**SUPREME COURT OF NOVA SCOTIA**
**IN BANKRUPTCY AND INSOLVENCY**

**Citation:** *Royal Bank of Canada v. 2M Farms Ltd*, 2017 NSSC 105

**Date:** 2017-04-18
**Docket:** Hfx. No. 425907
**Registry:** Halifax

**Between:**

Royal Bank of Canada

Applicant

v.

2M Farms Ltd.

Respondent

## Decision

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| **Judge:** | The Honourable Justice Moir |
| **Heard:** | February 23, 2017 & March 2, 2017, in Halifax, Nova Scotia |
| **Oral Decision:** | March 3, 2017 |
| **Transcribed & Edited:** | April 18, 2017, in Halifax, Nova Scotia |
| **Counsel:** | Gavin D.F. MacDonald & Meryn Steves, for the Applicant<br>Tim Peacock, for the Intervenor, National Building Group Inc.<br>Marc Comeau, for Dana Robinson Fisheries Limited |

**Moir, J. (Orally):**

**Introduction**

[1] BDO Canada Limited, as receiver of 2M Farms Ltd., moves for approval of a sale of a five acre lot including a potato warehouse and as counsel puts it: “foreclose out the encumbrances on title to the property.” The receivership and power of sale are to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, had been joined as a party.

[2] The other encumbrancer is National Building Group Inc. It has a builder’s lien that was registered after the banks’ security. The priority between the banks’ security and the builder’s lien is in dispute. National Building Group seeks to make a case under s. 8(3) of the *Builder’s Lien Act.*

[3] The proposed order provides for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities.

[4] In addition to the issues of approving the sale and ordering the proceeds be paid into court, I raised questions about the proposed terms for the order for sale by the receiver. Also, some questions about the appropriateness of permitting sale

before priorities are settled have been raised by National Building Group. I will deal with those issues after determining whether to accept the receiver's recommendation.

**Approval of Sale**

[5] The receiver submits that *Royal Bank of Canada v. Soundair Corporation* [1991] O.J. 1137 (CA) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.

[6] The *Bankruptcy and Insolvency Act* was amended after *Soundair*. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).

[7] As stated by Justice Wood at paragraph 14 of *ECBC v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420: "it is not the role of the Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the *Bankruptcy and Insolvency Act*, a receiver must deal with the receivership property in a

commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of *Crown Jewel*, that the court will consider fairness of the process that led to the sale.

[8] As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the *Bankruptcy and Insolvency Act*, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

[9] BDO Canada Limited was appointed receiver of 2M Farms Ltd. in April 2014 and it was given power to sell assets, mainly the potato warehouse in Berwick. The Royal Bank of Canada held a general security agreement and a collateral mortgage of the property. National Building Group Inc. registered a builders' lien. It appears that the Royal Bank is owned about a million dollars and National Building Group is owed about $130,000. These are the only secured creditors of the warehouse property. As I said, priority is in dispute.

[10] The land is five acres just outside Berwick. The bank financed and the National Building Group constructed a building on the property. It is a 18,300 square foot vegetable warehouse equipped to store and ventilate potatoes. The construction was nearly complete when the bank called its' loans and National Building Group filed its' lien.

[11] To finish the building, a new owner will have to install heating, plumbing, and septic systems. A part of the concrete floor remains to be poured.

[12] The receiver listed the property with a firm of commercial realtors in July, 2014 for about $700,000. No offers were received until June, 2015. Offers were well under list prices. As a consequence of the apparent lack of interest in the first year and disappointing offers after that, the receiver reduced the list price from time to time. In rounded figures the list prices went as follows:

February, 2015…… $600,000

January, 2016…….. $550,000

March, 2016…… $500,000

June, 2016……... $425,000

July, 2016…… $350,000

October, 2016…….. $315,000.

[13] The realtors reported regularly to the receiver and the bank. The reports, and testimony from one of the realtors, evidenced the marketing efforts and recommendations on listing prices. The evidence also shows that there were at least three impediments in the market. First, was the incomplete state of the construction. Secondly, uses desired by at least one potential purchaser required a change from the agriculture A1 zone attached to the five acres. Thirdly, there were problems with egress in the winter months.

[14] Four offers were made and negotiated over. The first was for $300,000 in June, 2015. The receiver attempted to move the price to $400,000 but the party was not interested. In August, 2015 $200,000 was offered. The negotiations stopped at $240,000. In June, 2016 there was an offer of $275,000, which the receiver succeeded in increasing to $350,000. The agreement failed when the purchaser attempted to negotiate a lengthy extension of a due diligence condition, mainly to pursue a change in the zoning.

[15] In November of 2016, Dana Robinson Fisheries Limited offered $200,000. Negotiations only got this party to $210,000. The receiver accepted an offer of that much, subject of course to approval by the court. That is the sale that concerns us today.

[16] National Building Group criticizes the sale in a number of ways. An MLS listing was not pursued. For several months before the sale there were no signs on the road that passes the property. There was a sign visible from Highway 101, but it was inadequate. At one time, the property could have been sold for $300,000, which is $90,000 more than the present sale.

[17] National Building Group also argues "the reasonableness of the purchase price… is a difficult analysis without an accounting by the receiver of the expenses incurred in the management and marketing of the property." It proposed that we determine the priorities before considering sale approval or "delay the proposed sale for 30 days to allow for an accounting", and an opportunity for National Building Group "to explore its' options".

[18] The difficulty with these arguments is that the purchaser will not be bound unless the receiver closes on the closing date or an agreed extension of it. The court cannot "delay the proposed sale". Further, I failed to see the connection between expense of receivership and the reasonableness of the sale price. The representatives of the lien holder explained that knowing the amount of the expense was requisite to National Building Group formulating or soliciting an amount to be offered now.

[19] This argument is augmented by the disclosure that there was a failure in communications between the receiver and National Building Group about the sale. Also, National Building Group counsel argues that the receiver's failure to consult when reducing the list price to $315,000 caused unfairness and obscured transparency. I will dispose of the other criticisms, then come back to the issue of whether National Building Group was treated fairly.

[20] The decision to reject the $300,000 offer was made almost two years ago. At that time the list price was $600,000, appraisals were available, and experienced commercial realtors were advising. To seek $400,000 was a judgement made by the receiver in the circumstances of that time. It may not have been commercially reasonable to accept $300,000 at that time.

[21] The complaint about signs takes us into a review far to detailed for a motion to approve a receiver's sale. Also, I refer to the details of the marketing effort and the testimony of Mr. Tom Carpenter, which I accept.

[22] The complaint about MLS was fully answered by Mr. Carpenter. That kind of listing is not usually helpful for marketing a commercial property in the Annapolis Valley. What is important is that MLS realtors were regularly informed about the

property and the list prices. This was one of the several marketing techniques Mr. Carpenter's firm used, and it did lead to potential purchasers.

[23] In light of the amount of secured debt and the appraisals, a $210,000 purchase price is disappointing. However, the property was exposed to the market for over twenty months while it was the subject of a professional marketing effort. I find the sale is commercially reasonable, unless it treats National Building Group unfairly.

[24] Communications between the receiver and National Building Group were through lawyers.

[25] In this case, the receiver chose to discharge its' power of sale by listing with a commercial realtor and exercising skill and judgement as exposure to the market unfolded. Just as when a receiver markets secured property through tender, auction, or direct negotiations, the receiver who employs a realtor advances a sale by the court.

[26] On May 8, 2015, National Building Group wrote to the receiver and its' lawyer complaining that there was no forsale sign on the warehouse property and requesting a report on the marketing efforts. That complaint and request was reiterated by National Building Group's counsel on August 13, 2015.

[27] Receiver's counsel provided a full response on August 13, 2015. He advised of the two offers and the termination of negotiations when the potential purchasers were unwillingly to come up towards what the receiver believed at the time was a reasonable price. He said negotiations with a "sophisticated property owner" were underway. He provided a detailed report from Mr. Carpenter. And, receiver's counsel wrote "Again, if your client knows of any person willing and able to make an offer on the property, they should encourage that person to make the offer either to the listing brokerage or to the receiver directly."

[28] There was further correspondence in December 2015 and January 2016 which included various requests by National Building Group for disclosure and disclosure by the receiver in response.

[29] By letter dated June 17, 2016, receiver's counsel advised National Building Groups counsel of the $350,000 agreement purchase and sale and provided a copy. A little over a month later counsel had to advise that the agreement was terminated under the due diligence conditions.

[30] An inadvertent failure occurred on November 24, 2016. The agreement of purchase and sale now sought to be approved had been concluded. On that day, receivers' counsel prepared a letter to be sent by email to National Building Groups'

counsel. It was to advise of the $210,000 sale to Dana Robinson Fisheries Limited. Copies were sent to the receiver, but through inadvertence nothing was sent to the main addressee.

[31] After the approval hearing started, National Building Group produced an offer of $230,000 and evidence that another offer could be coming. That offer would be for $236,500.

[32] A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. The integrity of the sale process depends on this. See Justice Nunn's decision in *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 57 N.S.R. (2d) 20 (S.C.).

[33] The failure to send the email on November 24, 2016, caused no unfairness to National Building Group. If it wanted to drum up interest in the receiver's sale it ought to have done so as the receiver suggested and directed interested parties to the realtor or the receiver before an agreement of purchase sale was finalized. On November 24, 2016, there was nothing left for National Building Group to do because the receiver was subject to a binding agreement of sale subject to an approval process that cannot be turned into a new opportunity for making offers.

[34] National Building Group says that the prospects it has recently solicited show that the receiver could have gotten a better price last November if National Building Group was advised of the sale. Again, producing slightly higher offers after the agreement of purchase and sale was completed would make no difference. To make a difference, National Building Group needed to solicit interest before the receiver contracted in good faith with a purchaser.

[35] National Building Group was not consulted about the reductions in list prices. It says this caused unfairness. There are three answers to that. First, National Building Group knew the receiver had concluded that the earlier list prices were too high because in June, 2016 National Building Group was told of the $350,000 sale. Second, list prices are public. Third, the lowest list price and the actual sale price exceed the debt owed to National Building Group. The reductions in list price would be of practical concern to the Royal Bank, to the defendant, to any guarantors, but not to National Building Group.

[36] I find that the sale process was fairly conducted in the interest of the various parties.

**Proposed Terms for Foreclosure**

[37] The draft order approving the sale provides for a receivers' deed and a receivers' certificate that would foreclosure "all of the right, title and interest of 2M Farms Ltd. and all those claiming through it". That language is fine for an order for sale to which all of those claiming through the mortgagor are bound.

[38] However, the draft order goes further. It says:

> including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levees, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the "Claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the Applicant; and, (iii) all recorded interests showing in the parcel register for the Property (collectively, the "Encumbrances").

Clearly, this language captures unascertained or unknown property interests.

[39] Does the broad language of the proposed order exceed the bounds of Nova Scotia receivership sales?

**Foreclosure-Based Versus Vesting Order-Based Receiverships**

[40] Counsel for the receiver writes:

> With respect for the concerns identified in *enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.* 2014 NSSC 420, the Applicant submits the following arguments in favour of the Court's power to order a sale of property by a receiver and foreclose out the various encumbrances on title subsequent to the security of the Applicant.

[41] Counsel then argues that s. 15 the *Real Property Act* incorporates the English Conveyancing Act, 1881 into Nova Scotia law. Subsection 25(2) of the English statute permitted the high court to order a sale of mortgaged property.

[42] This same argument, and others, were put forward by Mr. Robert G. MacKeigan, later of Queen's Counsel, in an extensive brief on receivership sales in *Canadian Imperial Bank of Commerce v. Yarcom Cable T.V. Limited and K-Right Communications Limited*, 1977 S.H. No. 13482. For the past forty years that brief has often been consulted by lawyers and judges. So much so, that it should be regarded as a published authority, as a reliable record of long standing practices, and as a work that has much influenced receivership practice in our province.

[43] Mr. MacKeigan finds, in the statutes, judicial decisions, and learned texts he cites equitable and statutory sources for our power to order a receiver's sale in proceedings to enforce security. He grounds the power in the equitable jurisdiction to order foreclosure.

[44] Justice Wood's decision in *ECBC v. Crown Jewel Resort Ranch Inc*. is not about the foreclosure-based receivership order that has been our practice for many years. In that case the receiver agreed to a sale. It sought approval. The subsequent encumbrancers got notice. Justice Wood approved the sale. The problem was that the receiver, following the practice in Ontario, sought a vesting order rather than an order for sale effecting foreclosure. Vesting orders are statutory and we have no statute for them. See paragraphs 19 and 20 of *Crown Jewel.*

[45] Also, the receiver of *Crown Jewel* had agreed to provide a deed and the purchaser had an opportunity to investigate title, consistent with our foreclosure-based receivership. Justice Wood said at paragraph 25:

> The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to the title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

[46] The *Crown Jewel* decision suggests that we may not have broad authority to grant vesting orders on unlimited grounds. It, therefore, questions the use of a vesting order-based receivership sale. It does not, however, raise any question about our foreclosure-based receivership sale.

[47] I respectfully adopt Justice Wood's reasons in *Crown Jewel*. In my opinion, there is no statutory authority in Nova Scotia giving the court unbound authority to vest property. In my opinion, a power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of paragraph 242(1)(c) of the *Bankruptcy and Insolvency Act*. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of the those claiming by, through, or under the debtor.

[48] I am prepared to make an order along those lines and not an order that appears to end unascertained or unknown rights the way a vesting order might do.

**The Need to Join Interested Parties**

[49] We do not take rights away from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties.

[50] I am told that a receiver had to get releases from subsequent encumbrancers in some unreported cases. Not joining subsequent encumbrancers as parties could be fatal to foreclosure. If joined in a receivership proceeding to enforce security in this

province, subsequent encumbrancers are foreclosed by the receiver's sale and have no right that may require a release.

[51] *Snell's Equity* says this at page 947:

> When a foreclosure claim is made, all encumbrancers subsequent to the claimant, as well as all other persons interested in the equity of redemption must be made parties or they will not be bound by the foreclosure decree.

John McGhee, Q.C., *Snell's Equity, Thirty-Third Edition* (2015, Sweet & Maxwell, London).

[52] There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforcers security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. They can be made parties through the mechanism of a notice to subsequent encumbrancer under Rule 35.12. Or, they may be privies prevented by collateral estopple for denying the foreclosure.

[53] The problem with relying on the third way is that the parties, and more importantly, the purchaser have no certainty until there is finding against the subsequent encumbrancer. The better practice therefore, is to join all subsequent encumbrancers as parties by the first or second method. In the case of 2M Farms, the only known encumbrancers are parties.

**Dispute about Priorities**

[54] When priorities are in dispute, the court commonly orders a sale with the proceeds standing in the place of the property. This preserves the value of the property while allowing time for a resolution or determination of the dispute. See, Rule 42.09.

[55] Thus, even if National Building Group Inc. turns out to have priority, the purchaser will take title free of that interest.

**Conclusion**

[56] I will grant an order approving the sale agreed to by the receiver. The order will contain the terms for approval and for payment into court found in the draft order. The terms concerning foreclosure need to conform with what I have said on that subject.

Moir, J.