



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ ENDORSEMENT FORM

COURT FILE NO.: CV-23-00701672-00CL DATE: OCTOBER 9, 2024

NO. ON LIST: 5

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

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

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Wendy Greenspoon-Soer Counsel	Cameron Stephens Mortgage Capital Ltd.	wgreenspoon@garfinkle.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Paul H. Starkman Calvin Zhang Counsel	2478659 Ontario Ltd.	paul@starkmanlawyers.com calvin@starkmanlawyers.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Dan Murdoch Nick Avis Counsel	Ron Barbaro	dmurdoch@stikeman.com navis@stikeman.com
Samuel Mosonyi Counsel	Elena Terpselas, in her Capacity as Estate Trustee of the Estate of Nicholas Kyriacopoulos	smosonyi@robapp.com

Paul F. Rooney Dale Denis Counsel	AJGL Group Inc.	rooney@paulfrooneyprofcorp.com dale@dilitigation.com
Ryan Taylor Counsel	Issam A. Saad and 2858087 Ontario Inc.	rtaylor@cmlaw.ca
Raffaele Sparano Counsel	2468659 Ontario Inc.	rsparano@himprolaw.com
Arif Dhanani Bryan Tannenbaum	TDB Restructuring Limited	adhanani@tdbadvisory.ca btannenbaum@tdbadvisory.ca
Douglas Montgomery Jeff Larry Counsel	TDB Restructuring Limited	douglas.montgomery@paliareroland.com jeff.larry@paliareroland.com

ENDORSEMENT OF JUSTICE W.D. BLACK:

- [1] This was a motion brought by TDB Restructuring Limited in its capacity as the court-appointed receiver (the “Receiver”) of the lands and premises known municipally as 311 Conacher Drive, Kingston, Ontario (the “Kingston Property”) and 2849, 2851, 2853, 2855 and 2857 Islington Avenue, Toronto, Ontario (the “Islington Property”) and together with the Kingston Property, the “Properties”) for, among other things, the approval of the sale of the Kingston Property.
- [2] More particularly, the Receiver seeks orders:
- (a) Approving the sale transaction (the “Transaction”) for the Kingston Property contemplated by the asset purchase agreement between the Receiver and 2349891 Ontario Inc. (the “Kingston Purchaser”) dated August 13, 2024 (the “APS”).
 - (b) Following the Receiver’s delivery of the Receiver’s certificate (substantially in the form at Schedule A to the proposed Approval and Vesting Order (the “AVO”), transferring and vesting all of Conacher Kingston Holdings Inc. (the “Debtor”)’s right, title, and interest in and to the Kingston Property to Crestmount Developments (Kingston) Limited, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances.
 - (c) Approving the Proposed Interim Distribution (as defined in the materials).
 - (d) Approving the Second Report of the Receiver dated September 26, 2024, and the Receiver’s activities described therein, as well as the fees and disbursements of the Receiver and its counsel as detailed in the Second Report and in two affidavits filed herein.
 - (e) Sealing Confidential Appendices 1 and 2 to the Second Report; and
 - (f) Approving the Receiver’s Statement of Receipts and Disbursements described in the Second Report.
- [3] With the exception of certain concerns discussed below, which in my view do not constitute reasons to prevent or delay the Transaction, the Transaction is essentially unopposed. In my view the process and

efforts undertaken by the Receiver easily meet the well-established criteria under *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (ONCA).

- [4] The evidence amply demonstrates that the Kingston Property was well-exposed to the market through, among other steps, distribution of promotional brochures to over 7000 potential purchasers and a public MLS listing for approximately seven weeks. An initial potential deal fell by the wayside, and the Receiver renewed its efforts and attracted (or confirmed) additional interest.
- [5] The Receiver received two offers for the Kingston Property by the Bid Deadline, in addition to the offer from the Kingston Purchaser giving rise to the Transaction.
- [6] The only condition for closing is the issuance of the AVO sought on this motion.
- [7] It is clear to me that the Receiver has made a robust effort to get the best price for the Kingston Property, and has not acted improvidently, and I see nothing to suggest that the process has been in any way unfair.
- [8] The only opposition to the Transaction came, first, from counsel to the putative second mortgagee on the Kingston Property, 2462686 Ontario Inc. (“286”) who raised, reasonably, a question as to whether a particular party who had previously expressed an interest in purchasing the Kingston Property had been approached. The Receiver provided a supplement to its Second Report confirming that indeed there had been communications with the agent for that party, from which no bid had resulted.
- [9] Appropriately, in light of receiving that information, counsel for 286 expressly withdrew the concern.
- [10] A second set of alleged concerns were voiced by counsel for the putative third mortgagee on the Kingston Property, 2478659 Ontario Ltd. (“247”). (I use the word “putative” with respect to mortgages of 246 and 247 inasmuch as, despite numerous requests from the Receiver, neither has yet provided documentation proving the validity of their respective charges. Both say they expect to do so, but for the moment at least some question has been raised about their mortgage security which remains to be resolved).
- [11] I regard the concerns raised by 247 as insubstantial and bordering on inappropriate. The concerns were in the nature of suggesting that, for example, although the Receiver reported that it had sent brochures to 7000 potential purchasers it had not in its materials identified the 7000 recipients or provided relevant details about them. Other similarly unconvincing concerns were raised. 247 also suggested that there was no evidence that the broker had a “for sale” sign in place on the Kingston Property; in response the Broker quickly confirmed that it had and offered photographic evidence (which I did not need to see to accept the Broker’s confirmation). In my view 247’s arguments in this vein were in the nature of “throwing everything against the wall in the hope that something would stick.” As a more troubling part of this offensive, counsel for 247 even went so far as to allege that the Receiver had engaged in “double counting” in respect of its fees.
- [12] Any party asserting such allegations against an officer of the court has, in my view, a duty to provide precise and compelling evidence to substantiate them. The processes involved in insolvency matters before this court are important, and often subject to time constraints and other pressures, and this court relies heavily on the professionalism and integrity of the court-appointed professionals who assist the court in these proceedings.

- [13] That is not to say that the Receiver (or any other court officer) is above scrutiny or reproach. However, such allegations must not be made lightly, and must be based in clear evidence.
- [14] In my view 247's allegations are not supported by the evidence in this record and were and are not reasonable allegations to make. I see nothing to suggest that the receiver has conducted itself with anything less than its usual level of diligence and professionalism.
- [15] I am satisfied that the Transaction is for the benefit of the relevant stakeholders and, as noted, in compliance with the Soundair principles, and I approve it. I also agree with the need for the Confidential Appendices to be sealed (in accordance with Sherman Estate and Sierra Club) and so order.
- [16] The other issues raised before me related to issues about the proposed distribution of funds.
- [17] Cameron Stephens Mortgage Capital Ltd. ("Cameron Stephens") is, undisputedly, the first mortgagee on both the Kingston Property – for which it provided first mortgage financing to Conacher Kingston Holdings Inc. ("Conacher Kingston") – and on the Islington Property – for which it provided first mortgage financing to 5004591 Ontario Inc. ("500", and together with Conacher Kingston, the "Debtors").
- [18] The Receiver proposes, after payments of property taxes to the City of Kingston, payment of its fees and those of its counsel, payment of the Receiver's borrowings relating to the Kingston Property, payment to the broker of its commissions and retaining a holdback for further fees and disbursements to pay to Cameron Stephens the remaining amount owed to it in respect of the indebtedness secured by its first mortgage on the Kingston Property (and the Receiver expects that Cameron Stephens indebtedness will be fully repaid from those net proceeds).
- [19] With respect to the second and third mortgagees, 246 and 247, as noted the Receiver remains to be satisfied that these parties have valid charges against the Kingston Property.
- [20] On the assumption that 246 and 247 will demonstrate that their respective security is valid and enforceable, the Receiver than proposed to make the following further distributions:
- (a) Payment to 246 of the lesser of:
 - i. The amount owed to it in respect of its mortgage; or
 - ii. The remaining proceeds from the sale of the Kingston Property; and
 - (b) Payment to 247 of the lesser of:
 - i. The amount owed to it in respect of the mortgage; or
 - ii. The remaining proceeds from the sale of the Kingston Property.
- [21] In the ordinary course, this proposed approach to distribution appears unassailable.
- [22] However, 247 in particular, and 246, make arguments arising in relation to the Islington Property, and in particular the ownership of the Islington Property. That is, and the premise for the "marshalling" argument discussed below, Conacher Kingston and 500 were each owned by the late Nick Kyriacopoulos.

- [23] I should note in passing that, in July of 2024 the Receiver brought a motion to approve the sale of the Islington Property. The motion was granted, but the purchaser ultimately failed to close the purchase, as a result of which the Islington Property was re-listed.
- [24] The order sought by the Receiver contemplates, after the distributions described above, the postponement of any further distributions to creditors pending the sale of the Islington Property. So, any excess proceeds from the sale of the Kingston Property will be held in trust by the Receiver until the Islington Property is sold and stakeholders have an opportunity to make submissions about the appropriate distribution of both any surplus funds from the Kingston Property and the net proceeds of sale of the Islington Property.
- [25] Notwithstanding this proposed approach, 247 has now brought a motion for a declaration that the “doctrine of marshalling be applied to require Cameron Stephens to realize on its security against the [Islington Property].” 247 also seeks an order requiring the Receiver to maintain the sale proceeds from the Kingston Property and the Islington Property in separate accounts, and that Cameron Stephens’ mortgage on the Islington Property not be discharged.
- [26] The Receiver opposes the relief sought by 247, noting that both Conacher Kingston and 500 have covenanted to Cameron Stephens to repay the full amount of their debt, as secured by the first mortgage, in each case that Cameron Stephens holds, on the respective properties.
- [27] The Receiver cites at least four reasons why the proceeds of sale of the Kingston Property ought not to be held back.
- [28] First, as noted, there is no dispute about the validity of Cameron Stephens’ charges over the properties, nor that Cameron Stephens is the first mortgagee in each case. The Receiver points to authority for the proposition that, even if the doctrine of marshalling is applicable, a fundamental principle of the doctrine is that “nothing will be done to interfere with the paramount right of the first mortgagee to pursue his remedy against either of the two estates.” (807933 Ontario Inc. v. Allison (Trustee of) (1995) 22 O.R. (3d) 102 (Gen. Div.), appeal dismissed (1998) 38 O.R. (3d) 337 (C.A.).
- [29] As such, the Receiver persuasively argues, the right of a junior creditor to invoke the marshalling doctrine is subject to the important qualification that nothing will be done to interfere with the ability of the first mortgagee to pursue its remedy against either of the two estates. The first mortgagee does not become a trustee for the junior mortgagees (*First Investors Corp. v. Veeradon Developments Ltd.* (1988), ABCA 38 (CanLII)). In this case, the Receiver asserts, requiring Cameron Stephens to postpone realization on its security would in fact prejudice its “paramount” right to pursue its remedy against either of the two estates.
- [30] Second, the Receiver takes issue with 247’s reliance on *Re Allison* (on which the Receiver also relies). The Receiver points out that the motions judge in that case concluded that “the applicants are not entitled to invoke the doctrine of marshalling” on the basis that the applicant was not a secured creditor.” Moreover, as was pointed out by counsel for the owner of the Islington Property, who was present in court, the specific aspect of the motions judge’s decision in *Re Allison* on which 247 specifically relied in argument was expressly overturned by the Court of Appeal for Ontario.
- [31] The Receiver notes that, even if the doctrine of marshalling applies – in respect of which it takes no position – the result would still be to pay down Cameron Stephens’ debt in full from the Kingston

Property sale, and subsequently allow 246 and/or 247 to argue that they have the right to marshal into the Islington Property, which is precisely what the Receiver's proposed approach will allow to happen.

- [32] The Receiver's third point is that the indebtedness owed to Cameron Stephens and the other creditors continues to grow as a result of the accrual of interest, such that the sooner its debt is satisfied the more money will be available for the satisfaction of other debts. On the other hand, reducing the amount of proceeds available to satisfy the claims of multiple creditors is in none of the stakeholders' interest.
- [33] Finally, the Receiver notes that creditors who assert claims, albeit unsecured, against proceeds from the Islington Property may similarly argue that Cameron Stephens' indebtedness ought to be repaid out of the Kingston Property first. In fact, those very arguments were raised in July 2024 when the Receiver sought approval of the sale of the Toronto Property.
- [34] I am persuaded by these submissions. In my view the doctrine of marshalling, even if it applies, does not assist the second and third mortgagees (246 and 247) here.
- [35] The Receiver's proposed approach to distribution in fact preserves whatever rights these parties (and others) may have to share in the proceeds of sale (of the two properties).
- [36] Moreover, it remains the case that 246 and 247 have yet to prove the validity of their respective charges (and counsel for the owner of the Islington Property maintains that they will be unable to do so). While I would not uphold the argument of 246 and 247 in the circumstances at hand in any event, I would be all the more loath to do so when the validity of their respective charges remains unproved.
- [37] As noted, and for these additional reasons, I am granting the orders sought by the Receiver, signed copies of which are attached, and dismissing the motions of 246 and 247.



W.D. BLACK J.

DATE: OCTOBER 9, 2024