

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

COURT OF APPEAL FOR ONTARIO

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

**Respondents/
Respondents in Appeal**

**SUPPLEMENTARY BOOK OF AUTHORITIES OF THE APPELLANT,
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CITATION: GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc., 2014 ONSC 1173

COURT FILE NO.: CV-12-9856-00CL

DATE: 20140224

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: GE Canada Real Estate Financing Business Property Company, Applicant

AND:

1262354 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Pillon and Y. Katirai, for the Receiver

L. Rogers, for the applicant, GE Canada Real Estate Financing Business Property Company

C. Reed, for the Respondent and for Keith Munt, the principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer

A. Grossi, for the proposed purchaser, 5230 Harvester Holdings Corp.

HEARD: February 18, 2014

REASONS FOR DECISION

I. Debtor’s request for disclosure of commercially sensitive information on a receiver’s motion to approve the sale of real property

[1] PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company (“GE”).

[2] The Receiver’s motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. (“800 Inc.”), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by

the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

[3] After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

[4] The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for \$10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of \$9.95 million. In January, 2013, the listing price was reduced to \$8.2 million.

[5] In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

[6] Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

[7] Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to \$6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

[8] One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property

under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to \$6.8 million.

[9] On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

[10] As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

[11] The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at \$6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

[12] In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

[13] By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately \$593,000 of the \$600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

[14] The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

[15] In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

[16] The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

[17] The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, “clean” - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations – and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

[18] The only persons who opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver’s materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

[19] At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver’s request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

[20] The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the “Receiver’s Confidentiality Agreement”). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

[21] By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

[22] On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

[23] On January 23 Debtor's counsel wrote to the Receiver:

My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

[24] The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

[25] The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

[26] Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

[27] On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

[28] At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver – i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been

the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

[29] The Receiver's Confidentiality Agreement contained a recital which read:

The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person to effect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

[30] Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

[31] By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

[32] In *Sierra Club of Canada v. Canada (Minister of Finance)*¹ the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects.² As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer – receiver, monitor or trustee – filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

[33] The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.³

[34] To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

[35] From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

¹ 2002 SCC 41

² *Ibid.*, para. 53.

³ 8857574 *Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Gen. Div.).

[36] Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

- (i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank of Canada v. Soundair Corp.*,⁴ specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;
- (ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership – a proper request. The Debtor was prepared to agree to that term;
- (iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

[37] In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

⁴ (1991), 4 O.R. (3d) 1 (C.A.)

V. Receiver's request for approval of the sale: The *Soundair* analysis

[38] The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

[39] The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

[40] Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

- (i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;
- (ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;
- (iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

[41] Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

[42] As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

[43] As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,⁵ motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

[44] First, one had to take into account the economic reality of this receivership – i.e. that given the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

[45] Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to \$356,301.40, and its counsel had incurred fees approximating \$188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

[46] Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

[47] Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

[48] Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation.⁶ In this receivership the Receiver had served this motion over a week in advance of

⁵ 2011 ONSC 346, para. 7.

⁶ *Hryniak v. Mauldin*, 2014 SCC 7, para. 31.

the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

[49] Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

[50] Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of a receivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

[51] For those reasons, I refused the Debtor's second adjournment request.

[52] Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

[53] Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

[54] For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

D. M. Brown J.

Date: February 24, 2014

CITATION: Kingsett Mortgage Corporation v. Churchill Lands United Inc. 2024 ONSC 7127
COURT FILE NO.: CV-24-00718940-00CL
DATE: 20241218

SUPERIOR COURT OF JUSTICE – ONTARIO

**IN THE MATTER OF AN APPLICATION UNDER 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*, RSO 1990, c. C.43, AS AMENDED**

RE: Kingsett Mortgage Corporation, Applicant

AND:

Churchill Lands United Inc., Respondent

BEFORE: Kimmel J.

COUNSEL: *Michael Citak/ Baruch Wise*, for the Respondent, Churchill Lands United Inc.

Sean Zweig/Aiden Nelms, for KSV Restructuring Inc., in its capacity as Court-appointed receiver

Gregory Dubecky, 1001024143 Ontario Inc., Graham Halley, the Purchaser under the proposed AVO

HEARD: December 12, 2024

ENDORSEMENT

The Motion: Background

[1] This motion originally came before the court on December 3, 2024. It was adjourned to December 12, 2024 at the request of the representative of Churchill Lands United Inc. ("Churchill" or the "Debtor"). The court's endorsement from December 3, 2024 contains some of the background to this motion. For ease of reference the relevant background is reproduced below:

[1] The Receiver, KSV Restructuring Inc., was appointed on May 14, 2024 at the request of the applicant (senior secured creditor owed in excess of \$2.5 million at the time of the appointment of the Receiver).

[2] On June 24, 2024 this Court granted an order (the "Sale Process Approval Order"), among other things:

- a. approving the sale process in respect of the Real Property (the "Sale Process"); and
- b. approving the listing agreement dated June 5, 2024 (the "Listing Agreement") between the Receiver and Jones Lang Lasalle Real Estate Services, Inc ("JLL").

[3] The Receiver conducted the Sale Process in accordance with the Sale Process Approval Order, and now brings a motion seeking: (i) an order (the "Approval and Vesting Order"), among other things, approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale between the Receiver and 1001024143 Ontario Inc., as purchaser dated October 11, 2024 (the "Sale Agreement") and vesting in the Purchaser, or as it may direct, all of the Debtor's rights, title and interest in and to the real property consisting of raw industrial land located in the Town of Whitby, Ontario that is subject to the applicant's first mortgage security (the "Real Property"), and (ii) an a "Distribution and Discharge Order", that deals with various matters ancillary to the discharge of the Receiver and seeks a sealing order in respect of the Confidential Appendices to the Receiver's Second Report dated November 27, 2024 (the "Confidential Appendices").

...

[5] JLL summarized the Sale Process and its recommendation with respect to the Transaction in its marketing report dated November 12, 2024 (the "JLL Report") . The Sale Process included a preliminary bid deadline of August 7, 2024. As is further discussed in the JLL Report, no offers were received by that date and JLL continued to market the Real Property and discuss the opportunity with prospective purchasers. The Purchaser subsequently submitted an offer on October 11, 2024. The purchase price in the offer was negotiated and eventually the Sale Agreement was signed, which is conditional upon court granting the requested Approval and Vesting Order.

[6] The Receiver has filed redacted copies of the JLL Report and the Sale Agreement with the Second Report. In each case, the only redactions concern the purchase price or the value of the Real Property. The Receiver has filed unredacted copies of the JLL Report and the Sale Agreement as Confidential Appendices to the Second Report. For the reasons detailed in the Receiver's factum at paragraphs 45-52, I am satisfied that the requesting [*sic*] sealing order is necessary and appropriate in the circumstances and I am granting it now so as to ensure that the Confidential Appendices to the Second Report are under seal.

...

[9] Although aware of the court approved Sale Process, neither the Debtor nor any affiliate of the Debtor participated in the Sale Process. Having learned on Friday of the purchase price amount for the Transaction, its representative appeared today to object. Although the burden on the Debtor at this late stage is onerous if it seeks to oppose the approval of the Transaction on the grounds that a sufficient effort was not made by the Receiver to obtain the best price and acted improvidently in negotiating and entering into the Sale Agreement, the court determined that a brief adjournment would be granted to allow the Debtor to bring forward evidence in support of its position so that it can be considered on a proper record. There was no apparent urgency or prejudice to granting a short indulgence to allow for this in the circumstances.

[2] The Sale Agreement is conditional upon court approval.

[3] When the motion was adjourned on December 3, 2024, the court directed that if Churchill intended to oppose the Receiver's motion its responding material (to be delivered by December 6, 2024 at noon) should include evidence of the following matters that its representative had made unsupported representations about on December 3, 2024:

- (a) an explanation for why the Debtor (or its affiliates or affiliates of Mr. Harmandayan) did not participate directly in the Sale Process; and
- (b) firm third-party evidence of a materially higher value of the Real Property that materially exceeds the purchase price in the pending Transaction, that has not been tainted by disclosure to any such third party of what the purchase price is under the pending Transaction.

[4] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Receiver's Second Report.

The Evidentiary Record and Request for Partial Sealing Order

[5] The Receiver's Second Report provides the detailed history of the listing and efforts to sell the Real Property. It also provides an explanation for why the purchase price under the Sale Agreement is significantly less than the list price under the court-approved Listing Agreement and previous offers and appraisals in respect of the Real Property.

[6] The court directed in the December 3, 2024 endorsement that the Confidential Appendices could be filed on a confidential basis and remain sealed pending the earlier of: (i) the closing of the Transaction; and (ii) further Order of the Court. The Confidential Appendices and any redactions in the publicly filed material are solely in respect of the purchase price, deposit and information concerning the value of the Real Property. This discretionary sealing order was

granted pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, with regard to the balancing of interests that the Supreme Court of Canada has most recently delineated in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 SCR 75, at para. 38. In this case, those interests include:

- (a) The important public interest of maximizing recoveries in an insolvency that could be compromised by the premature public disclosure of confidential information about the value of a property that a receiver is attempting to sell in a transaction that has not yet closed.
- (b) The fairness and integrity of the Sale Process. Failing to grant such sealing orders can give competitors or other potential bidders in a later round of bidding an unfair advantage as they can obtain sensitive commercial information about the asset up for sale while others have had to rely on their own resources to place a value on the asset when preparing their bids in an approved sale process (see *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173, at paras. 32-33).
- (c) The lack of any better reasonable alternatives to a temporary and partial sealing order of the confidential information about value (including offers and appraisals) to prevent the risk associated with disclosure pending the closing of a sale.
- (d) The salutary benefits of the sealing request outweigh any deleterious effects. The redacted information is limited and has been narrowly tailored. The only information that is redacted pertains to the purchase price, deposit and value of the Real Property. Moreover, this information will no longer be deemed sensitive or confidential after the close of the Transaction, and as such, the Confidential Appendices will be made publicly available at that time.

[7] It was necessary to grant the limited scope sealing order when the motion was first adjourned because the Debtor had indicated that it would be attempting to solicit an alternative transaction.

[8] The Debtor delivered a responding motion record that contains an alternative bid, and it continues to oppose the Receiver's motion.

[9] The responding motion record explained, among other things, that Mr. Harmandayan had been preoccupied with his spouse's health challenges during the Sale Process and was not engaged in work activities for part of the relevant time. Additionally, the motion record included an offer from Paul Padda Inc. dated December 5, 2024. That offer was later amended following discussions with the Receiver, dated December 8, 2024 (The "Padda Offer"), referenced in the Supplement to the Second Report of the Receiver dated December 9, 2024.

[10] There are aspects of the Responding Motion Record and Supplement to the Second Report of the Receiver that include or refer to confidential information about the value of the Real Property. This includes an April 15, 2024 offer that pre-dated the receivership, offers and appraisals of the Real Property dating back to 2021 (including one offer that was presented by the broker from JLL who marketed the Real Property under the Listing Agreement), the Padda Offer, and two appraisals dated December 4 and 5, 2024. The court was asked to extend the sealing order to include these.

[11] The reasoning and balancing of interests (of the open court principle with the commercial interests of all parties to this receivership in preserving the confidentiality of non-public information about the value of the Real Property pending the completion of a transaction for the sale of that property) apply equally to the confidential aspects of the Responding Motion Record and Supplement to the Second Report as they did to the Confidential Appendices and redacted information forming part of the Receiver's Second Report that have been sealed.

[12] The sealing order is accordingly extended to include the unredacted Responding Motion Record and Supplement to the Second Report of the Receiver on the same terms, pending the closing of a transaction for the sale of the Property. The redacted version of the responding motion record shall remain in the public record. Granting, and now extending, the sealing order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

[13] The Receiver shall ensure that the Confidential Appendices to the Second Report, the Confidential Appendices to the Supplemental Report and the unredacted Harmandayan Affidavit that contain this confidential value information are placed in a sealed envelope and physically sealed in accordance with this endorsement and signed order. The Receiver shall further ensure that they are unsealed at the appropriate time upon the earlier of the closing of a sale transaction involving the Real Property or further order of this court.

The Requested AVO and Approval of the Sale Agreement

[14] The Respondent takes the position that the Receiver has not made a sufficient effort to obtain the best price for the Real Property, that the Sale Agreement is evidently improvident (based on the purchase price), and that the Transaction should accordingly not be approved. Instead, the Respondent submits that the Property should be re-listed on the Toronto Regional Real Estate Board Multiple Listing Service system for a period of not less than three months. In the alternative, the Respondent asks the court to approve the Padda Offer.

[15] Although the Debtor would prefer to have the benefit of the higher Padda Offer, the Receiver continues to recommend that the court grant the AVO and approve the Transaction and grant the Distribution and Discharge Order. The Receiver defends its actions carried out pursuant to the court approved Sale Process that culminated in it signing the Sale Agreement. It maintains

that the court should grant the AVO and approve the Transaction to preserve the integrity of the Sale Process.

[16] All parties agree that the test that the court must apply in determining whether to grant the AVO is that which the Court of Appeal set out in *Royal Bank of Canada v. Soundair Corp.*, 4 O.R. (3d) 1 (C.A.) (1991), at p. 6, which requires the court to consider:

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.

[17] The Debtor's opposition to approval of the AVO and Sale Agreement is primarily focused on the first consideration, because the Debtor maintains that the purchase price under the Sale Agreement is improvident.

[18] The Debtor's position is simply that with the benefit of hindsight, the process did not generate an offer that is commensurate with what the Debtor believes the value of the Real Property to be. The purchase price under the Sale Agreement is approximately 10% of the value indicated by various appraisals.

[19] However, there is evidence in the Receiver's Second Report that indicates that the Debtor's view may not be fully informed because the Debtor did not participate in the Sale Process, has not signed a non-disclosure agreement ("NDA"), has not accessed the data room, did not ask to sign an NDA and access the data room after the Receiver's motion was served, and is thus not aware of the specific issues that the Receiver and JLL attribute to the difference between the purchase price under the Sale Agreement and other indications of value. Without signing an NDA and gaining access to the data room where this information would be readily available, the Debtor does not have all of the relevant information about the value of the Real Property that was available to all prospective bidders in the Sale Process and to the purchaser under the Sale Agreement in particular.

[20] The Padda Offer that the Debtor has brought forward is unconditional, but it is not based on any diligence or access to the data room. According to the information provided to the Receiver, it is the number that this purchaser arrived at after speaking with the principal of the Debtor, who owes Padda money (according to what the Receiver has been advised). The purchase price under the Padda Offer is only approximately 17% of the value indicated under the various appraisals that the Debtor has presented and relies upon. In these circumstances, the

Padda Offer cannot be considered to be a true reflection of the fair market value of the Real Property.

[21] It is not clear exactly what information Paul Padda Inc. had when it made (and amended) the Padda Offer. It is higher than the purchase price in the Sale Agreement. The primary focus of the Debtor's opposition to the AVO and approval of the Transaction is very much on the purchase price of the Padda Offer, which is an 80% increase in the purchase price under the Sale Agreement. However, it too is materially less than the other indicators of value that the Debtor points to in its confidential materials and is only approximately 17% of the value indicated in the appraisals relied on by the Debtor, as noted above.

[22] The Debtor says the court should be concerned about the fact that there is a continuum of offers and appraisals from 2021 until the two appraisals it received earlier this month, suggesting a much higher value for the Real Property. The Debtor argues that the value differential is so great, and the purchase price under the Sale Agreement is so much lower than other indications of value, that it does not matter that the current information that the Receiver and JLL attribute to the reduced sale price was not directly taken into consideration by these appraisers or other prospective purchasers. That delta alone should be enough, according to the Debtor, for the court to find: that the first part of the *Soundair* test (whether the party made a sufficient effort to obtain the best price and to not act improvidently) has not been satisfied.

[23] The Debtor suggests that the court (and the Receiver and Applicant) can take comfort that Paul Padda Inc. has said it "intends" to participate and renew its offer if the Sale Process is extended so that will set the floor higher than the current offer for which approval is sought now.

[24] The Alberta Court of Appeal in *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, 2010 ABCA 16, 63 CBR (5th) 26, at para. 13, broke down the first part of the *Soundair* test into the following four more specific considerations that the Debtor urges the court to apply to achieve its desired outcome in this case:

- (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.

[25] Relying on these criteria, the Debtor argues that the Receiver's efforts were inadequate because:

- (a) the purchase price under the Padda Offer is substantially higher than the purchase price under the Sale Agreement;
- (b) the purchase price under the Sale Agreement is so low in relation to the appraised values as to be unrealistic; and
- (c) insufficient time was allowed for the making of bids and the Real Property was not exposed to the market for long enough, or the timing of its exposure was not optimal.

[26] The Receiver has provided an explanation in the confidential materials for the unexpected reduction in the purchase price for the Real Property that the indications of higher value have not accounted for, and that renders the price comparisons that the Debtor so heavily relies upon to be of little value. The bidders in the Sale Process had this confidential information; Paul Padda Inc. and the Debtor do not because they did not sign NDAs. Only one bidder was prepared to make an offer and negotiate with the Receiver and only one Transaction has materialized from a marketing process that began in June 2024.

[27] In all of the circumstances, the reasonable inference to be drawn from the recent appraisals that the Debtor has obtained and put forward as evidence of the fair market value of the Real Property is that those appraisals did not take into account or consider the negative value indicators that the purchase under the Transaction was able to consider and take into account as an active bidder.

[28] The Receiver also points out that there was no court approved sale process in either of the *Soundair* or the *River Rentals* cases. The existence of a court approved Sale Process reduces the risks that the factors considered in those cases were concerned with.

[29] I agree with the Receiver that the integrity of the court approved Sale Process is important. This is trite. I had occasion to deal with this in a different context in the case of *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832, *Aff'd Rose-Isli Corp. v. Smith*, 2023 ONCA 548. In that case, the court had to balance the recognized need to protect the integrity of the sale process with the right of a mortgagor to redeem, and ultimately concluded that once the sale process had run its course and there was an accepted offer, a mortgagor could not step in at the eleventh hour to exercise a right to redeem. The Court of Appeal confirmed this approach and the importance of the integrity of the sale process at para. 10:

[10] We adopt the rationale for those guiding principles articulated in *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009),

2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.), where the court stated, at para. 22:

A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[30] The Debtor in this case was told when the Receiver's motion was first adjourned that it would have to meet a high bar to go behind the Sale Process and the accepted Sale Agreement. That said, it is routinely accepted that the court must consider the *Soundair* factors on a sale approval motion, even if the sale was made pursuant to a Sale Process. Consistent with this, the Sale Agreement is conditional on court approval.

[31] Having considered all of the evidence and submissions, I find that the proposed Transaction satisfies the *Soundair* principles.

- (a) The court-approved Sale Process was conducted by the Receiver in accordance with the Sale Process Approval Order. It provided for a fair, transparent and thorough canvassing of the market for the Real Property. I was not directed to any authority, nor am I prepared to find on the record before me, that the Receiver did not make a sufficient effort to obtain the best price for the Real Property or acted improvidently by entering into the Sale Agreement that emerged out of the court approved Sale Process.
- (b) The market was widely canvassed using several traditional marketing techniques to sell real estate, including direct solicitation of prospective purchasers by JLL. The Debtor is not complaining or taking issue with how the Sale Process was run. And does not suggest that it was not carried out in accordance with the Sale Process Approval Order. The Sale Process is a full answer to any concerns regarding the time that was available for bids to be made.
- (c) The Sale Agreement was the result of negotiations following the only offer that was presented in the Sale Process, which had to be extended by the Receiver to elicit an offer that could be negotiated. The Sale Agreement is the highest and best offer obtained for the Real Property through the Sale Process.

- (d) JLL, an experienced and reputable real estate broker, is familiar with the local real estate market and is of the view that the Transaction is the best one available in these circumstances. The Receiver believes that the approval of the Sale Agreement and the Transaction contemplated thereunder is in the best interests of the Debtor and all of its stakeholders. KingSett, the Debtor's senior secured creditor and the lone security holder with a charge against the Real Property, remains supportive of the Transaction (even though it would prefer to obtain the higher purchase price contained in the Padda Offer).

[32] The Receiver and JLL are of the view that the market itself is the best indicator of fair market value, and the Transaction, negotiated at arm's length after a reasonable listing period and efforts to market the Real Property is a reflection of the current fair market value. They do not believe that the other indications of value are true reflections of market value given that they do not take into account the negative disclosures that were discovered during the Sale Process.

[33] Mr. Harmandayan has put forward a valid and compelling explanation for why he was not actively engaged during the Sale Process. However, he did not ask to sign an NDA and access the data room to satisfy himself about the circumstances that the Receiver and JLL believe are negatively impacting the market value of the Real Property. Without the full information, the utility of the indicators of market value that the Debtor points to are not reliable. It is unfortunate that Mr. Harmandayan's personal circumstances prevented him from helping to identify prospective purchasers for the Real Property during the Sale Process, but even the purchaser that he has now identified does not appear to value the property at anywhere close to what the Debtor believes it is worth, based on the Padda Offer price.

[34] The Debtor's suggestion that there is no downside to extending the Sale Process by a further three months (or at all) is flawed:

- (a) First, it undermines the court approved sale process to send a message that a bidder that did not participate in it can come after the fact with an offer that will lead to the process being re-opened. The Receiver points out that this could have a chilling effect.
- (b) Second, there is no guarantee of a higher bid. Padda has only said that if the sale process is extended it intends to participate in that process. Counsel for the Debtor concedes that extending the Sale Process and re-listing may not produce a better offer.
- (c) Third, there is prejudice to the secured creditor because interest will continue to accrue on the full loan deficiency, and professional fees will continue to be incurred during the extended sale process. The accrued interest and the professional fees will ultimately be at the expense of the first secured creditor where, in a case such as this, a deficiency is projected. No one has done the math to determine whether the

full amount of the differential between the purchase under the Sale Agreement and the Padda Offer would be used up by these accruing fees and interest, but given that the gross dollar amount of this differential is not significant, certainly some if not all of it will be eliminated through these interim costs – The Debtor is not offering to cover these additional incremental costs if the Sale Process is extended; rather it is hopeful that these incremental costs be covered by any enhanced value received on a subsequent sale (which is not guaranteed).

[35] In JLL's view, it is unlikely that exposing the Real Property to the market for additional time will result in a superior transaction. There is nothing to suggest that this assessment is unreliable; rather, it is the other indications that appear to be unreliable.

[36] I am not confident that re-opening the Sale Process will produce any better outcome than the current Padda Offer, and it comes at a significant potential cost to the secured creditor who has as much to lose as the Debtor (or more, if the costs are factored in). This leaves only two other options: either approve the Transaction, or not approve it and direct the Receiver to accept the Padda Offer now. Faced with these choices, and having regard to the analysis above, the question for the court is whether the personal circumstances that prevented the principal of the Debtor from engaging in the Sale Process when it was running are a sufficient reason for the court to reject the Transaction that was a product of that process, in favour of a higher bid that came in after the Sale Agreement had already been signed.

[37] There was no objective unfairness in the manner in which the Sale Process played out. The unfortunate personal circumstances of the principal of the Debtor here are not enough to supplant the Sale Process. The Debtor's recent involvement has not produced an offer that is so superior to the Sale Agreement that the Sale Process should be disregarded at this late stage.

[38] The court must consider the interests of all stakeholders, and the public interest in the integrity of the court-approved Sale Process. This is especially so given that if the theory of improvident sale advanced by the Debtor is accurate, then the Padda Offer would also be improvident given that it is only 17% of the values of the two most recent appraisals, compared to the purchase price under the Transaction which is 10% of those appraisals.

[39] If these percentages are to be considered a measure of improvidence I am not prepared to replace one allegedly improvident offer for another that would also be improvident based on the measure of improvidence that the Debtor asserts, even if slightly less so.

[40] No compelling reason to undermine the integrity of the Sale Process has been provided. Having found that the *Soundair* principles have been satisfied with respect to the Sale Agreement, the Transaction is approved and the AVO is granted.

[41] Under the Sale Agreement, the Transaction is supposed to close ten days after court approval. This was the topic of some back and forth at the hearing, but it was eventually agreed that the closing date was to be 10 days from the AVO. I am mindful that the timing of the release of this decision could have implications for parties' holiday plans. If there is a preferred effective date for the AVO to, in turn, determine a different closing date, the parties can advise of that when they provide a revised draft AVO.

[42] I require the revised form of order dated the same day as this endorsement but with a specification of any other effective date that the Receiver and the purchaser under the Sale Agreement may mutually agree upon, if different than today, for signing by no later than noon on Friday, December 20, 2024. If it is not provided by then I will not be able to sign it until Monday, December 30, 2024.

The Distribution and Discharge Order

[43] The Receiver is seeking authorization to make the Proposed Distributions as set out in the Second Report from the net proceeds of the Transaction. Orders granting distributions are routinely granted by Canadian Courts in insolvency proceedings and receiverships: see *AbitibiBowater inc. (Arrangement relatif a`)*, 2009 QCCS 6461, at paras 70-75.

[44] The Proposed Distributions are to KingSett, the Debtor's senior secured creditor and the sole party with a charge against the Real Property. The Receiver's counsel has provided an opinion that KingSett's security is valid and enforceable, subject to the usual qualifications and assumptions.

[45] It has become common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent manner: see *Target Canada (Re)*, 2015 ONSC 7574, 31 CBR (6th) 311, at paras. 2 and 23; *Triple-I Capital Partners Limited v. 12471300 Canada Inc.*, 2023 ONSC 3400 at paras 65 and 66.

[46] The activities of the Receiver described in the Second Report and Supplement thereto were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order. I am satisfied that they were in the best interest of the stakeholders of the Debtor, and that the court's discretion should be exercised to approve the Receiver's Second Report, Supplement thereto and the activities described in them. The approval language in the order has been made subject to the standard qualification that has become the Commercial List practice to include in these types of orders.

[47] Throughout these receivership proceedings, the Receiver has acted prudently and contributed substantially to the administration of these proceedings, with the activities of the Receiver having been thoroughly disclosed throughout: see *Pinnacle v. Kraus*, 2012 ONSC 6376, at para. 47. Accordingly, the requested limited release of the Receiver that is sought as part of its discharge (with standard carve outs for any gross negligence or wilful misconduct on the part of the Receiver) is reasonable in the circumstances to provide finality, and is granted.

[48] The Receiver's administration and its duties and responsibilities under the Receivership Order and other Orders made in these proceedings are substantially complete, subject to completing the Transaction and attending to related administrative matters including the distribution of proceeds. To avoid the costs of making a further motion to the court to obtain the Receiver's discharge, the Receiver seeks an order now for it to be discharged upon the filing by the Receiver of a Discharge Certificate after the Transaction closes. This is appropriate in the circumstances, for among other reasons, the cost savings that it will allow for given the level of recoveries from this receivership.

[49] The Receiver is also seeking approval of the professional fees and disbursements incurred by it and its legal counsel as well as the Fee Accrual (for anticipated fees to close the Transaction and attend to any other matters prior to the Receiver's discharge), each as described in greater detail in the Fee Affidavits attached to the Second Report. The Receivership Order provides (at paragraph 17) that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.

[50] Having regard to the applicable factors that are taken into consideration in determining whether to approve the accounts of court officers and their counsel, I am satisfied that the fees and disbursements for which approval is sought are commensurate with the tasks performed and are both fair and reasonable in the circumstances of this case: see *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, 20 CBR (6th) 292, at paras. 33 and 35.

Final Disposition and Orders

[51] No party sought costs of these motions.

[52] The forms of Approval and Vesting Order and Discharge Order are consistent with the Commercial List model orders for this type of relief, with appropriate adjustments to reflect the particular circumstances of this case. Updated orders to reflect the date of this endorsement and any other agreement regarding the effective date of the AVO (discussed above) should be sent to my judicial assistant by email: linda.bunoza@ontario.ca as soon as possible.

Date: December 18, 2024

Kimmel J.

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

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

Court of Appeal File No. COA-24-CV-13

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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