



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

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

DATE: **June 1, 2023**

NO. ON LIST: **3**

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

BEFORE **MADAM JUSTICE KIMMEL**

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

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**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
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## ENDORSEMENT OF JUSTICE KIMMEL :

1. RSM Canada Limited, in its capacity as the Court-appointed receiver and manager (the "Receiver") of the Property (defined herein), seeks, among other related relief, the approval of its proposed sale procedure in respect of certain lands and premises known as 134, 148, 152, 184/188, 214, 224 and 226 Harwood Avenue (the "Harwood Properties) in the Town of Ajax (the "Town") and the assets, undertakings and properties of the Respondents acquired for, or used in relation to such lands, including all proceeds thereof (collectively, the "Property").
2. The Receiver was appointed by order of this court dated April 15, 2021 (the "Appointment Order").
3. Certain of the Harwood Properties are subject to a development agreement that granted the Town a right to repurchase such lands (the "Repurchase Right"). This motion follows protracted negotiations between the Receiver, the Town, and other stakeholders, regarding a new form of development agreement (the "New Development Agreement") that adequately balances the rights of creditors and the Town.
4. The Receiver's view is that this New Development Agreement minimizes the risk of a price ceiling being imposed on the Harwood Properties. This gives effect to one of the principal purposes of the Receiver's appointment, which was to ensure that the Town did not exercise its Repurchase Right at a price lower than what could be achieved under a court-supervised receivership. The final terms of the draft New Development Agreement will still be subject to negotiation between the Town and prospective purchasers.
5. With the Town's Repurchase Rights now circumscribed by the approved form of New Development Agreement, the Receiver is of the view that it is now in the best position to take the Harwood Properties to market, and it seeks to do so expeditiously.
6. The Receiver's motion was served on the service list almost a month ago, and no party has indicated any opposition.

### The Proposed Sale Procedure

7. The sale procedure proposed by the Receiver (the "Sale Procedure") has been prepared in consultation with Avison Young Commercial Real Estate Services, LP (the "Broker"), with the objective of obtaining offers for the Property through a comprehensive, transparent, fair and efficient process that the Receiver believes is designed to provide the greatest value to the debtors, and in turn, their creditors, and other stakeholders. The Sale Procedure is expected to conclude within sixteen weeks, subject to the terms of the Successful Bid, this court's availability for a hearing to approve any sale, and the time necessary for discussions between the Town and any Qualified Bidder selected by the Receiver.
8. The Harwood Properties will be listed unpriced, on MLS, and marketed on an "as is, where is" basis. The Receiver has retained the right to negotiate proposed offers and any transaction that it selects will be subject to approval by this Court.
9. Given that the Receiver has successfully negotiated a form of New Development Agreement that would be acceptable to the Town, the Receiver's view is that the Sale Procedure will optimize the chances that the Property will be sold for the best possible price while still abiding by the provisions contained in the Appointment Order (including in particular, those that were included to protect the Town's Repurchase Rights and the uncertainty that those created for any prospective bidder). The Receiver considers the Sale Procedure to be fair and reasonable and recommends that it be approved by the court.
10. The court's jurisdiction to approve the proposed Sale Process comes under section 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). The reasonableness and adequacy of any sale process proposed by a court-appointed receiver must be assessed in light of factors that the court is to take into account when considering the approval of a proposed sale, set out by the Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (CA), namely:
  - a. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

- b. whether the interests of all parties have been considered;
  - c. the efficacy and integrity of the process by which offers are obtained; and
  - d. whether there has been unfairness in the working out of the process.
11. This makes good sense given that the *Soundair* factors are process oriented and a SISP is the process by which bids will be solicited.
12. Chief Justice Morawetz recently summarized in *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 5338 at paras. 7- 8 (see also *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, 2020 ONSC 3517, at paras. 15 and 16 and *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, at para. 6) the factors that must be assessed by the court at the sale process approval stage
- a. the fairness, transparency, and integrity of the proposed sale process;
  - b. the commercial efficacy of the proposed sale process in light of the specific circumstances facing the receiver; and
  - c. whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
13. The Receiver's reasons for recommending the Sale Process address these factors. I am satisfied, having considered the factors to be assessed at the Sale Process approval stage, in light of the *Soundair* factors, that the Sale Process should be approved.

#### The Engagement of the Broker

14. Though the Receiver has the authority to retain advisors such as the Broker under the Appointment Order, given the important role that the Broker will play and that the Broker will receive a commission from the gross proceeds of the sale of the Property, the Receiver seeks approval of its engagement of the Broker and the court's authorization to enter into the proposed listing agreement with the Broker. The court's jurisdiction to do so can be found in s. 243 (1) (c) of the BIA.
15. The Receiver asked for proposals from five brokers, received three proposals from experienced and qualified brokers and has selected Avison Young Commercial Real Estate Services, LP as the most appropriate for this mandate. After reviewing the proposals submitted, including information provided by each of the realtors on their views on the Harwood Properties' estimated realizable value, their proposed marketing strategy and their compensation structure, the Receiver, with the concurrence of the debtor, proposes to enter into a listing agreement with Avison Young to market the Harwood Properties for sale.
16. The Receiver considers this Broker to have a realistic view of the market, based on its due diligence with the Town and understanding and appreciation of the unique circumstances of the Property and the existing rights of the Town that need to be addressed. The fees charged are within the market range of other proposals.
17. The court accepts the Receiver's recommendation and grants the requested approvals in connection with the Broker and listing agreement.

#### Sealing of Confidential Exhibits

18. The Receiver asks the court to seal certain confidential exhibits to its Second Report dated May 2, 2023 that contain confidential information about the Harwood Properties:
- a. Confidential Appendix "1" includes a summary of the salient points of the listing proposals received by the Receiver, including estimated values for the Property and marketing strategies.
  - b. Confidential Appendix "2" includes the Broker's compensation structure. In the event that the Sale Procedure is not successful, keeping this information confidential will be advantageous if the Receiver needs to later retain an alternate real estate broker.

19. The proposed limited sealing order is necessary to protect commercially sensitive information that could negatively impact the debtor and stakeholders if the Sale Process does not result in a concluded sale transaction and further efforts to sell the Property have to be undertaken.
20. The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the Property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Sale Process and any sale transaction arising therefrom.
21. The commercial interest in maintaining the integrity of the Sale Procedure and maximizing the value of the Property and net recovery to creditors in this proceeding is an important public interest that would be jeopardized if the Confidential Appendices are not sealed. There is no reasonably alternative means to prevent that jeopardy.
22. These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings.
23. I am satisfied that the limited nature and scope of the proposed *sealing order is appropriate and satisfies the Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Granting this order is consistent with the court's practice of granting limited partial sealing orders in these types of circumstances in insolvency proceedings.
24. The requested partial sealing order is limited in its scope (only to the two specifically identified confidential exhibits). However, it is not time limited because of a unique feature of the New Development Agreement. Specifically, if the successful purchaser under the Sale Procedure fails to commence construction within 150 days from the date of the successful purchaser receiving a construction permit, the Town will have the right to require the purchaser to convey the Property to the Receiver. During that period, the purchase price paid will be held in escrow by the Receiver, less an amount equal to the costs of the Sale Procedure. If the Town exercises this right, the Receiver would thereafter have to re-market the Property and the balance of the purchase price would be returned to the purchaser. Further, while the Town has agreed to a form of the New Development Agreement to be included in the data room for prospective purchasers, it remains open to negotiation with the Town.
25. This gives rise to sufficient uncertainty about the final conclusion of the Sale Process that I am satisfied that having an open-ended sealing order with a requirement for a further court order to terminate it is appropriate.
26. The Receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed and shall apply at the earliest opportunity for an order "unsealing" these confidential exhibits once the Sale Process has finally concluded and there is no risk of the Receiver having to re-market the Harwood Properties.

#### Approval of the Receiver's Activities

27. It is customary for the Receiver to seek approval of its reports and activities regularly during the receivership process, rather than at the end. This ensures transparency and accountability and provides an opportunity for concerns to be addressed and rectified as they arise. See *Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161, at paras. 15-17 citing *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 20-24, and *Laurentian University of Sudbury*, 2022 ONSC 5850, at para. 17.
28. The Receiver has had to work hard to secure a draft New Development Agreement that is acceptable to the Town. The Receiver's view was that, without such an agreement, lack of market visibility into what the Town might require in a development agreement would create uncertainty and negatively impact the potential price for the Harwood Properties. During the protracted negotiations with the Town and other

stakeholders, the Receiver has also had to deal with the tenants at certain of the Harwood Properties and has had to deal with unexpected repairs and maintenance and property management issues.

29. This was an unusual situation with a protracted negotiation that has now put the Receiver in a position to move forward with the sale of the Properties. This marks an appropriate milestone for the Receiver to seek the court's approval of its activities and conduct to date, as reflected in the First and Second Reports.
30. The actions, conduct and activities of the Receiver described in its First Report dated May 14, 2021 and its Second Report are consistent with its duties and powers under the Appointment Order and in furtherance of its mandate. They are approved, subject to the usual stipulation (provided for in the proposed draft order) that this approval may only be relied upon by the Receiver in its personal capacity and only with respect to its own personal liability.

#### Increased Borrowing Charge

31. The Receiver has borrowed the maximum amount authorized by the Receiver's Borrowings Charge (as defined in the Appointment Order) in order to carry out its activities to date. The Receiver does not have adequate funding to complete its mandate and therefore seeks an increase of the Receiver's Borrowings Charge from \$500,000 to \$1,500,000.
32. The Receiver advises that its fees and expenses to date have already exceeded the original \$500,000 Borrowings Charge under the Appointment Order. While the interim statement of receipts and disbursements shows a slight reserve of excess receipts over disbursements, this does not account for significant unbilled professional fees. The known existing fees and expenses of the Receiver and its advisors, over and above those that are covered existing Borrowings Charge, are estimated to be in the range of \$500,000. The anticipated fees and expenses to the end of the Sale Process will exceed this, but given the various uncertainties associated with the Sale Process (including the possibility that the Town could require the Receiver to remarket the Harwood Properties) the Receiver is asking for a buffer to be built into its Borrowings Charge to avoid the expense of having to bring a further motion before the final sale approval motion that it hopes to bring at the conclusion of the Sale Process.
33. While the Receiver is uncertain of the amount of funds it will need to borrow, the Receiver is of the view that increasing the Borrowings Charge limit of \$1,500,000 will avoid the need for further court applications requesting an increase to the borrowing limit.
34. Since this increase is not opposed and given that the Receiver will still be required to seek court approval of its fees and expenses, the court is satisfied the proposed increase in the Borrowings Charge is reasonable and in the best interests of the stakeholders in the circumstances and it is therefore approved.

#### Order

35. Order to issue in the form signed by me today.



KIMMEL J.