declined because it contained an unacceptable condition. Instead the receiver accepted the offer it had negotiated with the Canadian Airlines group. The Air Canada group then made a second offer that was "virtually identical" to its first one, except that the unacceptable condition had been removed. The Court nevertheless approved the sale to the Canadian Airlines consortium and dismissed the offer of the Air Canada group, which then appealed.

[53] In the course of his reasons dismissing the appeal, Gallagher J.A. (speaking for himself) noted that during the hearing of the appeal, counsel had gone on at some length comparing the prices contained in the two offers and had "put forth various hypotheses supporting their contentions that one offer was better than the other." He described the limited circumstances in which an appellate court should intervene in a contest between competing offers:

> It is my opinion that the price contained in the 922 offer [by Air Canada and another party] is relevant only if it shows that the price obtained by the Receiver in the OEL offer [i.e. the subsidiaries of Canadian Airlines] was not a reasonable one. In *Crown Trust v. Rosenberg*, *supra*, Anderson J. ... discussed the comparison of offers in the following way:
>
> > No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.
>
> In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:
>
> > If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly

> carried out his function of endeavouring to obtain the best price for the property.

The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> 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.

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. ...

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court. [At 8–10; emphasis added.]

Stalking Horse Bids

[54] The foregoing principles — and others — apply where the ‘stalking horse’ bid process is followed. Stalking horse bids have been used in Canada since around 2004, when Mr. Justice Farley approved one in connection with an arrangement under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”) proposed by Stelco Inc.: see *Re Stelco Inc.* [2004] O.J. No. 4899 (Sup. Ct.), 135

A.C.W.S. (3d) 372. J.L. Cameron, A. Mersich and K. Wong, authors of "Saddle Up: The Rise of Stalking Horse Credit Bids in Canadian Insolvency Proceedings", in J. Corraini & D.B. Dixon, eds., *Annual Review of Insolvency Law*, vol. 21 (2023), describe stalking horse bids as follows:

> A stalking horse process occurs where an offer to purchase the debtor's assets or business is negotiated with a potential purchaser in advance of the sales process. This offer is known as the "stalking horse bid". If approved by the court, the stalking horse bid is used as a baseline offer against which all other bids submitted in the sales process are compared. If no superior bids are received during the sales process, the stalking horse bid will be accepted and submitted to the court for approval of the sale. However, in certain situations, acceptance and approval of the stalking horse transaction is done simultaneously with approval of the stalking horse sales process. [Citing *Eastwinds Caribbean Limited Partnership et al v. Octopus Holdings Ltd. et al* (13 June 2019), Calgary 1901-07681 (Alta. Q.B.).] In such cases, the transaction contemplated by the stalking horse bid is approved, subject to the debtor receiving any superior offers during the sales process.
>
> More frequently, if the sales process produces an offer that is superior to the stalking horse offer, the sales process will contemplate a run-off auction between the stalking horse bidder and the party, or parties, that submitted the superior offer. For another bid to be considered "superior" to the stalking horse bid, it must typically exceed the stalking horse bid by a minimum amount prescribed in the stalking horse bid agreement and sales process. This amount is known as an "overbid increment". [At 369; emphasis added.]

Stalking horse agreements are commonly used in insolvency proceedings to "establish a baseline price and transactional structure for any superior bids from interested parties" and that they may in the right circumstances maximize value for the benefit of the stakeholders.

[55] Reference may also be made to Janis Sarra, *Rescue! The Companies Creditors Arrangement Act* (2007) at 118–123, who writes that the premise underlying such bids is that the stalking horse bidder has undertaken a fair amount of due diligence in determining the value of the assets in question, such that other potential bidders can rely "to some extent" on the value attached to the asset by the stalking horse bidder.

[56] Professor Sarra observes that certain "concerns" have arisen about stalking horse bids, one being that "the stalking horse can exert considerable control over

timelines, making them very tight such that other bidders do not have a meaningful opportunity to undertake their due diligence." If such concerns arise, she suggests, the court should approve the bid only *as a stalking horse bid* and not as a final agreement, "hence creating incentive on the parties to ensure a complete and fair process in order for any bid to be viewed as a final bid." (At 123; see also Daniel R. Dowdall and Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?" in Janis Sarra, ed., *Annual Review of Insolvency Law*, vol. 3 (2005) at 11.)

[57] Stalking horse bids were recently discussed at some length by Madam Justice Fitzpatrick in *Re Freshlocal Solutions Inc.* 2022 BCSC 1616 at paras. 15–33, a case decided under the *CCAA*. She reviewed various cases, including *Re Boutique Euphoria Inc.* 2007 QCCS 7129, *Re Brainhunter Inc.* [2009] O.J. No. 5578, *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.* 2012 ONSC 1750, *Re Danier Leather Inc.* 2016 ONSC 1044 and *Re Quest University Canada* 2020 BCSC 1845, all of which set out the various factors that should be considered by a court in assessing a stalking horse bid. In *Freshlocal*, Fitzpatrick J. observed:

> In *Quest University Canada (Re)*, 2020 BCSC 1845 at paras. 53–58, I addressed authorities that have discussed the question as to whether the financial incentives in a stalking horse offer are appropriate. At para. 59, I set out certain factors that can be considered in determining whether a given break fee is fair and reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate:
>
> a) Was the agreement reached as a result of arm's length negotiations?;
>
> b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;
>
> c) Is the relief supported by the major creditors?;
>
> d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;
>
> e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;
>
> f) Will the fee and charge enhance the realization of the debtor's assets?;

> g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and
>
> h) Does the monitor support the relief?
>
> At the most basic level, the benefits of entering into a stalking horse bid that can be potentially achieved in these proceedings must be justified by the costs in doing so. That cost/benefit analysis requires a rigorous review of all the relevant circumstances toward answering the question—is a stalking horse offer appropriate at this time in these *CCAA* proceedings? [At paras. 32–3; emphasis added.]

[58] It is not always the case that courts are satisfied that stalking horse bids will "optimize the chances … of securing the best possible price for the assets up for sale." (*CCM* at para. 6.) *Freshlocal* provides a good example. In that instance, the proposed agreement had not "come about through a competitive process" and the inference could be drawn that it "arose less from Freshlocal's objective enthusiasm for the transaction and more from [the interim lender's] not so veiled threats of litigation." (At para. 37.) Again in Fitzpatrick J.'s analysis:

> I accept here that Freshlocal was under substantial time pressures to move this proceeding forward to a sale. However, it is anything but transparent as to how the purchase price in the SH Agreement came about.
>
> In that vein, Freshlocal's reference, supported by the Monitor, that the SH Agreement establishes a minimum or "floor price" is concerning. This is more akin to a "reserve bid" at auction. I acknowledge that this phrase has been used in the past to describe stalking horse bids, but it is an unfortunate one in the sense that it gives the sense that higher bids are being sought and fully expected. A more appropriate description might be "value price", where the stalking horse is put forward as an appropriate pricing of the debtor's assets, in the event that no higher offer is received.
>
> It is not the underlying rationale of a stalking horse offer to allow a bidder to get a bargain basement price, save as might be (or likely will be) exceeded in the true marketplace, while securing substantial financial benefits for that bidder (see my discussion below).
>
> Freshlocal refers to the SH Agreement guaranteeing an outcome. I accept that the SH Agreement achieves that goal, but at what cost to the stakeholders?
>
> As was noted in *Boutique Euphoria*, an important consideration is to ensure you are riding the right "horse" in the sales process by having the right "benchmark" to hopefully attract other—and higher—bids. A failure to test the market toward picking your "horse" might very well mean that the debtor has "baked in" a result with a stalking horse offer which is not necessarily reflective of the value of the assets. [At paras. 40–4; emphasis added.]

[59] The Court went on to scrutinize the amount of the termination or 'break' fee and how it had been arrived at, the existence of any support by other stakeholders for the stalking horse arrangement, the fact that the insolvent company had agreed that it would engage in negotiations only with the interim lender, whether the stalking horse bidder had done due diligence on which other potential buyers could rely, whether other creditors objected to the arrangement, how the break fee affected the likely return, and whether the fee was "related to the stalking horse bid process itself and the efforts undertaken towards that end." (At para. 71, quoting *Boutique Euphoria*.) In the end, Fitzpatrick J. dismissed the application for approval of the stalking horse agreement, expressing confidence that the number of other bidders who had come forward expressing interest in the assets for sale made the proposed arrangement not only inappropriate but unnecessary.

[60] The Court also disapproved proposed stalking horse arrangements in *Farm Credit Canada v. Gidda* 2015 BCSC 2188 and in *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.* 2014 BCSC 1855. In *P218*, Mr. Justice G.C. Weatherill observed:

> The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process. [At para. 34; emphasis added.]

He was critical of the absence of evidence as to whether the break fee of $1.5 million was reasonable, evidence as to the value of the assets, and evidence as to whether other sale processes had been considered. (At para. 39.)

[61] In *Gidda*, the Court quoted paras. 20–21 of *PT218* and continued:

> However, the Receiver, in this case, completely ignored the fact that approval of a stalking-horse bid must be granted by the court prior to undertaking such a process. In this case, the Receiver did not apply to approve the Haakon bid as a stalking-horse bid. By failing to apply to the court, the Receiver completely avoided having to justify whether such a stalking-horse bid was appropriate in the circumstances. [At para. 37; emphasis added.]

The Court also queried whether market exposure of about *three months* was sufficient, especially given that one agreement of sale for part of the assets had been tentatively accepted by the receiver even before the property was listed for sale. (See para. 35.)

Analysis

[62] With the foregoing principles in mind, I return to the four grounds of appeal stated at para. 46 above. None of these raises a clear point of law that by itself would justify allowing the appeal. This is not a criticism of counsel, but a reflection of the nuanced way in which the usual *Soundair* factors line up in this case. Nor is there in my view any palpable and overriding error of fact on which the appeal can be decided. Indeed, many of the "findings" to which the appellants object — e.g., that the FRS offer was "speculative" or that the length of time it would take for FRS to obtain funding from BC Builds was "inordinate" — were actually expressions of opinion or characterizations by the chambers judge. All of them were open to him on the evidence. Other so-called "findings" were inferences the judge drew concerning what was likely to happen in future — for example, his observation that further offers were unlikely to arise by the end of August. Again, predictions like this are the kind that courts in bankruptcy or receivership cases are frequently required to make, and usually cannot be said to be clearly right or wrong.

[63] Rather than attempting to analyze the remaining grounds of appeal one by one, I propose to restate what emerged from counsels' submissions before us as the crux of the appellants' argument. I do so bearing in mind Mr. Moseley's suggestion that this court's guidance might be useful to the practice regardless of the outcome of this appeal. In my opinion, the real issue for this court involves the sale process considered *as a whole*: did the chambers judge err *in the circumstances of this case* in approving the Redekop offer without ordering at least a short adjournment to determine whether the BC Builds proposal or any other bid with sufficient certainty to compete with Redekop's bid might be elicited? Put another way, did the court below 'balance' the *Soundair* factors in a manner that was appropriate and fair to all the parties, and that could be seen as such?

[64] These questions engage all four *Soundair* factors, which I set out again here for convenience and will address below:

1. It [the court] 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; and

4. It should consider whether there has been unfairness in the working out of the process.

Sufficient Efforts?

[65] While it would appear that Colliers took the usual steps beginning in April 2024 to solicit offers locally for the Langley property, the period of time over which the property was on the market was at most 2.5 months — a period that is markedly short compared to those approved in similar cases. In *Farm Credit Canada*, for example, the Court was critical of the fact that the property in question had been listed only "a little over three months" and noted the absence of any international advertising that might have been done to attract overseas buyers. (See paras. 33–4.) In the case at bar, Colliers advertised the property in the *Western Investor* and sent out emails to almost 5,700 potential purchasers. MNP also stated in its Third Report that "direct communication through phone, email and in-person meetings with over 100 prospective purchasers" took place, but without elaboration as to MNP's own efforts. It stated that in its opinion, *Colliers' marketing program* had "adequately" exposed the property to the market.

[66] Even at the time MNP's Second Report was filed, however, the receiver was aware of Mr. Weber's discussions with BC Builds and FRS in which a price of almost double Redekop's bid had been suggested, although not accompanied by a binding offer. Yet the receiver was apparently unwilling to contact or negotiate with

BC Builds directly (as it had done with Redekop), leaving Mr. Weber to do so on his own. He expressed a sense of unfairness when he deposed at the end of his affidavit of July 3:

> I do not understand why the Receiver would accept the Redekop offer after only approximately a month and a half of marketing and for an amount that would leave over $18 million dollars, plus interest owing, while being apprised of the CPS and the imminent approval from BC Builds. Furthermore, it would wipe out over $8.25 million of original equity, years of work, and short [sic] the Province of affordable homes it desperately needs.

[67] Weighing against further delay, of course, was the high "burn rate" consisting of interest of approximately $235,000 per month and maintenance costs of approximately $165,000 per month. In my respectful view, these factors and the wide disparity between the bids may have led the receiver to focus its attention too quickly on the Redekop offer and fail to take any other bids or potential bids seriously. The potential of a bid being made at $64 million should have led the receiver — and ultimately the Court — to consider whether a longer marketing period was necessary to allow all the parties to have confidence that the process had likely elicited as good an offer as could be realistically expected.

Efficacy and Integrity of the Process

[68] In the case at bar, counsel were in agreement that Redekop's offer had arisen in the course of, and presumably as a result of, Colliers' marketing efforts; the receiver had not approached Redekop *before* undertaking the marketing program. Technically, then, Redekop's bid was not a "stalking horse" bid as the term is normally used. At the same time, and as all counsel also seemed to acknowledge, it was "*akin* to" a stalking horse bid: because *Practice Direction 62* required that Redekop's offer, as the "Original Bid", be disclosed prior to the court hearing, it effectively established a "floor" or "baseline" for subsequent bids. One might infer that this occurred because of the absence of an appraisal of the subject property — a deficiency that was not explained. MNP argued, however, that in this instance, given that the three (ultimately two) "offers" put before the chambers judge by the receiver on July 9 were clustered between $34 and $37 million, a fair market value

close to the price offered by Redekop could be inferred. This may or may not be so. In fact, while the *raison d'être* of stalking horse bids is to create a price floor, a floor set below market value can have the effect of artificially depressing later bids. This is so because subsequent bidders will lack incentive to *significantly* outbid the stalking horse and because, as suggested by Professor Sarra, subsequent bidders come to the table relying on the due diligence of the stalking horse. In any event, an appraisal would have allowed the chambers judge to be sure.

[69] As we have seen, where an actual stalking horse process is proposed, the receiver is bound to obtain the court's prior approval so that the court can be satisfied the necessary safeguards — usually the availability of a fair market appraisal — exist. I agree with the Court in *Gidda* that where a break fee is proposed, the fee itself must also be specifically approved (and therefore brought to the Court's attention.) As stated in *P218*:

> ... the mere fact that the proposed Termination Fee is within the range of reasonableness as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable …. The court is not simply a rubber stamp for the agreement that was made. [At para. 36.]

Interests of all Parties

[70] The receiver was bound, of course, to protect the interests of the creditors and to obtain the highest price it could for their benefit. Indeed, the interests of the creditors (which would include in this case those who were unlikely to be paid out under the Redekop arrangement) has been said to be the *primary* concern of a court-appointed receiver: see Galligan J.A. in *Soundair* at 12 and Goodman J.A., dissenting, at 23. But the interests of "*all*" parties, including the Debtors and the personal guarantors of MCAP's mortgage, are also required to be considered. As stated in the seminal case of *Cameron v. Bank of Nova Scotia* (1981) 45 N.S.R. (2d) 303 (C.A.):

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or where the circumstances indicate that insufficient time was allowed for the making of

> bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply be a consideration of the interests of the creditors. [At 307; emphasis added.]

Both Galligan J.A. and Goodman J.A. in *Soundair* also referred to the importance of protecting the "integrity of the court process": at 12, 23, citing *Cameron*.

[71] Looked at from the Debtors' point of view, the receiver's insistence that its process and the Redekop bid were "adequate" might well have seemed unfair. The possibility of a bid equal to almost double that of the Redekop bid merited some efforts *on the receiver's part* to direct some energy to negotiating a firm offer from BC Builds/FRS or other possible bidders.

Unfairness in Working out the Process?

[72] In all the circumstances, it seems to me that the 'balancing' process carried out by the court below was not done in a manner that was fair and could be seen to be fair by all parties. Respectfully, I conclude that the chambers judge erred in proceeding to grant the Asset Vesting Order without giving additional time — say two to four weeks — so that all parties could be satisfied either that the BC Builds offer could not be firmed up appropriately, that it was simply not worthwhile to wait any longer, or that the fair market value of the property was in the vicinity of $34 million.

[73] In terms of the standard of review, I conclude that the chambers judge gave "no, or insufficient, weight to relevant considerations" in the exercise of his discretion. (See *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27.)

No Fresh Evidence

[74] The period between the July 9 order and the hearing of this appeal on August 14 provided the appellants with another few weeks in which to firm up the BC Builds/FRS offer or find another offer, if humanly possible. But no application to

adduce fresh evidence was brought by the Debtors in this court; nor did FSR or BC Builds appear at the hearing or attempt to provide us with any new information. Mr. Moseley had to concede that his client's appeal would be difficult to sustain, although he suggested it provided us with an opportunity to clarify the law. *Had fresh evidence of a firmer offer been adduced*, I would have been inclined to admit it as meeting the *Palmer* criteria, allow the appeal and specify a short period (two to four weeks) during which the bidding process could be reopened.

[75] I acknowledge that an order of this kind should of course be made only in unusual circumstances: see *Re Selkirk* (1987) 64 C.B.R. (n.s.) 140, quoted from at para. 53 of these reasons; *MNP Ltd. v. Mustard Capital Inc.* 2012 SKQB 325. In this instance, however, the circumstances *were* unusual — the absence of any appraisal, the large disparity between Redekop's price and the price purportedly offered by BC Builds/FRS, and the relatively short marketing period of two months (until the Redekop agreement was signed) at most. This case seems similar to *Re 1587930 Ontario Ltd. v. 2031903 Ontario Ltd.* (2006) 25 C.B.R. (5th) 260 (Ont. Sup. Ct). In that instance, two competing groups were bidding for property being sold under the *CCAA.* On the eve of the court hearing, one of the bidders was permitted to apply to introduce new evidence. The chambers judge described the options available to the Court:

> Counsel for the Monitor advised that in his view, the Court would have before it three options. The first option would be to accept the Sagecrest offer, either on the basis that the time was past for the introduction of further evidence or even with consideration of fresh evidence, the Sagecrest offer represented the most realistic return for all creditors under the Proposed Plan.
>
> The second option would be to accept the new evidence and accept, as urged by Messrs. Soorty and Cocov, their offer on the basis that it represents a firm agreement to close by no later than November 3, 2006, with a certain return to Sagecrest of its outstanding debt and an enhanced recovery to the unsecured creditors.
>
> The third option would be to in effect re-open the opportunity to any party to put in a further offer on the understanding that the timeframe should be such that there would be a closing within 30 days to reduce the "burn" estimated to now exceed $500,000 per month. [At paras. 11–13.]

[76] The judge concluded that the third option was the most appropriate, reasoning that:

> It is with some reluctance that I have concluded that in the circumstances, option 3 is the most appropriate at this time. I am mindful that this is a *CCAA* proceeding, not an auction process. Both sides have pointed to the decision of the Court of Appeal in *Soundair* as setting out the guiding principles. The factual distinction between this case and the facts in *Soundair* is that here there is at least the potential for a much-improved return for unsecured creditors.
>
> The improved return is a factor, which while not necessarily the only consideration, it is a significant one. While I am concerned with the risk to the estate of the company of the cost of the further time involved, I have concluded that it is a risk worth taking, since the unsecured creditors who will bear that risk are prepared to do so.
>
> ...
>
> A *CCAA* proceeding is different from an ordinary civil action and trial. The process itself anticipates dynamic and "real time" process that should only be stifled when to do otherwise would operate as a significant prejudice to a creditor or group of creditors. There is no need to apply the criteria of introduction of new evidence to this proceeding in my view.
>
> What is of greater significance is whether the offer process should be allowed to continue. I have concluded that in these somewhat unique circumstances that it should.
>
> I do think that it would operate unfairly to Sagecrest to accept they Soorty/Cocov offer outright at this stage. Among other matters, there is an outstanding appeal by Sagecrest of disallowance of part of its claim, which is waived only if its offer is accepted. In addition, Sagecrest has become in effect a "stalking horse" with its firm offer and should not be prejudiced by what is both a last minute and still somewhat uncertain position.
>
> In addition, the unsecured creditors should not be deprived of the possibility of Court consideration of an improved Sagecrest offer. [At paras. 19–25; emphasis added.]

In the result, the judge ordered that the bidding process should be "re-opened" for a short time.

[77] *Re 1587930 Ontario Ltd.* was of course not an appeal, but in my respectful opinion, fairness in *this* case also required the chambers judge to grant a two-to-four week period for all offers to be finalized and reconsidered by the receiver. Alternatively, MNP should either have had an appraisal done or taken steps to

satisfy itself as to the fair market value of the property without reference to Redekop's bid.

[78] Again, on the other side of the scales was the fact that interest and site management costs were accruing every month, such that even the first mortgagee might not ultimately have received full payment of its loan. It is because of this "burn rate" that only a short period of delay as opposed to, say, six to ten months would have been appropriate.

In the Absence of Fresh Evidence

[79] In the absence, however, of new or fresh evidence from the Debtors of the kind I have described, it is my opinion that this court should not now delay the sale any further. In effect, the Debtors have had the benefit of the sort of adjournment the chambers ought to have ordered, with nothing to show for it. This is indeed unfortunate, especially for the personal guarantors, but the realities of the case must now be recognized as leading to the sale to Redekop.

[80] It is unnecessary to consider the fresh evidence application of the receiver, given that the proferred affidavits merely support the dismissal of the appeal.

Disposition

[81] In the result, we concluded that the appeal must be dismissed. We thank all counsel for their helpful submissions.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Grauer"

I agree:

"The Honourable Justice Winteringham"