Court File No. CV-13-10313-00CL
Court of Appeal No. M43512

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

FACTUM OF THE RECEIVER

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FACTUM OF THE RECEIVER

PART I – OVERVIEW

1. There are two competing motions before this Court:

   a) The appellant, 2122775 Ontario Inc. ("212") seeks a declaration that the Approval and Vesting Order granted by Mr. Justice D. Brown on February 14, 2014 (the "Order") is automatically stayed pending appeal pursuant to Section 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3 (the "BIA"), or in the alternative, an order granting a stay of the Order pending appeal; and

   b) The Receiver seeks a declaration that there is no automatic stay of the Order, and in the alternative, requests an order lifting any automatic stay that may be in place pending the determination of the appeal.

2. Whether the Order is or is not automatically stayed pending appeal, the Receiver respectfully submits that there should be no stay of the Order pending the appeal by 212.

3. As discussed in greater detail below, there is no merit to the appeal, no evidence to suggest any unfairness to 212, and no suggestion that the Receiver failed to carry out the marketing and sale of the Property, fairly, and in accordance with the process previously approved by the Court. 212 had been attempting, without success, for more than a year, to obtain construction financing to complete development of the Property, and there was no compelling evidence to suggest that 212 would ever be able to do so. The term sheets advanced by 212 do not provide construction financing. 212 has had ample opportunity to obtain financing and, to this date, has been unable to provide evidence of available funds. A stay of the Order pending appeal will jeopardize the sale of the Property, on terms which the market has proven will maximize realizations, to the detriment of the stakeholders generally. Therefore, the balance of convenience does not favour a stay. Accordingly, the Receiver requests that this Court lift any stay (if one is in place), to permit the Receiver to complete the sale transaction approved by the Order, or in the alternative, dismiss the motion by 212 for a stay pending appeal.

PART II –FACTS

Background

4. Home Trust Company ("Home Trust") is a mortgage lender which advanced a mortgage loan in the amount of $6,500,000 (the "Mortgage") to 212. The Mortgage matured in December, 2012 and was not repaid. On October 30, 2013, Home Trust commenced an application returnable on November 8, 2013 for the appointment of Collins Barrow Toronto Limited as receiver of 212. At the request of 212, the receivership application was adjourned to November 15, 2013, to allow 212 additional time to secure financing to

repay Home Trust's indebtedness. On November 15, 2013, 212 failed to demonstrate to the Court that it had secured financing.

First Report of the Receiver at Paras. 14-16;
Receiver's Motion Record at p. 57

5. By Order of the Ontario Superior Court of Justice (Commercial List) dated November 15, 2013 (the "Appointment Order"), Collins Barrow Toronto Limited was appointed as receiver (the "Receiver") of all current and future assets, undertakings and properties of 212, including the lands and premises municipally known as 2425 and 2427 Bayview Avenue, Toronto, Ontario (the "Property"). The Appointment Order authorized the Receiver to, among other things, take possession and control of the Property, and sell the Property, with the approval of the Court, in respect of any transaction in which the purchase price or aggregate purchase price exceeds $500,000.

Second Report of the Receiver at Paras. 1, 2, and Appendix A;
Receiver's Motion Record at pp.14, 32 and 36

Marketing Process

6. On December 11, 2013, the Receiver moved, on notice to 212, for an Order of the Court approving a marketing and sales process to be conducted by the Receiver in respect of the Property (the "Marketing Process"). The Marketing Process contemplated that the Receiver commence marketing the Property on December 12, 2013 and stipulated January 23, 2014, as the deadline for submission of binding offers to purchase the Property. Although 212 was served with notice of that motion, it did not attend or oppose the Marketing Process proposed by the Receiver.

Second Report of the Receiver at Para. 3;
Receiver's Motion Record at p.15

7. By Order of the Honourable Mr. Justice D.M. Brown dated December 11, 2013 (the "Marketing Order"), the Court approved the Marketing Process.

> Second Report of the Receiver at Para. 4 and Appendix J;
> Receiver's Motion Record at p.15, 68-69

8. In accordance with the Marketing Order, the Receiver conducted an extensive and comprehensive marketing and sale process. As at January 23, 2014, ten offers were received.

> Second Report of the Receiver at Paras. 27-29;
> Receiver's Motion Record at pp.23-25

9. Of the ten offers received, four were selected as being the best (the "Top Four"). Details of the offers received and the rationale for the selection of the Top Four are set out in the Receiver's Supplemental Report which was filed with the Court and sealed by the Court until after a sale transaction closes.

> Second Report of the Receiver, Para. 30;
> Receiver's Motion Record at p.25 and Tab 4

10. After January 23, 2014, the Receiver contacted the Top Four to clarify certain aspects of their offers, express concerns as to conditions imposed and/or to give them an opportunity to submit a revised offer by noon of January 30, 2014 (the "Revised Offer Date"). In addition, the Receiver corresponded with the remaining six offerors, and informed them that if they wished to re-submit their offers, they must do so before the Revised Offer Date. No one informed the Receiver that they required additional time to submit an offer. As of the Revised Offer Date, the Receiver had received 11 offers to consider.

Second Report of the Receiver at Paras. 32-36;
Receiver's Motion Record at pp.25-26

11. With Home Trust's concurrence, the Receiver determined that the offer from Urbancorp (Downtown) Developments Inc. ("Urbancorp") was the highest and best offer, and entered into an agreement of purchase and sale with Urbancorp (the "APS") subject to approval of the Court. The only condition in the Urbancorp offer is the granting of the Approval and Vesting Order.

Second Report of the Receiver at Paras. 37-39;
Receiver's Motion Record at pp.26-27

Prejudice Resulting from a Stay

12. Urbancorp expended significant time, effort and financial resources negotiating with the Receiver, and retaining legal counsel to advise it in connection with drafting and entering into the Agreement.

Affidavit of Susanna Han sworn February 14, 2014 ("Han Affidavit"), at para. 13

13. Urbancorp wishes to complete the purchase of the Property as soon as possible. As development of the Property has been at a standstill for a lengthy period, and the partially constructed site continues to be exposed to the elements (in this particularly harsh winter), Urbancorp has serious concerns about the physical deterioration of the Property, including but not limited to, the possibility of: soil erosion, flooding, collapsing of structures if shoring is not in place or completed, shifting as a resulting of frost, and/or leakage or other damage to the unfinished model unit. The occurrence of any of the foregoing would not only diminish the value of the Property being purchased, but also give rise to further challenges and delay in advancing development of the site.

Han Affidavit at paras. 9, 11, 12

14. Urbancorp, stands to suffer material prejudice in the event of any delay and/or derailment of the sale. Any delay in closing will compress the construction period, place constraints on the construction methodology utilized at the site, and in turn, will increase costs and delay timing of the development - again, to the detriment of Urbancorp. As development at the site continues to remain inactive, the project becomes further "contaminated" in the eyes of potential buyers.

Han Affidavit at para. 11

15. Pursuant to the APS, the "Closing Date" for completion of the sale transaction is 31 days after the granting of the Approval and Vesting Order, and in no event later than May 1, 2014. At the request of Urbancorp, Urbancorp and the Receiver have fixed March 20, 2014 to close the sale transaction.

212's Request to Redeem

16. On February 13, 2014, the day before the Receiver's motion for the Approval and Vesting Order, 212 served its motion for an order staying Marketing Process in order to redeem the Home Trust Mortgage, pay the Receiver's fees and disbursements, and terminate the receivership. In support of its motion, 212 filed an affidavit of its principal, Mr. Suleman attaching as exhibits two financing term sheets received by 212, together with a letter dated January 23, 2014 from Toronto Capital Inc. ("TCI") confirming that, subject to fulfillment of standard financing conditions, the financing "commitments" are firm.

Affidavit of N. Suleman sworn February 13, 2014

17. Notwithstanding that the letter from TCI was dated January 23, 2014, it was not provided to the Receiver until the evening of February 10, 2014, and 212 did not provide Home Trust with prior notice of its intent to redeem the Home Trust mortgage.

> Second Supplemental Report of the Receiver dated February 13, 2014 ("Second Supplement"), at Para.7;
> Receiver's Motion Record at p. 99

18. The financing which was potentially available to 212 pursuant to the term sheets filed prior to the motion on February 14, 2014 was not sufficient to pay out the Home Trust mortgage and costs, plus unpaid receivership costs incurred to date. The total of Home Trust's mortgage, the cost of funding the receivership and receivership disbursements was approximately $7,368,917 as at February 10, 2014, compared to the funds that would be available upon the closing of the proposed TCI financing of $6,820,000. The resultant deficiency was $548,917, calculated by the Receiver as follows:

Funds allocated for payout of Home Trust mortgage	
TCI Term Sheet	$4,775,000
Ushjo Term Sheet	2,045,000
Total available for payout of Home Trust mortgage	$6,820,000
Balance owed to Home Trust as at February 10, 2014	$6,730,006
Receiver's Borrowing Charge to February 10, 2014	301,609
Actual and accrued receivership costs to February 10, 2014	337,303
Total mortgage and receivership costs to date	$7,368,917
Deficiency in funding	**$ (548,917)**

> Second Supplement at Para.11-13
> Receiver's Motion Record at p. 93-94

19. The term sheets proffered by 212 prior to the February 14, 2014 motion did not specify any firm dates as to when TCI's due diligence was to be completed or when the funds

would be advanced. As well, the funding was conditional upon certain conditions being satisfied, including satisfactory site inspection by the lender. TCI did not contact the Receiver to make arrangements to visit the site.

Second Supplement at para. 13-16
Receiver's Motion Record at p. 94-95

PART III – LAW AND ARGUMENT

A. Nature of the Order Under Appeal

20. In its Notice of Appeal, the appellant cites Sections 193(a), (b) and (c) of the *BIA,* and Section 6 (1)(b) of the *Courts of Justice Act*, R.S.O. 1990, C. c-43 ("CJA"), as the basis of this Court's jurisdiction to hear the appeal.

21. Section 193 of the *BIA* provides as follows:

> "193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the Court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal."

22. Section 6(1)(b) of the *CJA* provides as follows:

> "6. (1) An appeal lies to the Court of Appeal from,

> (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(a)(a) or an order from which an appeal lies to the Divisional Court under another Act;"

23. In *Business Development Bank of Canada v. Pine Tree Resorts Inc., et al.*, 2013 O.N.C.A. 282, Blair J.A. narrowly interpreted Section 193(a) and (c) of the *BIA*. His Lordship held that "future rights" do not include rights that presently exist, but that may be exercised in the future. In the present case, the right involved in the appeal is 212's right to redeem the first mortgage held by Home Trust, which right crystalized on default under the Home Trust Mortgage. Accordingly, it is a presently existing right, as opposed to a right exercisable in the future.

> *Business Development Bank of Canada v. Pine Tree Resorts Inc., et al.*, 2013 O.N.C.A. 282 at paras. 14-16.

24. Blair J.A. also narrowly interpreted Section 193(c) of the BIA, and concluded that an order appointing a receiver over property with a value of more than $10,000.00, is not an order involving property in excess of $10,000.00 within the meaning of 193(c) of the *BIA*. Blair J.A. characterized the order appointing the receiver, not as bringing into play the value of property, but simply as an order appointing an officer to preserve and monetize assets. Justice Blair reasoned that because the vast majority of bankruptcy claims involve amounts in excess of $10,000.00, if 193(c) of the *BIA* were broadly applied to permit any appeal involving a threshold dollar value of $10,000.00, it would open the flood gates to appeals and render paragraph 193(e), which requires leave to appeal, meaningless.

> *BDC v. Pine Tree*, at paras 17-18

25. The New Brunswick Court of Appeal has similarly concluded that:

> It is difficult to think of a case involving a corporate bankrupt in which the amount ultimately in issue would not exceed $10,000.00. Consequently, there would be little utility to the other four subsections under Section 193 if such cases were subject an appeal as a right. Since the issue on appeal in this case does not directly involve an amount in excess of $10,000.00, there can be no appeal as of right under Section 193(c) . . .
>
> *Royal Bank v. Profor Kedgwick Ltee/Ltd. (2008)* CarswellNB 464, (NBCA), at paras 17, 9 and 21

26. In *Alternative Fuel Systems, Inc. v. Edo*, 1997 CarswellAlta. 737, (Alberta Court of Appeal, in Chambers), O'Leary J.A. specifically held that an appeal from an order of a bankruptcy judge directing a sale of assets by the trustee to a specific purchaser did not fall within Section 193(a) or 193 (c) of the BIA and could not be appealed as of right.

> *Alternative Fuel Systems, Inc. v. Edo*, 1997 CarswellAlta. 737, at para. 12

27. It is therefore respectfully submitted that if the appeal in this case is governed by the *BIA*, leave to appeal is required under section 193(e) of the *BIA*.

28. 212 has not sought leave to appeal from the Order, and leave should not be granted in the circumstances of this case. Leave to appeal should only be granted if the issue raised on appeal is:

a) Of general importance to the bankruptcy/insolvency practice or to the administration of justice as a whole;
b) *Prima facie* meritorious; and
c) Would not unduly delay or hinder the bankruptcy proceedings.

> *BDC v. Pine Tree*, at para. 29

B. <u>Leave Should Not Be Granted</u>

(a) No Issues of General Importance

29. The decision of Justice Brown under appeal did not break new ground. Rather, Justice Brown applied the well-established principles governing receivership sales and considered the following relevant factors which a Court must consider when reviewing a sale by a receiver:

1. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
2. the interests of all parties;
3. the efficacy and integrity of the process by which offers are obtained;
4. whether there has been unfairness in the working out of the process.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R (3d) 1 (C.A.), at para 16

(b) Merits of the Appeal

30. The proposed appeal is not *prima face* meritorious. The findings of fact and factual inferences made by the motions judge ought not to be reversed on appeal, unless it can be established that the judge made a "palpable and overriding error."

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, at paras. 4, 10 and 19

31. On a motion for a stay pending appeal, the trial judge's fact findings must *prima facie* be accepted. The Court must proceed on the assumption that the judgment below is correct and that the relief ordered was properly granted.

Ogden and Entertainment Services v. United Steel Workers of America, 1998, CarswellOnt 1787 (C.A.), at para. 5;
Canrock Ventures LLC v. Ambercore Software Inc., 2011 CarswellOnt 4170 (O.C.A.) at para. 4 and 5;
Regal Constellation Hotel, 2004 Carswell Ont. 2653 at para. 22 and 23

32. The decision by The Honourable Mr. Justice Brown under appeal was an exercise in judicial discretion and is therefore entitled to deference. Appellate Courts will not

interfere with such orders, unless the discretion has been exercised on the basis of an erroneous principal or is patently unjust.

Regal Constellation, supra at para 22

33. When reviewing a receiver's request for approval of a sale, the Court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and not based on information which has come to light after the receiver made its decision. If the decision of the receiver to enter into an agreement of sale is reasonable and sound under the circumstances existing when it is made, it should not be set aside simply because a later and higher bid is made.

Royal Bank of Canada v. Soundair (1991), 4 O.R.(3d) 1 (C.A.), at paras. 21-22

34. The Courts have repeatedly emphasized the importance of protecting the integrity of procedures followed by a receiver in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. When reviewing a sale by a receiver, Courts exercise considerable caution and will interfere only in special circumstances. The foregoing must be kept in mind when considering the exercise of discretion by the motion judge in the context of these proceedings.

Royal Bank of Canada v. Soundair (1991), 4 O.R.(3d) 1 (C.A.)
Regal Constellation Hotel 2004 CarswellOnt 2653, at paras. 22-27

35. It is respectfully submitted that the Order was granted, at least in part, pursuant to the jurisdiction of the Court under the *CJA* to grant declarations and vesting orders. The Court's power to grant a declaration stems from Section 97 of the *CJA* which provides as follows:

> The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

36. The Court's jurisdiction to vest property stems from Section 100 of the *CJA* which provides as follows:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

37. Rule 63.01 of the *Rules of Civil Procedure* provides that delivery of a Notice of Appeal from a final order stays only a provision in the order for the payment of money. All other provisions of an order under appeal continue in effect, notwithstanding the delivery of a notice of appeal, unless a stay is imposed by order.

38. The filing of a Notice of Appeal from an order approving a sale by a court-appointed receiver and vesting title in the purchaser does not automatically stay the order.

> *Regal Constellation Hotel*, 2004 CarswellOnt 2653(O.C.A.) at paras. 35 and 49

39. As such, there is no automatic stay in the case at bar.

No Absolute Right to Redeem

40. In the context of a court-appointed receivership proceeding, a mortgagor does not have an absolute right to redeem. Receivership orders empower the receiver to market the property and sell it, to the exclusion of all other persons, including the debtors, and without interference from any other person. In the face of such provisions, the debtor does not have an automatic right to redeem. As stated by Pepall J. (as she then was):

> 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.

Ron Handleman Investments Ltd. v. Mass Properties, Inc. 2009 CarswellOnt 4257 at para.20-22

(c) Undue Delay and Prejudice

41. A serious, potential consequence of a stay pending appeal of the Order in this case is the loss of the sale to Urbancorp. The Receiver and Urbancorp have agreed upon a closing date of March 20, 2014 for completion of the sale transaction. Absent the consent of Urbancorp, the Receiver is required to close on that date. Any stay of the Order beyond March 19, 2014 will jeopardize completion of the sale.

C. <u>There Should Be No Stay Pending Appeal</u>

42. Section 195 of the *BIA* confers a broad discretion on the Court of Appeal or a judge thereof to cancel a stay pending appeal "for such reasons as the Court of Appeal or a judge thereof may deem proper".

43. The principal factors which the Court examines in determining whether to lift a stay are the relative merits of the appeal and the relative prejudice to the parties. Generally, the Courts must decide whether the interests of justice call for a stay. The applicable test is similar to the test for an injunction as set out in *RJR-MacDonald Inc. v. Canada* [1994] 1 S.C.R. 311 and can be summarized as follows:

a) Whether there is a serious issue to be appealed;
b) Whether compliance with the order under appeal would cause irreparable harm; and
c) What is the balance of convenience.

Matco Capital Limited v. Interex Oil Field Services Ltd., 2007 A.B.C.A. 317 (CanLII) at para. 4

Yewdale v. Campbell, Saunders Ltd., 1994 CarswellBC 1187, at para. 16;

Relative Prejudice/Balance of Convenience

44. In *Matco Capital Limited v. Interex Oil Field Services Ltd.*, 2007 A.B.C.A. 317, at para. 11, the Honourable Madam Justice Paperney dismissed an application for a stay pending appeal of an order approving a sale by a court-appointed receiver, for the following reasons:

> "No one has challenged the propriety or efficacy of the receiver's sale process. In other words, there has been a broad canvassing of the available market with a view to maximizing the return to all stakeholders. The process undertaken by the receiver is not impugned. Nor are its conclusions that the sale agreement represent the best offers available for the assets. In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sale will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming tips the balance of convenience in favor of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit to the appellants".

45. Similarly, in the case at bar, a stay of the Order and loss of the sale to Urbancorp is likely to result in a "tainting of the market", such that the value of the Property will be diminished in the eyes of prospective purchasers, and result in harm to all of the stakeholders.

D. <u>Terms and Conditions of Any Stay</u>

46. In the alternative, as a term and condition of any stay of the Order pending appeal, the Receiver requests that this Court impose a requirement upon the appellant to post security to compensate the estate for the potential loss of the sale to Urbancorp.

Hall-Chem., Inc. v. Vulcan Packaging., Inc. 1994 CarswellOnt 523 (O.C.A.) at para. 21;
Babbitt v. Paladin Inc., 1993 CarswellOnt 467 (O.C.A.);
Stan-Canada Inc. v. Calibrated Instruments Inc. 1995 CarswellOnt 143 at para. 11

47. The appellant, 212 is insolvent. If the Order is stayed pending appeal, the receivership will continue for an extended period of time and the costs of the receivership will continue to mount. As the Receiver's fees and disbursements are secured by a charge ranking in priority to other creditors of 212, such creditors will be prejudiced by the accrual of additional costs. As well, as at February 28, 2014, per diem interest in the amount of $1,276.38 is accruing on the amount owing under the Home Trust Mortgage, and will continue to increase until such time as a sale is completed and proceeds are distributed to Home Trust. Finally, the Receiver will incur significant legal fees in responding to the Appeal which, by virtue of the insolvency of 212, will not be recoverable from 212, even if the Appeal is dismissed.

48. In such circumstances, imposition of a stay pending appeal, without security, would run totally contrary to the fundamental objective of real time litigation on the Commercial List, in the context of insolvency proceedings. As Justice Farley has remarked:

> "Minimizing down time is important to avoid unnecessary erosion of value. The court must be capable of being accessed on a timely basis as required. Insolvency litigation is what I term "real time" litigation and must take precedence over what I call "autopsy" litigation, which is not adversely affected if it is dealt with tomorrow, next month or next year."

49. Similarly, The Honourable Chief Justice Winkler (as he then was) stated:

> "The commercial list . . . has become a model in Canada for the provision of timely and effective adjudication of commercial disputes. It has a cadre of judges who know what is happening in the corporate and commercial world. They understand that money flows rapidly and that time is of the essence. There are many recent examples of our court's willingness to address disputes on a "real time" basis.

Huff, Pamela J., "The Honourable James M. Farley, QC: International Advocate for the Canadian Insolvency Process and Cross Border Cooperation," Annual Review of Insolvency Law, 2006, 33 at page 41.
Chief Justice Warren K. Winkler, Court of Appeal for Ontario, "Commercial Arbitration and the Courts," remarks to the Commercial Arbitration Society on September 7, 2010."

E. Fresh Evidence

50. The Receiver respectfully submits that 212 has improperly proffered on this Motion an affidavit containing fresh evidence which was not before Justice Brown at the time he granted his Order. The Receiver respectfully submits that this evidence is not admissible on this Motion, and that admitting the new evidence would result in an abuse of process and give rise to an entirely new hearing, as opposed to an appeal. This Court must strive to protect the integrity of the legal process and finality is an important part of that integrity.

SLM Soft.com Inc. v. Rampart Securities Inc., 2005 CarswellOnt 6487 at para. 38

51. The test for introducing fresh evidence on appeal is as follows:

> 1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at the trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .;
> 2. The evidence must be relevant in the sense that it bears upon a decision or a potentially decisive issue in the trial or motion;
> 3. The evidence must be credible in the sense that it is reasonably capable of belief; and
> 4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at the trial or a motion, be expected to have affected the result.

R. v. Palmer, [1980] 1 SCR 759, at para. 22

52. In the circumstances of this case, 212 has not satisfied any of the foregoing criteria for admission of fresh evidence. Firstly, the evidence is hearsay and as such inherently lacks credibility. Significantly, 212 has not tendered any direct affidavit evidence from its alleged lender, Toronto Capital Inc., with respect to its willingness to advance funds to 212 at this time, on an unconditional basis. Secondly, it cannot be said that the fresh

evidence would have an important or decisive influence on the result. At best, the fresh evidence and new commitments remain subject to a number of conditions precedent and there is no evidence that such conditions have been satisfied. Finally, there is no reasonable explanation as to why the proposed new evidence could not have been obtained with the exercise of due diligence by 212 prior to the time of the hearing before Justice Brown.

53. In any event, the window within which 212 was required to make its bid or redeem has closed. If 212 wished to prevent a sale of the Property, it ought to have done so prior to the commencement of the Marketing Process authorized by the Court, and certainly before the Receiver's acceptance of the offer from Urbancorp.

PART V – ORDER REQUESTED

54. The Receiver therefore respectfully requests:

a) a declaration that the Approval and Vesting Order of the Honourable Mr. Justice D. Brown dated February 14, 2014 is not automatically stayed pending disposition of the appeal by 212;

b) in the alternative, if this Court finds that the Order is automatically stayed, an order cancelling the stay and allowing the Receiver to complete the sale transaction with Urbancorp and register the Order, notwithstanding the appeal; and

c) in the further alternative, should this Court determine that the Order ought to be stayed pending appeal, any such stay should be conditional upon 212 posting security in the form of a letter of credit or bond, in the amount of not less of $3

million, as security for any damages to be suffered by the estate, in the event that the sale to Urbancorp is lost.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 6th day of March, 2014.

Lisa S. Corne
Counsel for the Receiver

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Business Development Bank of Canada v. Pine Tree Resorts Inc., et al.*, 2013 O.N.C.A. 282
2. *Royal Bank v. Profor Kedgwick Ltee/Ltd. (2008)* CarswellNB 464, (NBCA)
3. *Alternative Fuel Systems, Inc. v. Edo*, 1997 CarswellAlta. 737
4. *Royal Bank of Canada v. Soundair* (1991), 4 O.R.(3d) 1 (C.A.)
5. *Housen v.* Nikolaisen, [2002] 2 S.C.R. 235
6. *Regal Constellation Hotel*, 2004 Carswell Ont. 2653
7. *Canrock Ventures LLC v. Ambercore Software Inc.*, 2011 CarswellOnt 4170 (O.C.A.)
8. *Ogden and Entertainment Services v. United Steel Workers of America*, (1998), 38 OR (3d) 448 at 449 (C.A.)
9. *Ron Handleman Investments Ltd. v. Mass Properties Inc.* 2009 CarswellOnt 4257
10. *RJR-MacDonald Inc. v. Canada* [1994] 1 S.C.R. 311
11. *Yewdale v. Campbell, Saunders Ltd.*, 1994 CarswellBC 1187
12. Matco *Capital Limited v. Interex Oil Field Services Ltd.*, 2007 A.B.C.A. 317 (CanLII)
13. *Stan-Canada Inc. v. Calibrated Instruments Inc.* 1995 CarswellOnt 143
14. *Babbitt v. Paladin Inc.*, 1993 CarswellOnt 467 (O.C.A.)
15. *Hall-Chem., Inc. v. Vulcan Packaging., Inc.* 1994 CarswellOnt 523 (O.C.A.) at para. 21;
16. *Chief Justice Warren K. Winkler*, Court of Appeal for Ontario, "Commercial Arbitration and the Courts," remarks to the Commercial Arbitration Society on September 7, 2010
17. *Huff, Pamela J.*, "The *Honourable* James M. Farley, QC: International Advocate for the Canadian Insolvency Process and Cross Border Cooperation," Annual Review of Insolvency Law, 2006, 33
18. *SLM Soft.com Inc. v. Rampart Securities Inc.*, 2005 CarswellOnt 6487
19. *R. v.* Palmer, [1980] 1 S.C.R. 759

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Courts of Justice Act, R.S.O. 1990, CHAPTER C. c-43

Court of Appeal jurisdiction

6.(1)An appeal lies to the Court of Appeal from,

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3

Appeals

Court of Appeal

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

Stay of proceedings on filing of appeal

195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

Rules of Civil Procedure

AUTOMATIC STAY ON DELIVERY OF NOTICE OF APPEAL

Payment of Money

63.01 (1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order.

HOME TRUST COMPANY
Applicant

-and-

2122775 ONTARIO INC.
Respondent

Court File No. CV-13-10313-00CL
Court of Appeal No. M43512

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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