



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-20-00651299-00CL

DATE: March 5, 2025

REGISTRAR: Rahma Mohamud

NO. ON LIST: 2

TITLE OF PROCEEDING: **2615333 Ontario Inc. v. Central Park Ajax
Developments Phase 1 Inc et al**

BEFORE JUSTICE: **CAVANAGH**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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Name of Person Appearing	Name of Party	Contact Info
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For Other, Self-Represented:

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

- [1] This is a motion by TDB Restructuring Limited in its capacity as court-appointed receiver (the “Receiver”) over the lands and premises described in the appointment order dated April 15, 2021 (the “Harwood Properties”) owned by Central Park Ajax Developments Phase 1 Inc., 9654488 Canada Inc., 9654461 Canada Inc. 9654372 Canada Inc., 9617680 Canada Inc. and 9654445 Canada Inc. (the “Respondents”).
- [2] The Receiver’s motion is for an order that approves the agreement of purchase and sale dated September 12, 2024 and the associated transaction between the Receiver and the Corporation of the Town of Ajax (the “Town”) and, upon delivery of a certificate by the Receiver containing confirmation of the closing of this transaction, vesting in the Town all of the Respondents’ right, title and interest in and to the Harwood Properties.

Background Facts

The Harwood Properties

- [3] The Harwood Properties are comprised of the “Phase 1A Lands”(a parking lot that is intended to be the main site of a future condominium development), the “Phase 1B Lands” (lands adjacent to the parking lot, currently with units in a strip mall) and the “Utility Lands” (other units in the strip mall).

The Development Agreement

- [4] The Phase 1A Lands and the Utility Lands were subject to a Development Agreement between Lemine Real Estate Consulting Inc. (“Lemine”) and the Town. Lemine is a developer and an affiliate of the Respondents. The Phase 1B Lands were not subject to the Development Agreement.
- [5] The Development Agreement provided that, upon Lemine’s default, the Town could purchase the Phase 1A Lands and the Utility Lands at a certain price. Before the commencement of this proceeding, the Town commenced an action to enforce its repurchase right and determine that price. The price would be less than could be realized through a sale of the Harwood Properties in a court supervised receivership.

The Receivership Order

- [6] The Receiver was appointed as receiver over the Harwood Properties by Order dated April 15, 2021 (the “Receivership Order”). The Receivership Order provides that the Receiver is empowered and authorized:

- a. to market any or all of the Harwood Properties as the Receiver in its discretion may deem appropriate, provided, however, that such terms and conditions must be satisfactory to the Town, unless otherwise ordered by this Court, and
- b. to sell, convey, transfer, lease or assign the Harwood Properties or any part or parts thereof out of the ordinary business with the approval of this Court, in consultation with the Town, in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in paragraph 3(j)(i); and
- c. unless otherwise agreed to by the Town and the applicable purchaser or transferee, none of the real property presently subject to the Development Agreement shall be sold, conveyed, transferred, leased or assigned by the Receiver without the purchaser or transferee agreeing to enter into a development agreement with the Town, on mutually agreeable terms, which include a right of repurchase in favour of the Town, substantially similar to such right provided for in the Development Agreement.

New Development Agreement

- [7] The Receiver concluded that too much uncertainty would have resulted if the Receiver had marketed the Harwood Properties for sale without being able to present to the market a new development agreement acceptable to the Town.
- [8] After extensive efforts, the Receiver was able to negotiate a new development agreement (the “New Development Agreement”) with the Town.

Sale Procedure

- [9] The Receiver undertook the approved sale procedure (pursuant to an Order dated June 1, 2023) which resulted in two bids. Bidder #1 (1000612843 Ontario Inc. (“843 Ontario”)) failed to pay a deposit and was disqualified. During the Receiver’s discussions with Bidder #2, that bidder, among other things, required a \$3 million abatement to the price set out in its bid, which was not acceptable to the Receiver or the Applicant. The Receiver states that this information was shared with the Town as part of the Receiver’s consultation with the Town and the Applicant about this possible sale.

March 2024 motion

- [10] In March 2024, the Applicant brought a motion for a determination that its rights vis-à-vis the Harwood Properties that are subject to the Development Agreement are in priority to the rights of the Town arising from the Development Agreement, and for an Order varying the Appointment Order to remove the rights granted to the Town.
- [11] On this motion, the Receiver reported that the New Development Agreement had not been well received by the market and was seen as extremely onerous and one-sided, with unrealistic timelines and severe penalties.
- [12] The Applicant’s motion was dismissed pursuant to an endorsement released on March 11, 2024.
- [13] Following release of this endorsement, the Receiver approached the Town regarding possible amendments to the New Development Agreement that would make the Harwood Properties more attractive to potential purchasers.

- [14] The Town's representative, Geoff Romanowski, provided affidavit evidence that a meeting was held on April 3, 2024 between representatives of the Receiver and representatives of the Town for the purpose of determining how the existing development agreement could be modified so as to bring more perspective purchasers to this transaction and have them submit potentially higher bids for the purchase. According to Mr. Romanowski, this discussion started by focusing on how to modify the repurchase right (the New Development Agreement) so as to make it more acceptable to potential purchasers but no mutually agreeable alternatives to the proposed development agreement could be identified. Mr. Romanowski's evidence is that at this meeting, the Town suggested the possibility that it could buy the Harwood Properties from the Receiver.

Bids from 843 Ontario and the Town

- [15] The Town decided to move forward with a proposed purchase of the Harwood Properties.
- [16] While the Receiver and the Town were negotiating such an offer, the Receiver received an offer from 843 Ontario on superior financial terms to those the Town was prepared to offer. The Receiver ultimately entered into an agreement with the 843 Ontario. Pursuant to this agreement, 843 Ontario would satisfy the purchase price by paying a certain amount in cash and assuming a mortgage on title to the Harwood Properties. 843 Ontario agreed to enter into the New Development Agreement with the Town. The Receiver entered into an agreement of purchase and sale with 843 Ontario.
- [17] After entering into the 843 Ontario agreement of purchase and sale, the Receiver entered into an agreement of purchase and sale with the Town as a back-up bid.
- [18] The Receivership Order authorizes the Receiver to sell the Harwood Properties with the approval of this Court, in consultation with the Town. Mr. Romanowski deposes that the Town was aware that an unqualified bidder was prepared to pay a purchase price to the Receiver and that the Receiver was prepared to consider this price for the sale of the Harwood Properties. He deposes that the purchase price that the Town selected for its offer was in the same amount that the Receiver would have received from the unqualified bidder. There is no evidence that, when making its offer, the Town had received information that it was not entitled to receive under the Receivership Order.
- [19] The Receiver brought a motion returnable on October 3, 2024 for approval of the agreement of purchase and sale with 843 Ontario and the agreement of purchase and sale of the Town. The Applicant objected to the relief sought in respect of the agreement of purchase and sale with the Town, and that request for relief was adjourned. The Court-approved the 843 Ontario agreement of purchase and sale and related transaction and issued an approval and vesting order dated October 3, 2024.

843 Ontario failed to close

- [20] 843 Ontario failed to close on the 843 Ontario agreement of purchase and sale. The Receiver has retained the deposit paid by 843 Ontario pursuant to this agreement.

Analysis

- [21] In *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), the Court of Appeal held that when deciding whether a receiver who has sold a property acted properly, the court should consider:

- a. Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
- b. The interests of all parties.
- c. The efficacy and integrity of the process by which offers are obtained.
- d. Whether there has been unfairness in the working out of the process.

[22] Absent a violation of the *Soundair* factors, the court should be loathe to interfere with the business judgment of a receiver and refuse to approve a transaction recommended by the receiver acting properly in the fulfillment of its obligations as an officer of the court. See, for example, *Morganite Canada Corporation v. Wolfhollow Properties Inc. et al.*, 2003 CanLII 7759, at para. 8.

[23] The Applicant submits that the Receiver's efforts to obtain the best price since the first sales process have not been sufficient. The Applicant submits that the Receiver is looking to end its engagement without regard to the interests of all creditors. The Applicant submits that the Town is seeking to misuse the power over the sale which it was granted in the Appointment Order to financially benefit itself. The Applicant submits that its legitimate interest in a sales process that will realize value that is not lessened by unreasonable restrictions imposed by the New Development Agreement has been neglected.

[24] I do not accept these submissions. While the Applicant may now regard the restrictions imposed by the rights conferred on the Town under the Receivership Order to be unreasonable, these rights were conferred on the Town at the request of the Applicant, and on consent of the Applicant and the Town. The Applicant's prior motion to vary the Receivership Order to remove the rights given to the Town thereunder was dismissed.

[25] The Receiver submits that the *Soundair* factors support the conclusion that the Receiver acted properly, and that the Receiver's recommendation should be accepted. The Receiver notes that it moved in October 2024 for an order approving the sale to 843 Ontario and approving the sale to the Town as a back-up bid. The latter relief was adjourned, but the Court was satisfied that the *Soundair* factors, including the process by which offers were obtained, were met when it approved the sale to 843 Ontario. The same process is before the Court on this motion. The Receiver submits that the issue on this motion is whether the Receiver has acted acting improvidently in entering into the agreement of purchase and sale with the Town and recommending its approval. I accept this submission. See my endorsement dated October 3, 2024, at paras. 8-9.

[26] The Applicant makes a number of submissions in support of its position that the *Soundair* factors do not support the conclusion that the Receiver has not acted improvidently in entering into the agreement of purchase and sale with the Town and recommending approval of this agreement of purchase and sale. I address them below.

Exposure of the Harwood Properties to the market

[27] The Applicant submits that there has been an insufficient effort to get the best price given that the Harwood Properties have not been exposed to the market since the sales process in June 2023.

[28] The Harwood Properties were robustly marketed in the sale process. This sale process did not result in a successful bid.

[29] A receiver's conduct is to be viewed in light of the information a receiver had and not with the benefit of hindsight. The court is not to consider whether a receiver has failed to get the best price. Rather, the court should consider whether the receiver has acted in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties. It is the receiver's sale, not a sale by the court. See *Skyepharm PLC. v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007, citing *Soundair* at pp. 9-10.

[30] As the Court of Appeal held in *Soundair*, in deciding to accept an offer, a receiver is entitled to prefer "a bird in the hand to two in the bush". The Receiver submits that this is what it is doing here, through the exercise of its business judgment.

[31] The parties who oppose the Receiver's motion submit that it is unlikely that that Town's offer would not be renewed if a new sales process failed to produce a superior offer. This may be so, however, it is not certain, and the Receiver is entitled to prefer a bird in the hand where it has not been shown that a fresh sales process is likely to produce a better offer than the Town's agreement of purchase and sale.

[32] I conclude that it was commercially reasonable for the Receiver to enter into the agreement of purchase and sale with the Town.

The Receiver received further offers, however, it chose not to pursue them.

[33] On January 29, 2025, the Receiver received an offer from two individuals in trust for a company to be incorporated to purchase the Harwood Properties a later date.

[34] The Receiver reports that it decided not to pursue this offer for a number of reasons, including:

a. this offer is conditional upon, among other things:

i. a 45 business-day due diligence period;

ii. financing;

iii. the prospective purchaser entering into a development agreement that excludes the Town's New Development Agreement.

b. The purchase price is subject to adjustment, and is therefore not certain whether the new offer provides for materially superior financial terms compared to the agreement with the Town; and

c. entertaining the new offer would almost certainly interfere with the Receiver's motion. The Receiver's view is that the relief sought should not be delayed any further

[35] In *Soundair*, the Court of Appeal addressed jurisprudence relating to relevance of late offers when a motion for approval is before the court and held:

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be

changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

- [36] The offer from this bidder is highly conditional. This offer does not show that the price in the Town's offer was so unreasonably low that the Receiver acted improvidently in accepting it.
- [37] On February 27, 2025 in the late afternoon, the Receiver received an email from counsel to 843 Ontario enclosing a commitment letter which contemplated funding for a purchase of the Hardwood Properties at a price higher than 843 Ontario's prior agreement to purchase. The Receiver responded that this communication does not constitute an offer to purchase the Harwood properties that is capable of acceptance. The Receiver notified counsel for 843 Ontario that if it intended to make a new offer, it could only be on the basis of an executed agreement of purchase and sale clearly setting out 843 Ontario's proposed terms accompanied by a deposit.
- [38] Counsel for 843 Ontario appeared at the hearing of this motion and was given leave to make submissions. Counsel gave oral assurances about the steps that 843 Ontario was taking to raise financing to allow it to complete the agreement it had made. Counsel asked for an adjournment of the Receiver's motion to give his client more time to make the necessary arrangements.
- [39] The Receiver has not received a further offer from 843 Ontario nor a fresh deposit. The Receiver reports that it has determined not to pursue the communication from 843 Ontario because:
- a. if 843 Ontario intended to present an offer in accordance with the financial terms described in the commitment letter, it has not done so despite having been given the opportunity to do so, and in any event, it did not deliver a deposit to the Receiver;
 - b. if 843 Ontario intended to make an offer on the same financial terms as the terminated agreement of purchase and sale, without paying a fresh deposit, that would be unacceptable to the Receiver;
 - c. after (i) failing to pay a deposit during the formal sale and marketing process conducted by the Receiver in the summer of 2023, and (ii) failing to close on the terminated agreement of purchase and sale, the Receiver does not have confidence in 843 Ontario's ability to close, notwithstanding the commitment letter; and
 - d. the Receiver remains of the view that concluding the sale to the Town is in the best interests of the stakeholders, assessed collectively and objectively.
- [40] In *Soundair*, it was held that the Court should assume that a receiver is acting properly unless the contrary is clearly shown. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by a receiver. The conduct of the receiver should be reviewed in the light of the specific mandate given by the court. Where the receiver's decision is made as a matter of business judgment, the court should not reject the recommendation of the receiver except in the most exceptional circumstances.
- [41] The Receiver considered the two outreaches from proposed purchasers and explains in its reports why it exercised its judgment not to pursue them further. I decline to grant the adjournment requested by 843 Ontario. To grant an adjournment would invite the chaos that the Court of Appeal cautioned against in *Soundair*.

The agreement of purchase and sale with the Town is substantially below appraised values of the Harwood Properties.

- [42] The parties opposing the Receiver's motion rely on appraisals of the Harwood Properties obtained by the Applicants where the appraisers gave opinions that the value was considerably higher than the price under the Receiver's agreement of purchase and sale with the Town.
- [43] In *Pricewaterhousecoopers Inc. 1905393 Alberta Ltd.*, 2019 ABCA 433, the Court held, citing *Skyepharm*, that a reviewing Court's function is not to consider whether a receiver has failed to get the best price. Rather, a receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties. In *First Circle Mortgage Investment Corporation v. Movassaghi*, 2024 BCSC 2358, the court, at para. 48, held that where the market speaks, appraisals become relegated to not much more than well meant but inaccurate predictions.
- [44] The two appraisals upon which the Applicant relies accounted for the Town's right of repurchase according to the New Development Agreement by discounting the value of the Harwood Properties. The amount of the discount, however, was significantly less than the discount in the appraisal obtained by the Receiver. In addition, the Receiver reports that the appraisals obtained by the Applicant rely on inflated square footage for the retail units at the Harwood Properties because these appraisals include in their calculation of leasable area basement areas which are not tenanted nor capable of being leased. The Receiver's appraisal excludes those areas.
- [45] The appraisals obtained by the Applicant do not show that the Receiver failed to make sufficient effort to get the best price or that it acted improvidently. The fact is that the sales process did not produce any acceptable offers for the Harwood Properties. The offer by 843 Ontario and the offer by the Town came outside of this sales process. There is no evidence that a new sales process would produce a better offer or that the Receiver's business judgment should be questioned.

The Receiver has not considered a separate sale of the Phase 1B Lands which were not subject to the Development Agreement.

- [46] At the hearing of the Applicant's application for the appointment of a receiver, the Applicant agreed that the Harwood Properties are more valuable if sold as a package than if sold separately.
- [47] The Applicant did not question until after the sales process that the New Development Agreement should apply to the Harwood Properties when sold together.
- [48] The Applicant has not shown that the Receiver's judgment that the sale to the Town should proceed for all of the Harwood Properties should be called into question on this basis.

The Receiver has not insisted that the Town pay fair market value based on the fact that it would be unrestricted by the restrictions imposed on all other perspective purchasers.

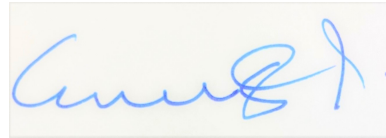
- [49] The Town is not in the same position as other potential purchasers because, as a purchaser, it is not required to enter into the New Development Agreement as a part of the purchase. It does not follow from this fact that the Receiver can insist that the Town pay more than its offer for the purchase of the Properties.

Conclusion

- [50] The Receiver considered the relevant circumstances and the interests of all parties when it exercised its business judgment and decided to accept the Town's offer. It has not been shown that the Receiver acted unreasonably or improvidently. The factors in *Soundair* support this conclusion.

Disposition

- [51] For these reasons, I grant the Receiver's motion and make an order approving the agreement of purchase and sale dated September 12, 2024 and the associated transaction between the Receiver and the Town and, upon delivery of a certificate by the Receiver containing confirmation of the closing of this transaction, vesting in the Town all of the Respondents' right, title, and interest in and to the Harwood Properties.
- [52] I ask counsel for the Receiver to send me an approved form of order in the usual form.
- [53] If costs are sought and not resolved, I may be spoken to.

A handwritten signature in blue ink, appearing to be "C. M. B.", is displayed on a light gray rectangular background.

Released: March 5, 2025