



[2023] JMCC Comm 51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. 2023IS00001

IN THE MATTER OF MYSTIC MOUNTAIN LIMITED (In Bankruptcy and Receivership)

AND

IN THE MATTER OF an Application by the Receiver of Mystic Mountain Limited (In Receivership), a Bankrupt, for approval to complete the Sale of the Business and Assets of Mystic Mountain Limited pursuant to an order dated November 11, 2022, made in Claim No. SU2022IS00009

AND

IN THE MATTER OF Sections 73(1)(a), 79 and 277 of the **INSOLVENCY ACT 2014**

AND

IN THE MATTER OF Sections 4(2) (c) and (f) of the **SECURITY INTERESTS IN PERSONAL PROPERTY ACT, 2013**

BETWEEN

WILFRED BAGHALOO (Receiver, MYSTIC MOUNTAIN LIMITED (In Receivership)

CLAIMANT

AND

MYSTIC MOUNTAIN LIMITED (In Bankruptcy)

1st DEFENDANT

**SKY-HIGH HOLDINGS LIMITED (Bondholder
and Agent of the Bondholder Trustee, JCSD
Trustee Services Limited)**

2nd DEFENDANT

Receivership and Bankruptcy – Sale of assets – Application to approve sale – Whether best price obtained – Expert opinions – Relevance and treatment of expert opinions – Whether unsigned report admissible- Relevance of whether “commercially reasonable” effort to sell made - Observations on principle of open justice- Observations on the distinction between a court appointed and a privately appointed Receiver.

W. John Vassell KC, Julianne Mais-Cox, Topaz Johnson, and Trudy-Ann Dixon Frith instructed by Dunn Cox for the Claimant Wilfred Baghaloo (The Receiver).

Carlene Larmond KC, Dane Patterson, and Giselle Campbell instructed by Patterson Mair Hamilton for the First Defendant Sky High Holdings Limited (Bondholder and agent of the Bondholder’s Trustee, JCSD Trustee Services Limited)- Observations on principle of Open Justice.

Dr. Christopher Malcolm and Dianna Toussaint instructed by Debbie-Ann Gordon & Assoc. for the Second Defendant the Trustee in Bankruptcy of Mystic Mountain Limited (In Bankruptcy).

Frank Walwyn, Aon Stewart, and Ashleigh Ximines instructed Knight Junor Samuels for Karibukai Limited and Rainforest Adventure Holdings.

Fayola Evans- Roberts for the Supervisor of Insolvency.

Maxine Johnson watching proceedings for Tax Administration Jamaica

Kwame Gordon and Matthew McAnuff-Jones instructed by Samuda and Johnson watching proceedings for the majority inspectors appointed by the unsecured creditors.

Janet Morrison instructed by Hart Muirhead & Fatta watching proceedings for named unsecured creditors (as per amended list filed on the 4th August 2023).

Heard: 8th, 11th, 12th & 22nd May; 26th June; 2nd, 3rd, 4th, 10th, 16th (in chambers), & 18th August 2023.

In Open Court

BATTS, J.

- [1] When the trial in chambers commenced, on the 8th May 2023, I heard an application to intervene on behalf of Karibukai Limited. That company owns the shares in Mystic Mountain Limited the insolvent company (hereinafter referred to as Mystic Mountain). Having heard submissions, I refused the application to intervene and promised that my reasons would form part of the judgment in this matter. These reasons may be shortly stated.
- [2] Mr. Waldwyn for Karibukai Limited (hereinafter referred to as Karibukai) submitted that this claim ought properly to have been an application in Claim # SU2022 IS 00009. In that claim the court made an interlocutory order that any agreement, to sell the bankrupt's assets, should contain a clause requiring the court's prior approval of the sale. Counsel submitted that in filing a separate claim to seek approval the Claimant was doing an "*end run*" around that claim. His client is the sole shareholder of the bankrupt and is interested in the ultimate surplus. Therefore, he submitted, his client ought to be allowed to participate in this claim which seeks the court's approval of the sale of the bankrupt's assets.
- [3] Mr. Vassel KC for the Claimant, who is the Receiver Mr. Wilfred Baghaloo (hereinafter referred to as the Receiver), objected to the application. He submitted that intervention by the shareholders of the bankrupt would not assist the resolution of the issues in this claim. He referred to rule 19(2) (3) (a) of the Civil Procedure Rules (2002). Miss Larmond KC, for the secured creditors who are named as 2nd Defendants, also objected to the application as she felt Karibukai's presence could add no value to the proceedings. Perusal of the affidavit in support, she said, suggests that Karibukai intended to argue that this claim be struck out as they seek to re-litigate issues already dealt with, at the injunction stage in Claim SU 2022 IS 00009, when they attempted to stop this sale. Dr. Malcolm representing the first Defendant, in the person of its Trustee Mrs Debbie-Ann Gordon (hereinafter referred to as the Trustee), had no objection to the application to intervene. He felt that Karibukai had a relevant issue to litigate being whether the process was a

proper one which resulted in the best price reasonably obtainable. In answer to the court Dr. Malcolm indicated that the Trustee would put forward any relevant information the shareholders gave her. The Supervisor of Insolvency made no submissions on the application to intervene. Mr. Walwyn in his reply said he did not intend to relitigate issues and wished only to bring relevant material to the attention of the court. His client was concerned with the process by which the sale had occurred.

[4] Having heard the submissions, I was satisfied that the presence of the shareholders as parties would add no value to these proceedings. This is important as I must consider the bankrupt's estate and the additional costs to which it will be exposed. The bankrupt is represented by the Trustee and has a direct financial interest in the sale and its proceeds. Shareholders do not. Furthermore, any evidence or information relevant to the question before this court can be advanced by the Trustee who is duty bound, and whose counsel has confirmed that she will, put forward any relevant evidence provided by the shareholders. The shareholder's interest, in the questions before this court, are represented by the Trustee in Bankruptcy.

[5] I should add that much has been said about this claim rendering a trial in Claim SU 2022 IS 00009 redundant or nugatory. I do not see it that way. This claim follows the court's refusal, in that claim, to stop the sale proceeding. The refusal of the injunction followed an assessment of various matters, see ***Karibukai Limited v Sky-High Holdings Limited et al [2022] JMCC Comm 38 (unreported judgment 11th November 2022)***. The court imposed a safeguard, for the benefit of the bankrupt, which was that before the sale could be completed the court must approve the sale. The court will not approve the sale unless satisfied that the sale price is the best that can reasonably be obtained. The order is intended to reduce any loss or damage which may be incurred by the bankrupt company or its shareholders in consequence of the injunction being refused. Claim SU 2022 IS 00009 still exists and will I suppose proceed to a trial on its merits. If as alleged there were irregularities in the conduct of the sale the Claimant in that suit will still

be able to attract a remedy by way of a declaration and/or damages. It is quite possible that, notwithstanding any irregularities in the process of sale, the best price has been obtained. This claim is therefore not inconsistent or predeterminate of the other claim. Karibukai will, in Claim SU 2022 00009, have the opportunity to prove any irregularities in the process of sale and any loss, injury or, unnecessary expense caused.

[6] Having ruled that Karibukai was not an appropriate party to these proceedings the trial of the Fixed Date Claim commenced. The Claimant in this suit applied for the following relief:

- “(1) An order of this Honourable Court approving the completion of the sale of the business and assets of Mystic Mountain Limited (in Receivership) a bankrupt, (“Mystic Mountain”), including the current leases between Mystic Mountain and lessors Jamaica Bauxite Mining Limited and Urban Development Corporation, upon the terms and conditions of sale by the Claimant as receiver of Mystic Mountain dated January 19, 2023 (“Sale Agreement”) to the Purchaser named therein duly executed between the parties thereto.*
- (2) Such consequential, further or other Orders in relation to the Order at paragraph 1 herein as this Honourable Court deems fit.*
- (3) The first hearing of the Fixed Date Claim Form can be treated as the trial of the claim herein and the claim be dealt with summarily.*
- (4) Liberty to apply.”*

[7] All parties filed substantial affidavit evidence and written submissions. These were conveniently packaged in paginated bundles which, with the concurrence of all

counsel, were numbered. In the course of this judgment, I will refer to bundle numbers and the pages in bundles. Dr. Malcolm, at this very late stage, indicated he had new evidence which he wished to bring to the court's attention. This consisted of a valuation/assessment by Broadspan Capital LLC dated February 2022 (hereinafter referred to as the Broadspan report). Over the objections of Mr. Vassell KC, I permitted Dr. Malcolm to have the valuation put in evidence on affidavit and directed that good faith efforts be made to locate the individual who had done that valuation. The document was referred to, but not exhibited at, paragraph 56 of an affidavit by Mr. Cadien Campbell filed on the 2nd May 2023, see Bundle 3 page 185. I adjourned the hearing to allow the Broadspan report to be placed before the court on 11th May 2023. On that date the new affidavit evidence had not been filed and I again adjourned the hearing to the 12th May 2023 and thereafter to the 22nd May and 1st June 2023. On the 11th and 12th May I completed hearing submissions in Claim 0005 the judgment for which was delivered on the 18th August 2023, see ***Sky High Holdings Limited (as agent of JSCD Trustee Services Limited the Bondholder's Trustee) v Debbie- Ann Gordon Trustee of the Bankrupt Estate Mystic Mountain Limited (In Bankruptcy) [2023] JMCC Comm 38.***

- [8] On the 22nd May, 2023 the Trustee placed before the court an affidavit sworn by her and filed on the 16th May, 2023, see page 60 Bundle 4. This affidavit exhibited the Broadspan report, exhibit DAG 22 (page 71 Bundle 4). King's Counsel, for the Receiver and the 2nd Defendant, each objected to this evidence since the valuer had not sworn the affidavit, nor was the document signed by anyone, and the person who prepared the document was not even identified. Dr. Malcolm in reply then made the rather surprising submission that the document was not being put in for the truth of its content. He wanted only to establish its existence. I ruled that the document be removed as an exhibit to the affidavit. The proceedings before me are to determine whether the contract is in the best interest of the bankrupt estate that is, in this case, whether the purchase price is the best that could be reasonably obtained, see ***Marley and others v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 AllER 198 @ pages 203 and 210.*** A valuation is

therefore only relevant if its content demonstrates the value and/or market price obtainable for the assets at a particular time. The document placed before me could do neither because it is not the opinion of an identified expert. In any event, as Dr. Malcolm was not relying on it for the truth of its content, it was irrelevant to the issue before me.

- [9] Mr. Vassell and Ms Larmond also took objection to other affidavits containing expert evidence. One by an accountant, see the 6th affidavit of the Trustee, Bundle 5 page 305 and exhibit DAG 46 at page 313. Having heard submissions, I ordered the document removed. It purported to be a “*comparative analysis*” of two reports (one of which was not before the court) and whether or which approach to valuation is preferable. The others by Canadian attorneys being, an affidavit of Kevin P McElcheran, attached as exhibit DAG 9 to the third affidavit of Debbie- Ann Gordon filed on the 11th May 2023 see Bundle 4 page 27, and an affidavit of Mr Patrick Shea filed on the 1st May 2023. These contain matters of law. This court does not require expert opinion either, on Jamaican law or, on foreign law where the contract is one to which Jamaican law applies. My statement of reasons for disregarding this evidence was delivered orally on the 20th May 2023 and I reproduce those reasons here:

“The affidavits of P. Shea and Kevin P. McElcheran are struck out and will not be relied upon. This case concerns the law of Jamaica. Evidence of foreign law does not arise and is irrelevant as the matter will not be determined by foreign law. Counsel is at liberty to, when making submissions on Jamaican law, refer to and rely upon the law of any other jurisdiction when trying to persuade the court as to how Jamaican statutes are to be interpreted on the one hand or how the common law is to be developed on the other”.

Dr. Malcolm applied for leave to appeal and it was refused. This is a ruling on evidence in the course of a trial. No useful purpose will be served or time saved by permitting such an appeal which, in any event, has no real prospect of success. After this ruling Dr. Malcolm applied for permission to obtain a valuation. When I asked who would be paying for it he could not answer. I indicated that I would not permit the estate's funds to be used for a valuation at this stage. The matter was thereafter adjourned part heard to the 26th June 2023. The date previously set of the 1st June was vacated.

[10] On the 26th June 2023 I heard an application by Dr Malcolm for disclosure of a document which was referred to in an affidavit. Mr. Vassell objected on grounds of confidentiality, but I ordered that disclosure be granted. The document was a valuation report by Delano Reid & Associates, referred to in Para 8 of the 9th affidavit of W. Baghaloo filed on the 2nd June 2023, see Bundle 5 page 494, to which no privilege applied as it had not been made in contemplation of litigation. Mr. Vassell then urged the court to permit expert evidence of Mr. Anura Jayatillake. He said that his valuation report would take no more than 13 days to be prepared. Dr. Malcolm opposed and asked for time to consider the application which had been short served. The application to permit that expert evidence was therefore adjourned to the 6th July, 2023 at 9:30 a.m. Mr. Vassell KC, also on the 26th June 2023, took issue with another affidavit filed by the Trustee. He complained that the Trustee was again seeking to adduce the expert report her counsel had previously said he did not rely on for the truth of its content and on which the court had already ruled. Having heard submissions, I made the following further ruling:

"I am taking counsel Dr. Malcolm at his word and therefore order that the 1st Defendant is permitted to rely on the Broadspan report of February 2022 provided the maker Mr. Noah Kessler attends for cross-examination."

The following orders were also made at the same time:

- a) *“All further affidavits to be filed and served on or before the 10th July, 2023.*
- b) *The Claimant is permitted to file a further affidavit of Fiona Hyman an expert valuer*
- c) *Costs in the claim*
- d) *Claimant’s attorney to prepare file and serve formal order*
- e) *All Notices of Intention to cross-examine to be served on or before the 19th July 2023*
- f) *Affiants so served shall attend for cross-examination.”*

[11] On the 6th July, 2023, having heard submissions and considered the affidavits filed, I granted permission for the Claimant to put in evidence an expert opinion as to the value of the assets and the basis of the valuation as at 22nd June 2022 and/or as to whether the methods used were commercially reasonable. The report was to be filed by the 21st July 2023. The question as to whether the cost of the report was to be borne by the estate was reserved. I made that order because the evidence of the value of the asset is relevant to the question whether the best price reasonably obtainable in the circumstances had been obtained. The proposed expert was clearly qualified. The evidence on affidavit did not suggest the alleged or any conflict of interest. There was no evidence to support the suggestion that confidential information had been shared with the proposed expert. In fact, the evidence was to the contrary. It is true this expert evidence was being proffered rather late in the day, but I suppose it was better late than not at all. I however reserved on the question whether the costs should be borne by the estate in any event.

[12] On the 2nd August, 2023, when the trial resumed, Dr. Malcolm applied for an order permitting reliance on the *“Kroll report.”* This was by virtue of an Amended Notice

of Application filed on the 31st July 2023. All the other parties objected. Ms. Larmond KC indicated that the purported amended application was originally filed on the 2nd June 2023. The court had already made orders on that application on the 26th June, 2023. The application was therefore spent because the Trustee elected then to rely only on the Broadspan report. I ruled that the Notice of Application of the 2nd June 2023 was no longer before the court as the court had already made a decision on it. Dr. Malcolm then made an oral application to rely on the Kroll report of 30th July, 2023. I refused permission. It was too late in the day. This claim was to be heard as a matter of urgency, see paragraph 37 of the affidavit of Wilfred Baghaloo filed on 24th January 2023 page 22 Bundle 1. The intended purchaser cannot be expected to wait indefinitely. To admit the “Kroll” report now would mean a further postponement as the other parties would need time to take instructions. In any event the court had already given permission for two independent experts, Mr. Jayatillake and Broadspan, to give evidence. There is also in evidence the opinion of Fiona Hyman, see Bundle 4 page 239.

[13] Mr Vassel then took objection to the questions posed to Mr. Jayatillake by the Trustee. Having considered, and heard submissions on each, I ruled that paragraphs 1, 2, 5, 6, 9, 11, 25, 38, 34 and 37 were permissible questions. Dr. Malcolm then indicated that representatives of Broadspan would not be attending for cross-examination. It followed that the Broadspan report would not be admitted into evidence. The only witness to be cross-examined would therefore be Mr. Jayatillake.

[14] Mr. Vassell KC thereafter resumed his opening submissions which had been interrupted on the 8th May 2023. He took the court through the evidence, highlighted the sale process by way of “*auction*” and the Receiver’s method of selection of the present purchaser. Mr. Vassell submitted that if the process used is “*commercially reasonable*” then there is a deemed sale for the best price reasonably obtainable. Reliance was placed on section 36(4) of the Security Interests In Personal Property Act 2013 (hereinafter referred to as SIIPA). As regards a suggestion that the security was not good, he submitted that issue would

be dealt with in Claim SU CD 00005. In any event, he submitted, the debenture was exhibited, see Bundle 2 page 30 and had been duly registered, Bundle 2 pages 72, 75 and 79. The charge was registered and enforceable. The notice to enforce security is to be found at Bundle 3 page 179. Mr Vassel said that the only question for this court is whether the best price reasonably obtainable has been obtained. In this regard he relied on the report of Mr. Jayatillake, Bundle 6 pages 131 and 169-170, see also exhibits 1(a) and 1 (b). The sale price was US\$13.4 million dollars and the opinion of market value is a range of US\$12.5 to US\$13.8 million dollars.

- [15] On the question raised, about whether the lease can be renewed or assigned, Mr. Vassell indicated that it would be the Trustee's duty to do this, see Bundle 5 pages 469 and 478. Jamaica Bauxite Mining Limited has no objection to the lease being assigned, see Bundle 2 page 14 and letter of 7th March 2023 at page 18. In any event these issues had nothing to do with whether the best price reasonably obtainable has been had. The purchaser should have done its due diligence before signing a binding contract subject to this court's approval, see Bundle 1 p. 202.
- [16] Mr. Vassell thereafter demonstrated that the purchaser was able to pay and, within two days of approval being granted, would pay US\$8.8 million of the US\$13.4 million dollars purchase price. There is an undertaking from a financial institution to pay the balance, see Bundle 1 p. 293. Finally, Mr. Vassell adverted to the opinion of Fiona Hyman, Bundle 4 page 239, of a range of US\$10.5 to US\$12.4 million dollars. The price obtained he said exceeded that amount. He referenced his written submissions and the authorities cited and in particular ***Tse Kwong Lam v Wong Chit Sen and others [1983] 3 All ER 54*** as to the approach of the court when considering whether to approve a sale.
- [17] Mr. Jayatillake (whom I will hereafter refer to as Mr, J) commenced his evidence on the morning of the 3rd April 2023. His expert report and answers to questions posed were put into evidence as exhibits 1 (a) and 1(b). Dr. Malcolm subjected

him to probing and rather extensive cross-examination. I will not restate this evidence as it is all recorded and much of it, frankly, was not particularly germane. I will only reference here such of the evidence as I think requires my comment. In cross examination Mr. J admitted he did not have a specific designation as a “*valuer*.” To the suggestion that he was not a “*certified*” valuer the witness responded:

“A: What you mean? If you look at credentials of educational programmes I have completed look at answer today, I confirmed I completed educational performance and there is a reason I did not want to apply for dispensation because I...to release client information and did not want to release. Look at my work and quality and first time someone asking for my designation.”

[18] Mr. J admitted that his report did not show the connection between port calls of cruise ships and attendance at the park. He was challenged on his assumptions/conclusions on growth. The witness indicated that he had not used industry projections as these were inappropriate when considering a specific company. There was the following interesting exchange: -

Q: you said that you felt appropriate to do 2021-22

A: In this case sale of asset package. Someone to purchase when submitting bid will look at level of revenue, visitors starting from 2022

Q: so you value by reference to what interested buyer would do rather than seller

A: no, because when look at price will seller be willing to do transaction at that price and whether buyer will pay. It has to be fair or otherwise there will not be a transaction.

Q: *Whose objective do you serve, how frame valuation*

A: *to arrive at range of values that buyer and seller can agree*

Q: *based on projections you made when was industry post covid projected to get back to normal*

A: *by 2023 to 2024*

Q: *would it surprise you that your projections do not indicate industry getting back to 2026.*

A: *I have not given industry projections. I only gave projections for the business. Projection numbers for business can be either higher or lower than for industry.”*

[19] When challenged about his assessment of the correlation between visitor arrivals and projections the following further exchange occurred.:

Q: *My question is whether a correlation between cruise ship arrivals and visitors to attraction was done.*

A: *Cannot do correlation because after covid some passengers book directly. So cruise ship number you can't identify as only way know classify as from cruise ship if they purchased a package from cruise ship. Some walk into property you cannot know if from cruise ship*

Q: *is correlation between difficult or cannot*

A: *yes, but more importantly is whether it will be useful or not. I did not consider that to be useful”.*

And later,

“Q: Did you examine to determine what correlation was between tourist arrival by cruise ship and visits to park.

A: the correlation these numbers suggest is not worthwhile as I would be overestimating

Q: you did no correlation analysis

A: No, as it would not have produced accurate analysis

Q: on what basis then did you relate management projections

A: I did not use correlations to do so

Q: on what basis

A: if management make projection in March – June 2022 and it was off by 60% and if as cruise ship passengers and habitual guests also off by a significant amount (50%), so do I need anything more to understand that management projections not reasonable basis for future projections.

Q: How did management projections compare to industry projections

A: how would that help

Q: did you try to get Caribbean Tomorrow projections

A: I have a team that did that

Q: Where in report is industry projection

A: *industry is to reach similar by 2024*

Q: *where in report is industry projection reflected*

A: *Apart from I have not given a specific number*

Q: *page 123, your report page 33, how relate to industry*

A: *As a market participant you can reasonably expect to attain. I project align with industry by F124. If industry project F124 to be same as F119. Take company numbers or a package in F124.*

Q: *How do your projections relate to industry.*

A: *I have not seen projections for industry for Ochi cruise ship arrivals up to 2030.*

Q: *where look*

A: *the PIOJ and I cannot say for sure as it was my team that did it. Same from Global numbers. The research my team conducted I was not given graphic forecast for Jamaica.*

Q: *who ultimately responsible*

A: *me*

Q: *did you reflect in report that you sought relevant information and not get it.*

A: *because of trend, seen in 2024 more people use technology. There is growth in walk in category. That trend and not how many cruise ships. If I use same*

number I would be double counting. It therefore not relevant.”

[20] These extensive quotations demonstrate the witness’s competence and ability to explain his findings. The same occurred when he was challenged on the valuation of the assets.

“Q: *Valuation literature, is it accepted that when you value assets of business is unusual for price of assets and business to be lower than price of assets.*

A: *not unusual. People sell business below book value*

Q: *you did not investigate Delano Williams source to find*

A: *I did not know I could or whether it would serve any useful purpose*

Q: *What does valuation literature say*

A: *it’s not prescriptive, but practice is projections on tax computation is done using depreciation as a proxy to capital allowances.”*

And later,

“Q: *So if you accepted Delano Reid valuation of assets and you are not property valuer where your valuation of assets and business comes in lower than valuation of assets done is it not then incumbent on you to look at their asset valuation.*

A: *if I understood how value 2021 not relevant for me in June 2022*

Q: *why not get valuation specific in 2022*

A: *I have sufficient experience because we do valuation known as installed value. Not considered in a stand-alone property valuation and also I explain the basis of how machinery valuers estimate fair market value. Depreciated replacement costs. So that would not be relevant if sell as a package because if valuer given instructions that they are to be sold so no certainty of renewal of lease the machinery would precede other valuations such as a value uninstalled or market value if these items to be sold to someone.*

Q: *am I to conclude valuation of land not relevant*

A: *it is not but use to calculate depreciation*

Q: *mean the asset valuation not relevant*

A: *I did my own assessment of it. Valuation May June 2022 but triggered me to assess if 14.1 million what means for my valuation. Can you sell these assets and recover? Can you sell them as part of land owned by landlord? If MMI owned land I would ask for valuation of land and assets.*

Q: *was that valuation relevant or not*

A: *it was"*

[21] The expert, in very clear terms, explained some divergence from the data:

“Q: this is inconsistent with the data

A: yes, when you are giving a professional opinion about value it is not possible to make simplistic assumptions about revenue based on a regression line, meaning industry increase 15% and company revenue also 15%. Must look at competition and how company has performed in relation to their expectations. Even management projections done in March 2022 showed significant variation from actual information. In my view, if I made an assumption that when cruise ship industry recovers that automatically it will revert back to previous levels than I would have unrealistically high revenues and cash flow and therefore unreasonable value conclusion.

Based on my experience buyers and sellers assessed risk factors when submitting a bid. So therefore I apply professional judgment about likely recovery of company which need not have a perfect correlation to the industry.”

[22] After the witness was cross examined there was no re-examination. In answer to the court the witness explained to my satisfaction why it is the assessed value of a business may be less than the value of its assets. This occurs if the purpose of the valuation is to determine market price, that is what a reasonable buyer and a reasonable seller may agree upon. The witness indicated that given market or other conditions businesses have been sold for less than the value of their assets. The witness, also in answer to the court, stated that he had no criticism of the

marketing effort of the Receiver as it was very similar to ones he had done. These answers sparked further questions arising from the judge's question. The expert, to my mind, adequately addressed them all.

[23] The Claimant thereafter closed its case. Neither Defendant offered any witness for cross-examination and the parties were asked to return on the 10th August 2023 to make submissions. Written submissions were to be filed and served by the 9th August 2023. On the 10th instant each party was allowed one hour for oral submissions and, for the most part, complied with the restriction. In addition to written submissions "speaking notes" were also handed to the court. I listened to, read and considered all submissions before giving my decision on the 18th August. It is not necessary to restate them in this judgment save to express my gratitude for the industry of all counsel.

[24] Before embarking on the statement of my conclusions it is necessary to reference a meeting by "Zoom" which occurred between myself and all counsel on the 16th August 2023. The meeting occurred because Dr. Malcolm thought it necessary to bring to the court's attention communication he received from a member of the media. Having heard the submissions of all Counsel I ruled it irrelevant. I set out below in full my ruling, delivered orally at the time, because it may be a useful guide to the profession.

"Having heard Dr Malcolm, including his reading from correspondence he received from a newspaper, it is my view that the material is entirely irrelevant to this matter. I am fortified in my decision not to consider any new material before hearing from all parties as to whether I should look at or consider such new material. I agree with the submissions of learned King's Counsel in that regard. Let me say that it is not unusual for persons to express views one way or the other as to how a judge or jury may decide. Such speculation is only human and to be expected. It is of some concern that counsel

would seek to bring such matters to the court's attention. It has not been suggested, nor I suppose could it be, that the correspondence emanated from or had any connection to the bench. Therefore it is quite irrelevant, irregular, and perhaps improper to have so directed the correspondence.

*This trial was in open court for a reason. It is in keeping with the hallowed principle of "OPEN JUSTICE" a feature of the common law for hundreds of years. Justice should not be "cloistered" (as per Lord Atkins in **Ambard v Attorney-General for Trinidad and Tobago [1938] AC 322**) and hence public comment is to be expected save and except that the comment is designed to undermine the system of justice or prevent a fair trial. That has not been suggested and from what was read by Dr Malcolm could not possibly be suggested.*

My decision is already prepared and will be known on Friday at 11:00 am all being well. As to the costs of this morning's adventure I will make no order. Dr Malcolm was clearly misguided in his zealous approach to the court".

- [25] In the final analysis having considered the evidence on affidavit as well as the oral evidence given, I am satisfied that the sale is to be approved. In this regard the onus of proof is on the Claimant to satisfy me, on a balance of probabilities, that the agreement reflects the best price reasonably obtainable in the market at the time, see **Marley and others v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 AllER 198 @ pages 203 and 210**. Section 36 of SIPPA may create a presumption however evidence, that "commercially reasonable" efforts were made to sell the property, is not decisive. This is not a claim in negligence or breach of fiduciary duty where a sale has already occurred. In which case the test is whether the trustee took all reasonable care to obtain the best price reasonably obtainable

in the market. The difference is subtle but important. This court, where a sale is to be approved before it is completed, must be satisfied that the contract in fact reflects the best that could be obtained in the market at the time.

[26] Other than a complaint as to the requirement to pay redundancy, see Para. 96 of submissions filed 19th May 2023 (and which was adequately addressed by the receiver see pages 496-497 Bundle 5), no term of the agreement was seriously challenged. On the issue raised, with respect to the validity of the security, I agree with Mr Vassel's submission that it does not properly arise on this application. The documentation appears valid, duly registered, and hence satisfactory. As regards the matter of the transfer/assignment of the lease, the owner has indicated consent in writing, see references at paragraphs 14 and 15 above. The Trustee, once this court's approval is granted, ought to execute documentation necessary to effect the transfer/assignment. In any event the purchaser should, consistently with caveat emptor, have done its due diligence. The real question for me is whether the price is the best reasonably obtainable. In this regard I looked at the expert report and evidence of Mr. J. His clear and competent analysis is persuasive. There is no admissible evidence before me that a higher price could or should have been obtained in the market. One year later no one has come forward offering to pay more. I looked at the report of Broadspan which was done for the company's management. In that document there is none of the analysis one might have expected as to projections or market conditions or otherwise. On its face the report is not particularly impressive. It begins with a disclaimer stating that Mystic Mountain supplied the data upon which the opinion is based, see page 72 Bundle 4. No expert from Broadspan came to defend the opinion hence its exclusion. It is unsigned, and its alleged maker is deceased. I considered too the affidavit of Rafael Preschel, filed on the 2nd August 2023, which questions some of Mr J's assumptions and his choice of base year. It did not shake the cogency of the expert's evidence during which most of those matters were addressed.

[27] The Trustee's position is that she is not opposed to the sale of assets but is concerned about the process adopted, see paragraph 7 of supplemental submissions filed on the 9th August 2023. The Trustee also relied on written submissions filed on the 19th May 2023. The submissions taken together involved wide ranging criticisms of process. I hope I do no injustice by summarising them as follows: (1) Insufficient evidence as to priority standing of the secured creditor (2) No legal opinion to confirm validity or enforceability of the security (3) No verification of the bankrupt's state of affairs was done (4) The expert evidence of Mr J was used to cure a procedural defect as Receiver did not have a valuation before selling (5) Mr J did not show working papers and followed no professional standards (6) Mr J made unreliable assumptions, used an abnormal year as his base year, and failed to critically consider his conclusions in relation to other information (7) Several authorities were cited in support of a submission that "*... the Receiver in disposing of secured property, has a duty that goes beyond acting in good faith. Commercial reasonableness requires that reasonable steps are taken to obtain the true market value of the secured property.*" (8) The Trustee has the right to exercise on behalf of all creditors certain power in order to protect their interests (9) The court should apply the standard of supervision of the exercise of a Receiver's power of sale as stated in **Royal Bank of Canada v Soundair Corp et al 4OR (3d)1[1991] OJNo.1137 Action No.318/9.**

[28] I have already indicated my own impressions of Mr J's evidence. I do not share Dr Malcolm's concerns, which I regard as unreasonable, more so because on the 3rd August 2023 Mr J filed detailed answers to questions posed. I found the expert's explanations and analysis impressive. The position of the Trustee is heavily influenced by a somewhat misplaced reliance on the decision in **Soundair** which emphasised the "*integrity of the process*". That case is however distinguishable from the case at bar in that the court was there reviewing a court appointed receiver's sale. Justice of Appeal Galligan, who formed part of the majority, explained the relevance in this context of the distinction between a court appointed receiver and one privately appointed as follows:

“The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons when a receiver’s sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver’s work or change the sale strategy adopted by the receiver”.

[29] In the case at bar the Receiver is privately appointed, see paragraph 6 of the affidavit of Wilfred Baghaloo filed 24 January 2023 page 24 Bundle 1. The creditors therefore are entitled to control the process of sale and to determine to whom the assets are sold. My order, which caused the insertion of a clause requiring court approval, did not change the status of the receivership. The order is intended only to minimise any loss consequent on the refusal of the interlocutory injunction which was applied for to stop the sale proceeding. The issues related to process and propriety of conduct are still to be tried. The only issue at this stage, and in this application, is whether the price is the best that could reasonably be obtained. There are other distinctions, such as the fact that in **Soundair** a very small market was under consideration and the creditors were the ones seeking to prevent the sale proceeding. Interestingly in that case a higher offer to purchase was placed before the court which nevertheless allowed the sale to proceed. It need only be said that in this case no higher offer has been put before the court. One bid at auction was higher by only \$200,000 but contained terms which the

Receiver considered unacceptable hence was not a better offer. Although no one argued otherwise, I express no view on the reasonableness of the Receiver's rejection of that bid save to observe that the bid falls within the range of the opinion on value I have accepted. An opinion of value, it should be noted, is only an evidential guide. The best evidence of market value is that which the market has to offer.

[30] I am satisfied on a balance of probabilities that the price is the best that could reasonably be obtained. I make no finding as to whether the Receiver's conduct of the auction and/or, the process of marketing and sale, were fair and proper or, on any issue having to do with the "*integrity of process*". However, the evidence as to advertising, taking of bids, and negotiating bids upwards (see paragraphs 9, 10, and 23 of the affidavit of Wilfred Baghaloo filed on the 24th January 2023, page 22 Bundle 1), fortified my conclusion.

[31] My orders, made on the 18th August 2023, were therefore as follows:

1. The sale of the business and assets of Mystic Mountain Limited (In Receivership and Bankruptcy) hereinafter referred to as Mystic Mountain, including the current leases between Mystic Mountain and lessors Jamaica Bauxite Mining Limited and the Urban Development Corporation, upon the terms and conditions of sale set forth in the Agreement for Sale dated the 19th day of January 2023 to the purchaser named therein, and duly executed by the parties thereto is hereby Approved.
2. The costs of filing and preparation of the claim, all applications, and affidavits in support in answer and in reply as well as the costs of all hearing, mention, and trial dates up to and including the 2nd day of August 2023 are to be borne by the estate of Mystic Mountain.
3. Order # 2 applies to the Claimant, the 1st and 2nd Defendants and the Interested Parties however, for the avoidance of doubt, there is to be no double recovery with respect to suit # 00005 which was heard at the same time.

4. The costs of trial dates of the 3rd, 4th, and 10th August 2023 are to be paid by the Trustee personally and are awarded to the Claimant, the 2nd Defendant and the Interested Parties save and except that all costs related to the expert report of Mr Jayatillake and of his attendance to give evidence shall be paid by the estate Mystic Mountain.
5. Costs of today are to be paid by the estate Mystic Mountain.
6. Liberty to Apply.
7. Costs awarded are to be taxed if not agreed.

David Batts
Puisne Judge