

Court File Number: CV-20-00651299-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

2615333 Ontario Inc.

Applicant

AND

**Central Park Ajax Developments Phase 1 Inc., 9654488 Canada Inc., 9654461
Canada Inc., 9654372 Canada Inc., 9617680 Canada Inc., and 9654445 Canada
Inc.**

Respondents

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Wendy Greespoon-Soer for applicant Mervyn D. Abramowitz and David T. Ullman for respondents Edmund Lamek and Danny Nunes for Ajax Master Holding Inc. John R. Hart for the Town of Ajax Jeffery Larry for 25118358 Ontario Inc. Aziza Hirsi for Investecs		

Order Direction for Registrar **(No formal order need be taken out)**

Above action transferred to the Commercial List at Toronto (**No formal order need be taken out**)

Adjourned to: _____

Time Table approved (as follows): _____

Date Heard: February 11, 2021

Introduction

- [1] The applicant 2615333 Ontario Inc. ("261") brings this application for an order under subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) ("BIA") and section 101 of the *Courts of Justice Act* (Ontario) ("CJA") appointing RSM Canada Limited ("RSM") as receiver and manager, without security, over the lands and premises of certain properties in Ajax, Ontario (the "Ajax Properties") owned by the respondent corporations.
- [2] For the following reasons, the application is granted.

Background Facts

- [3] The respondent Central Park Ajax Developments Phase 1 Inc. is an Ontario corporation and the remaining respondents are all federally incorporated companies. They are all single-purpose companies incorporated for the purpose of holding title to the Ajax Properties. Tong (Thomas) Liu ("Liu") is the sole officer and director of each of the respondents.
- [4] The respondents are the registered owners of the Ajax Properties which comprise several parcels of vacant land proposed as part of a multi-phase real estate development project in Ajax (the "Project"). The respondents oppose the application. They deny the indebtedness to 261.
- [5] 261's asserts that as of November 3, 2020, the amount owing by the respondents to 261 was \$10,294,623.69 with further interest, expenses and legal fees continuing to accrue. The indebtedness to 261 is secured by various mortgages registered against the Ajax Properties in different ranking positions on different municipal addresses comprising the entire package of properties. On 184/188 Harwood Avenue, 261 holds a second ranking charge behind the Corporation of the Town the Ajax (the "Town"), as well as additional subsequent ranking charges. On the remainder of the properties, 261 holds a first ranking charge, together with subsequent ranking charges.
- [6] Demands for payment and Notices of Intention to Enforce Security under the BIA were delivered to the respondents on November 22, 2018 followed by the issuance of a Statement of Claim to enforce the mortgage security.
- [7] There are additional creditors of the respondents, Investecs Developments Inc. ("Investecs") and Ajax Master Holdings Inc. ("AMHI"), with mortgages in default who have also made demand and issued Notices of Intention to Enforce Security. The loan balances to Investecs and AMHI are said to be in excess of \$1 million and \$18,500,000, respectively.
- [8] The Town holds a first ranking charge against 184/188 Harwood Avenue (the "Phase 1A Lands"). The Town has outstanding writs of execution for unpaid costs awards and has commenced

proceedings to enforce a right under a master development agreement with LeMine Real Estate Consulting Inc. ("LeMine") (the "MDA") to repurchase the Phase 1A Lands, and other lands described as the "Utility Lands", for a defined purchase price. The Town also sent a demand and Notices of Intention to Enforce Security and commenced its own receivership application to appoint Crowe Soberman Inc. as receiver. The respondents consented to the appointment of a receiver proposed under the Town's application.

- [9] The Town has withdrawn the Town's application and has, instead, provided its consent and support for the application of 261 on the terms of the order sought by 261.
- [10] Investecs does not oppose the within application but takes the position that the MDA is an important consideration for the maximization of realization and should be included in the assets over which the receiver is appointed.
- [11] AMHI, in addition to a creditor, is also the majority shareholder, either directly or indirectly, of the Respondents. AMHI opposes the application by 261 and, alternatively, the selection of the Receiver put forward by 261.

Evidence in relation to 261 Indebtedness

- [12] In December 2017, Xia Zhu ("Zhu") was introduced to Liu through a real estate agent, Rex Cheng ("Cheng") to discuss the potential for Zhu to invest in the Project. Liu and Zhu reached an agreement that Zhu would invest \$10 million to acquire a 50% interest in the Project. Liu prepared a Share Purchase Agreement which was executed on January 12, 2018 by Zhu personally, as "Purchaser", and LeMine Project Holding Inc. ("LeMine Project") as "Seller" (the "SPA") which included a representation that LeMine Project owned all 20,000 of the AMHI shares and that 10,000 of the AMHI shares would be sold to Zhu. The SPA called for a \$2 million deposit which was paid by Zhu.
- [13] Zhu evidence is that he considered the SPA an expression of intent, subject to proper and satisfactory due diligence. After signing the SPA, Zhu retained legal counsel to perform due diligence and to incorporate 261 to carry out the transaction.
- [14] On July 15, 2017, the Town served its repurchase notice pursuant to the MDA.
- [15] Zhu evidence is that he was unaware when signing the SPA that the respondents had failed to meet required deadlines under the MDA and that the Town had delivered a notice of repurchase, terminating the rights of Liu's companies to develop the Ajax Properties. Zhu discovered this fact on January 18, 2018 through lawyers hired to carry out the due diligence and finalization of the share purchase.
- [16] Liu then admitted to the dispute with the Town but assured Zhu it would be resolved. He indicated that the advancement of the remaining \$8 million investment would assist him in his discussions with the Town.
- [17] After Zhu learned of the dispute with the Town, 261, AMHI, and Lemine Investment Group Inc. ("Lemine Investment") executed a Letter of Intent dated January 29, 2018 (the "LOI") whereby 261 agreed to loan \$5 million to each of AMHI and Lemine Investment and whereby the \$2 million deposit previously paid by Zhu under the SPA was to be applied on account of the total \$10 million.

The LOI provides that 261 would become an equity investor and convert the LOI Loans to equity if, among other conditions, the Town withdrew its repurchase notice and allowed the development of the Project to continue.

- [18] On February 1, 2018, 261 advanced the \$8 million in escrow to Liu's lawyer pursuant to an escrow agreement made as of January 29, 2018 that required the funds to be held on the same conditions. On March 15, 2018 Zhu demanded the return of the escrow funds because the Town's repurchase notice had not been withdrawn. That day, \$8 million was repaid.
- [19] A mortgage for the principal sum of \$3 million was granted by the respondents and registered in favour of 261 against the Ajax Properties on March 21, 2018 to secure the outstanding balance under the LOI.
- [20] In March 2018, LeMine commenced an action against the Town claiming damages and alleging that the Town had wrongfully issued its notice of repurchase. In a decision released on September 28, 2018, Mullins J. held that the delivery of the notice of repurchase was valid and that the Town had the right to repurchase the lands subject to the notice (the Phase 1A Lands and the Utility Lands) in accordance with the provisions of the MDA. The Court of Appeal for Ontario, in a decision released on October 4, 2019, upheld the decision of Mullins J.
- [21] The respondents had other mortgage loans secured against the Ajax Properties in favour of Toronto Capital Corporation and a syndicate of other investors (the "TCC Loans"), which loans were in default in the spring of 2018.
- [22] 261 entered into a Loan Purchase Commitment Letter with the respondents and related companies and guarantors on May 16, 2018 (the "Loan Purchase Commitment"), whereby 261 agreed to purchase the TCC loans and take an assignment of the security held by TCC and extend the maturity date to the earlier of a refinancing or June 30, 2018. The terms of the Loan Purchase Commitment provide for an acknowledgement of the indebtedness and an acknowledgement that all security remained valid and enforceable. The Loan Purchase Commitment also provide that the existing \$3 million charge would be increased to \$4 million (the "\$4 million Mortgage") and that the debt would be converted to equity in the event that the borrowers arranged new third-party financing of not less than \$10 million for the Project and provided satisfactory evidence that the Town would not exercise its repurchase rights and would allow the development to continue (the "Conversion Conditions").
- [23] On May 18, 2018, 261 entered into a Mortgage Loan Purchase Agreement (the "Loan Purchase Agreement") with all parties and proceeded to purchase the TCC Loans and to take an assignment of the security held by TCC which included: (a) a mortgage for \$2,050,000 registered on June 16, 2016 against the Ajax Properties and against the personal residence of the guarantors, Liu and his wife (the "\$2 million Mortgage"), (b) a mortgage for \$5,000,000 registered September 15, 2016 against the Ajax Properties and also collaterally secured against the Academy Project on Ellesmere (the "\$5 million Mortgage"), and (c) a Mortgage for \$500,000 registered October 5, 2016 against 266 Harwood (the "\$500,000 Mortgage").
- [24] In furtherance of the loan purchase, 261 paid out the indebtedness to TCC in excess of \$8.5 million and took an assignment of all of its security, which security included an Assignment of Plans and Related Agreements by all of the respondents, Liu and by LeMine, the party to the MDA.

[25] The respondents also executed an acknowledgement as to the validity of the security dated May 16, 2018 (the “Acknowledgement”) which provided that:

The Security Documents are, and any other security delivered by the Borrowers, Tong Liu, or any other person, to the Investor to secure the Loans after the date hereof will be, in full force and effect, constitute legal, valid and binding obligations of the Borrower, or the person granting security, and each of the Debtor Parties hereby waives and agrees not to assert or cause to be asserted on its behalf, and is hereby estopped from asserting or causing to be asserted on its behalf, any defences or rights with respect to the legal effect of the Security Documents, this Acknowledgement, the Commitment letter, the security or the legality, validity or binding effect of the obligations of the Debtor parties thereunder and hereunder, and the enforceability of same.

[26] The respondents did not arrange any third-party financing and were unsuccessful in their proceedings against the Town, both initially and on appeal. The Conversion Conditions were never satisfied.

[27] 261 made demand upon the respondents and the guarantors, in writing, and delivered Notices of Intention to Enforce Security pursuant to section 244 (1) of the *Bankruptcy and Insolvency Act* on November 22, 2018. 261 also issued a Notice of Sale of the Ajax Properties dated November 22, 2018.

[28] 261 commenced an action to enforce the mortgages on April 17, 2019. The respondents delivered a Notice of Intent to Defend, but no Statement of Defence, on December 6, 2019. The respondents commenced a separate action against Zhu and 261 on December 6, 2019 seeking to restrain the enforcement of the mortgages and seeking damages, among other things, for alleged breaches by Zhu of his obligations under the SPA. Neither action advanced after December 2019 as the respondents failed to respond to a Demand for Particulars and Request to Inspect dated February 20, 2020 and follow-up requests.

[29] The Town commenced an action on February 26, 2020 seeking to enforce its right to repurchase some of the Ajax Properties against the subsequent encumbrancers for an amount determined by its contract with the respondents. 261 and the other subsequent encumbrancers on the Phase 1A Lands defended the Town’s action and 261 also opposed the Town’s right to repurchase the Utility Lands.

[30] 261 engaged in negotiations with the Town that would allow for a sale under power of sale of all of the Ajax Properties in order to maximize the recovery for the secured creditors and that would address the concerns of the Town. Ultimately, 261 brought this application to seek a court-appointed receiver to take control of all of the Ajax Properties with a view to selling them in one package, in cooperation with the Town, in order to maximize the recovery for the creditors.

The Competing Applications

[31] After providing notice of its Application to the Town and other interested parties, 261 was advised by the solicitor for the Town that another creditor, Investecs, through its lawyer, had approached the Town for its cooperation and consenting to the appointment of Crowe Soberman Inc. (“CSI”)

as receiver in an application intended to be brought by Investecs. Investec's lawyer advised the Town's lawyer that he had the cooperation and consent of Liu and provided a draft order and signed copy of the consent.

- [32] Investec's lawyer suggested to the Town's lawyer that the Town should be the applicant, instead of Investecs, with CSI continuing to be the proposed receiver, and the Town thereafter delivered demands and Notices of Intention to Enforce Security upon the respondents. In response, Liu and the respondents provided the Town with a consent to waive the requisite notice period and Investec's lawyer advised the Town's lawyer that the respondents consented to the Town's application to appoint a receiver.
- [33] The Town learned that CSI had previously acted as the Proposal Trustee for Liu's company, 3070 Ellesmere Developments Inc., prior to the appointment of RSM as receiver of the Academy Project and that a company related to Liu had put a stalking horse bid as part of the Proposal. The Town learned that Investec's lawyer and a representative of CSI had met with Liu and his counsel to discuss the proposed receivership application that Liu would support.
- [34] The Town had decided that it would not support redevelopment of the Ajax Properties involving Liu and his companies. After learning of these matters, the Town determined that it would withdraw the Town's application. On the basis of revised provisions in the proposed draft order, the Town agreed to consent to 261's application.

The Respondents' Outstanding Obligations

- [35] The evidence of 261 is that the Debtors' outstanding indebtedness to it as of November 3, 2020 when the application was prepared was \$10,294,623.69 with interest, expenses and fees continuing to accrue.

Issues

- [36] The issue on this application is whether it is just and convenient for a receiver to be appointed pursuant to s. 243(1) of the *BIA* and s. 101 of the *CJA* appointing RSM as receiver over the Ajax Properties on the terms of the requested order.

Analysis

- [37] The respondents oppose the appointment of RSM as receiver. They submit that the application does not involve a lender seeking to recover its loan, rather, this is a shareholder dispute and an attempt by 261 and Zhu to abuse their positions as shareholders and insiders to take control of the assets of the respondents and oust other shareholders.
- [38] I address the submissions made on behalf of the respondents.

Are the notices of sale and notices of intention to enforce security ineffective because they are "stale dated"?

- [39] The respondents submit that the notices of sale under 261's mortgages and the notices of intention to enforce security sent by 261 are stale dated and that 261 is not able to enforce its mortgage security and seek the appointment of a receiver without issuing fresh notices.

- [40] I do not accept this submission. There is no issue in respect of the expiry of any limitation period. The doctrine of laches, upon which the respondents rely, does not in these circumstances. The respondents have had ample time to refinance their indebtedness and they have been unable to do so. The issues presented by the Town's litigation arose after the notices were sent, and 261 relies on these issues to support its submission that it is just and convenient for a receiver to be appointed.
- [41] 261 is not required to issue fresh notices of sale or notices of intention to enforce security. This would simply result in further delay.

Has 261 shown that the respondents are indebted to it?

- [42] The respondents do not challenge the validity of the written agreements that Liu signed on his own behalf and on behalf of the respondents. They acknowledge that the documents were validly executed. They do not assert any impropriety in relation to these agreements. Nevertheless, they do not acknowledge the indebtedness owed to 261.
- [43] Pursuant to the LOI, the \$2 million deposit (paid pursuant to the SPA) was to be applied on account of a loan of the aggregate amount of \$10 million to be made to AMHI and Lemine Investment. A mortgage for the principal amount of \$3 million was registered to secure the outstanding balance under the LOI. 261 paid out the indebtedness owed to TCC in excess of \$8.5 million and took an assignment of all of its security.
- [44] The Acknowledgement signed by Liu on his own behalf and on behalf of the respondents and directed to 261 expressly states that 261 wishes to purchase the TCC loans and has agreed to extend the maturity date of the loans. By the Acknowledgment, Liu and the respondents (and other entities) agreed, represented, covenanted and warranted that the security documents and any other security delivered by the "Borrowers" (defined to include the respondents) to secure the TCC loans will constitute legal, valid and binding obligations of the Borrowers. Each respondent waived and agreed not to assert or cause to be asserted any defences or rights with respect to the legal effect of the security or the legality, validity or binding effect of their obligations under the security documents, the Acknowledgement, or the Loan Purchase Commitment.
- [45] The respondents submit that there are issues raised in the pleadings in the three civil actions which are pending, including the action by the respondents against 261, and, based on these claims and the evidence on this motion, there is a genuine issue requiring a trial in relation to whether the respondents are indebted to 261.
- [46] I disagree. Pleadings are not evidence. The evidence is that the respondents entered into written agreements with 261 by which they expressly agreed that they were indebted to 261. By the Acknowledgement, they agreed that they are indebted to 261, and they covenanted not to raise any defences, which would include the defence of set-off.
- [47] The respondents contend that notwithstanding the validity of the LOI, the Loan Purchase Commitment, the Acknowledgement, the \$2 million Mortgage, the \$5 million Mortgage, and the \$500,000 Mortgage, the SPA has not been terminated and remains a valid and subsisting agreement by which Zhu agreed to purchase shares of AMHI. The respondents contend that the SPA prevails over these agreements.

[48] 261 is not a party to the SPA, and the obligations of Zhu thereunder, to the extent that they continue, do not affect the status of 261 as a creditor. In addition, I note that the seller of shares under the SPA is LeMine Project Holding Inc. whereas the LOI states that Lemine Investment Group Inc., a separate company, owns all of the issued and outstanding shares of AMHI, being 15,000,000 common shares. If LeMine Project Holding Inc. wishes to pursue remedies under the SPA, it is a liberty to do so, but this does not affect 261's status as a creditor on this application.

[49] The affidavit evidence of Mr. Liu in relation to the purchase of the TCC debts and security is that "it was never intended that Zhu or 261 would become a lender to CPAD or the Project, but rather, the intention, as per the SPA, was that he would be an equity investor." This statement conflicts with the clear terms of the agreements signed by Mr. Liu which show that 261 is a lender, not a shareholder. This type of evidence of the subjective intention of a party to a written contract is inadmissible to contradict the agreement.

[50] I am satisfied that 261 has proven that it is a creditor of the respondents.

Does 261 meet the test for the appointment of a receiver?

[51] Subsection 243(1) of the *BIA* provides:

243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was required for a used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Subsection 101 of the *CJA* provides:

101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted, or a Receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

[52] In deciding whether to appoint a receiver, the court must have regard to all the circumstances but, in particular, to the nature of the property and the rights and interests of all parties in relation thereto.

[53] In *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 CarswellOnt 11979, at para. 22, Brown J. (as he then was) observed that "[t]ypically, issues for a court to determine on

such an application include: (i) the existence of a debt and default; (ii) the quality of the creditor's security; and (iii) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return to the parties, the costs associated with the appointment, and any need to preserve the property pending realization." Brown J. held that those issues "normally require an adjudication of private rights as between the applicant secured creditor and the debtor respondent with, as well, some consideration of the potential effect of the order sought another creditors, whether secured or otherwise, and other stakeholders of the debtor corporation who might be affected by a receivership order".

[54] In *Reichmann v. Koplowitz et al.* 2017 ONSC 4842, at para. 44, Akbarali J. cited the decision of Strathy J. (as he then was) in *Anderson v. Hunking*, 2010 ONSC 4008, at para. 15, in which he identified the following principles to govern a motion for the appointment of a receiver in the context of such a motion to preserve assets for the purpose of execution.

- a. The appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudices the conduct of a litigant, and should be granted sparingly.
- b. The appointment of a receiver for this purpose is effectively execution before judgement and to justify the appointment they must be strong evidence that the plaintiff's right to recovery is in serious jeopardy.
- c. The appointment of receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties.
- d. In deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto.
- e. The test for the appointment of an interlocutor a receiver is comparable to the test for interlocutor injunctive relief, as set out in the *RJR-McDonald* decision of the Supreme Court of Canada.

[55] The respondents submit that 261 has failed to discharge its onus of showing that it is just and convenient to appoint RSM as receiver, having regard to these principles.

[56] AMHI, a secured creditor of the respondents which asserts that it is owed in excess of \$18.5 million, also opposes the appointment of a receiver on the grounds that there are numerous ongoing and interrelated legal actions which raise issues concerning the rights of the parties in respect of the Project. AMHI contends that the appointment of a receiver will unnecessarily add to the complexity of these proceedings and that the determination of issues raised in the legal actions will affect the actions of and decisions taken by a receiver.

[57] On this application, the position taken by the Town is a key factor which must be considered when I determine whether it is just and convenient to appoint a receiver.

- [58] The Town has a right to repurchase the Phase 1A Lands and the Utility Lands, and this right has been confirmed by the judgment of Mullins J. as upheld by the Court of Appeal. The Town has commenced litigation seeking an order fixing the repurchase price to be paid and, upon payment of the repurchase price, an Order conveying the Phase 1A Lands and the Utility Lands to the Town, free and clear of all encumbrances. The formula used to establish the repurchase price under the MDA is based on the prices paid by LeMine or its nominees for the Phase 1A Lands and the Utility Lands, rather than using present market values. The mortgagees, including 261, have objected to the Town's proposed repurchase on ground that the amounts to be paid would be substantially less than the fair market values of these lands and that the mortgagees would be prejudiced if their mortgages were discharged following the Town's repurchase at the repurchase price provided for by the MDA and upheld by the courts.
- [59] I am satisfied on the evidence before me that it is not in the interests of the mortgagees for the Phase 1A Lands and the Utility Lands to be separated from the other Ajax Properties through repurchase by the Town. This would result in a lower amount realized on the sale of the Ajax Properties. For the Town to proceed to repurchase the Phase 1A Lands and the Utility Lands at the repurchase prices provided for in the MDA, and for these lands to be separated from the other Ajax Properties, would not be in the interests of the mortgagees. This factor supports a conclusion that it is just and convenient to appoint a receiver.
- [60] To address the concerns raised by the Town, 261 entered into negotiations with the Town with a view to addressing the Town's requirement that it control the development on the Phase 1A Lands. These lands were originally owned by the Town and were sold to LeMine pursuant to the MDA, subject to the Town's repurchase right in the MDA. The Town's position is that without the assurance that development of the Phase 1A Lands will proceed in keeping with the Town's vision and in a manner acceptable to the Town, it will proceed with the exercise of its repurchase right.
- [61] The negotiations between the Town and 261 are described in the affidavit of Geoff Romanowski sworn on behalf of the Town. During these negotiations, the Town conducted separate negotiations with Investecs in which it was proposed that Crowe Soberman Inc. would be appointed as a receiver. As part of these separate negotiations, the Town contemplated advancing its own receivership application, with Crowe Soberman to be put forward as receiver, on terms which would provide satisfactory assurance to the Town that the Town would have control of the development of the Phase 1A Lands. The respondents did not object to such a receivership order.
- [62] During these negotiations, the Town was informed that Liu had previously retained Crowe Soberman for the purpose of submitting a proposal in respect of another project. The Town had been unaware of this fact. The Town was not willing to be involved against with Liu and had concerns about being aligned with Crowe Soberman because of its previous connection with Liu. The Town agreed to support 261's application for a receiver on the basis of a proposed order which gives the Town the same controls over the development of the Phase 1A Lands that were included in the Town's proposed receivership order.
- [63] The requested order provides in paragraph 3(j)(iii) that unless the Town agrees otherwise, none of the real property subject to the MDA shall be sold by the Receiver without the purchaser agreeing to enter into a development agreement with the Town on mutually agreeable terms,

including a right of repurchase in favour of the Town which is substantively similar to such right provided for in the MDA.

- [64] The Town's repurchase right has priority over the mortgages. Any purchaser of the Ajax Properties will be required to work with the Town to develop the Ajax Lands.
- [65] As I have noted, under the requested receivership order, there would not be a separation of the Phase 1A lands and the Utility Lands from the other Ajax Properties. A receiver would be able to realize on all of the Ajax properties, and this would maximize realizations for the benefit of creditors. In the circumstances, in my view, the provision in paragraph 3(j)(iii) of the requested order is proper and does not inappropriately circumscribe the Court's ability to approve a sale process for the Ajax Properties. I note that the respondents did not object to the similar provision in the receivership order that the Town intended to request had its application proceeded.
- [66] I am not satisfied that the fact that the MDA, an asset of LeMine, may not be an asset under the control of a receiver, is a basis for me to conclude that it would not be just and equitable to appoint a receiver. 261 contends that the MDA is an asset that was pledged to 261 as part of the security package for the indebtedness owed to it. In any event, the Town has exercised its repurchase right under the MDA and, under the proposed order, the Town is required to enter into a development agreement with a purchaser.
- [67] The respondents object to the appointment of RSM as receiver. The respondents submit that because RSM was involved in another receivership which involved the respondents in which contentious issues arose, it would be inappropriate for RSM to be appointed as receiver. AMHI makes the same submission. AMHI proposes another qualified receiver, if a receiver is to be appointed, who has no connections with any of the parties.
- [68] The president of RSM, Bryan Tannenbaum, swore an affidavit on this application. Mr. Tannenbaum states that RSM's only prior relationship with 261 or any of its principals arose as a result of the appointment of RSM as receiver of the assets and undertakings of 3070 Ellesmere Developments Inc., a company previously operated by Liu. Mr. Tannenbaum's evidence is that RSM, with court approval, successfully marketed and sold the Ellesmere property and obtained an approval and vesting order. 261 was the second ranking mortgagee in the Ellesmere receivership and RSM's only involvement with 261 was with respect to the distribution of the net proceeds of sale of the Ellesmere property to 261, with court approval.
- [69] I do not accept that the simple fact that RSM was the court appointed receiver in another receivership which involved the respondents which they describe as contentious is a sufficient reason for me to question the independence of RSM, or to find that there is a reasonable perception that RSM is not independent, and appoint a different receiver. There is no suggestion that RSM is not qualified to act as receiver. In the absence of evidence to support a reasonable perception that RSM lacks independence and impartiality, I do not give effect to the objections of the respondents and AMHI. I am satisfied that RSM is qualified and independent.
- [70] In my view, it is just and convenient for RSM to be appointed as receiver over the Ajax properties for the following reasons:
- a. The respondents are insolvent and are indebted to 261 and other creditors for substantial amounts;

- b. The mortgages in favour of 261 and other secured creditors are in default and have been so for several years;
- c. The respondents are unable to refinance the Ajax Properties and are unable to reach an agreement with the Town to proceed with their development;
- d. The Ajax Properties will be more valuable if sold as a package with redevelopment potential than if broken up and sold in pieces by different creditors;
- e. The respondents consented to the appointment of a receiver by other creditors but oppose this application by 261 to appoint RSM.
- f. The Town has consented to the application on the terms of the requested order;
- g. The appointment of a receiver is necessary to ensure that the Town does not exercise its right to repurchase the Phase 1A Lands at prices which would be less than could be realized through a sale of the Ajax Properties in a court supervised receivership.

Disposition

- [71] For these reasons, I grant this application in accordance with the draft form of order submitted by 261. I ask counsel for 261 to provide me with a clean copy of this form of order to be signed.
- [72] If the parties are unable to resolve costs, written submissions may be made. If there is a disagreement about the schedule for such submissions, a short appointment with me should be made.

Cavanagh J.

April 15, 2021