

**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, SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*,
R.S.O. 1990, C. C30**

B E T W E E N:

C & K MORTGAGE SERVICES INC.

Applicant

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.
(Sale Approval Motion returnable October 6, 2020 via Zoom videoconference at 11:15 am)

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TO: ATTACHED SERVICE LIST

FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.

PART I – OVERVIEW

1. This factum is filed in support of the Receiver’s motion for, *inter alia*, an Order approving the Camilla APS and Mateo APS and vesting the Debtors’ right, title and interest in those properties in and to the Camilla Purchasers and Mateo Purchasers, respectively.

PART II – SUMMARY OF FACTS

Background

2. By Order of the Honourable Justice Conway dated July 2, 2020 (the “**Appointment Order**”), Rosen Goldberg Inc. was appointed as receiver (“**Receiver**”), of all of the assets, undertakings and properties of the Respondents, Camilla Court Homes Inc. (“**Camilla**”) and Elite Homes Inc. (“**Elite**” and together with Camilla, the “**Debtors**”) acquired for, or used in relation to a business carried on by the Debtors, including the lands and premises municipally known as 180 Mateo Place Mississauga, Ontario (the “**Mateo Property**”) and 2371 Camilla Road, Mississauga, Ontario (the “**Camilla Property**” and together with Mateo Property, collectively, the “**Properties**”) and all proceeds thereof.¹

¹ Appointment Order, **Appendix A**, Receiver’s Report dated October 6, 2020 (“**Report**”) at para 1, Receiver’s Motion Record (“**Receiver’s MR**”).

3. The Appointment Order empowered and authorized the Receiver to, among other things, take possession and control of, market and sell, and apply for vesting orders to convey the Properties.

4. Camilla is the registered owner of the Properties. Elite was a Tarion-registered builder. The Properties are located within a residential common area condominium. At the time of the Receiver's appointment, the Debtors were building single family homes on each of the Properties. The home on the Mateo Property was very close to complete. The home on the Camilla Property was approximately 35% complete.²

The Camilla Property

5. Prior to the Receiver's appointment, the Camilla Property was subject to an agreement of purchase and sale between Elite and the Camilla Purchasers. Following its appointment, the Receiver notified the Camilla Purchasers that it intended to disclaim their pre-receivership agreement and would be considering its options, in terms of completing construction of the home, or selling the Camilla Property on an "as is, where is" basis. The Camilla Purchasers advised the Receiver that they were interested in purchasing the property and completing construction on their own.³

² Para 19, Report, Receiver's MR.

³ Para 6, Report, Receiver's MR.

6. The Receiver performed an analysis to assess the projected net realizations that would be achieved by completing the construction of the house as compared to selling the Camilla Property on an “as is, where is” basis. The Receiver concluded that there could be a marginal benefit to completing the construction of the home, but the benefit was insufficient to mitigate the risks of cost overruns, construction delays and a decline in the real estate market.⁴

7. After lengthy negotiations with the Camilla Purchasers, the Receiver entered into the Camilla APS on September 2, 2020. The purchase price is \$1,125,000.00, inclusive of HST. The Receiver is holding a deposit of \$75,000.00. The Camilla Purchasers have waived conditions and have agreed to close on October 7, 2020. The First Mortgagee, C & K Mortgages Services Inc. (the “**First Mortgagee**”), who holds a first mortgage (the “**First Mortgage**”) against the Properties and who will be suffering a shortfall, supports the sale.⁵

Mateo Property

8. Prior to the Receiver’s appointment, the Mateo Property was subject to an agreement of purchase and sale (the “**Tan APS**”) between Elite and Jeremy Tan (“**Mr. Tan**”), pursuant to which Mr. Tan had paid an unsecured deposit of \$400,000.00 directly to Elite.⁶

⁴ Receiver’s Analysis, **Appendix E**, Report at paras 19-21, Receiver’s MR.

⁵ Camilla APS, **Appendix F**, Report at para 22, Receiver’s MR.

⁶ Report, Paras 8 and 11, Receiver’s MR.

9. In early July of 2020, the Receiver notified Mr. Tan that it did not intend to complete the sale of the Mateo Property to him pursuant to his agreement of purchase and sale with Elite (the “**Tan APS**”). The Receiver’s disclaimer of the Tan APS prompted Mr. Tan to move to compel the Receiver to complete the Tan APS. On August 27, 2020, Justice Dietrich dismissed Mr. Tan’s motion (the “**August 27 Disclaimer Order**”).⁷

10. Her Honour dismissed the motion on the basis that Justice Conway was well aware of Mr. Tan’s concern and the real possibility that the Tan APS would be disclaimed, but Mr. Tan did not take steps to appeal the Appointment Order. Justice Dietrich also held that the equities did not justify subordinating the legal priority of the First Mortgage and rejected Mr. Tan’s argument that the Receiver breached its fiduciary duty to take into account the interests of the stakeholders in the Debtors’ estates in deciding to disclaim the Tan APS.

11. The Receiver undertook various work to complete and repair the home on the Mateo Property to enhance its saleability. When the work was substantially completed, the Receiver entered into a listing agreement with an experienced broker of residential properties in Mississauga. The listing price was \$1,898,000. The Receiver decided that no offers would be considered until September 10, 2020. The date was stipulated to protect Mr. Tan’s ten day right to file an appeal of the August 27 Disclaimer Order under the BIA, which expired on September 8, 2020.⁸

⁷ Her Honour’s Endorsement, **Appendix C**, Report; Disclaimer Order, **Appendix D**, Report at para 12, Receiver’s MR.

⁸ Para 25, Report, Receiver’s MR.

12. The Receiver's listing broker, among other things, staged the house with furniture and accessories, listed the property on MLS, prepared floor plans and measurements of each room, a brochure, a virtual tour and marketed the property on various websites. As a result of these activities, there were 34 showings and ultimately four offers were received.⁹

13. After reviewing the offers, the Receiver entered into the Mateo APS on September 11, 2020. The purchase price payable under the Mateo APS was the highest offered. The Mateo APS is unconditional. The Receiver is holding a deposit of \$200,000. The closing date is November 5, 2020, which will allow the Receiver to complete the remaining work required to obtain an occupancy certificate. The First Mortgagee, who will be suffering a shortfall, approves of the sale.¹⁰

14. On September 14, 2020, the Receiver was notified by Mr. Tan's counsel that he was finalizing instructions to appeal the August 27 Disclaimer Order. On September 17, 2020, Mr. Tan served a Notice of Motion in the Court of Appeal to extend the 10 day period prescribed for filing a notice of appeal under the *BIA* and for directions on whether leave is required to appeal the August 27 Disclaimer Order. Mr. Tan's motion is currently returnable on October 8, 2020.¹¹

⁹ Para 26, Report, Receiver's MR.

¹⁰ Redacted Mateo APS, **Appendix G**, Report at para 28; unredacted Mateo APS, **Confidential Appendix 2**, Report, Receiver's MR.

¹¹ Para13, Report, Receiver's MR.

15. The closing date under the Mateo APS is sufficiently far out that it will not interfere with Mr. Tan's motion to the Court of Appeal.¹²

16. The Receiver proposes to distribute the net sale proceeds from the Camilla Transaction and the Mateo Transaction to partially satisfy the First Mortgage.¹³ The Receiver obtained an opinion from Blaney McMurtry that the First Mortgage was valid.

17. The Receiver was recently advised that Garfinkle Biderman LLP, who acted for the First Mortgagee in registering the First Mortgage and advancing funds thereunder, is holding \$223,536 in trust on account of holdback pursuant to the Construction Act. Based on the Receiver's review, the quantum of funds held back appears to exceed the aggregate lien claims. Prior to making any further distributions, the Receiver will prepare an analysis of the liens claims and move for directions. In the meantime, the funds held by Garfinkle Biderman LLP should be controlled by the Receiver.¹⁴

18. The development on which the Properties are situated is located within a registered common area condominium. The Receiver understands the condominium corporation was managed by the Debtors and that there are significant arrears of fees owing to the condominium corporation. The Receiver has asked the Debtors' principal to provide pertinent information relating to the condominium corporation, including banking records, most of which has been

¹² Para 30, Report, Receiver's MR.

¹³ Para 31, Report, Receiver's MR.

¹⁴ Para 32, Report, Receiver's MR.

received. The Receiver is working towards establishing a proper accounting and operation of the condominium corporation.¹⁵

PART III – ISSUES

19. The central issue on this motion is whether the Camilla APS and the Mateo APS should be approved.

PART IV – LAW AND ARGUMENT

20. The test to be applied in deciding whether a receiver has acted properly in the sale of property is set out in *Royal Bank v. Soundair Corp.* The factors to be considered are:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.¹⁶

21. Courts are reluctant to second-guess the considered business decisions made by a receiver in arriving at its recommendations. Only in exceptional circumstances, such as where there seems

¹⁵ Para 34, Report, Receiver's MR.

¹⁶ [*Royal Bank of Canada v. Soundair Corp.*](#), 1991 CanLII 2727 (ON CA), at p. 9.

to be some unfairness in the process or where there are substantially higher offers which would tend to show that the sale was improvident, will a court intervene and proceed contrary to the recommendation of a receiver.¹⁷

22. A receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not to with the benefit of hindsight. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price.¹⁸

23. In the present case, each element of the *Soundair* test has been met:

- a) Sufficient Efforts to Obtain Best Price: The Receiver indicates that it does not believe further exposure of the Properties will achieve superior realization. As noted above, the Receiver performed an analysis to assess the projected net realizations that would be achieved by completing the construction of the house as compared to selling the Camilla Property on an "as is, where is" basis. The Receiver concluded that there could be a marginal benefit to completing the construction of the home, but the benefit was insufficient to mitigate the risks of cost overruns, construction delays and a decline in the real estate market. Hence, the Receiver entered into the Camilla APS.
- b) The interest of all parties: The Receiver has reported to all interested parties throughout the marketing process with respect to its progress and all parties have had an opportunity to participate. The interests of the first mortgagee are of primary importance and it supports both of the proposed transactions. It is also important to consider the interest of the purchasers who have invested time and money in the negotiation of the Camilla APS and Mateo APS. Finally, it is in the best interest of all parties to finalize the sale of the Properties promptly. The indebtedness owing by the Debtors to the First Mortgagee is increasing at a significant rate each day, as interest accrues on the outstanding debt as are professional fees.

¹⁷ [Royal Bank of Canada v. Soundair Corp.](#), 1991 CanLII 2727 (ON CA), at p. 9.

¹⁸ [Skypharma PLC v. Hyal Pharmaceutical Cop.](#), 1999 CanLII 15007 at para 4.

- c) The efficacy and integrity of the process: There has been no unfairness in the process described in the Second Report. Further, there will be no unfairness caused as a result of the approval of those agreements. Rather, it would be unfair to the purchasers and undermine the public confidence in the receivership sale process, if the court were to refuse to approve the Receiver's recommendation in the circumstances.

PART V - ORDER REQUESTED

24. The Receiver respectfully requests that its motion be granted and an Order issued approving the Camilla APS and the Mateo APS, and, upon completion of the transactions, vesting title to the respective properties in the respective purchasers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of October, 2020.

per:



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SCHEDULE A

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
2. *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007

SCHEDULE "B"
RELEVANT STATUTES

C & K MORTGAGE SERVICES INC.
Applicant

-and- **CAMILLA COURT HOMES INC. et al**
Respondents

Court File No. CV-20-00643021-00CL

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PROCEEDING COMMENCED AT TORONTO

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