



Clerk's stamp:

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Court:

COURT OF QUEEN'S BENCH OF ALBERTA

IN THE MATTER OF THE INSOLVENCY OF
ELABORATE HOMES LTD., ELABORATE
DEVELOPMENTS INC., MANJIT (JOHN) NAGRA,
JASWINDER NAGRA

Judicial Centre

EDMONTON

Applicant

PRICEWATERHOUSECOOPERS INC.

Respondents

ELABORATE HOMES LTD., ELABORATE
DEVELOPMENTS INC., MANJIT (JOHN) NAGRA,
JASWINDER NAGRA

Document

**BRIEF OF THE APPLICANT PRICEWATERHOUSE
COOPERS INC.**

Hearing

JUNE 3, 2011

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I. NATURE OF THE APPLICATION

1. The applicant, PricewaterhouseCoopers Inc. ("PWC"), applies for the following relief:
 - (a) An Order Approving Sale and Vesting Order substantially in the form attached as Schedule "A" of the Notice of Application, or on such further and other terms as this Honourable Court may direct; and
 - (b) A temporary Restricted Court Access Order pursuant Rule 6.28 of Alberta *Rules of Court*, sealing the contents of the Receiver's Bid Summary until the proposed sale of assets is closed.

II. FACTS

2. On February 22, 2011, PWC was appointed as Receiver (the "Receiver") of all the current and future assets, undertakings and properties of Elaborate Homes Ltd. ("Homes") and Elaborate Developments Inc. ("Developments") (collectively referred to as "Elaborate" or the "Company") pursuant to the provisions of Orders (the "Orders") granted by the Court of Queen's Bench of Alberta (the "Court").
3. Homes was established in Grande Prairie in 1989, and is in the business of the construction and sale of new homes. Developments was established in Grande Prairie in 2000, and is in the business of commercial and residential real property development and sales.
4. Pursuant to S. 3(k) of the Orders, the Receiver was authorized to market any or all of the property and sell, convey, transfer, lease or assign the property with the approval of the Court if the disposition is made out of the ordinary course of business of the Debtor.
5. Due to the co-mingling of operations and assets, commonality of the assets, creditors and potential buyers for each of the companies' assets, the Receiver conducted one sales process, soliciting offers for the assets of both of Homes and Developments.
6. The Receiver prepared a salient fact sheet and a Confidential Information Memorandum ("CIM") which included a standard form of offer. The salient fact sheet was distributed to 160 home builders and land developers throughout Canada and made it available to all of the Receiver's offices in Canada. In addition, the Receiver established a website which contained status updates on the receivership as well as a copy of this salient fact sheet.
7. On March 31, 2011, the Receiver ran an advertisement in respect of the sale of the assets of Elaborate in the following publications:
 - (a) Globe and Mail (National Edition);
 - (b) Edmonton Journal;
 - (c) Calgary Herald; and,
 - (d) Grande Prairie Daily Herald Tribune.
8. On April 14, 2011, the Receiver ran a further advertisement in respect of the sale of the assets of Elaborate in the following publications:
 - (a) Edmonton Journal;
 - (b) Calgary Herald; and,
 - (c) Grande Prairie Daily Herald Tribune.
9. The Receiver prepared a CIM which set out Elaborate's assets in various logical parcels as well as other information to assist potential purchasers in making their offer. This CIM was issued to 147 parties who had seen the advertisement or had received the salient fact sheet and who wanted additional information on the assets.

10. In addition, the Receiver created an electronic data room and provided interested parties with access to this online data room. The data room contained title searches, floor plans, real property reports, community information (including layouts, restrictive covenants, land use and development guidelines, architectural guidelines and geotechnical reports – as available) and photos. The Receiver also facilitated numerous site tours of the assets by interested parties.
11. The sales process established a deadline for the submission of offers at 5:00 pm on May 6, 2011 (the "Offer Deadline").
12. Prior to the Offer Deadline, the Receiver contacted via phone calls and email all known parties expressing an interest in submitting an offer to address any concerns the parties may have prior to the Offer Deadline.
13. As of the Offer Deadline, the Receiver received offers from 27 different parties comprised of three en bloc offers and numerous offers for specific parcels, groups of parcels or individual properties.
14. The Receiver summarized the offers received, including the proposed allocation of the purchase price reflected by each interested party in their offer (the "Bid Summary").
15. Based on the offers received, the Receiver concluded that an en bloc sale of the assets will lead to a higher net recovery than a piecemeal sale. The Receiver analysed the offers for specific parcels received by combining the best individual offers available and determined that this piecemeal approach did not provide a higher realization than the en bloc offers received.
16. Of the three en bloc offers received, the Receiver concluded that the offer submitted by 1601812 Alberta Ltd. (the "Successful Offeror") will lead to the highest net recovery. The terms of this offer to purchase are summarized in the Bid Summary.
17. The Receiver commissioned a forced liquidation appraisal of all of the land and home assets of Elaborate, and the value of the Successful Offeror's offer represents an average of approximately 77% of the appraised value of assets considered in the offer.
18. The Receiver is of the view that the sales process was conducted in accordance with the terms of the Orders, and that the market was properly canvassed. Significant interest was expressed in acquiring the Company's assets as evidenced by the number of requests for CIM's and the offers received. The Receiver considers that all reasonable requests for information made to it by parties during the sales process were satisfied.
19. Both Homes and Developments are supportive of the Receiver's recommendation.
20. The Successful Offeror's offer was one of the top two offers received and represents the highest realizations after considering the quantum of the Assumed Liabilities.
21. The offer was for an En Bloc sale of the assets, which was considered to be economically preferable to a piecemeal sale.
22. If approved by the Court, the parties intend to close the transaction by June 10, 2011 or such other date as may be agreed in writing between the Receiver and the Successful Offeror.

23. The Receiver is seeking the approval of an offer and, accordingly, in the event this Honourable Court does not grant an order approving the sale or the transaction does not close, the Receiver is of the view that efforts to re-market the assets of Elaborate may be impaired if the Bid Summary is made public at this time. The Receiver is of the view that it is preferable for the Bid Summary to remain confidential until such time as the sale transaction closes.

III. APPROVING SALE AND VESTING ORDER

(a) Legislation

24. The Court may appoint a receiver to do the following:

- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;
- (b) exercise any control that the court considers advisable over the property and over the insolvent corporation's business; and
- (c) take any other action that the court considers advisable.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), s. 243(1) [Tab A]

25. A receiver has the obligation to deal with the property of an insolvent corporation in a commercially reasonable manner.

BIA, s.247 [Tab B]

(b) Consent Receivership Orders

26. The Receiver was granted the following powers pursuant to the Orders of Justice J.J. Gill, dated February 22, 2011:

- (a) To take possession of and exercise control over Elaborate Property (the "Property") and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) To engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties;
- (c) To market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (d) To apply for a vesting order to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (e) To report to, meet with and discuss with such affect persons as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable; and

- (f) To exercise any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

Consent Receivership Order, granted by Justice J.J. Gill in *The Matter of the Insolvency of Elaborate Homes Ltd.*, February 22, 2011 [Tab C]

Consent Receivership Order, granted by Justice J.J. Gill in *The Matter of the Insolvency of Elaborate Developments Inc.*, February 22, 2011 [Tab C]

(c) Jurisprudence

27. When reviewing a proposed sale of assets by a receiver the court must consider:

- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interests of all the parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16. [Tab D]

Sufficient Effort to Receive the Best Price and Acting Providently

28. When dealing with the property of an insolvent corporation, a receiver's duty is not to obtain the best price possible for the property, but to do everything reasonable in the circumstances to obtain the best price.

Skyepharm PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para. 4 [Tab E]

29. Prices contained in other offers submitted to the receiver only have relevance 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.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 30 [Tab D]

The Interests of the Parties

30. The court's primary concern when reviewing the interests of the parties should be the interests belonging to the creditors of the insolvent corporation.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 39 [Tab D]

The Efficacy and Integrity of the Process

31. The court is not required to scrutinize every element of the process by which the receiver reached its decision to accept the offer.

Crown Trust Co. et al. v. Rosenberg et al. (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pg. 548 [Tab F]

32. When dealing with the property of an insolvent corporation, the court should assume that the receiver has acted properly unless the contrary is clearly demonstrated.

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 14 [Tab D]

Unfairness in the Process

33. If the receiver has acted reasonably, prudently, fairly, and not arbitrarily, it is only in exceptional circumstances that the court will find the sale process unfair and proceed contrary to the recommendation of the receiver.

Crown Trust Co. et al. v. Rosenberg et al. (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pg. 548 [Tab F]

IV. TEMPORARY SEALING ORDERS

(a) Legislation

34. On an application to temporarily seal a court file, the court has broad discretion and may make a direction on any matter that the circumstances require, and the court may grant the order notwithstanding the provisions of Division 4 of Part 6 of the *Rules of Court*.

Rules of Court, Alta Reg 124/2010, Rule 6.28 [Tab G]

Order, granted by Justice K.M. Eidsvik in *Royal Bank of Canada v. Hannaco (2008) Ltd. O/A Canada Grey Motor Inn, Naheed Zia and Nasreen Zia*, January 14, 2011, at para. 11 [Tab H]

Order, granted by Justice K.D. Yamauchi in *The Matter of Cow Harbour Construction Ltd.*, May 28, 2010, at para. 5 [Tab I]

(b) Jurisprudence

35. Temporary sealing orders should only be granted when:
- (a) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
 - (b) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (S.C.C.) at para. 45 [Tab J]

36. The most appropriate sealing order in a court approval sale situation is that the supporting valuation material remain sealed until such time as the sale transaction has closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab K]

37. Commercial courts have accepted that temporary sealing orders are appropriate in circumstances where the information subject to sealing orders contain sensitive commercial information, the release of which could be prejudicial to the stakeholders of the confidential information.

Nortel Networks Corp. (Re) (2009), 56 C.B.R. (5th) 224 (Ont S.C.J. [Commercial List]) at para. 39 [Tab L]

Maxtech Manufacturing Inc. (Re) (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J. [Commercial List]) at para. 30 [Tab M]

38. In the context of a receivership and the sale of assets, it is common for the court to seal the Receiver's Bid Summary in case a further bidding process is required if the transaction being approved falls through.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab K]

39. A temporary sealing order is required until the sale is fully executed due to the confidential nature of the accepted offer and the deleterious effect it would have on the integrity of any future sale process should the original sale not close.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab K]

Canrock Venture LLC v. Ambercore Software Inc., 2011 ONSC 2308 (Ont S.C.J. [Commercial List]) at para. 17 [Tab N]

40. It is extremely rare that an interested party will come back asking that the sealing order be set aside as, ordinarily, all of the assets that are bid on during the court sale process are sold and approved by court order. No one will have a further interest in the confidential information when the transaction is closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab K]

V. USE BY THE RECEIVER OF CONFIDENTIALITY AGREEMENTS

41. For the reasons outlined in the Receiver's Second Report, it is essential that the contents of the Receiver's Bid Summary be kept confidential. The purpose is to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17 [Tab K]

42. There are many cases where a Receiver or Court Officer has utilized a Confidentiality Agreement in these circumstances:

See:

Bank of Montreal v. Dedicated National Pharmacies Ltd.; 2011 CarswellOnt 185, 2011 ONSC 346, 73 CBR (5th) 13 (Ont. S.C.J. [Commercial List])

Pope & Talbot Ltd., Re, 2008 CarswellBC 1726, [2008] B.C.W.L.D. 6657, [2008] B.C.W.L.D. 6618, 46 C.B.R. (5th) 34 (BCSC)

ICICI Bank Canada v. 1539304 Ontario Ltd., 2009 CarswellOnt 6114, 57 C.B.R. (5th) 300 (Ont. S.C.J.).

Canrock Ventures LLC v. Ambercore Software Inc., 2011 CarswellOnt 1069, 2011 ONSC 1138 (Ont. S.C.J. [Commercial List])

Bank of Montreal v. Barber Glass Industries Inc., 2011 CarswellOnt 470, 2011 ONSC 755 (Ont. S.C.J.)

For the sake of brevity, copies of these cases are not attached to this Brief.

VI. RELIEF CLAIMED

43. Based upon the materials filed and the foregoing submissions, PWC respectfully requests:
- (a) An Order Approving Sale and Vesting Order substantially in the form attached as Schedule "A" of the Notice of Application, or on such further and other terms as this Honourable Court may direct; and
 - (b) A declaration that Division 4 of Part 6 of the *Rules of Court* does not apply to the request for a temporary sealing Order, or alternatively, a temporary sealing of the contents of the Receiver's Bid Summary until the proposed sale of assets is closed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF JUNE, 2011.

MILLER THOMSON LLP

Per:



RICK T. G. REESON, Q.C.
Solicitors for the Applicant,
PricewaterhouseCoopers Inc.

TABLE OF AUTHORITIES

Legislation

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Rules of Court, Alta. Reg. 124/2010

Jurisprudence

Bank of Montreal v. Barber Glass Industries Inc., 2011 CarswellOnt 470, 2011 ONSC 755 (Ont. S.C.J.)

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Canrock Ventures LLC v. Ambercore Software Inc., 2011 CarswellOnt 1069, 2011 ONSC 1138 (Ont. S.C.J. [Commercial List])

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