



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ ENDORSEMENT FORM

COURT FILE NO.: CV-23-00701672-00CL DATE: DECEMBER 10, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: **CAMERON STEPHENS MORTGAGE CAPITAL LTD. v. CONACHER KINGSTON HOLDINGS INC. et al**

BEFORE: **JUSTICE W.D. BLACK**

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE W.D. BLACK:

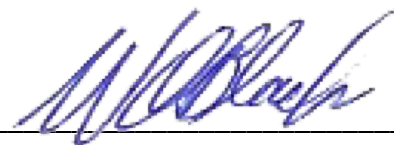
- [1] These parties were before me last week, on December 4, 2024. At that time, as my brief endorsement of that day reflects, there had been considerable activity in the hours leading up to the time appointed for the hearing, including new last-minute offers to purchase the “Toronto Property” that was the subject of the appointment.
- [2] In the circumstances, I directed that the parties should have an opportunity to exchange their materials and submissions in a slightly less compressed fashion, and that we would reconvene today (December 10, 2024).
- [3] Since the parties were before me last week, there has been one significant development. That is, 1001079582 Ontario Inc (“100”), a would-be purchaser of the Toronto Property delivered a further offer on Saturday December 6, 2024, (the “Third Offer”) at a higher price than its two previous offers.
- [4] On December 4, and until the arrival of this latest offer, the Receiver’s position had been, even-handedly but firmly, to the effect that the prior offers from 100, although higher than the offer/price (the “subject offer” or the “subject price”) in the transaction for which the Receiver was seeking approval (the “subject transaction”), was not “substantially higher” than that price so as to raise concerns about the providence of the proposed sale.
- [5] In its supplementary factum for purposes of the December 4 hearing, the Receiver had reviewed certain caselaw in which late offers ranging from 8% to 30% higher than the offers subject to approval in those cases had not led to a conclusion that the subject price was unreasonable, or that the process undertaken to obtain the subject price was unreasonable or flawed.
- [6] In the circumstances of last week, in reliance on those cases, the Receiver’s position was that it had run a comprehensive marketing effort, that the (existing) purchaser (the “subject purchaser”), had “acted in good faith” and was a “*bona fide* third party purchaser” and that the “existence of marginally higher bids, submitted on the eve of the hearing, are not sufficient to displace the Receiver’s recommendation set out in its Third Report.”
- [7] That recommendation, stressing the “overriding concern with integrity, fairness and predictability of the court-ordered sales process,” was that the court should approve the conforming, successful (subject) bid. The Receiver reminded the court of the words of Cumming J. in *1730960 Ontario Ltd. (Re)*, in which His Honour said “[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 that is marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid.”
- [8] The Third Offer, however, is 37% higher than the subject price.
- [9] While the Receiver, quite appropriately, stands by its submissions about the integrity of the process, and the worrisome precedent associated with giving effect to an offer received very late in the process (and in the face of the subject offer that the Receiver has accepted and recommended), the Receiver also clearly recognizes that at a certain level, a late-breaking offer can and perhaps must be considered simply by dint of its value.
- [10] It is apparent that the Receiver allows that the Third Offer may be in that category. Before me today Receiver’s counsel submitted that, albeit the Receiver’s first position remains that the proposed subject

transaction should be approved, it now says that, as a second possibility, if the court is persuaded that 37% is a sufficiently higher price to qualify as “substantially higher” such that that the subject price risks improvidence, then the Receiver suggests a further “auction” process whereby the bidders are asked to submit their best offers by a specified date in the near term.

- [11] In determining what to do in these circumstances, I first observe that I regard the circumstances as unique, likely singular, and unlikely to be replicated in future (or certainly not often).
- [12] In that regard, I heard submissions from counsel for the purchaser whose offer is the subject of the approval motion, pointing to the specter of the unpredictable free-for-all that will ensue if I fail to approve the subject transaction and countenance 11th hour offers like the Third Offer.
- [13] I do not regard that as a high risk, let alone an inevitable consequence. Again I find that the circumstances before me are unique and unlikely to be regularly repeated.
- [14] I should note that, on the other side of the fence, I also reject certain submissions on behalf of 100’s bid, offered to suggest that in fact the equities here favour my approval of – or at least a re-opening of the process to recognize and make room for consideration of – the Third Offer.
- [15] Those submissions include the assertion that 100 stands in the shoes of a beneficial owner of the Toronto Property, and that its offer is akin to a redemption.
- [16] The ownership argument is based on the fact that AJGL Group Inc. (“AJGL”) is the beneficial owner of the shares of 5004591 Ontario Inc. and beneficial owner of 2849, 2851, 2853, 2855, and 2857 Islington Avenue in Toronto, being the Toronto Property.
- [17] It is clear that AJGL assembled the five properties making up the Toronto Property and developed them over a number of years, ultimately obtaining planning approval for a 110-unit mid-rise condo building which Colliers (engaged by the Receiver) marketed for sale in the receivership.
- [18] It is as a result of that ownership and that “sweat equity” that AJGL, via 100 (hereafter AJGL and 100 will be referred to from time to time collectively as “AJGL”), seeks “to acquire ownership back from the Receiver by submitting the highest bid.” AJGL submits that, as such, its position is “analogous to that of a mortgagor seeking to redeem a mortgage.”
- [19] AJGL argues that this ownership interest puts it in a unique position, different than the competing bidder in all of the cases on which the Receiver relies in its argument. It says that whereas the cases in the Receiver’s factum involve “disinterested third-parties as bidders” AGJL is instead a “beneficial owner of the [Toronto] Property seeking to have its equitable right to redeem the [Toronto] Property recognized and protected by the Court.”
- [20] I do not accept that AJGL is akin to a beneficial owner seeking to redeem.
- [21] A redemption of the mortgage financing here would require payment of roughly four times the amount of the Third Offer. So, while the Third Offer is potentially propitious, and while the past ownership stake may mean that acquiring the Toronto Property has unique value for AJGL, the Third Offer is not fairly characterized as being in the nature of a redemption.

- [22] I am prepared to give modest credence to AJGL's related argument that, inasmuch as the subject purchaser would be aware of the former owner's interest, and aware that the former owner may seek to reclaim ownership, the subject purchaser's argument that a late-breaking offer from the former owner is not within the reasonable expectation of the subject purchaser may be somewhat attenuated.
- [23] In addition, recognizing that it could be criticized for "lying in the weeds," AJGL offers an explanation for not submitting a bid before the bid deadline. It says that it believed that the Kingston Property (also a part of the receivership, and for which a sale that was approved earlier this fall did not close) would be sold first, and that there would be sufficient proceeds from that sale that the Toronto Property would not ultimately be sold. AJGL says that this was its business judgment, which proved to be incorrect, but that its decision was taken in good faith, and not with a view to "waiting in the wings."
- [24] While I do not dismiss this explanation out of hand, for the most part, like AJGL's past ownership interest and its claim to an entitlement to an equitable claim, I view the purported excuse for the late offer as largely irrelevant.
- [25] I also reject AJGL's assertions that Colliers, in particular, on which the Receiver relied for advice and guidance with respect to the sale process, failed to provide proper advice, and failed in particular to ensure that the Toronto Property was exposed to the residential market in addition to that for developers, such that the sale and marketing effort was flawed.
- [26] I understand the impetus for AJGL making these arguments, but, as with the over-reaching claims about AJGL's purported rights to equitable redemption, I find these arguments insubstantial and unpersuasive, and again for the most part frankly irrelevant.
- [27] What is relevant, and the consideration that concerns and compels me, is the sheer size of the Third Offer.
- [28] Not surprisingly, in light of the 37% larger amount of the Third Offer, it has attracted the support of various parties with a potential stake in the proceeds. Ms. Greenspoon-Soer for the applicant Cameron Stephens Mortgage Capital Ltd., Mr. Taylor for 2858087 Ontario Inc. and Issam A. Saad, creditors of relevant entities, and Mr. Mosonyi on behalf of the estate trustee of the late Nicholas Kyriacopoulos each indicate, albeit for slightly different reasons, that their respective clients favour recognition of the Third Offer, and a process to include AJGL/100 with a view to maximizing the return for the Toronto Property, rather than approval of the subject transaction.
- [29] As noted, despite its appropriately stated concerns about the integrity of the process, the 37% delta between the Third Offer and the subject price caused the Receiver to suggest, as an alternative to approval of the subject offer, a further process to ensure that the value of the Third Offer is captured and maximized.
- [30] In the unique circumstances as described, I find that this is the preferable approach.
- [31] I do so without suggesting that the subject purchaser acted in anything other than good faith.
- [32] I do so, also, with an appreciation of the need to preserve the integrity and predictability of the marketing and sale process within receiverships, and the reasonable expectation in the vast majority of cases that the process will yield a value-maximizing result that should not be subverted by late-breaking offers.

- [33] As noted, I do not find that there are any flaws with the sale and marketing process undertaken here; to the contrary I find that the conduct of the Receiver, and those involved in the process, including Collier, was unassailable.
- [34] 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 appropriate or in the interests of a majority of stakeholders to leave that much money “on the table.”
- [35] As such, and subject to input from the Receiver about any fine-tuning required, I am ordering the process (the “Proposed Auction Process”), set out in paragraph 79(b) of AJGL’s Aide Memoire, save and except that the deadline for further bids should be 5:00 p.m. on December 16 (rather than December 18 as suggested in that paragraph). To be clear, as will be evident, the subject purchaser is able to participate in this further process, and so is not precluded from making a further bid to purchase the Toronto Property.
- [36] In the course of its submissions, acknowledging the regrettable lateness of its bids (including the Third Offer) AJGL offered that, if the subject purchaser does not remain the successful bidder following the Proposed Auction Process, AJGL will reimburse the subject purchaser for its reasonable legal costs associated with the process to date. I find that to be a fair proposal, and direct AJGL to do so if we end up in that scenario.
- [37] AJGL requested the right, which I allowed, to file further written submissions after the time allotted for the hearing had elapsed. The further submissions, which I have reviewed, ask that the vesting order that will be required for the sale of the Toronto Property include a particular provision.
- [38] At the time that I granted AJGL the right to file the supplementary written submission, I also confirmed that the Receiver would have an opportunity to respond, also in writing. At the time of preparing this endorsement I have not yet received the Receiver’s position.
- [39] Inasmuch as the issue with respect to the insertion or not of that clause at issue relates to an approval of a transaction not yet in place, and inasmuch as there is some urgency to deal with the process for selling the Toronto Property, I will defer my consideration and determination of the issue regarding the proposed insertion of the clause until such time as I hear from the Receiver as to its position.



W.D. BLACK J.