



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00707989-00CL

DATE: May 29, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: 1180554 ONTARIO LTD. vs. CBJ DEVELOPMENTS INC., et al

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Jeff Larry – CSL for Receiver	TDB Restructuring Ltd.	jeff.larry@paliareroland.com
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE KIMMEL:

The Motion

- [1] TDB Restructuring Limited, in its capacity as the court appointed receiver (the "Receiver"), without security, of all present and future property, assets and undertakings of CBJ - Clearview Garden Estates Inc., CBJ Bridle Park II Inc., and CBJ Developments Inc. (collectively, the "Debtors"), seeks a court order for the approval of the sale of the real property (the "Properties") that is the subject of the sale transaction (the "Transaction") contemplated by an asset purchase agreement between the Receiver and Toronto Capital (Stayner) Corp in Trust (the "Purchaser") dated April 28, 2024 (the "APA"), including approval of the Transaction and the vesting of title to the Properties as well as the approval of a proposed interim distribution and holdback from the sale proceeds (the "AVO").
- [2] The Receiver also seeks an ancillary order (the "Ancillary Order") approving the First Report of the Receiver dated May 22, 2024, (the "First Report"), and the Receiver's activities, statement of receipts and disbursements and the fees of the Receiver and its counsel, all as described therein. A sealing order is sought as part of the Ancillary Order in respect of the agreement of purchase and sale for the Transaction, which is the only confidential appendix to the First Report.
- [3] The Receiver was appointed on January 26, 2024. The Debtors' primary assets are the Properties, which are the site of a residential property development. There are two lenders with mortgages registered on title to the Properties. The Receiver is not aware of any other secured or priority creditors and has not determined if there are unsecured creditors. The two secured creditors both support the Receiver's motion, as does the purchaser under the APA.
- [4] The applicant ("First Mortgagee") has a first mortgage in respect of a loan made September 15, 2021 (the "First Mortgage Loan") in the principal amount of \$16 million. As at May 29, 2024, the amount outstanding under the First Mortgage Loan is estimated to be \$18,158,231 for the principal, interest and costs and advances by way of borrowings made to the Receiver. The applicant also advances a further priority secured claim in respect of an \$11.6 million participation fee (the "Participation Fee"), the priority of which is disputed.
- [5] Various second mortgages ("Second Mortgages") were assigned to First Global Financial Corp. ("First Global" or the "Second Mortgagee"). First Global claims that the amount owing to it, and secured by the Second Mortgages, is \$44,601,713. Some of the interest claimed under the Second Mortgages is disputed. The undisputed amount of the Second Mortgage claims is approximately \$40 million.

Requested Relief - Analysis

Approval of the Transaction, AVO and Proposed Interim Distribution and Holdback

- [6] The factors to be considered for the approval of a Transaction and granting of an AVO are well established. See *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (ONCA) at para 16. The Receiver's First Report establishes that,
- a. the Properties were sufficiently exposed to the market through, among other things, distribution of promotional brochures to over 1,000 potential purchasers, two periods of public MLS listings (one prior to and one after the Receiver was appointed, using the same listing agent) and targeted solicitation calls;
 - b. the marketing process was fair and transparent and yielded the most advantageous (and only) offer for the Properties;
 - c. the APA contains no conditions which would delay any closing; and
 - d. the approval of the Transaction and the AVO is in the interests of the known stakeholders.

[7] The Receiver recommends the approval of the Transaction and the granting of the AVO. There are no exceptional circumstances which would warrant a rejection of the Receiver's recommendation. See *Soundair*, at para. 21. I am satisfied that it meets the *Soundair* test.

[8] The Purchase Price will be partly satisfied by a cash payment and partly by a new vendor take back mortgage that First Global will provide (the "VTB"). Part of the cash component of the Purchase Price will be used to pay down the undisputed portion of the First Mortgage Loan. The balance will be held back pending the determination of whether the First Mortgagee has a priority claim for the Participation Fee.

[9] The Receiver has determined that the First Mortgagee has a valid and enforceable charge on the Properties in first priority in respect of the First Mortgage Loan. The Receiver recommends the proposed distribution from the sale proceeds to the First Mortgagee from the net cash component of the Purchase Price (as defined in the APA) for the undisputed amount of the First Mortgage Loan, less the holdbacks described herein (particularly with respect to the disputed Participation Fee). The approval of this distribution will permit the Receiver to proceed towards the conclusion its mandate in an efficient manner, minimizing the need for the added expense of further court attendances.

[10] Under the APA, if the holdback is not used (in whole or in part) to satisfy the Participation Fee claimed by the First Mortgagee then any portion that remains may be used to pay down the VTB that will be granted upon the closing of the Transaction. The Receiver

advises that there is no scenario in which there will be sufficient cash from the sale proceeds to fully extinguish the undisputed portions of both the First and Second Mortgages, so there is no scenario in which any of the cash component of the Purchase Price could have been available to satisfy the claims of any as of yet unidentified unsecured creditors or other stakeholders. On this basis, with the recommendation of the Receiver and the concurrence of the First and Second Mortgagees, the proposed distribution and holdback is approved.

The Ancillary Order: Approval of Activities, Fees and Sealing Order

[11] The requested approval of the Receiver's activities and statement of receipts and disbursements described in the First Report is appropriate. The proposed form of order contains the appropriate qualification regarding the approval of the Receiver's activities, in accordance with the court's practice.

[12] The fees and disbursements of the Receiver and its counsel were incurred at each party's standard rates and charges as set out in their respective fee affidavits. The fees of the Receiver and its counsel for which approval is sought are supported by fee affidavits and the time and hourly rates that correspond with the fees appear to be reasonable having regard to the work that was done.

[13] The Confidential Appendix over which a limited partial sealing order is sought contains the purchase price and other mechanics for its satisfaction under the APA. If the Transaction does not close, the Receiver is concerned that the release of the purchase price and related transactional information could potentially have an adverse effect on any subsequent sales process that the Receiver might carry out in connection with the Properties. Sealing this confidential appendix is necessary and appropriate to ensure that the Receiver can maximize value for the Properties, in the interests of all stakeholders, if the contemplated Transaction does not close and the Receiver (or someone else) markets the Properties again.

[14] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Preservation of the confidentiality of information inherent in a sale process is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 85 when limited to only that material that contains the confidential and sensitive information and only for as long as may be necessary, as has been proposed in this case. The sealing order will terminate upon the satisfaction or waiver of the conditions in the APA and the completion of the Transaction.

[15] Counsel is directed to ensure that the sealed Confidential Appendix is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the Confidential Appendix can be physically sealed. Counsel is further directed to apply, at the appropriate time, for an unsealing order.

Orders

[16] The AVO and Ancillary Order signed by me today shall be effective immediately and without the necessity of issuing and entering.

A handwritten signature in cursive script that reads "Kimmel J.".

KIMMEL J.