

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990 C. C.43, AS AMENDED**

B E T W E E N:

**B&M HANDELMAN INVESTMENTS LIMITED, FLORDALE HOLDINGS LIMITED M.
HIMEL HOLDINGS INC., 1530468 ONTARIO LTD., MAXOREN INVESTMENTS, AND
SHEILACO INVESTMENTS INC.**

Applicants

- and -

CHRISTINE DROTOS

Respondent

FACTUM OF THE MOVING PARTY

(Returnable on June 1, 2018)

May 31, 2018

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PART I – THE NATURE OF THIS OBJECTION

1. The moving parties, Pillar Capital Inc. and World Finance Corporation, oppose the motion brought by Rosen Goldberg Inc. (the “**Receiver**”) for Court approval of the sale of 4 Birchmount Road, Toronto, Ontario (the “**Birchmount Property**”) and request that this Honourable Court:

- (a) Dismiss the Receiver’s motion;
- (b) Discharge the Receiver and replace it with Grant Thornton Limited; and
- (c) Implement a proper sale process in respect of the Birchmount Property.

PART II – STATEMENT OF FACTS

2. On April 13, 2018, Rosen Goldberg Inc. was appointed as Receiver (the “**Receivership Order**”) over the assets, property and undertakings of the respondent, Christine Drotos (the “**Respondent**”).

3. The Respondent is the owner of the Birchmount Property. The Birchmount Property comprises 1.85-acre waterfront property, located in the desirable bluffs region in Eastern Toronto.

4. On the Birchmount Property, the Moving Parties hold:

- (a) the first mortgage through Pillar Capital Inc., in the amount of \$2,500,000; and

(b) the third mortgage through World Finance Corporation, which is owed approximately \$6,700,000.¹

5. The Applicants hold the second mortgage on the Birchmount Property.

6. Pursuant to the Receivership Order, the Receiver was authorized to market the Birchmount Property.

7. Despite being fulcrum secured creditors with an economic interest in the Birchmount Property, at no point did the Receiver or its counsel:

(a) consult any representative of the first or third mortgagee;

(b) consult with our legal counsel as to the sale process, including the length of time to market the property, the list price, an acceptable purchase price or the degree of exposure to the market; or

(c) take any steps to identify the appropriate person to consult with in respect of these matters.²

8. According to a report prepared by Remax Caccavella Margiotta (the “**Remax Report**”), the Receiver listed and marketed the Birchmount Property at below market value.³ Based on the Remax Report, and using comparables in the area, the Receiver should have listed and marketed the property for \$4-\$4.5 million.⁴

¹ Affidavit of Troy Wilson, Motion Record Tab 1 at para 7(b)

² Affidavit of Troy Wilson, Motion Record Tab 1 at paras 12 and 13

³ Affidavit of Troy Wilson, Motion Record Tab 1A, page 14, para. 5

⁴ Affidavit of Troy Wilson, Motion Record Tab 1A, page 14, paras 5 and 6

9. In addition, the Receiver's listing language described the home as a "concrete shell" and contained remarks about the sale being "court-appointed" which language negatively affects the potential sale price of a property.⁵

10. The Receiver marketed the Birchmount Property for **eight days** before accepting a \$3.4M offer, which offer the Remax Report states could be as much as \$1M below market value.⁶

11. For high value, unique properties, a fair process requires a reasonable period of exposure to the market of between three to six months, as well as an opportunity to sign back all submitted offers at the conclusion of the listing period with a request for best and final offers.⁷

12. In a May 30, 2018 report prepared by Grant Thornton Limited (the "**Grant Thornton Report**"), the report describes several steps that should be taken by a Receiver when selling real estate in the context of a Court appointed Receivership, which steps were not taken by the Receiver or not otherwise disclosed in the Receivers Report. These steps include having a six-month listing period.⁸

13. This purchase price obtained by the Receiver for the Birchmount Property is the equivalent to the land value of the property, even though the house is not a tear down. In fact, the purchase price is equivalent to the MCPAC tax assessed value and it is common knowledge that tax assessed value is significantly lower than market value.⁹

⁵ Affidavit of Troy Wilson, Motion Record Tab 1 at para 9 and Tab 1A at page 14, para. 1

⁶ Affidavit of Troy Wilson, Motion Record Tab 1 at para 15 and Tab 1A at page 14, para. 5

⁷ Affidavit of Troy Wilson, Motion Record Tab 1 at para 14

⁸ Grant Thornton Report, Motion Record Tab 1B, para 8

⁹ Affidavit of Troy Wilson, Motion Record Tab 1A, page 14, paras 3, 4 and 7

14. Should this transaction close, the proceeds from the sale will only go as far to only pay out the first mortgagee and the Applicants. However, the consummation of the transaction will provide cents on the dollar for the third mortgagee, World Finance Corporation.¹⁰

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

15. The issue in this motion is whether the Receiver properly discharged its duties in selling the Birchmount Property.

16. The Moving Parties respectfully submit that the Receiver has not met the applicable “*Soundair*”, as detailed below.

The Duties of Receivers in the Course of a Sale

17. Section 247 of the *Bankruptcy and Insolvency Act* (the “*BIA*”) provides that a receiver shall deal with the property of the bankrupt in a commercially reasonable manner.¹¹

18. The Receiver’s duties are summarized by Galligan J.A. in *Royal Bank of Canada v. Soundair*:

- (a) It should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) It should consider the interests of all parties;
- (c) It should consider the efficacy and integrity of the process by which offers have been obtained; and

¹⁰ Affidavit of Troy Wilson, Motion Record Tab 1 at para 17

¹¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 274(b) [*BIA*].

- (d) It should consider whether there has been unfairness in the working out of the process.¹²

(A) *The Receiver has not Made Sufficient Efforts to obtain the Best Price*

19. The Receiver's duty to conduct sales in a 'commercially reasonable' manner obliges him to do everything in the circumstances to obtain the best price.¹³

20. Here, the Receiver did not make sufficient efforts to obtain the best price because, *inter alia*, the Receiver:

- (a) listed and marketed the Birchmount Property for less than market value;
- (b) had the property on the market for only eight days, as opposed to three to six months;
- (c) obtained only one offer, as opposed to waiting for multiple offers and signing all submitted offers back at the end of the three to six-month listing process with a request for best and final offers; and
- (d) used negative language and remarks about the sale being court-appointed, which affects the sale price.

21. Because of the above, the Receiver obtained the land value of the Birchmount Property only, even though the structure is not a tear down. The purchase price obtained by the Receiver also reflects the tax assessed value of the home and it is common knowledge that the tax assessed value is typically lower than market value.

¹² *Royal Bank of Canada v. Soundair Corp.*, [1991] OJ No 1137 at para 16 [Soundair].

¹³ *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] OJ No 4300 at para 4.

(B) *The Receiver did not Consider the Interests of All Parties*

22. A Court appointed Receiver stands as an officer of the Court and owes fiduciary duties to all parties concerned with the assets under receivership.¹⁴

23. As an officer of the Court, the standard required of a Receiver has been characterized as “one of meticulous correctness”.¹⁵ In *Alta. Treasury Branches v. Invictus Fin. Corp.*, Stratton J. (as he then was) said that the Receiver’s obligations “reach further than merely acting honestly and in good faith”.¹⁶ He quoted Wilson J. in *Fotti v. 777 Management Inc.* at paragraph 16:

...the Receiver is an officer of the Court and in his discharge of that office he may not, in the name of the Court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this Court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.¹⁷

24. The Receiver did not consult with the first mortgagee on the property or the third mortgagee, despite being fulcrum creditors in these proceedings. In particular, the Receiver did not consult or consider their interests in designing or implementing the sale process, in the selection of a real estate broker, the length of time on the market, the list price or as to an acceptable purchase price for this property. This is described by the Grant Thornton Report as an area of concern.¹⁸

¹⁴ *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, (2002), 59 O.R. (3d) 376 at para 15.

¹⁵ *Panamericana v. Northern Badger Oil & Gas Ltd.*, [1991] ABCA 181 at para 40; quoted with approval by Austin J.A. in *Toronto-Dominion Bank v. Usarco Ltd.*, (2001), 196 D.L.R. (4th) 448 at para. 29.

¹⁶ *Alberta Treasury Branches v. Invictus Financial Corporation*, 42 Alta. LR (2d) 181 at para 42.

¹⁷ *Fotti v. 777 Management Inc.*, [1981] 5 WWR 48 at para 16.

¹⁸ Report of Grant Thornton Limited, Motion Record Tab 1B, para 14

(C) *The Receiver has not discharged its duty to preserve the efficacy and integrity of the sale process*

25. The Receiver's duty to scrutinize and ensure that standards of integrity and fairness are met is not relieved or discharged simply because the main creditor has approved or agreed to the process. This is because the Receiver, as an officer of the Court, owes fiduciary duties to all parties interested in the assets.¹⁹

26. In *Sullivan v. Letnik*, Cameron J. described 'minimum' procedural requirements for conducting a sale of land:

A sale in a commercially reasonable manner requires marketing the sale to more than two people, if one of them is not likely to purchase. It requires a reasonable effort to find competing offers to purchase with a view to obtaining a fair price. This requires discussions with people familiar with the [industry] to identify potential buyers or groups which would include potential buyers. This should be followed by contacting these people to obtain expressions of interest and proving those interested a package of information sufficient to encourage bids. This normally takes more than 13 days.²⁰

27. The sale process for this property was only eight days. The Receiver accepted an offer for this property after a very brief exposure to the market. Eight days did not allow enough time for realization of the appropriate market value for this unique property.

28. Grant Thornton, in exercising its duties as court appointed receiver on mandates, typically executes listing agreements for a period of six months.²¹

¹⁹ *Royal Bank v. Denco Industries Ltd.*, [1988] BCWLD 1391 at para 7, quoted with approval in *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.*, [1992] BCJ No 2664 at para 23 and *Westcott Savings Credit Union v. Wachal*, [1989] BCWLD 177 at para 6.

²⁰ *Sullivan v. Letnik*, [2002] OJ No 4037 at para 33 and 35.

²¹ Report of Grant Thornton Limited, Motion Record Tab 1B, para 8

(D) There has been Unfairness in the Working out of the Process

29. Where there is unfairness in the sale process, the Receiver's duty will not have been met, even if the unfairness was not the Receiver's fault. It is respectfully submitted, the relevant question is not whether the Receiver is at fault, but whether the requisite duty has been discharged.²²

30. The Receiver did not consult with the first or third mortgagee on the property as to the sale process, the list price or an acceptable purchase price. The Receiver only consulted with the Applicants who are the second mortgagee on this property.

31. The Receiver ran a sale process and obtained a purchase price for the Birchmount Property which only would ensure that the Applicants are paid in full and gave no consideration to subsequent debt holders, including the fact that a longer sale process would almost certainly have brought greater value.²³

32. In addition, the Receiver has not explained why the marketing period on the Birchmount property was only eight days long.

PART IV – RELIEF REQUESTED

33. Based on the foregoing, it would be appropriate for this court to:

- (a) refuse the sale proposed by the Receiver;
- (b) discharge Rosen Goldberg Inc., as receiver;

²² Re Selkirk, [1987] O.J. No. 2006 at para 4-6, 10-11; Cameron v. Bank of Nova Scotia, [1981] N.S.J. No. 43 at para. 28, 37 and 39

²³ Report of Grant Thornton Ltd., Motion Record Tab 3; Affidavit of Troy Wilson Tab 1

- (c) appoint Grant Thornton Limited as receiver;
- (d) order a new sale process, including that the property be re-listed for a four to six-month listing period, such that the property may obtain a more commercially reasonable price; and
- (e) such further and other relief as this Honorable court deems just.

Dated: May 31, 2018



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SCHEDULE "A"**List of Authorities**

1. *Alberta Treasury Branches v. Invictus Financial Corporation*, 42 Alta LR (2d) 181
2. *Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership*, [1995] BCWLD 036
3. *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.*, [1992] BCJ No 2664
4. *Canadian Imperial Bank of Commerce v. Morrison*, [1985] NSJ No 52
5. *Cameron v. Bank of Nova Scotia*, [1981] NSJ No 43
6. *Fotti v. 777 Management Incorporated*, [1981] 5 WWR 48
7. *Jeanette B.B.Q. Ltée v. Caisse populaire de Tracadie Ltée*, [1991] NBJ No 556
8. *Panamericana v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181
9. *Polar Bear Water Distiller Mfg. Co. v. 590863 Alberta Ltd.*, [2001] AWLD 501
10. *Re Selkirk*, [1987] OJ No 2006
11. *Royal Bank v. Soundair Corp.*, [1991] OJ No 1137
12. *Salima Investments Ltd. v. Bank of Montreal*, [1985] AWLD 1418
13. *Skyepharm PLC v. Hyal Pharmaceutical Corp.*, [1999] OJ No 4300
14. *Sullivan v. Letnik*, [2002] OJ No 4037
15. *Toronto Dominion Bank v. Agriborealis Ltd.*, [1988] NWTJ No 26
16. *Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, [2002] OJ No 1398
17. *Toronto Dominion Bank v. Usarco Ltd.*, [1997] OJ No 2240

SCHEDULE "B"**Statutory Authorities**

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Good faith, etc.

247 A receiver shall

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

B&M HANDELMAN INVESTMENTS LIMITED -and-
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Proceedings commenced at Toronto

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