

Court of Appeal File No. COA-24-CV-13328
Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

In the Matter of Section 243(1) of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3 as amended and Section 101 of the Courts of Justice Act R.S.O. 1990 c. 43 as amended

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

**Applicant/
Respondent in Appeal**

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC

**Respondent/
Respondent in Appeal**

**FACTUM OF ARJUN ANAND IN TRUST FOR A COMPANY TO BE
INCORPORATED**

TEPLITSKY LLP

Barristers
70 Bond Street
Suite 200
Toronto ON M5B 1X3

Jonathan Kulathungam (42049N)
jkulathungam@teplitskyllp.com

Tel : (416) 365-9320
Fax: (416) 365-0695

Lawyers for the Appellant, Arjun
Anand in Trust for a Company to
be Incorporated

TO: **GARFINKLE, BIDERMAN LLP**
Barristers & Solicitors
1 Adelaide Street East
Suite 801
Toronto ON
M5C 2V9

Wendy Greenspon-Soer
wgreenspoon@garfinkle.com
Tel : (416) 869-1234
Fax: (416) 869-0547

Lawyers for the Applicant

AND **BLANEY MCMURTRY LLP**
TO: Barristers & Solicitors
2 Queen Street East
Suite 1500
Toronto ON
M5C 3G5

David Ullman
dullmann@blaney.com
Tel : (416) 593-1221
Fax: (416) 593-5437

Lawyers for the Respondent

AND **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
TO: Barristers and Solicitors
155 Wellington Street West
35th Floor
Toronto ON
M5V 3H1

Jeff Larry
jeff.larry@paliareroland.com
Tel: (416) 646-4330
Ryan Shah
ryan.shah@paliareroland.com
Tel: (416) 646-6356

Tel : (416) 646-4300
Fax: (416) 646-4301

Lawyers for the Receiver

AND **STIKEMAN ELLIOTT LLP**
TO: Barristers and Solicitors
Commerce Court West, 5300
199 Bay Street
Toronto ON
M5L 1B9

Jordan D. Wajs
jwajs@stikeman.com
Tel: (416) 869-5685
Daniel S. Murdoch
dmurdoch@stikeman.com
Tel: (416) 869-5529
Nicholas Avis
navis@stikeman.com
Tel: (416) 869-5563

Tel : (416) 869-5500
Fax: (416) 947-0866

Lawyers for
Ron Barbaro

AND **ROBINS APPLEBY LLP**
TO: Barristers and Solicitors
120 Adelaide Street West
Suite 2600
Toronto ON
M5H 1T1

Irving Marks
imarks@robapp.com
Tel: (416) 360-3329
Michael Gasch
mgasch@robapp.com
Tel: (416) 360-3414
Samuel Mosonyi
smosonyi@robapp.com
Tel: (416) 360-3356

Tel : (416) 868-1080
Fax: (416) 868-0306

Lawyers for Elena Terpselas, Estate Trustee of Nicholas Kyriacopoulos, deceased

AND **CRAWLEY MACKEWN BRUSH LLP**

TO: Barristers and Solicitors
179 John Street
Suite 800
Toronto ON
M5T 1X4

Michael Byers
MByers@CMBLaw.ca
Tel : (416) 217-0885
Fax: (416) 217-0220

Lawyers for
Issam A. Saad and 2858087 Ontario Inc.

AND **TYR LLP**

TO: 488 Wellington Street West
Suite 300-302
Toronto ON
M5V 1E3

Jason Wadden
jwadden@tyrllp.com
Tel: (416) 627-9815
Shimon Sherrington
ssherrington@tyrllp.com
Tel: 1 (587) 777-0367

Tel : (416) 477-5525

Lawyers for
Lakeshore Luxe Design and Build Group Inc.

AND **CORSIANOS LEE**

TO: Barristers & Solicitors
3800 Steeles Avenue West
Suite 203W
Vaughan ON
L4L 4G9

Jacob Lee
jlee@cl-law.ca
Tel : (905) 370-1093
Fax: (905) 370-1095

Lawyers for
Lakeshore Luxe Design and Build Group Inc.

AND **DAVIDZON LAW**
TO: 1120 Finch Avenue West
Suite 503
North York ON
M3J 3H7

Ronald Davidzon
ronald@davidzonlaw.com
Tel : (416) 792-5556
Fax:

Lawyers for
2462686 Ontario Inc.

AND **TDB Restructuring Ltd.**
TO: 11 King St. West, Suite 700
Toronto, ON M5H 4C7
Tel: 416-575-4440
Fax: 416-915-6228

Arif Dhanani
Tel: 647-725-0183
adhanani@tdbadvisory.ca

Bryan Tannenbaum
Tel: 416-238-5055
btannenbaum@tdbadvisory.ca

Receiver

AND **STARKMAN BARRISTERS**
TO: Barrister and Solicitor
675 Cochrane Drive, East Tower
Suite 304
Markham ON
L3R 0B8

Paul H. Starkman
paul@starkmanlawyers.com
Tel: (905) 477-3110
Calvin Zhang
calvin@starkmanlawyers.com

Tel : (905) 477-3110
Fax: (905) 477-3210

Lawyer for
2478659 Ontario Ltd.

AND **HIMELFARB PROSZANSKI**
TO: Barristers and Solicitors
480 University Avenue
Suite 1401
Toronto ON
M5G 1V2

Raffaele Sparano
rsparano@himprolaw.com
Tel: (416) 599-8080 ext 347
Peter Proszanski
peter@himprolaw.com
Tel: (416) 599-8080

Tel : (416) 599-8080
Fax: (416) 599-3131

Lawyers for
Yury Boltyansky and 2462686 Ontario Inc.

AND **LOOPSTRA NIXON LLP**
TO: 366 King Street E.
Suite 340
Kingston ON
K7K 6Y3

Jenna Morley
jmorley@LN.law
Tel : (437) 291-9034

Lawyers for
2349891 Ontario Inc.

AND **DENIS LITIGATION**
TO: 365 Bay St., Ste. 800
Toronto ON
M5H 2V1

Dale Denis
dale@dilitigation.com
Tel : (416) 479-3417

Lawyers for
AJGL Group Inc.

AND **BLANEY MCMURTRY LLP**
TO: Barristers & Solicitors
2 Queen Street East
Suite 1500
Toronto ON
M5C 3G5

Anisha Samat
asamat@blaney.com
Tel : (416) 593-3924
Fax: (416) 593-5437

Lawyers for
2083053 Ontario Inc.

AND **PAUL F. ROONEY PROFESSIONAL CORPORATION**
TO: 204 Tavistock Rd
Toronto ON
M3M 2P6

Paul F. Rooney
rooney@paulfrooneyprofcorp.com
Tel : 647-981-7838

Lawyers for
AJGL Group Inc.

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**FACTUM OF THE ARJUN ANAND IN TRUST FOR A COMPANY TO BE
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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. The Appellant Arjun Anand in trust for a company to be incorporated (the “**Appellant**”) entered into an agreement of purchase and sale (“**APS**”) with a Court Appointed Receiver. Pursuant to a Sales Process (as defined below), the Appellant made an offer (“**Offer**”) by the Bid Deadline Date (defined below) which Offer was accepted by the Receiver to purchase a property municipally known as 2849, 2851, 2853 and 2857 Islington Avenue, Toronto, Ontario (the “**Toronto Property**”). The Appellant waived all conditions.
2. After the Sales Process, after the Bid Deadline date, and after the Receiver served a motion record seeking, *inter alia*, an approval and vesting order (“**AVO Motion**”), the Late

Bidder (who is a related entity to the owner/debtors), made two offers to purchase, each slightly higher than the Purchase Price as set out in the APS. The Late Bidder then improperly used Confidential Information (as defined below) concerning the Appellants offered price and made a third unsolicited offer for a higher price (“**Third Late Bid**”).

3. The AVO Motion was heard by the Honourable Justice Black on December 4 and 10, 2024 (“**Motions Judge**”). The Third Late Bid was made on or about December 9, 2025. Despite there being a firm APS, a robust Sales Process, and despite the Motions Judge explicitly finding that the Sales Process was “*unassailable*,” His Honour, by way of the order and decision dated December 10, 2024 (the “**Order**”):

- (a) Reopened the completed Sales Process; and
- (b) Converted the completed Sales Process into an auction to take place between not only the Appellant and the Late Bidder but also to any third party who wished to make an offer.

4. As set out below, the Late Bidder made the Third Late Bid by gaining an unfair advantage and wrongfully using Confidential Information. The Late Bidder increased each of its offers hoping that eventually the Court, the Receiver, and potentially other stakeholders would ‘bite’ and take the bait, notwithstanding that the “fishing derby” had ended.

5. In setting aside the already completed Sales Process and re-opening the Sales Process, His Honour erred in law by failing to abide by the well-established case law and, in particular, the principles as set out in *Royal Bank v. SoundAir Corp.*¹

6. There were no “*exceptional circumstances*” which would warrant rejection of the Receiver’s recommendations or the principles in *SoundAir*.

7. His Honour erroneously categorized the facts as being “*unique circumstances*” when they were not. He erroneously did so in an attempt to circumvent *stare decisis* and the well-established jurisprudence. As the jurisprudence clearly establishes, it is not uncommon for late bidders or owners to attempt to redeem at the 11th hour. In such circumstances, the courts have consistently maintained that the integrity of the process must be upheld and rejected the requests of the late bidders.

8. As set out in *SoundAir*, a substantially higher late bid can be considered by the Court but only if it meets the following conjunctive test:

“...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.”² [emphasis added]

9. In other words, there needs to be evidence **and a finding** that:

¹ *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA) [“*SoundAir*”], Appellant’s Book of Authorities (“ABOA”) at Tab 1

² *SoundAir* at para 30, ABOA Tab 1

- (a) The price contained in the offer accepted by the Receiver was “unreasonably low” at the time it was accepted³; **and**
- (b) The Receiver **was improvident** in accepting the earlier offer.

Hereinafter referred to as the “*Soundair Test*.”

10. Neither finding was made. His Honour did not find that the Appellant’s Offer was “unreasonably low” and that the Receiver was improvident in accepting the Offer.

11. The Late Bidder improperly using and taking advantage of the Confidential Information constitutes a serious breach of the integrity of the Sales Process.

12. The Court should not condone such wrongful conduct. It brings into question the integrity of the entire process. Permitting the Late Bidder to take advantage and use of such Confidential Information leads to a “*mockery of the system*”⁴ and will have a chilling effect on future receiverships and, more particularly, parties’ willingness to participate in a sales process.

13. Permitting the Order to stand sets a dangerous precedent. It permits debtors and late bidders to lay in the reeds, take advantage of confidential information, and come out at the 11th hour to frustrate a completed Sales Process. This would have a significant impact on the use of Receivers and would dissuade bidders who follow the rules from spending the required money to conduct their due diligence. Permitting the Late Bidder to vary and set aside the already completed Sales Process, in essence, creates a situation where the Late Bidder has stepped into

³ [Crown Trust Co et al v Rosenberg et al, 1986 CanLII 2760](#) citing *Re Selkirk* (1986) 58 C.B.R. (N.S.) 245, ABOA at Tab 8

⁴ *SoundAir* at para 68, ABOA at Tab 1

the shoes of the Receiver and is now dictating the process. Courts have consistently cautioned against such scenarios. An approach that does not favor the integrity of the process creates chaos in the commercial world and fosters uncertainty and mistrust between receivers and purchasers.⁵

PART II - BACKGROUND

14. On December 6, 2023, the RSM Canada Limited was appointed Receiver of, *inter alia*, the Toronto Property pursuant to an order of Justice Conway of the Commercial Court (“**Appointment Order**”).⁶ On March 1, 2024, the Court granted an order substituting the name TDB Restructuring Limited in place of RSM Canada Limited as Receiver (the “**Receiver**”).⁷

15. The Appointment Order was sought by the secured lender being Cameron Stephen Mortgage Capital Inc. (the “**Lender**”) pursuant to a mortgage in the amount of \$15,600,000.00 registered on the Toronto Property.⁸ The Lender is the only creditor with a registered charge on title to the Toronto Property.

Robust sales process

16. There was a robust and lengthy sales process (spanning 8 months) undertaken by the Receiver. As correctly found by the Motions Judge, the conduct of the Receiver as it relates to, *inter alia*, the Sales Process, was “**unassailable**”.⁹ The steps undertaken by the Receiver are set out in detail in the reports filed by the Receiver, and include the following:

⁵ *Soundair* at para 30, ABOA at Tab 1; [River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa](#), 2010 ABCA 16 (CanLII) [*River Rentals*] at para 19, ABOA at Tab 2; [Terrace Bay Pulp Inc., \(Re\)](#), 2012 ONSC 4247 at para. 54, ABOA at Tab 9; [Smith Street Lands Ltd. v. KEB Hana Bank of Canada](#), 2020 SKCA 41 at paras. 38-41, ABOA at Tab 10

⁶ Appointment Order, Appendix A to the Third Report, Receiver’s Motion Record (“**RMR**”), Tab 2A, p. 38.; Appellant’s Appeal Book and Compendium (“**ABCO**”), Tab 6

⁷ Omnibus Order, Appendix B to the Third Report, RMR, Tab 2B, p. 56.; ABCO Tab 7

⁸ Third Report, paras.33-35, RMR, Tab 2, p. 32.; ABCO Tab 8

⁹ Endorsement of Justice Black dated December 10, 2024, (“**December 10 Endorsement**”) at para 33; ABCO Tab 3

(i) **Stage 1: Retaining Realtor**

- (a) The Receiver invited eight commercial real estate brokers to submit proposals for the marketing and sale of the Toronto property, including Colliers.
- (b) The Receiver received listing proposals from six of the eight brokerages and ultimately selected Colliers. On March 22, 2024, the Receiver entered into a MLS listing agreement with Colliers.
- (c) After discussion with Colliers, the Receiver set an offer deadline date of June 3, 2024.
- (d) Colliers launched the listing on MLS on March 25, 2024 and commenced a marketing campaign for the Toronto Property on April 4, 2024.
- (e) The Receiver provided Colliers with a form of agreement of purchase and sale to be uploaded to an online data room maintained by Colliers, in order to facilitate purchaser due diligence (“**Data Room**”).
- (f) Colliers drafted a form of confidentiality agreement for interested parties to execute to be given access to the virtual data room and perform due diligence (the “**Confidentiality Agreement**”).

(ii) **Stage 2: Terminated APS**

- (g) A summary of the marketing activities undertaken by Colliers during stage 1 of the Sales Process included:

- (i) Emails being sent to Colliers's distribution list of approximately 3,000 parties, which emails contained a marketing brochure, website link to Collier's web page for the Toronto Property and a link to the Confidentiality Agreement.
- (ii) An electronic data room being set up to provide access to the confidential information pertaining to the Toronto Property and parties which had executed the Confidentiality Agreement.
- (h) Colliers received 18 signed Confidentiality Agreements by perspective purchasers or brokers, all of whom were given access to the electronic data room.
- (i) On June 3, 2024, Colliers received three offers and a letter of intent for the Toronto Property. The Receiver reviewed the offers with Colliers and the Lender. The Receiver requested of Colliers that it go back to the offers that submitted bids on June 3, 2024 to ask them to re-submit their highest and best offers.
- (j) Only Lakeshore Lux and Design Build Group Inc. ("**Lakeshore Lux**") made a revised offer. The Receiver determined that Lakeshore Lux's offer was the highest and best available offer and should be accepted.
- (k) On June 12, 2024, the Receiver and Lakeshore Lux entered into an agreement of purchase and sale for the Toronto Property on a "as is, where is" basis (the "**Terminated APS**").¹⁰

¹⁰ First Report, paras.27-42, Appendix C to the Third Report RMR, Tab 2C, p. 78-81; ABCO Tab 9

- (l) On July 24, 2024, the court granted an Approval and Vesting Order (“AVO”) in respect of the Terminated APS, which was scheduled to close on July 30, 2024.
- (m) After a series of extensions, Lakeshore Lux was unable to close the transaction.
- (n) On August 27, 2024, the Receiver, through counsel, advised that the transaction was terminated and the deposit paid by Lakeshore Lux, including various extension fees, was forfeited.¹¹

(iii) Stage 3: Remarketing of the Toronto Property

- (o) The Receiver requested that Colliers remarket the Toronto Property, and on August 29, 2024, the MLS listing for the Toronto Property was changed from “*sold firm*” back to “*available*” and Colliers sent out an email blast to its data base of approximately 3,000 parties.
- (p) Colliers also contacted all previous bidders and those that signed a confidentiality agreement and had access to Colliers data room to advise that the Toronto Property was back on the market.
- (q) With the concurrence of the Receiver, Colliers set a bid deadline date of September 26, 2024 at 3:00 p.m. (“**Bid Deadline**”).
- (r) Colliers did not receive any additional signed Confidentiality Agreements from new parties with interest in the Toronto Property.

¹¹ Second Report, paras 9-15, Appendix D to the Third Report, RMR, Tab 2D, p.94-95; ABCO Tab 10

(s) On September 26, 2024, Colliers received two offers and one letter of intent for the Toronto Property. A subsequent offer was received on September 28, 2024.

The Receiver considered all four offers.

(t) After 8-9 months of work, the Receiver determined that the Offer from the Appellant was the highest and best available offer given amongst other things, current market conditions, and should be accepted.¹²

(iv) Stage 4: APS with Appellant – Unconditional and Firm

17. On October 7, 2024, the Receiver executed the APS with the Appellant, subject to the approval of the Court. The Appellant complied with the Sales Process and complied with the Bid Deadline and all other requirements (as set out by the Receiver). In good faith, the Appellant completed its due diligence and waived all conditions,¹³ and, accordingly, there was a firm and binding APS subject only to Court approval.¹⁴

18. The Receiver was of the view and advised the court that sufficient efforts were made to obtain the best price for the Toronto Property and that the marketing process was conducted fairly. The Receiver regarded the APS as the most advantageous offer for the Toronto Property.¹⁵

The Receiver recommended to the Court that it approve the APS.¹⁶

¹² Third Report, para. 22, RMR Tab 2, p. 29; see also Confidential Appendix 1, submitted under seal for a summary of the offers; ABCO Tab 8

¹³ Third Report, para. 23-24, RMR, Tab 2, pg. 29; ABCO Tab 8

¹⁴ Third Report, para. 23-25, RMR, para. 23-25, RMR, Tab 2, pp. 29-30; ABCO Tab 8

¹⁵ Third Report, paras. 27-28, RMR, Tab 2, pp. 31-32; ABCO Tab 8

¹⁶ Third Report, para. 29, RMR, Tab 2, p. 31; ABCO Tab 8

(v) **Stage 5: December 4, 2024, Motion and Late Bidder**

19. The AVO Motion was scheduled for December 4, 2024 (“**December 4, 2024, Motion**”).

The day before the hearing, 1001079582 Ontario Inc. (“**Late Bidder**”) submitted two unsolicited offers to purchase. The second offer was higher than the first.

20. The Receiver placed the Late Additional Offers before the Court in a Confidential Second Supplement to the Third Report of the Receiver¹⁷ and advised the Court that an additional issue would need to be addressed: *under what circumstances should a court consider or accept a late, but higher offer from an unsuccessful bidder?*¹⁸

21. The Receiver canvassed the relevant caselaw and submitted a Supplementary Factum setting out its position:

*“In this case, the First Factum sets out the comprehensive marketing efforts undertaken by the Receiver. The existence of the other offers confirms the reasonableness of the purchase price, since **the late offers are only marginally (6.7%-14.2%) higher**. The purchase price in the APS before the court falls squarely within the range of offers received, and importantly, was compliant with the sales process.*

Finally, the overriding concern with integrity, fairness and predictability of the court-ordered sales process militate in favour of the approval of the conforming, successful bid. As Justice Cumming pointed out in Re 1730960 Ontario Ltd, “[i]t is unfair and objectionable for a party to wait until another bid is made and has been accepted by the Receiver and then to make a bid which is marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid.” [emphasis added]

¹⁷ Supplementary Factum of the Receiver dated December 3, 2024 (“**Supplementary Factum of the Receiver**”); Appellant’s Appeal Record (“**AAR**”), Tab 4

¹⁸ Supplementary Factum of the Receiver at para 4; AAR at Tab 4

22. Justice Black adjourned the December 4, 2024 hearing to December 10, 2024, so as to “*accommodate the additional information and submissions*” and not “*rush the hearing to conclusion in the circumstances.*”¹⁹ The AVO Motion then proceeded on December 10, 2024.

23. The Late Bidder, in essence, went “fishing.” They initially provided two late bids which the Receiver said was not “substantially high”. Unfortunately, despite seeking a sealing order, the purchase price paid by the Appellants was indirectly disclosed to the Late Bidder (by the Receiver in its factum as stated above) (“**Confidential Information**”). Using this information, just before the re-attendance on December 10, 2024, the Late Bidder made yet a third and even higher bid with the hope that the Receiver (and the Court) would eventually “bite” and would consider the Late Bidder’s offer.

24. This use of the Confidential Information and the abuse of same brings into question the integrity of the entire process.

25. At the AVO Motion, despite the Late Bidder not having standing, the Motions Judge permitted the Late Bidder to make submissions and, despite rejecting all material arguments of the Late Bidder, accepted the submissions of the Late Bidder to:

- (a) Re-open the completed Sales Process; and
- (b) Convert the Sale Process to an auction.

26. The learned Motions Judge correctly:

¹⁹ December 10 Endorsement at para 3; ABCO at Tab 3

- (a) Rejected the arguments of the Late Bidder that it had an indirect ownership interest, was a beneficial owner and therefore had a right to redeem;
- (b) Found the integrity of the process must be maintained, and correctly quoted prior well-established jurisprudence as it relates to the integrity of the process;
- (c) Rejected the Late Bidder's assertions that Colliers failed to provide proper advice and failed to ensure that the Toronto Property was exposed to the residential market;
- (d) Rejected the Late Bidder's assertions that the Receiver and/or Colliers failed to properly market and sell the Toronto Property;
- (e) Explicitly found that there were no flaws in the Sale Process:

*“As noted, **I do not find that there are any flaws with the sale undertaken here**; to the contrary I find that the conduct of the Receiver, and those involved in the process, including Collier, was **unassailable**” (paragraph 33) [emphasis added].*

- (f) Found that the Appellant acted in “good faith”.²⁰

(collectively, hereinafter referred to as “**Findings of Fact**”).

27. Despite making his Findings of Fact, His Honour incorrectly, and contrary to the jurisprudence, held:

“Nonetheless, I find that the magnitude by which the Third Offer exceeds the subject price does in fact qualify as “substantially higher” and that it is not

²⁰ December 10 Endorsement at para 31; ABCO at Tab 3

*appropriate or in the interest of the majority of the stakeholders to leave that much money “on the table.”*²¹

28. The Motions Judge re-opened the Sale Process and implemented an auction process as between the Appellant and the Late Bidder. The Motions Judge further held that if the Appellant was not ultimately the successful purchaser, then at the suggestion of the Late Bidder, the Appellant would be entitled to “*reasonable legal costs associated with the process to date*”.²²

29. The Motions Judge found that the Third Offer was “*substantially higher.*” He also found that the Receiver’s conduct was “*unassailable.*”²³ The Motion did not find that the Appellant’s offer was “*so unreasonably low*”.²⁴ Having made the explicit finding of “*unassailable*” conduct on the part of the Receiver, it follows that the Receiver could not have acted improvidently in accepting the APS and the Court could not set aside the already completed Sale Process. As correctly submitted in the Receiver’s Supplementary Factum:

*“Courts have rarely refused to approve the original offer on the basis that a new offer is “substantially higher”. Ultimately, **where the receiver’s process is fair, and its decision to enter into an agreement of purchase and sale was reasonable and sound at the time it was made, courts are generally unwilling to set aside this decision simply because a later, higher bid is made.**”*²⁵ [Emphasis Added]

30. A substantially higher late bid can be considered by the Court but only if it meets the conjunctive *SoundAir* Test²⁶.

²¹ December 10 Endorsement at para 34; ABCO at Tab 3

²² December 10 Endorsement at para 36; ABCO at Tab 3

²³ December 10 Endorsement at para 33; ABCO at Tab 3

²⁴ [SoundAir](#), supra at para. 30, ABOA at Tab 1

²⁵ Supplementary Factum of the Receiver at para 9; AAR at Tab 4

²⁶ [SoundAir](#) at para 30. 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.

31. There were no “*exceptional circumstances*” which would warrant rejection of the Receiver’s recommendations or the principles in *SoundAir*.

32. In effect, the learned Motions Judge permitted the Late Bidder to take advantage of Confidential Information make a higher bid which was then used as the basis to re-open the completed Sales Process, restart the sale process and convert it to an Auction. This is despite there being no finding of improvidence by the Receiver. This constitutes a serious breach of the integrity of the Sales Process. It leads to a “*mockery of the judicial system*” and fails to apply the binding authority of this Court in *SoundAir*.²⁷

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

33. The issues on this Appeal are as follows:

Preliminary Issues

- (a) Is there an automatic right to appeal pursuant to section [193\(c\) of the BIA](#)?
- (b) If there is no automatic right to appeal, should leave be granted pursuant to section [193\(e\) of the BIA](#)?

The Appeal

- (c) What is the appropriate standard of review? Did the Motions Judge err in principle and in misapplying the test set out in *SoundAir*?
- (d) Did the Motions Judge err in law in granting standing to Late Bidder?

²⁷ [SoundAir](#) at para 68, ABOA at Tab 1

- (e) What is the appropriate remedy?

Issue (a) Is there an automatic right to appeal pursuant to section 193(c) of the BIA?

34. The Appellants have an automatic right of appeal to the Ontario Court of Appeal pursuant to subsection [193\(c\) of the BIA](#). There is no dispute that the Toronto Property involved in the appeal exceeds in value ten thousand dollars.

Issue (b) If there is no automatic right to appeal, should leave be granted pursuant to section 193(e) of the BIA?

35. In the alternative, if leave to appeal were required (which it is not), the test for granting leave has been met.²⁸ The appeal:

- (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters, the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) is *prima facie* meritorious, and
- (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

36. To permit this decision to stand would create significant uncertainty in the commercial bar and, in particular, as it relates to the conduct of the Receiver. The integrity of the entire court ordered receiverships and sales process will be brought into disrepute and question:

- (a) Potential purchasers would be hesitant to negotiate and enter into an agreement of purchase and sale with a court appointed Receiver only to have the potential

²⁸ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para. 29 [*Pine Tree*], ABOA at Tab 3

purchaser's genuine good faith efforts be ignored by a late bidder who takes advantage of confidential information and attempts to circumvent the Sales Process.

- (b) The inconsistent interpretation and application of the *SoundAir* Test will lead to lack of certainty. A dangerous precedent will be set. Courts have consistently maintained that a Court will only consider a late bid if the steps taken by the Receiver were improvident. This decision opens the door to permit late bids even if there is no finding of improvident steps taken by a receiver.
- (c) It would permit a late bidder to set aside an "unassailable" sales process by merely making an 11th hour bid (in circumstances where the then bidder made use of Confidential Information).
- (d) There will be a lack of finality. The courts cannot have endless bidders who ignore the process to show up at the last minute. It would lead to chaos which would need additional court intervention. The Court would then be required to take on the role of the Receiver.

37. The appeal is *prima facie* meritorious as the Order is contrary to the established law. Moreover, there is no evidence that the appeal would unduly hinder the progress of the bankruptcy / insolvency proceedings or cause any prejudice to any of the majority stakeholders.

38. There is an automatic stay pending appeal pursuant to section 195 of the BIA. However, if the Court determines that there is no automatic stay pending appeal despite the granting of leave, the Appellant/Moving Party requests that the Court grants a stay pending appeal pursuant

to [Rule 63.02\(1\)\(b\) of the Rules of Civil Procedure](#), as the appeal will be rendered moot if a stay is not granted and the test for granting a stay has been met.

Issue (c) Standard of Review - The learned Motions Judge erred in principle and in misapplying the *SoundAir* Test

39. Bankruptcy and insolvency matters stand apart from other forms of secured debt collection and are governed by their own standard of review, which accords deference to the Chambers judge.²⁹

40. An appeal court will interfere where the judge erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations.³⁰

41. This case is one that meets the above factors. The learned Motions Judge erred in law in misapplying the *SoundAir* Test, and exercised his discretion based on erroneous considerations (i.e. finding unique circumstances where there were none).

42. When deciding whether a receiver who has sold a property acted properly, the Court is to 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;

²⁹ [Re Harmon International Industries Inc.](#), 2020 SKCA 95 at para 40, ABOA at Tab 4

³⁰ [Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization](#), 2018 ONCA 713, 426 D.L.R. (4th) 273, at para 54, ABOA at Tab 5

(d) whether there has been unfairness in the working out of the process.³¹

43. To determine if the Receiver has acted improvidently or failed to get the best price, the

Court is to consider:

- (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;
- (b) whether the circumstances indicate that insufficient time was allowed for the making of bids;
- (c) whether inadequate notice of sale by bid was given; or
- (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.³²

44. It is only in exceptional circumstances that the Court will intervene and proceed contrary to the Receiver's recommendation if satisfied that the Receiver has acted reasonably, prudently, and fairly and not arbitrarily.³³ Courts consistently favour an approach that preserves the integrity of the process.³⁴ As set out in *Cameron*:

*"In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and a higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation. ..."*³⁵
[emphasis added]

³¹ *River Rentals* at para 13, ABOA at Tab 2 citing *Cameron v. Bank of Nova Scotia* (1981), 1981 CanLII 4762 (NS CA), 45 N.S.R. (2d) 303 (C.A.) [*Cameron*], ABOA at Tab 6 and *Salima Investments Ltd. v. Bank of Montreal* (1985), 1985 ABCA 191 (CanLII), 65 A.R. 372 (C.A.) at para. 12, ABOA at Tab 7

³² *River Rentals* at para 13, ABOA at Tab 2

³³ *Soundair* at para 21, ABOA at Tab 1, citing *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), ABOA at Tab 8

³⁴ *Soundair* at para 22, ABOA at Tab 1; *River Rentals* at para 19, ABOA at Tab 2

³⁵ *Cameron* at para 35, ABOA at Tab 6

45. Courts will set aside decisions of chambers judges if the chambers judge acted unreasonably, erred in principle, or made a manifest error.³⁶

46. In the within case, the Court considered all the above factors and correctly determined that the Receiver's conduct and the completed Sales Process were "unassailable." Despite this correct finding, and despite correctly finding that there were no flaws with the sale and marketing process,³⁷ the learned Motions Judge then erroneously concluded that this case had "unique circumstances"³⁸ that warranted rejection of the Receiver's recommendation. No such unique circumstances existed. As case law makes clear, it is not uncommon for late bidders to make a higher bid or for an owner to redeem at the 11th hour.³⁹ That, in and of itself, without a finding that the price contained in the offer accepted by the Receiver was so "unreasonably low" and that the Receiver "was improvident" in accepting such an offer, does not constitute "exceptional circumstances" that warrant rejecting the Receiver's recommendation.⁴⁰

47. This is exemplified in *River Rentals*, where the Respondent submitted a late bid for an increased offer based on an erroneous understanding that he would get possession of the subject property earlier than anticipated.⁴¹ The Court ordered a re-tendering based on same and granted an order extending the deadline to submit revised offers. During this time, the Respondent submitted a bid higher than the Appellant's, while the Appellant did not increase their original

³⁶ *River Rentals* at para 21, ABOA at Tab 2

³⁷ December 10 Endorsement at para 33; ABCO at Tab 3

³⁸ *Ibid* at para 13.

³⁹ *River Rentals* at para 8-9, ABOA at Tab 2

⁴⁰ *Cameron* at para 35, ABOA at Tab 6

⁴¹ *River Rentals* at para 8, ABOA at Tab 2

offer. An order was granted directing that the property be sold to the Respondent. On appeal, the Court allowed the appeal. As set out by the Court:

- (a) There was no finding of improvidence by the Receiver in accepting the Appellant's offer;⁴²
- (b) This court has consistently favoured an approach that preserves the integrity of the process;⁴³
- (c) The prior order granting an extension to submit revised offers to purchase neither considered the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids⁴⁴;
- (d) **There was no cogent evidence of any unfairness to the Respondent** ⁴⁵;
- (e) ***“On the contrary, the impugned order of June 2 conferred an advantage upon [The Respondent] who then knew the price that had previously been offered by the Appellant when re-tendering his offer.”***⁴⁶ [emphasis added]

48. Likewise, there was no finding of improvidence by the Receiver in accepting the Appellant's offer. The decision by the Motions Judge in this case is particularly egregious in that the Late Bidder was able to take advantage of the Confidential Information to submit the Third Offer. As such, there is cogent evidence of unfairness to the Appellant. As in *River Rentals*, the learned Motions Judge did not consider the interests of the Appellant whose offer was accepted

⁴² *River Rentals* at para 16, ABOA at Tab 2

⁴³ *River Rentals* at para 18, ABOA at Tab 2

⁴⁴ *River Rentals* at paras 16-17, ABOA at Tab 2

⁴⁵ *River Rentals* at para 20, ABOA at Tab 2

⁴⁶ *River Rentals* at para 20, ABOA at Tab 2

by the Receiver in making his decision. There was no evidence of any unfairness to the Respondents. In fact, the Late Bidder had the distinct advantage of knowing the offer by the Appellant when submitting the Third Offer. The Late Bidder chose not to “play by the rules” presumably because it was to its advantage not to do so. Such conduct cannot be encouraged let alone condoned.

Issue (d) The Late Bidder had no standing

49. The fundamental purpose of a sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale.⁴⁷ The Motions Judge correctly rejected the arguments of the Late Bidder that it was in essence the owner and had a right to redeem. This finding places the Late Bidder as “*unsuccessful would be purchaser*” and accordingly, the Late Bidder had no interest or standing with respect to issues relating to the AVO Motion.

50. The policy reason to restrict the involvement of prospective purchasers in a sale approval motion is the potential for greater delay and additional uncertainty which may “*create commercial leverage in the hands [of] a disappointed would-be purchaser which could be counter productive to the best interests of those for whose benefit the sale is intended.*”⁴⁸

51. As stated by the court in *Skyepharm PLC, supra*:

*Indeed the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expenses.*⁴⁹

⁴⁷ [Skyepharm PLC v. Hyal Pharmaceutical Corporation \[2000\] OJ No. 467](#), ABOA at Tab 11

⁴⁸ [Skyepharm PLC v. Hyal Pharmaceutical Corporation, supra](#) at para. 20, ABOA at Tab 11

⁴⁹ [Skyepharm PLC v. Hyal Pharmaceutical Corporation, supra](#) at para. 15, ABOA at Tab 11

Issue (e) Remedy Sought

The Appellant submits that the Order and Decision of the Honourable Justice Black dated December 10, 2024 be set aside, and an order be granted approving the Appellant's APS as originally sought by the Receiver.

PART IV - ORDER REQUESTED

52. An Order setting aside the order and decision of the Honourable Justice Black dated December 10, 2024 (the "**Order**");

53. An Order granting an AVO with respect to the APS, with any necessary extensions of time;

54. An Order directing the Receiver to proceed with the APS and vesting title to the Toronto Property to the Appellant on the closing of the APS;

55. If necessary, an Order declaring that the Appellant has the right to appeal to this Court under section 193 (c) of the BIA, and that there is a stay of proceedings under section 195 of the BIA;

56. In the alternative, an order granting the Appellant leave to appeal pursuant to section 193(e) of the BIA and an order granting a stay of the Order pending appeal;

57. If necessary, an Order for the abridgment of time to serve and file materials for the Notice of Appeal and dispensing with further service thereof;

58. An Order expediting the appeal;

59. An Order granting the Appellants their costs of this appeal and of the motion before the Motions Judge on a substantial indemnity scale;

60. Such further and other relief as the Appellant may request and this Honorable Court may deem just.

Estimated time for oral argument of the appeal (not including reply): 90 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2024.



Jonathan Kulathungam

TEPLITSKY LLP

Barristers
70 Bond Street
Suite 200
Toronto ON M5B 1X3

Jonathan Kulathungam (42049N)
jkulathungam@teplitskylp.com

Tel : (416) 365-9320
Fax: (416) 365-0695

Lawyers for the Appellant, Arjun
Anand in Trust for a Company to
be Incorporated

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC

Respondent

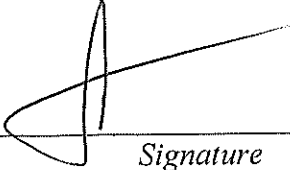
CERTIFICATE

I estimate that 90 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with Rule 61.11(1)e(iii). There are 4868 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 23rd day of January, 2025.

Date January 23, 2025



Signature

SCHEDULE "A"

LIST OF AUTHORITIES

1. [Royal Bank of Canada v. Soundair Corp.](#), 1991 CanLII 2727 (ON CA)
2. [River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa](#), 2010 ABCA 16 (CanLII)
3. [Business Development Bank of Canada v. Pine Tree Resorts Inc.](#), 2013 ONCA 282
4. [Re Harmon International Industries Inc.](#), 2020 SKCA 95
5. [Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization](#), 2018 ONCA 713, 426 D.L.R. (4th) 273
6. [Cameron v. Bank of Nova Scotia](#) (1981), 1981 CanLII 4762 (NS CA), 45 N.S.R. (2d) 303 (C.A.)
7. [Salima Investments Ltd. v. Bank of Montreal](#) (1985), 1985 ABCA 191 (CanLII), 65 A.R. 372 (C.A.)
8. [Crown Trust Co. v. Rosenberg](#) (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.)
9. [Terrace Bay Pulp Inc., \(Re\)](#), 2012 ONSC 4247
10. [Smith Street Lands Ltd. v. KEB Hana Bank of Canada](#), 2020 SKCA 41
11. [Skyepharma PLC v. Hyal Pharmaceutical Corporation \[2000\] OJ No. 467](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193 1992, c. 27, s. 68

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

R.S., 1985, c. B-3, s. 195 1992, c. 27, s. 69

Rules of Civil Procedure

By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

- (a) by an order of the court whose decision is to be appealed;
- (b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken. O. Reg. 465/93, s. 8.

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and- CONACHER KINGSTON HOLDINGS INC. AND 5004591
ONTARIO INC
Respondent

Court of Appeal File No. COA-24-CV-13328

Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE ARJUN ANAND IN TRUST FOR A
COMPANY TO BE INCORPORATED**

TEPLITSKY LLP

Barristers
70 Bond Street
Suite 200
Toronto ON M5B 1X3

Jonathan Kulathungam (42049N)

jkulathungam@teplitskyllp.com

Nipuni Panamaldeniya (77106A)

npanama@teplitskyllp.com

Tel: (416) 365-9320

Appellant, Arjun Anand in Trust for a Company to be
Incorporated

Parties served:
Service List