

CANADA / JUDGMENT

Feronia Inc. (Re)

2020 BCSC 1372

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Supreme Court of British Columbia

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2020 BCSC 1372 Feronia Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Feronia Inc. (Re),

2020 BCSC 1372

Date: 20200915

Docket: B200352

Registry: Vancouver

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, As Amended

And

In the Matter of the Notice of Intention to Make a Proposal of Feronia Inc., of the City of Vancouver, in the Province of British Columbia

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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B. Burland

Place and Date of Hearing:

Vancouver, B.C.

September 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 15, 2020

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I. Introduction

- [1] On September 3, 2020, I made an order that, among other things, approved the sale of the assets of the debtor, Feronia Inc. ("Feronia"), to an affiliate of one of its two largest shareholders. Feronia had recently filed a notice of intention to make a proposal to its creditors under Part III, Division 1 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], and therefore needed court approval under s. 65.13 of the BIA in order to proceed with the sale.
- [2] The application was opposed by one of Feronia's convertible unsecured subordinated debenture holders, who argued that, among other things, the process leading to the sale was flawed and inadequate and, as a result, the assets were being sold for far less than their real value.
- [3] Because the matter was urgent, I granted the order immediately after hearing the application and advised the parties that I would provide written reasons for my decision at a later date. The following are those reasons.

II. The Background Facts

A. Feronia and its Assets

- [4] Feronia is a public company with a registered office in Vancouver. Its head office is in Kinshasa, in the Democratic Republic of the Congo (the "DRC"). Although its shares are listed on the TSX Venture Exchange, it has, since July 22, 2020, been subject to a cease trading order by the Ontario Securities Commission for having failed to file certain periodic disclosure material.
- [5] Its largest shareholders are the CDC Group PLC ("CDC") and KKM 2 Limited ("KKM"), who own 42% each. The remainder of its shares are held by others, including members of the public. It has issued various debentures, options and deferred share units, among other forms of convertible securities.
- [6] Feronia is essentially a holding company with no employees. It holds all but one of the shares in a Belgian subsidiary, known as Feronia Maia Sprl ("FM"). Between them, Feronia and FM hold a 76.16% equity interest in a DRC company known as Plantations et Huileries du Congo SA ("PHC"). PHC operates three palm oil plantations in the DRC, the government of which holds the remaining 23.84% interest in PHC.
- [7] Over 8,000 unionized permanent and temporary employees, on a full-time equivalent basis, work at those plantations. The plantations are said to be an important pillar of the local community in the DRC, providing employment, amenities, healthcare and education to approximately 100,000 people who live in and around them.
- [8] Apart from those shares and certain intercompany claims (against PHC, in the case of Feronia, and against Feronia, in the case of FM), neither Feronia nor FM have any other assets of significance.
- [9] Feronia was formed in 2008 for the purpose of raising funds to bid on and acquire PHC, which was then owned by the Unilever group. It was originally incorporated under Ontario's Business Corporations Act, R.S.O. 1990, c. B.16, but was on August 18, 2016 continued into British Columbia under the British Columbia Business Corporations Act, S.B.C. 2002, c. 57.
- [10] Feronia acquired its interest in PHC in 2009. Before then, PHC was having difficulty attracting investment due at least in part to civil unrest and instability in the PRC. Feronia has since invested in replanting and infrastructure upgrades at the plantations. Despite those investments, PHC has continued to operate at a loss and so Feronia and PHC have had to borrow extensively from third parties to fund PHC's infrastructure investments and operations.

B. Feronia's Debts and Financial Difficulties

- [11] Feronia's only secured debt arises from a term facility dated December 21, 2015 that PHC entered into with the so-called "DFI Lenders," a group of lenders and investors focused on social and economic development internationally. That facility (the "DFI Term Facility") took the form of a term loan to PHC in the principal amount of up to US\$49 million. By 2017, PHC

had drawn down the entire amount of the loan. Approximately US\$55 million in principal and interest was said to be owing as of July 31, 2020. PHC's indebtedness to the DFI Lenders is guaranteed by Feronia and secured by way of a pledge of Feronia's and PHC's assets.

[12] Feronia and its affiliates' unsecured debts include the following:

- a) CDN\$6,060,773, in respect of a series of convertible unsecured subordinated debentures, issued by Feronia through an indenture between Feronia and Equity Financial Trust Company (since assigned to TSX Financial Trust Company), dated July 24, 2012 and amended on August 29, 2012 and July 24, 2017;
- b) loan facilities provided by CDC directly to Feronia in 2018 (on which US\$6,118,565 was owing as of August 2020) and 2019 (on which US\$16,436,932 was owing as of August 2020); and
- c) various intercompany loans.

[13] As of December 31, 2018, the entire DFI Lender Term Facility fell due and became a current liability as a result of breaches of a covenant in the agreement to maintain certain solvency standards. On January 2, 2020, Feronia announced that it did not make the scheduled semi-annual interest payment on its outstanding convertible debentures. By mid-March 2020, PHC's operational losses had consumed all of the cash that had previously been advanced to it. During the period between January 1 and May 4, 2020 alone, PHC lost an average of US\$1.4 million per month, for a total of US\$5.4 million, not including financing activities.

C. The Sponsor Support Agreement

[14] In order to continue operating, PHC urgently required additional funding. KKM and CDC advised Feronia in early 2020 that no further funds would be forthcoming unless it pursued an immediate restructuring.

[15] The resulting negotiations led to the Sponsor Support Agreement dated May 20, 2020, among Feronia, CDC and KKM, through which FM received:

- a) an unsecured, subordinated term loan of up to US\$15 million, with an initial advance of US\$5million, from an affiliate of KKM, on which US\$5,038,904 was outstanding as at July 31, 2020; and
- b) another bridge loan from CDC, on which \$4,563,616 was outstanding as of August, 2020.

[16] Those loans were advanced in exchange for Feronia's promise to restructure itself by taking the following steps, among others:

- a) accepting a majority of KKM appointees to its board of directors;
- b) filing a notice of intention to make a proposal under the BIA by no later than July 3, 2020 (later extended by agreement);
- c) seeking to complete a sale of its assets by no later than August 15, 2020; and

- d) entering into a "backstop agreement", pursuant to which KKM would acquire Feronia and FM's shares in PHC on certain terms unless those shares were sold through a court-approved sales process by August 15, 2020 on terms more favourable to Feronia and its stakeholders, as determined by Feronia's board of directors.
- [17] On May 22, 2020, Feronia issues a press release announcing its having entered into the Sponsor Support Agreement. As of June 30, 2020, Feronia and its affiliates owed approximately US\$91.6 million to their various creditors.

D. The Sales Process

- [18] Less than a week after signing the Sponsor Support Agreement, on May 26, 2020, Feronia engaged Ernst & Young Corporate Finance (Canada) Inc. and Ernst & Young Orenda Corporate Finance Inc. (collectively, "EY Corporate Finance") as its independent financial advisors to assist in marketing and selling Feronia's assets (i.e., the shares in FM and PHC and its intercompany debt). On June 2, 2020, Feronia issued a press release advising of the appointment of EY Corporate Finance and inviting interested parties to contact them.
- [19] In order to meet the deadline in the backstop agreement, EY Corporate Finance set a bid deadline of June 30, 2020. In consultation with Feronia, it:
- a) developed a teaser letter;
 - b) prepared a confidential information memorandum;
 - c) set up an electronic data room; and
 - d) compiled a list of 49 potential purchasers to approach directly.
- [20] Despite those efforts, the sales process attracted very little interest. Of the 49 potential buyers targeted, 26 refused to proceed further after reviewing the teaser letter or receiving a brief summary and 21 did not respond at all. Only two signed a non-disclosure agreement to gain access to the confidential information memorandum.
- [21] In the end, EY Corporate Finance received no offers, other than KKM's, which was made pursuant to the Backstop Agreement and presented on the bid deadline, June 30, 2020. No potential buyer requested more time to consider the opportunity.

E. The Proposed Transaction

- [22] After the terms of the backstop sale were finalised, Feronia's independent directors authorized it to enter into the resulting Purchase Agreement with KKM's nominee purchaser and to file a notice of intention to make a proposal. The parties consequently entered into the Purchase Agreement on July 17, 2020 and Feronia filed the notice of intention to make a proposal on July 23, 2020. Ernst & Young Inc. was appointed as the Proposal Trustee. On August 21, 2020, Feronia obtained an order of this Court that, among other things, extended the original stay of proceedings until October 6, 2020.

[23] The consideration to be paid to Feronia under the Purchase Agreement includes the following:

- a) a "closing cash payment" of US\$500,000 plus an additional, unspecified amount to pay out:
 - i. any priority claims ranking ahead of the DFI Lenders' secured interest in the shares;
 - ii. accrued and unpaid amounts relating to the period from the date of the Purchase Agreement to the closing of the transaction; and
 - iii. costs of the bankruptcy;
- b) a further investment of up to US\$10 million into PHC, of which US\$1 million is to be made before closing; and
- c) assumption of certain of FM's indebtedness to CDC and KKM or their affiliates.

[24] In addition, CDC has agreed to forgo US\$22.5 million of its claims, representing approximately 78% of the liabilities that the purchaser is not assuming under the Purchase Agreement.

[25] I was provided with a confidential, non-binding Debt Restructuring Term Sheet dated July 17, 2020, which has been filed subject to a sealing order, summarizing the terms under which the purchaser is expected to assume Feronia's indebtedness to the DFI Lenders. It provides for, among other things, a significant reduction in PHC's indebtedness to the DFI Lenders pending the completion of the transaction and provided that certain other conditions are satisfied.

[26] In summary, the purchaser is expected to assume US\$64.7 million of Feronia's current debt, leaving Feronia with approximately US\$4.6 million in unsecured debt, excluding intercompany liabilities. Feronia will have no assets, other than the remaining balance of the "closing cash payment" which is expected to be applied to pay priority creditors and professional fees associated with the transaction and these insolvency proceedings.

[27] In its first report dated August 14, 2020, the Proposal Trustee expressed its view that "the Sale Process and other efforts used to arrive at the proposed Sale Transaction were fair and reasonable under the circumstances". The report added that the transaction was not expected to cause any further material deterioration in the existing financial position of Feronia's remaining creditors because:

- a) no transaction can be successful without the support of CDC, KKM and the DFI Lenders;
- b) PHC requires significant additional financial resources and debt relief to continue in its operations; and
- c) the remaining creditors would be unlikely to recover anything in a liquidation scenario.

III. The Parties' Submissions

A. Mr. Steers and his Arguments against the Proposed Order

- [28] Gregory K. Steers is a shareholder and debenture holder of Feronia. His is the only response filed in opposition to the application for approval of the sale, but he argues that he is alone in that regard only because the other debenture holders were not properly consulted. He says that, with proper consultation, he "would expect many other Debenture Holders would wish to participate in these proceedings". He complains that, "this process has been structured to give inadequate notice to the Debenture Holders to prevent them from meaningfully participating in this process".
- [29] Mr. Steers alleges that Feronia should have sought alternate financing from other sources rather than entering into the Sponsor Support Agreement with CDC and KKM. The effect of that agreement, he says, was to force Feronia into a flawed sales process with artificial and unrealistic deadlines, as part of KKM's overall strategy to take Feronia's assets for itself without having to go through a conventional restructuring. By way of contrast, when Feronia originally acquired PHC's assets in 2009 from Unilever, the process took about a year to complete. His counsel suggested in the course of his oral submissions that had there been more time this time, Mr. Steers might have been interested in putting forward a bid himself.
- [30] Mr. Steers alleges that, in pursuing this sale, Feronia used new, Canadian-based financial advisors who, unlike its previous, European-based consultants, were unfamiliar with the palm oil business and therefore unqualified to market the assets properly. For example, he says, at least two potential purchasers who might have been interested in bidding, and had even indicated interest in the past, were never approached. As a result, he says, the consideration that Feronia will receive for the assets is mainly directed at the subsidiary level (and is therefore no consideration at all) and does not reflect their true value.
- [31] In support of those submissions, Mr. Steers has adduced two affidavits, his own and that of Ravi Sood, who describes himself as the original founder and a former chair and executive director of Feronia. Relying partly on a 2017 publication, they say that African plantations are typically valued on the basis of their price per hectare, which typically ranges from \$7,000 to \$10,000. According to Mr. Sood, Feronia made its investments in PHC with a view to raising PHC's value to the higher end of that range.
- [32] Both Mr. Steers and Mr. Sood assert that their valuation analysis is confirmed by comparing PHC with another palm oil producer, known as Société Financière des Caoutchoucs ("Socfin"). Socfin is a much larger producer, with 193,000 hectares of tropical palm oil plantations and rubbers trees located in Africa and Southeast Asia. Its publicly available financial statements suggest that it has a value of \$6,818.52 per hectare, as calculated by Mr. Steers. Mr. Steers asserts that, regardless of the differences in their respective locations and the crops that they grow, PHC's plantations "would have a similar (or slightly, but not materially, less) value per hectare" than Socfin's. Mr. Sood agrees with that analysis.

- [33] On that basis, Mr. Sood says that PHC's real value, based on its 19,418 planted hectares, can be conservatively estimated at CAD\$6,000 per hectare, yielding a likely value in excess of CAD\$116 million. Had the assets been sold at a price in that range, Mr. Steers argues, the proceeds would have been sufficient to satisfy all or most of Feronia's debts, including at least some of the debt owing on the debentures.
- [34] Finally, Mr. Steers argues that in justifying its support for the proposed transaction, the Proposal Trustee has offered no real valuation analysis or comparable sales data, but merely relied on the predictable results of a flawed and inadequate sales process. Accordingly, he argues, its recommendation should not be followed.

B. Feronia's and the Proposal Trustee's Arguments in Reply

- [35] On September 1, 2020, the Proposal Trustee delivered a supplemental report to the service list to address the issues raised by the response of Mr. Steers. The supplemental report contained the following additional comments:
- a) PHC could not have remained in operation had Feronia not entered into the Sponsor Support Agreement;
 - b) no further funding is available under the Sponsor Support Agreement to fund a longer sales process;
 - c) no other party has come forward to offer additional funding, making it critically important to complete the transaction to avoid a risk of depleting the Feronia group's going-concern value;
 - d) the Proposal Trustee expects the creditors will not receive a better outcome in a bankruptcy than under the proposed transaction;
 - e) there are various factors that call into question Mr. Steers' assertions as to the value of the assets being sold, including:
 - i. geographical considerations (Feronia having advised the Proposal Trustee that plantations in Southeast Asia enjoy a value premium over those in Africa for various reasons);
 - ii. company factors (Feronia is unlike Socfin for various reasons, such as its inability to demonstrate profitability, its lack of integrated refining capacity, its dependence on only two refiners, its market being confined to the DRC, its lower yields due to historic low quality seed stock and its operating costs being twice as high as those in Southeast Asia, due in part to lower productivity, lack of overhead controls and community commitments);
 - iii. valuation approach (the unique attributes of the subject assets make comparisons difficult; also, historic investment into PHC's infrastructure is not necessarily an indicator of its present value);

- iv. enterprise value vs. value of purchased assets (what is being sold is not the enterprise as a whole, but only a controlling interest in it, which is subject to a minority 23.84% interest held by the government of the DRC);
- v. debt relief (the magnitude of the debt relief supported by CDC and the DFI Lenders is said to be "indicative of the value of the Purchased Assets, if there is any, in the absence of a comprehensive restructuring of the Feronia Group supported by the Senior Lenders");
- f) EY Corporate Finance has extensive experience in marketing other kinds of business assets, including agribusinesses, although admittedly not specifically in palm oil related assets;
- g) EY Corporate Finance did not contact the two potential purchasers identified by Mr. Sood but Feronia did issue a press release on June 2, 2020 announcing the sale;
- h) EY Corporate Finance chose not to contact one of those potential purchasers, because it is also one of PHC's two major customers, and Feronia had expressed concerns about being subjected to pricing pressure were that customer to gain access to PHC's sensitive commercial information; and
- i) no parties requested an extension to the bid deadline.

[36] On those grounds, the Proposal Trustee reiterated its conclusion that:

- a) the sales process was fair, adequate and reasonable in the circumstances;
- b) the proposed transaction would be beneficial or neutral to the creditors compared to a disposition under a bankruptcy;
- c) the most compelling indication of value is that generated by the market through the sales process; and
- d) the consideration to be paid for the assets is therefore fair and reasonable in light of their market value.

[37] At the hearing, I also heard oral submissions from counsel for Feronia, the Proposal Trustee and CDC in support of the application. Those submissions generally reiterated the observations in the supplemental report, adding that:

- a) neither Mr. Steers nor Mr. Sood were properly qualified as expert witnesses so as to render their opinions admissible in court;
- b) Mr. Steers' suggestion in oral argument that Feronia should have explored other sources of financing, rather than entering into the Sponsor Support Agreement, was unrealistic, given the circumstances it faced;
- c) Feronia's press releases gave adequate notice of the sales process to potential bidders who were not specifically targeted;

- d) the trustee for the debenture holders was duly served with Feronia's notice of intention to make a proposal;
- e) no potential bidders, including Mr. Steers, ever approached the Proposal Trustee during the sales process to seek more time to prepare and put forward a bid;
- f) if the sale is not approved, there is no guarantee that Feronia's lenders will continue to fund PHC's operations, in which case PHC may be forced to cease operations for lack of cash;
- g) a shutdown of PHC's operations would not only reduce the value of the assets to be sold but also devastate the communities in the DRC that depend on the plantations for their livelihood; and
- h) even if the proposed transaction had been presented to the creditors in the context of a conventional proposal to restructure Feronia's debt, as Mr. Steers says it should have been, the creditors supporting the present application would have sufficient votes to approve it.

IV. Discussion

[38] The test to be applied in determining whether to authorize a sale of a debtor's assets in these circumstances is set out in s. 65.13 of the BIA, which states, in relevant part, as follows:

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to secured creditors

- (3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

- (4) In deciding whether to grant the authorization, the court is to consider, among other things,
 - (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors -- related persons

- (5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that
 - (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

- (6) For the purpose of subsection (5), a person who is related to the insolvent person includes
 - (a) a director or officer of the insolvent person;
 - (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
 - (c) a person who is related to a person described in paragraph (a) or (b).

[39] In *Veris Gold Corp. (Re)*, 2015 BCSC 1204, Fitzpatrick J. had occasion to consider a similar application under s. 36(3) of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, the provision in that statute that parallels s. 65.13 of the BIA. After setting out that legislation, she described the principles emerging from the related jurisprudence as follows, at paras. 23-25:

[23] A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at para. 49, 72 C.B.R. (5th) 49, leave to appeal ref'd 2010 QCCA 1950.

[24] In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are helpful in considering whether to approve a sale:

1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;

2. The interests of all parties;
3. The efficacy and integrity of the process by which offers were obtained; and
4. Whether there has been any unfairness in the sales process.

[25] Various authorities support that, in considering the test under s. 36 of the CCAA, the principles of Soundair remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Re Canwest Publishing Inc.*, 2010 ONSC 2870 at para. 13; *White Birch* at para. 50; *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 3367 at para. 54.

[40] In the discussion that follows, I will consider each of the statutory factors enumerated in ss. 65.13(4), as well as those in ss. 65.13(5), given that the proposed purchaser in this case is clearly a "related person" as that term is defined in s. 65.13(6).

A. Was the sales process reasonable in the circumstances?

[41] Mr. Steers' criticisms of the sales process focus on two main concerns: its relatively short duration and the degree to which it failed to expose the assets sufficiently to the niche market that may exist for them.

[42] With respect to the duration of the process, it is not disputed that the 30-day time limit was driven primarily by the terms of the Sponsor Support Agreement. Mr. Steers argues that Feronia did not explore other restructuring alternatives before committing to the draconian strictures of that agreement. In that regard, he cites *Komtech Inc. (Re)*, 2011 ONSC 3230, as an example of a case in which an asset sale was approved under s. 65.13 of the BIA on the stated basis that, among other things, the debtor had "made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business" (at para. 9) - something he argues is entirely missing here.

[43] I do not find that argument persuasive.

[44] If the Sponsor Support Agreement had imposed the 30-day time limit arbitrarily, for no apparent reason, then Mr. Steers' argument would be more persuasive. In fact, however, the timelines were kept short because PHC had run out of cash and had been losing more than US\$1.4 million every month in the months immediately preceding the finalisation of that agreement.

[45] In those circumstances, the parties had to balance the cost of allowing for additional time to sell the assets against the likely benefit that would flow from any such extension. It was not necessarily unreasonable to allow the sales process to run only for so long as the business could continue to operate with the cash available. While one can argue, as Mr. Steers does, that the sponsors should have provided even more funding in order to enable Feronia to run a longer process, the evidence does not show that a process lasting more than 30 days would have been likely to yield any better results.

- [46] While I accept that potential bidders cannot be assumed to have been alerted to the sales process by the press releases alone, the target audience was a small one and an effort was made to solicit interest from a carefully compiled list of 49 potential targets. I am not persuaded by the suggestion that other, more specialised brokers in Europe would have compiled a very different list or that they would have succeeded in generating greater interest from the same or other targets. The assets on offer were understandably unattractive to the market, given the financial predicament that the prospective bidders were being invited to buy into. That situation would only have worsened, not improved, with more time.
- [47] Therefore, the fact that Feronia may have taken a year to complete its original purchase of PHC from Unilever in 2009 says little about the minimum duration needed for an adequate sales process in the present context. No potential bidder sought more time to consider and prepare a bid in this case.
- [48] The fact that EY Corporate Finance did not specifically approach the two potential bidders identified by Mr. Steers does not, by itself, demonstrate that its overall marketing effort was inadequate. Feronia has offered a reasonable explanation for not wanting to invite one of its two main customers to submit a bid. While I accept that measures can be and often are taken in other sales processes to address such concerns, that does not mean that it was necessarily unreasonable for Feronia to have preferred not to take that chance in this case.
- [49] In summary, I have concluded that the sales process that was followed in this case was a reasonable one in the circumstances.

B. Did the trustee approve the sales process?

- [50] Although the Proposal Trustee has expressed the view that the process leading to the sale was a reasonable one in the circumstances, Mr. Steers argues that that opinion should not attract the usual deference from this Court because the sale was carried out prior to Feronia's filing, and therefore outside the supervision of the Court, with its attendant safeguards.
- [51] In support of that submission, he cites in *Sanjel Corporation (Re)*, 2016 ABQB 257. In that case, Romaine J. was asked to approve a sale in the context of a so-called "pre-pack" filing, whereby a Sales and Investment Solicitation Process ("SISP") had already occurred and the resulting agreement entered into prior to the originating court filing (in that case, the proceedings were commenced under the CCAA).
- [52] Justice Romaine described the concerns that can arise in that context as follows, at paras. 69-71:
- [69] It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

- [70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA [the equivalent of s. 65.13 of the BIA] and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.
- [71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.
- [53] Nevertheless, in the end, Romaine J. accepted the monitor's recommendation and approved the sale, explaining her conclusion in that regard as follows, at paras. 77-80:
- [77] While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.
- [78] I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.
- [79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.
- [80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

- [54] I agree with Mr. Steers that the fact that the sales process that was followed in this case was not approved by the Court in advance is a factor to be weighed in considering whether it was reasonable. Nevertheless, in approving the sale that was in issue before her, Romaine J. also took account of the fact that the debtor had engaged financial advisers during the pre-filing SISP and that the monitor, once it became involved, believed that the process, with the professionals engaged, had been reasonable.
- [55] This case is similar in that sense. Feronia had engaged EY Corporate Finance to assist with the sales process prior to the filing and, having done so, followed its advice. The Proposal Trustee, once it became involved, came to the view that the process that had been followed prior to its involvement was a reasonable one in the circumstances.
- [56] As Romaine J. stated, ultimately it is the "specific details of the [sales process] as conducted that will be scrutinized". Like her, I have found the favourable opinion of the Proposal Trustee, although arrived at post facto, to be helpful in scrutinising the sales process at issue before me.
- [57] The favourable opinion of the Proposal Trustee on that question is therefore another factor that weighs in favour of approval.

C. Has the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy?

- [58] There is such a report before me. Mr. Steers argues that the Proposal Trustee's opinion in that regard should not be relied upon, however, because it is unsupported by any analysis.
- [59] I disagree. The Proposal Trustee considered the likely impact of a bankruptcy. It concluded that the creditors would be likely to see a diminished recovery in a bankruptcy scenario, principally because the business would not be sold as a going concern, as it is now, and the additional debt relief that has been made available under the terms of the proposed sale would not otherwise be available.
- [60] I find that opinion persuasive.

D. To what extent were the creditors consulted?

- [61] The sales process was conducted in consultation with the creditors holding the vast majority of Feronia's debt. It is not disputed, however, that the debenture holders were not formally consulted through the indenture trustee before Feronia entered into the Sponsor Support Agreement and then carried out and essentially completed the sales process. They would not even have become aware of those developments unless they happened to review Feronia's relevant press releases at the time. By the time the indenture trustee was given formal notice of the filing of Feronia's intention to make a proposal, the sales process had essentially run its course.

[62] The lack of consultation with the debenture holders is a factor that, I accept, must be weighed in the analysis. But the importance of that factor depends on the degree to which there was ever a realistic prospect of any recovery for them. The evidence suggests that there was not.

E. What effects will the proposed sale have on the creditors and other interested parties?

[63] The Proposal Trustee has identified the significant advantages to the stakeholders that will flow from allowing the proposed sale to proceed. PHC will be able to continue in operation with a new source of working capital. The local communities that depend on the plantations will continue to enjoy the benefits they provide.

[64] I accept that another consequence of the transaction is that the debentures will be rendered worthless. The true cost to them must, however, be assessed in light of the realistically available alternatives. In that regard, the evidence suggests that debenture holders will be in no worse a position as a result of the sale.

[65] Even on Mr. Steers' numbers, which are hotly contested, their prospects for recovery would be limited. If PHC's three plantations were, as he contends, worth approximately CDN\$116 million in total, then Feronia's 76.16% interest in them would be worth no more than approximately CDN\$88,345,600. Had Feronia received that amount in a sale of its assets (plus whatever additional amount it might have received for the intercorporate debt it holds), after paying out the US\$55 million owing to the DFI Lenders, there would be at best only a fractional recovery for the US\$36.6 million in unsecured debt, in which the CDN\$6,060,773 owed to the debenture holders would rank *pari passu*.

[66] Although even a fractional recovery is admittedly better than no recovery at all, if, as I have concluded, the analysis of the Proposal Trustee presents the more accurate assessment of the value of the assets being sold, then the debenture holders are no worse off as a result of the sale.

F. Is the consideration to be received for the assets reasonable and fair, taking into account their market value?

[67] It is not disputed that the assets being sold in this transaction are difficult to value. I agree with the Proposal Trustee that their value cannot be calculated simply by applying a conventional price per hectare, given that ownership of PHC is shared with the government of the DRC and the long and consistent record of losses with which these assets are burdened. I also agree, for the reasons advanced by the Proposal Trustee, that Socfin's value does not serve as a helpful comparator for this purpose.

[68] Moreover, I disagree with Mr. Steers' submission that he has adduced the only valuation evidence before me. On the contrary, I also agree with the Proposal Trustee that a compelling indicator of the true value of Feronia's assets can be discerned from the disappointing results of the recently completed sales process, coupled with the willingness of the senior lenders to accept a reduction in the debt owing to them in order to keep the business operating.

[69] For those reasons, I have concluded that the consideration to be received in the proposed transaction is indeed reasonable and fair.

G. Were good faith efforts made to sell the assets to an unrelated party?

[70] Mr. Steers argues that there were no good faith efforts made to sell Feronia's assets in this case. In particular, he alleges that KKM forced Feronia to enter into the Sponsor Support Agreement, the terms of which were deliberately designed to ensure that the sales process would fail, as it ultimately did. KKM intended, in doing so, to acquire Feronia's assets for itself at little or no cost and without having to put a restructuring proposal to Feronia's creditors, it is alleged.

[71] In support of that submission, Mr. Steers cites Hypnotic Clubs. Inc. (Re), 2010 ONSC 2987 as an example of a case in which a proposed asset sale was not approved under s. 65.13 of the BIA, despite the favourable opinion of the proposal trustee, for want of good faith efforts to sell the debtor's assets to an unrelated party. In that case, the debtor, Hypnotic Clubs Inc. ("Hypnotic") applied to sell its assets to an affiliate of Muzik Club's Inc. ("Muzik"), an entity that was related to Hypnotic for purposes of s. 65.13(5) of the BIA. Hypnotic was a tenant under a sublease granted by Muzik. Muzik had refused to enter into any sublease with a subtenant who was not related to it, thereby leaving Muzik or one of its affiliates as the only potential purchaser and precluding any sale of Hypnotic's assets to the public.

[72] The facts of this case are distinguishable, however. The Sponsor Support Agreement did not preclude a sale of Feronia's assets to an unrelated party, as Muzik had. Rather, it contemplated an arm's-length, transparent sales process that appears to have been genuinely intended to generate such a sale. Feronia, unlike Hypnotic, retained third party advisors to run the sale process on its behalf. EY Capital Markets, with the assistance of Feronia, made what I find to be good faith efforts to find a willing and suitable arm's-length buyer. The fact that no such buyer came forward does not mean that the effort to find one was other than in good faith.

[73] In the circumstances, I find that Feronia did make good faith efforts to sell its assets to an unrelated party.

H. Is the consideration to be received superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition?

[74] It is not disputed that the consideration to be paid for Feronia's assets in the proposed sale is superior to any other offer made through the sales process, given that there were no such other offers.

V. Conclusion

[75] The factors enumerated in s. 65.13 of the BIA overwhelmingly favour approving the sale. I have therefore concluded that the sale should be approved and the order granted on the terms sought.

"Milman J."

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