2009 CarswellOnt 4257
Ontario Superior Court of Justice [Commercial List]

Ron Handelman Investments Ltd. v. Mass Properties Inc.

2009 CarswellOnt 4257, 179 A.C.W.S. (3d) 114, 55 C.B.R. (5th) 271

B&M HANDELMAN INVESTMENTS LIMITED et al v. MASS PROPERTIES INC. AND MASS BANQUET HALLS INC.

Pepall J.

Judgment: July 14, 2009
Docket: 09-CL-7995

Counsel: David Preger for Receiver, Harris and Partners Inc.
Allan V. Mills for Mass Properties Inc., Mass Banquet Halls Inc.
James S.G. Macdonald for Samra Singh
Satwant Merwar for 2205884 Ontario limited
S. Sood for Castimis Inc., Manjit Kaur Sidhu
S. Schneiderman for Tara Singh

Subject: Property; Corporate and Commercial; Insolvency; Contracts
Related Abridgment Classifications
Real property
VII Mortgages
VII.10 Sale
VII.10.d Judicial sale
VII.10.d.ix Application for order confirming sale
VII.10.d.ix.H Miscellaneous
Headnote
Real property --- Mortgages — Sale — Judicial sale — Application for order confirming sale — Miscellaneous
Mortgagors owned property on which they operated banquet hall — Mortgagee held first mortgage on property — Property was also subject to second mortgage, tax liens, construction liens, and one-half interest of judgment creditor — Mortgagee successfully brought application for appointment of receiver over all of mortgagors' assets — Offers made to receiver for property ranged from $2,400,000 to $3,750,000 — Receiver accepted unconditional offer of $3,735,000 with $500,000 deposit from prospective purchaser — Second prospective purchaser made offer directly to mortgagors — Judgment creditor wished to redeem mortgage or purchase property for higher price — Receiver brought application for approval of sale to first prospective purchaser and for vesting order — Application granted — Second prospective purchaser did not have standing — Judgment creditor was not entitled to redeem at this stage of proceedings — Receiver was exclusively authorized and empowered to pursue sale of property to exclusion of all other persons — Allowing redemption at this stage would make mockery of practice and procedures relating to receivership sales — Receiver had acted properly in sale of property — While advertising in ethnic newspapers would have been preferable, receiver had not acted improvidently — Receiver's efforts to obtain best price were certainly sufficient and best offers were above both appraised value and listing price — Prospective buyer was serious buyer — Receiver had considered interests of all parties.
Table of Authorities
Cases considered by *Pepall J.*:

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303, 1981 CarswellNS 47 (N.S. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

Winick v. 1305067 Ontario Ltd. (2008), 41 C.B.R. (5th) 81, 2008 CarswellOnt 900 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

s. 47(1) — referred to

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

s. 101 — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

Mortgages Act, R.S.O. 1990, c. M.40

s. 31 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 63(4) — referred to

APPLICATION by receiver for approval of sale of mortgagors' property and for vesting order.

***Pepall J.*:**

Relief Requested

1 Harris and Partners Inc., the Receiver of the debtor respondent companies, Mass Properties Inc. ("MPI") and Mass Banquet Halls Inc.("MBHI") (the "Receiver"), seeks an order approving a sale transaction contemplated by an agreement of purchase and sale between the Receiver and Balbir Bharwalia dated May 8, 2009. It also seeks a vesting order. The Receiver's motion is supported by the Applicant mortgagees and the purchaser, Mr. Bharwalia.

2 There is opposition to the motion. There are two cross-motions. Tara Singh is a 50% owner of the subject real estate. She seeks a discharge of the Applicants' mortgage and a discharge of the Receiver. The debtors, Mass Properties Inc. and Mass Banquet Halls Inc., seek declaratory relief, an order withholding approval of Mr. Bharwalia's agreement of purchase and sale and directing the Receiver to accept any counter-offer proposed by the Respondents. Others opposing the motion consist of Daljit Samra and Sukhvinder Singh, plaintiffs in an action against the debtors commenced in September, 2007 in which they claim a 50% interest in the subject real estate, and Castimis Inc., a lien claimant owed approximately $16,271 and the principal of whom, Manjit Kaur Sidhu, also wishes to purchase the property.

Facts

3 The relevant facts are as follows. On March 31, 2009, Hoy J. appointed Harris and Partners Inc. as Receiver of all of the assets of the debtor Respondent companies. The appointment order was made after four adjournments of the application to appoint the Receiver were granted by Hoy J. According to the Receiver, these were at the request of the debtor Respondent companies and the premise of the adjournments was imminent refinancing that did not materialize.

4 The assets under the Receiver's administration consist of real property known as 75 Hedgedale Road, Brampton and personal property (the "Property"). The former is a 2.478 acre parcel of land with a one storey, 12,603 sq foot building which is used as a banquet hall. The latter consists of chattels in connection with the banquet hall, the liquidation value of which was appraised as being $17,900.

5 The Applicants hold a first mortgage over the real property that was registered on September 26, 2005. As at June 24, 2009 the Applicants state that $2,259,498.31 is due and owing to them by the debtors pursuant to the mortgage. There is a second mortgage in the amount of $184,882.00 that is registered against the real property but the Receiver has been unable to locate the second mortgagee, Kishor Kamal. The City of Brampton is owed $265,076.68 on account of realty taxes as of January 22, 2009 and there are construction liens of approximately $100,000 registered against the real property along with a tax lien registered in the amount of $94,538.67 pursuant to the *Excise Tax Act*.

6 The registered owner of the real property is the debtor Respondent, MPI. Manjit Singh Saini ("Manjit") is the principal of MPI. He is also the principal of the other debtor Respondent, MBHI, which owns the personal property.

7 On January 13, 2009, Klowak J. granted a judgment in favour of Tara Singh in an action she brought against Manjit, the debtor Respondent companies and certain others. On consent of Manjit and the debtor Respondent companies, Klowak J. granted Ms. Singh a 50% interest in the real property subject to encumbrances registered between August 2, 2002 and October 4, 2005. Her interest was therefore subject to the Applicants' mortgage. Klowak J. ordered that the real property immediately be listed for sale at a price to be determined by Ms. Singh and MPI. According to the Receiver, Ms. Singh through her counsel has had notice of each Court appearance in this proceeding and did not oppose the appointment of the Receiver.

8 Upon the granting of the appointment order, the Receiver negotiated an arrangement with Manjit to permit him to remain in occupation and continue to operate the banquet hall business. In return, he agreed to pay ongoing expenses and occupation rent. The Receiver was of the view that a better realization would result if the banquet hall business continued to operate.

9 The Receiver also engaged Chris Kelos of Coldwell Banker Case Realty, an agent with significant experience selling commercial real estate on behalf of secured lenders and secured creditors. The Receiver set May 7, 2009 as a deadline for submission of offers. The Property was listed for $3,690,000 pursuant to a listing agreement dated April 8, 2009. The listing price was higher than the appraised value of the Property. The Property was listed on MLS and 1,573 hits were received on the MLS listing. In addition, advertisements for the Property were placed in the Globe and Mail on April 23 and 28, 2009. The Receiver sent 49 detailed information packages to prospective purchasers, select real estate agents and persons who responded to the advertisements. 97 showings of the Property were conducted and the Receiver received 9 offers to purchase the Property ranging from a high of $3,750,000 to a low of $2,400,000.

10 On May 8, 2009, the Receiver accepted an unconditional offer of $3,735,000 from Mr. Bharwalia who paid a deposit of $500,000. The purchase agreement imposed an obligation on the Receiver to apply for court approval of the purchase agreement and a vesting order. The allocation of the purchase price as between the real and personal property was to be determined at a later date and on June 4, 2009, the purchaser and the Receiver agreed to allocate $18,000 towards the personal property and $3,717,000 towards the real property. Mr. Bharwalia secured private financing for the purchase. He has had to pay both lenders' fees and legal fees in that regard. The price offered was the second highest offer received by the Receiver prior to the May 7, 2009 deadline. The highest offer received was for $3,750,000 but it was conditional on obtaining financing. Due to market volatility, uncertain market conditions, the difficult credit environment, and the $15,000 price differential, the Receiver was of the view that acceptance of the higher offer presented significant downside risk and for those reasons, did not accept it. The Receiver was and remains of the view that Mr. Bharwalia's terms including the price represent the best offer in the circumstances. Acceptance of his offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. The price proposed is both higher than the appraised value and the listing price and the offer is unconditional. The Receiver entered into an agreement of purchase and sale with Mr. Bharwalia that is subject to Court approval. The Receiver now recommends that the Court approve that purchase agreement and grant a vesting order.

11 Turning to those opposing the order requested, on June, 9, 2009, the Receiver received an agreement of purchase and sale dated May 29, 2009 between Manjit Kaur Sidhu as purchaser and MPI as vendor. Manjit purported to bind MPI

even though only the Receiver had power to do so and the listing agent was described as Homelife/Miracle Realty Ltd. even though the property had been listed with Coldwell Banker. The purchase price was $4,200,000 which is $465,000 more than the price offered by Mr. Bharwalia. No deposit was paid but the agreement stated that a deposit of $600,000 would be payable upon acceptance. There are various purchaser's conditions contained in the offer. Ultimately Manjit Kaur Sidhu provided the Receiver with an unconditional offer to purchase the real and personal property for $4,300,000 however, the closing date is 50 days following court approval in contrast with the 10 days provided for in Mr. Bharwalia's offer. The Receiver has asked but received no explanation as to why the offer of Manjit Kaur Sidhu was outside the May 7, 2009 deadline; why 50 days are required for closing; why Manjit purported to bind MPI and why Homelife Miracle Realty Ltd. was described as the agent; and why, according to the Receiver, there is an apparent proximity of relationship between Manjit and Manjit Kaur Sidhu. In addition, although requested by the Receiver, no information on Manjit Kaur Sidhu's creditworthiness has been forthcoming.

12 MPI and MBHI bring a cross motion for a declaration that the mode of advertising was inadequate as the Receiver failed to advertise in any national paper or any Indian or South Indian paper thereby limiting the prospects of yielding maximum returns. They ask that approval of Mr. Bharwalia's offer be refused and that I grant an order directing the Receiver to accept a counter offer proposed by them. They also seek a declaration that they are entitled to a sale process that would yield maximum returns to creditors and that would guarantee a viable continuation of the debtors' business activities. Manjit states that it would have been far more productive to have enlisted the aid of a real estate agent of his ethnic backround and experience who might better understand the intrinsic value of the hall, the facilities and the nature of the events that take place at the premises. He does not take exception with the listing agent but does take exception to the mode of advertising chosen. The facility was not advertised in any Indian or South Asian paper or in any national publication that might be specifically seen and reviewed by persons of an Indian or South Asian backround. The advertisement, according to Manjit, did not include the correct size of the real property and the parking lot, understated the value of the chattels and failed to indicate that bookings were available as was the cooperation of the existing operators (being the debtors). He provided no particulars with respect to these complaints about the advertisement. He also notes that the equipment appraisers have the same address as Mr. Bharwalia. He says that he is familiar with the other offeror, Manjit Kaur Sidhu, and his group.

13 Daljit Samra and Sukhvinder Singh commenced their action in September, 2007 but have not obtained a judgment against the debtors. They state that they advanced funds to Manjit and MPI that were used to buy the 75 Hedgedale property. They learnt of the Receivership on March 31, 2009. They complain, amongst other things, that the Receiver's plan of action was to list the Property for sale but there was no mention of any sale of the on going banquet hall business. They state that the total claims amount to over $5,000,000 and question whether the Receiver's lack of knowledge of the quantum of debts caused it to assume that a sale of $3,500,000 would satisfy all of the creditors. They also complain that the marketing and sale process was without any consultation with creditors other then the Applicants. In addition, the Receiver should have retained a business valuator. They also complain that the one month listing was too short a time period. They say that the Sidhu offer indicates that the Receiver's sales and marketing process did not attract the attention of at least one serious buyer. They ask the Court to refuse the approval of the Bharwalia agreement of purchase and sale and accept submissions from other interested parties. They state that the Court should be concerned as to how the Receiver came to determine a list price, the listing period and the deadline for submission of offers. The failure of the Receiver to consider the value of the business was a glaring omission. They further state that there was a lack of consideration of the interests of all parties.

14 In response, the Receiver states that it did not disregard their interests and the Property was appraised on the basis of its continued use as a banquet hall which the appraiser considered to be the highest and best used for the real property. The appraiser used a direct sales approach to value in part because although requested by the Receiver, no income and expense statements were forthcoming from Manjit and it appeared likely that none existed. The appraiser did prepare a reconstructed income and expenses statement based on industry norms but the income approach yielded a considerably lower value.

15 As to the one month time period, no prospective purchasers or agents suggested that they would have submitted an offer have they had more time.

16 Turning to Tara Singh, she states that she advanced $946,000 for the purchase of the Property of which she has been repaid $427,000. She wishes to discharge the mortgage of the Applicants. Her position is that there is no binding agreement of purchase and sale in that Mr. Bharwalia's has been terminated and she therefore retains the right to redeem. As mentioned, she had commenced an action against the debtors and Manjit. The parties to that action signed minutes of settlement in which the defendants were to pay Tara Singh $600,000 within 120 days during which time she was not to act upon a consent judgment given to her as part of the settlement and she also was not to have any dealings with mortgagees of the Property. The 120 days expired on May 13, 2009. Meanwhile, on May 8, 2009, the Receiver had entered into an agreement to sell the Property. Section 6 of Mr. Bharwalia's purchase agreement states that there is no agreement of purchase and sale until the offer has been accepted by the vendor and approved by the Court. As such, Ms. Singh maintains that she is still entitled to redeem. Alternatively, she states that if Court approval has not been granted within 21 days of waiver of the purchaser's conditions, the agreement automatically terminates. Ms. Singh submits that 21 days had elapsed and therefore there is no agreement. Ms. Singh wishes to discharge the mortgage or failing same, she is prepared to purchase the Property for $4,220,000, closing to occur within 14 days of June 29, 2009 with no conditions for financing. This is $485,000 higher than Mr. Bharwalia's offer and $20,000 higher than that of Manjit Kaur Sidhu but with an early closing date. There is no evidence of any deposit having been paid.

17 The Receiver states that before the Receivership proceeding was launched, the option of obtaining an assignment of the Applicants' security was canvassed with Ms. Singh's counsel on January 22, 2009. On February 5, 2009, the option of purchasing the Property was also canvassed with her counsel. The Receiver states that the sale process would be undermined if stakeholders were permitted to wait by the sidelines until an offer is accepted before acting to protect their equity.

Issues

18 The issues to consider are:

(i) Does Manjit Kaur Sandu have standing?

(ii) May Tara Singh redeem the Applicants' mortgage?

(iii) Should the agreement of purchase and sale between the Receiver and Mr. Bharwalia be approved as recommended by the Receiver?

Discussion

(a) Standing

19 Manjit Kaur Sandu does not have standing in his capacity as a prospective purchaser. In contrast to a successful purchaser, an unsuccessful prospective purchaser has no standing on a sale approval motion: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* [1] and *Winick v. 1305067 Ontario Ltd.* [2]

(b) Redemption

20 The Receiver accepts that Ms. Singh is a mortgagor but states that she is not entitled to redeem at this stage of the proceedings. I agree.

21 The Receiver was appointed pursuant to section 47(1) of the BIA and section 101 of the Courts of Justice Act on March 31, 2009. The Court order empowered the Receiver to market the Property and to sell it out of the ordinary course of business with the approval of the Court if the purchase price exceeded $250,000. It was ordered that notices

under section 63(4) of the Personal Property Security Act and section 31 of the Mortgages Act were not required. In each case where the Receiver took such steps, it was exclusively authorized and empowered to do so, to the exclusion of all other persons including the debtors and without interference from any other person. The order also provided that proceedings against the debtor, Mass Properties Inc., or its property were stayed. The order specifically addressed the exercise of rights and remedies against the debtor as follows:

> THIS COURT ORDERS that all rights and remedies against the Debtor, Mass Properties Inc., the Receiver or affecting Mass Property Inc.'s property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

22 In the face of these provisions, Ms. Singh does not have an automatic right to redeem. 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.

23 Secondly, I do not accept that the agreement of purchase and sale has been terminated. As in *Winick v. 1305067 Ontario Ltd.* [3], it is clear from the parties' position in Court and from their conduct that they both relinquished their right to insist on and rely on the 21 day time requirement and waived any rights in that regard. This was a mutual, not a unilateral waiver. In any event, subject to my discussion of the principles associated with sale approval, I would approve the agreement of purchase and sale nunc pro tunc.

(c) Approval of Mr. Bharwalia's Agreement

24 The leading case on approval of receiver sales is *Royal Bank v. Soundair Corp.* [4] In deciding whether a receiver has acted properly in the sale of property, the Court must consider:

> (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) the interests of all parties;
>
> (iii) the efficacy and integrity of the process by which offers are obtained; and
>
> (iv) whether there has been unfairness in the working out of the process.

25 While it would have been preferable had the Receiver advertised in the Indian and South Indian newspapers, it did not act improvidently and it certainly made sufficient effort to get the best price. It placed the property on MLS where there were 1573 hits, advertised twice in the Globe and Mail and contacted 49 prospects. The Property was shown 97 times and was on the market for a month. As to the listing of one month, there was never any suggestion made to the agent, Mr. Kelos, by any prospective purchaser or agent that an additional offer would have been submitted had there been more time. Nine offers were received and the Property sold for more than both the appraised value and the listing price. Mr. Bharwalia is a serious buyer as evidenced by the deposit of $600,000 that was paid and the absence of conditions to the offer.

26 The appraisal that was done by Lebow, Hicks Ltd., described the highest and best use of 75 Hedgedale Road as being continuation of its use as a banquet hall. The appraiser used a direct sales approach. Contrary to the submissions of the debtor corporations, an income approach was also used. Income approach indicates value based on the potential income stream that can reasonably be expected to result from the operation of the property. The validity of the income

approach depends on the reliability of the underlying data. In that regard, the appraiser noted that no income or expense statements or operational information were supplied. A cursory income approach based on comparable lease rates and industry performance levels was included in the appraisal. The Receiver indicated that he sought information from the debtors but it was not forthcoming. The Receiver was of the view that it likely did not exist. The income approach used by the appraiser yielded a considerably lower value and was therefore dismissed as a proper approach to market value. As is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

27 The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair* [5], it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver. In this case, it is clear that the Receiver considered the interests of all relevant parties. It contacted Ms. Singh well before it entered into any agreement. Indeed, she was unopposed to the appointment of the Receiver. The Receiver also was in discussions with others including the debtors.

28 As to the efficacy and integrity of the process by which the offer was obtained, Macdonald J.A.'s commentary in *Cameron v. Bank of Nova Scotia* [6] continues to be apropos:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

29 There is nothing in the evidence that causes me to question the efficacy and integrity of the process by which offers were obtained. Furthermore, there was no unfairness in the process. In my view, the Receiver's recommendation that the purchase agreement with Mr. Bharwalia be approved should be accepted.

30 The proposed order is largely similar to the Commercial List Users' Committee model approval and vesting order and should be granted with the exception of paragraph 11 for which there is no compelling evidentiary support. The remaining provisions are reasonable in the circumstances.

Application granted.

Footnotes

1 (2000), 47 O.R. (3d) 234 (Ont. C.A.)

2 (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]).

3 Ibid, at paras. 7 and 8.

4 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

5 Ibid, at paras. 39 - 40.

6 (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) at p.11.

2009 CarswellOnt 4257, 179 A.C.W.S. (3d) 114, 55 C.B.R. (5th) 271

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2015 ONSC 3909
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.

2015 CarswellOnt 9453, 2015 ONSC 3909, 255 A.C.W.S. (3d) 896, 27 C.B.R. (6th) 166

Business Development Bank of Canada, Applicant and Marlwood Golf & Country Club Inc., Respondent

Newbould J.

Heard: June 15, 2015
Judgment: June 22, 2015
Docket: CV-15-10878-00CL

Counsel: Wojtek Jaskiewicz, Bobby H. Sachdeva for Receiver, BDO Canada Limited
Anthony O'Brien for Applicant
R. Graham Phoenix for T.P.C.@Marlwood Inc.
Tony N. Nguyen for Respondent

Subject: Contracts; Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Real property
VII Mortgages
VII.5 Redemption
VII.5.d When redemption available
VII.5.d.iv Miscellaneous
Headnote
Real property --- Mortgages — Redemption — When redemption available — Miscellaneous
Mortgagor mortgaged golf course — Mortgagor defaulted on mortgage — Receiver was appointed and undertook sales process which resulted in acceptance of successful bid — Principals of mortgagor allegedly threatened bidders — Receiver brought motion to approve sale — Mortgagor brought motion for permission to redeem mortgage — Receiver's motion granted; mortgagor's motion dismissed — Redemption of mortgage in circumstances would interfere with integrity of sales process — Sales process was reasonable and appropriate — Mortgagor did not establish that it came to court with clean hands — Mortgagor had not acted in good faith — Sale approved.
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Mortgagor mortgaged golf course — Mortgagor defaulted on mortgage — Receiver was appointed and undertook sales process which resulted in acceptance of successful bid — Principals of mortgagor allegedly threatened bidders — Receiver brought motion to approve sale — Mortgagor brought motion for permission to redeem mortgage — Receiver's motion granted; mortgagor's motion dismissed — Redemption of mortgage in circumstances would interfere with integrity of sales process — Sales process was reasonable and appropriate — Mortgagor did not establish that it came to court with clean hands — Mortgagor had not acted in good faith — Sale approved.
Table of Authorities
Cases considered by *Newbould J.*:

Ron Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

MOTION by receiver to approve sale of property; MOTION by mortgagor for permission to redeem mortgage.

Newbould J.:

1 The receiver moved for approval of a sale transaction in which an 18 hole golf course property in Wasaga Beach was sold to a purchaser named the Smardenka Group and then assigned to T.P.C.@Marlwood Inc. The approval was opposed by the respondent, the first mortgagee of the property, who now wishes to redeem the first mortgage and has brought a motion for that relief. At the conclusion of the hearing I granted the motion of the receiver approving the sale and dismissed the motion by the respondent, with reasons to follow. These are my reasons.

2 Marlwood was operated by Trilinks Golf Limited in conjunction with another golf course in Wasaga Beach called the Links at New England Village. Marlwood, Trilinks and the Links are all related and owned by Baywood Homes Partnership. The receiver was advised that Trilinks and Baywood were experiencing cash flow difficulties in 2014. Baywood entered into an agreement under which a third party named Simmons took possession of Marlwood late in the 2014 golf season and operated the golf course. During the winter of 2014-15 Marlwood and Simmons had a falling out and no utilities were paid.

3 The first mortgage by Marlwood to BDC was made in 2007 for $2.6 million. It went into default on July 31, 2014. Demand by BDC on the first mortgage was made on October 9, 2014.

4 On February 17, 2015 BDC applied for the appointment of a receiver of the property of Marlwood. By that date there were no services to the Marlwood clubhouse and all leased golf carts and turf equipment had been removed by the lessors as payments for leased equipment and utilities had not been made. The golf course superintendent had also not been paid. Simmonds had offered memberships for 2015 to the members of Marlwood and money from the members who accepted had been deposited into a Marlwood account.

5 On February 17, 2015 Justice Spence adjourned the BDC application for the appointment of a receiver to March 3, 2015 and appointed BDO as a monitor of the property of Marlwood. On March 3, 2015 Justice McEwen continued the appointment of BDO as monitor, ordered a $25,000 forbearance fee to be paid by Marlwood and ordered that Marlwood sign a consent to the appointment of a receiver to be held in escrow until March 31, 2015 subject to terms including the right of BDC to act on the consent if the second mortgagee failed to consent by May 6, 2015 to the terms of a refinancing of the first mortgage proposed by Toronto Capital Corp.

6 The second mortgagee is Romspen Investment Corporation which holds a mortgage for $55 million registered on July 9, 2014. It is a collateral mortgage and part of a larger security package in which Romspen has first mortgage security over several other pieces of land including adjacent development land and another golf course. Romspen failed to consent to the refinancing of the BDC first mortgage by May 6, 2015. Accordingly BDO was appointed receiver of the property on May 12, 2015. Marlwood did not oppose the appointment of BDO as receiver. In its motion material before me, Marlwood requested an order setting aside the receivership order, but this was abandoned at the hearing.

7 The order appointing BDO as receiver authorized it to market the property. BDO determined that if it marketed the property quickly, it might be able to complete a sale of the assets by early June allowing a purchaser to operate the course during the busiest summer months of July and August. While it would have been possible for the receiver to operate the course for play during the sales process, it believed that the costs of doing so would not be recovered by income taken in before a sale could be achieved.

8 The receiver undertook a sales process. It is described in detail in the receiver's report at paras. 29 to 36. I am satisfied that it was a reasonable sales process and that the property was sufficiently exposed to the market for a reasonable period of time to enable prospective bidders to assess the property and bid for it. Marlwood contends that the property was not listed through a "real estate agent experienced in golf courses". There is no evidence that such a real estate agent exists in the market or that such an agent would have achieved any better result than the receiver did. The receiver advertised twice in the Globe and Mail, local newspapers and online. It also engaged a Canadian firm with expertise in the golf industry which provided an electronic notice of the sale to approximately 4,000 industry parties drawn from its own data base. The sales process resulted in 60 enquiries. Twenty-two persons signed confidentiality agreements and obtained access to the receiver's data room. Two offers were received.

9 Marlwood contends that the sale was an improvident sale. I cannot so find based on the evidence. BDC obtained an appraisal from an accredited appraiser with an effective date of February 9, 2015. BDO obtained its own appraisal from an accredited appraiser with an effective date of February 24, 2015. The bid from the successful purchaser is very favourable compared to the appraisals. The appraisals appear to be thorough and well supported. The appraisers each opined that the highest and best use of the property was as a golf course.

10 Marlwood complains that it did not have access to the sale agreement or to the appraisals obtained by BDC and BDO. The sale agreement and appraisals have been filed under seal, as is usual in the Commercial List, in case any approved sale fails to close and the property must be again exposed to the market place. The integrity of any future sales process would be jeopardized if these documents were available to any future bidders. Marlwood had no special right to these documents. The receiver declined to provide these documents to Marlwood and I cannot quarrel with that decision. Indeed, Mr. Ralph Canonaco, a director of Marlwood and together with his brother Tony Canonaco the two principals of Marlwood, filed an affidavit in which he referred to the down payment on the sale and had no concern estimating the purchase price based on the amount of the deposit. This was not helpful to the process in the event that the sale were to fall through. In my view, the *Sierra Club* test has been met to require the documents to be filed under seal until the sales process has been completed and a sale to the successful purchaser has been completed.

11 Mr. Canonaco asserted in his affidavit that the Marlwood assets should be valued at approximately $2 million, much higher than his estimate of the sale price. There is no cogent evidence from him as to how he arrived at a $2 million value, nor have any appraisals been provided on behalf of Marlwood to support it. I do not accept his assertions of value as being in any way reliable.

12 I am satisfied that the sales process carried out by BDO in the circumstances was reasonable and appropriate and meets the test of the *Soundair* principles in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

13 Marlwood moved for an order permitting it to redeem the first mortgage. On June 9, 2015 BDC provided a mortgage discharge statement stating that the amount outstanding was $2,129,477, inclusive of principal, interest and costs of BDC incurred in enforcing its mortgage, including expected receiver costs. At the hearing, counsel for Marlwood stated that he had a certified cheque in hand to pay that amount. In all of the circumstances, I declined to permit the first mortgage to be redeemed. The essential reason is that it would upset the integrity of sales process undertaken by the receiver.

14 In its affidavit material sworn June 15, 2015, BDC takes the position that it supports the sale to the Smardenka Group. In argument, counsel for BDC said BDC believes in the court sales process but took no position on whether Marlwood should be entitled to redeem its mortgage. While it was not said, the fact that BDC would get less on the sale of the property than if its mortgage were immediately redeemed, may mean that BDC is satisfied that Marlwood and any guarantors would be good for the shortfall on the mortgage covenant.

15 Immediately after the appointment of the receiver, the principals of Marlwood told the receiver that it wished to redeem the BDC mortgage. The earlier proceedings in which the application to appoint a receiver had been adjourned featured some offer of financing from Toronto Capital Corp. that Romspen had not consented to. In mid-March,

Marlwood advised it was in the process of arranging financing and the receiver provided an estimate of the amount required to redeem. However no redemption at that time took place.

16 During the currency of the sales process, the receiver was advised that the principals of Marlwood had reached a conditional agreement with BDC for an assignment of the BDC security. The receiver understood that this information had been communicated as fact within the local community by the principals of Marlwood and the receiver received many inquiries regarding the return of the golf course to Marlwood. Some parties interested in the assets of Marlwood asked the receiver about the rumours that Marlwood was going to take back its assets and what effect that would have on the sale process. The receiver believes that based on conversations with interested parties, a number of potential purchasers did not make bids because of the rumours of redemption and the activities of the principals of Marlwood. An e-mail from one interested party to the receiver of May 6, 2015 is troubling. It refers to threats from Mr. Ralph Canonaco that led to the third party backing away from a bid as he viewed the sales process as tainted. Mr. Canonaco did not deny this in his affidavit.

17 The receiver established May 8, 2015 as the deadline for bids to be submitted. On that day, just prior to the bid deadline of 12:00 noon, the receiver was advised by counsel for BDC that they had been contacted by counsel for Toronto Capital Corp., Marlwood's mortgage consultant, that funds were in place to redeem the mortgage. By this date the bid from both bidders, including the winning bid from the Smardenka Group, had been received. The bids were irrevocable until 5 p.m. on May 13, 2015 and after acceptance of the winning bidder, that bidder had 15 days to complete due diligence.

18 On May 13, 2015 at 10:45 am counsel for BDC advised the receiver that the deal with Toronto Capital Corp. was officially dead and that the solicitor for the investor group had been directed to return the funds to his clients. On that day the receiver contacted the two bidders and requested improved bids. The improved bids were received and on May 15, 2015 the bid by the Smardenka Group was accepted.

19 Mr. Alex Smardenka received what he described as two unsolicited visits. The first was from an Eva Ricci and Ralph Canonaco on May 31, 2015. Mr. Smardenka said that Mr. Canonaco strongly suggested that it was in their best interest to forge a partnership with him for the golf course or that Mr. Canonaco and his legal team would put a swift end to the Smardenka purchase of the golf course and that Mr. Canonaco would again be the owner. Mr. Smardenka took this as a threat. The second was the next day on June 1, 2015 from a Michael Sannella and a person named Frank who said they were from Toronto Capital Corp. working on behalf of Mr. Canonaco. They insisted that Mr. Smardenka enter into a partnership with Mr. Canonaco or that the Smardenka purchase of the golf course would not happen. Mr. Smardenka said he was rattled by their threats and so suggested they put their offer on paper for his lawyer to review. They said that this would not be proper in the eyes of the court and so refused to provide any offer. Mr. Sannella also said that for the deal to work Mr. Smardenka must hire his son for $150,000 per year and that his job would be to redevelop the golf course into residential. Mr. Sannella said that Baywood was not in the golf course business but in the land development business and that they would reclaim Marlwood with or without Mr. Smardenka. Mr. Smardenka recorded the visits in an e-mail to the receiver on June 1, 2015.

20 On June 2, 2015 the solicitors for BDO wrote by e-mail to Mr. Canonaco and Mr. Sannella of Toronto Capital Corp. and advised that the visits to Mr. Smardenka were a deliberate interference with the receiver's mandate and were designed to disrupt the receiver's intended action to sell the golf course. They suggested that the recipients of the e-mail feel free to have their lawyers get in touch if they wished to discuss the matter. No response to the e-mail was received back.

21 Mr. Canonaco admits he called and met with Mr. Smardenka. He puts a different light on it. He says that he presented Mr. Smardenka with an opportunity of a joint venture. He said at no material time was it his intention to undermine the receiver's efforts. He says that at the time, he disagreed with the receiver's plans to sell Marlwood to a third party and he believed that by working together with the purchaser, the affected stakeholders, being BDC, the receiver, Mr. Smardenka and Marlwood's shareholders and guarantors could benefit. He denies threatening Mr. Smardenka.

22 There has been no cross-examination on the affidavits of Mr. Smardenka or Mr. Canonaco and I hesitate to say too much about the evidence of the visit from Mr. Canonaco to Mr. Smardenka. I note, however, that no evidence from Eva Ricci was provided about that meeting to deny what Mr. Smardenka has stated took place. Even on Mr. Canonaco's version of his visit to Mr. Smardenka, it is an indication that Mr. Canonaco was prepared to interfere in the sales process. He could have waited until the sale closed and then approached Mr. Smardenka. It is clear from his affidavit that Mr. Canonaco was against the receiver selling the property to a third party.

23 I accept the evidence of Mr. Smardenka as to what took place on June 1, 2015 in the visit from Mr. Sannella of Toronto Capital Corp. Neither Mr. Sannella nor Frank Mondelli of Toronto Capital Corp. gave any evidence denying what Mr. Smardenka says happened, and Mr. Canonaco did not say anything in his affidavit about the visit by Mr. Sannella or deny that Mr. Sannella was speaking for him. In his affidavit, Mr. Canonaco just said that when he met with Mr. Smardenka, he told him that Michael Sannella and Frank Mondelli of Toronto Capital Corp. would be calling to discuss the matter further. I take it from the evidence that Messrs Sannella and Mondelli were speaking on behalf of Mr. Canonaco. The threats made by them to Mr. Smardenka indicate a complete interference with the sales process undertaken by the receiver and indicate a lack of good faith on the part of Mr. Canonaco and Toronto Capital Corp.

24 At the hearing, counsel for Marlwood said that he had in his possession a certified cheque signed by the solicitors of Toronto Capital Corp. for the amount to redeem the BDO mortgage. He said that Romspen, the second mortgage, now was prepared to consent to the new financing. What caused the change from May 13, 2015 when Toronto Capital Corp. had said that the deal was dead was not explained by any evidence, nor was any evidence provided as to why any problems with the earlier Toronto Capital Corp. endeavours to provide financing to redeem the mortgage could not have been solved before the sales process was to be completed. The mortgage had been in default for nearly one year and, when Toronto Capital Corp. announced on May 13, 2015 that the refinancing was dead, the receiver was justified in completing the sales process and selling the property.

25 A mortgagee has no automatic right to redeem in these circumstances. In another case involving a mortgagee who on a motion to approve a receiver's sale applied for the right to redeem the mortgage in default, *Ron Handelman Investments Ltd. v. Mass Properties Inc.* [2009 CarswellOnt 4257 (Ont. S.C.J. [Commercial List])], Pepall J. (as she then was) denied the request to redeem. Her statements in that case are completely apt to the present situation. After referring to the terms of the receivership order, which were the same as in this case, she stated:

> 22 In the face of these provisions, Ms. Singh does not have an automatic right to redeem. 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.

26 While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. See Galligan J.A. in *Soundair*. Moreover, the interests of a purchaser in a property run sales process by a receiver are to be considered. In *B&M Handelman* Pepall J. also stated:

> 27 The Receiver considered the interests of all parties. As Galligan J.A. stated in *Soundair*, it is well established that the primary interest is that of the creditors of the debtor but other persons' interests require consideration as well. This may include the interests of a purchaser such as Mr. Bharwalia who has negotiated an agreement with a Court appointed receiver.

27 In this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process. I also find that the respondent has not established that it has come

to court with clean hands entitling it to the order sought permitting it to redeem its mortgage. The respondent has not acted in good faith.

28 In the circumstances, it is appropriate that the sale to the Smardenka Group and assigned to T.P.C.@Marlwood Inc. be approved and that the motion by the respondent Marlwood to redeem the first mortgage be dismissed.

Receiver's motion granted; mortgagor's motion dismissed.

2014 ONSC 1039
Ontario Superior Court of Justice [Commercial List]

Home Trust Co. v. 2122775 Ontario Inc.

2014 CarswellOnt 1888, 2014 ONSC 1039, 237 A.C.W.S. (3d) 650

Home Trust Company, Applicant and 2122775 Ontario Inc., Respondent

D.M. Brown J.

Heard: February 14, 2014
Judgment: February 18, 2014
Docket: CV-13-10313-00CL

Counsel: L. Corne, for Receiver, Collins Barrow Toronto Limited
C. Ho, for Applicant, Home Trust Company
B. Jenkins, for Defendant, 2122775 Ontario Inc.
S. Crocco, for Proposed Purchaser, Urbancorp (Downtown) Developments Inc.
L. Finegold, for Subsequent Mortgagees, US Capital Corp. and Ali Visram

Subject: Corporate and Commercial; Property; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VIII Executions
VIII.8 Stay of execution
VIII.8.a General principles
Real property
VII Mortgages
VII.3 Change of ownership
VII.3.b Mortgaged land
VII.3.b.ii Sale or transfer of interest in land
VII.3.b.ii.E Miscellaneous
Headnote
Debtors and creditors --- Executions — Stay of execution — General principles
Real property --- Mortgages — Change of ownership — Mortgaged land — Sale or transfer of interest in land — Miscellaneous

***D.M. Brown J.*:**

I. Receiver's sale approval motion and debtor's effort to stay the motion

1 Collins Barrow Toronto Limited, the receiver of 2122775 Ontario Inc. (the "Debtor") pursuant to the November 15, 2013 appointment order of Thorburn J., moved for the approval of an agreement of purchase and sale between it and Urbancorp (Downtown) Developments Inc. ("Urbancorp") of certain assets of the Debtor. The Debtor moved for a temporary stay of the receivership and its sale process for 30 days in order to enable it to complete a re-financing. At the hearing I dismissed the Debtor's motion and granted the approval and vesting order sought by the Receiver. These are my reasons for so doing.

2 The Debtor owned property on the east side of Bayview Avenue, north of Post Road (the "Property"). The Debtor was undertaking to develop a townhouse complex on the Property. Following its appointment the Receiver moved for an order approving a sales and marketing process for the Property. I granted that order on December 11, 2013.

3 The Receiver then conducted a standard marketing process, including the distribution of a marketing flyer, placing advertisements in local papers, distributing a confidential information memorandum to 111 parties who signed a confidentiality agreement, making an electronic data room available to such parties and conducting 28 site tours. The Receiver set a bid deadline of January 23, 2014.

4 Ten offers were made to the Receiver, and the Receiver contacted the top four offerors to clarify their bids. The Receiver then set a revised deadline of January 30 for the top four offerors to improve their bids. Following a call from one of the other offerors, the Receiver contacted the remaining six bidders and afforded them the opportunity to submit improved bids. By the time of the revised deadline, 11 offers had been sent to the Receiver. After discussing the offers with Home Trust, the Receiver accepted the offer from Urbancorp, subject to Court approval.

5 The Receiver filed, on a confidential basis, a summary of all offers received at the initial and revised deadlines. The Urbancorp offer was superior in regards to price, as well as its unconditional nature.

6 Shortly before the return date of the Receiver's approval motion, the Debtor advised that it had negotiated term sheets with two lenders — Toronto Capital Inc. and USHJO Enterprises Inc. — which, if completed, would take out the first mortgage of Home Trust and allow the development of the project so that on completion the Debtor could pay the amounts due to the second, third and fourth mortgagees. The Debtor advised the Receiver that it would apply to the Court to request the redemption of the Home Trust mortgage and to stay the sale process. The subsequent mortgagees supported the Debtor's motion to stay the sale approval process to permit the negotiation of the refinancing.

7 In its Second Supplemental Report the Receiver observed that neither term sheet was "firm" and the combined amounts in the term sheets would be insufficient to pay out the Home Trust mortgage and the Receiver's actual and accrued receivership costs. At the hearing counsel for the Debtor advised that his client was working on obtaining revised term sheets which would eliminate any such deficiency.

8 Urbancorp filed an affidavit from its Chief Financial Officer, Susanna Han, which stated that it had spent time and money participating in the Receiver's bidding process and it had participated in good faith believing that the superior offer would be approved by the Court. Urbancorp also stated that a delay in the closing of the purchase could push back the start of resuming the development of the townhouses, thereby increasing costs and delaying the timing of the development. Han deposed: "[I]t would be manifestly unfair and prejudicial to Urbancorp if the approval of the sale is not granted in these circumstances".

9 Although the Debtor portrayed its request as one seeking a stay of the sale in order to enable it to redeem the first mortgage, in essence the Debtor sought an extension of the bid deadline in order to make a late bid. If granted, the stay requested by the Debtor would seriously impugn the integrity of the court-sanctioned sales and marketing process. The bid process employed by the Receiver was done pursuant to the Sales and Marketing Order and was transparent. It was open to the Debtor to participate in the bid process. While the Debtor did not do so until well after the bid deadline had passed, 11 other bidders complied with the rules of the sales process set by the Receiver, and Urbancorp submitted the superior bid. To permit the Debtor to stay the sales process in such circumstances would risk seriously eroding the confidence of the market in the integrity of receivership sales processes sanctioned by the Ontario Superior Court of Justice.

10 Moreover, this is not a case where the Debtor had presented a vastly superior offer to that accepted by the Receiver. On the contrary, the Debtor's proposal was inferior in all respects: it was not firm and the consideration would be inadequate to pay the first mortgage and the Receiver's charge.

11 I concluded that the sales process conducted by the Receiver and the agreement it submitted for court approval satisfied the principles set out in *Royal Bank of Canada v. Soundair* [1] — the Receiver sought prior court approval for a sales and marketing process; it followed that process; it used a transparent sales process; it afforded all offerors an opportunity to submit improved bids; and, the Receiver accepted the superior bid.

12 For those reasons, I dismissed the Debtor's motion to stay the sale process, and I granted the approval and vesting order sought by the Receiver. Given the commercially sensitive information contained in the Receiver's Supplemental Report dated February 5, 2014, I order that it be sealed until the closing of the Urbancorp agreement of purchase and sale or the further order of this Court.

Footnotes

1 (1991), 4 O.R. (3d) 1 (C.A.)