

Court File No.:

COURT OF APPEAL FOR ONTARIO

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

NOTICE OF APPEAL

THE APPELLANT, WORLD FINANCE CORPORATION, APPEALS to the Court of Appeal from the Order and decision of The Honourable Mr. Justice Dunphy (the “**Motions Judge**”) of the Ontario Superior Court of Justice, Commercial List, dated June 1, 2018, approving the sale (the “**Sale Approval Order**”) by Rosen Goldberg Inc. in its capacity as receiver (the “**Receiver**”) over the real property municipally known as 4 Birchmount Road, Toronto, Ontario (the “**Birchmount Property**”) made at Toronto.

THE APPELLANT ASK THAT:

1. The Sale Approval Order be set aside and that an order be made requiring the Receiver to re-commence the marketing and listing process recommended by the real estate agent engaged by the Receiver, Re-Max Hallmark Corbo & Kelos Group Realty Ltd. (the “**Receiver’s Real Estate Agent**”);
2. Costs of this appeal be granted and payable to the Appellant within 10 days; and
3. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

4. The Receiver is an officer of the court who has a fiduciary duty to all claimants with an interest in the debtor’s property;
5. In this circumstance, the Receiver failed to act fairly and with impartiality, including by only considering the interest of the applicants in the receivership proceeding;
6. In conducting a sale process and accepting a bid for the Birchmount Property, the Receiver failed to consider the interests of the Appellant, a fulcrum secured creditor holding the third mortgage on the Birchmount Property, and who is owed approximately \$6.7 million;

7. Despite being a fulcrum creditor, the Receiver did not, at any time, consult with the Appellant as to:
 - (a) the development of the sale and marketing process for the Birchmount Property;
 - (b) the determination of the list price for the Birchmount Property, which would take into account the interests of the Appellant;
 - (c) any offers received in respect of the Birchmount Property; or
 - (d) the ultimate purchase price accepted by the Receiver for the Birchmount Property;

8. The Receiver, instead, only consulted with the applicants with respect to the sale of the Birchmount Property.

9. The Receiver accepted an offer for the Birchmount Property after only marketing it for 8 days. This is despite the fact that:
 - (a) the Receiver's Real Estate Agent recommended that the Receiver conduct a 60-75-day sale and marketing process in order to provide maximum exposure of the property to the marketplace; and
 - (b) the only times the Receiver advertised the property in the *Globe & Mail* newspaper was on the date of accepting the offer and one week following acceptance of the offer;

10. The accepted offer for the Birchmount Property provides for a purchase price that is lower than the taxed assessed value of the property and was over 10% less than the list price. The acceptance of this offer results in the Appellant receiving no recovery on account of its indebtedness;

The Decision of the Motions Judge

11. In approving the sale of the Birchmount Property, the Motions Judge determined that the Receiver had met the “*Soundair*” test required to be met in order to approve a sale of assets by a receiver;
12. The Motions Judge, however, committed a number of errors that warrant the intervention of this Honourable Court. In particular, the Motions Judge erred by:
 - (a) failing to properly apply the “*Soundair*” test;
 - (b) misapprehending the evidence;
 - (c) failing to consider the Receiver's failure to fulfill its fiduciary obligations to the Appellant and its duty to act impartially;
 - (d) failing to apply the appropriate burden of proof; and
 - (e) such further and other grounds as counsel may advise and this Honourable Court permit;

Automatic Right of Appeal

13. An automatic right of appeal lies to the Court of Appeal from any order or decision of a judge under section 193(b) of the *Bankruptcy & Insolvency Act* (the “**BIA**”) if the order or decision of a judge is likely to affect other cases of a similar nature in the proceedings;
14. Here, the Motion Judge’s decision will affect other cases the same parties in related and concurrent proceedings because:
 - (a) Rosen Goldberg Inc. is also the Court-appointed receiver in the receivership proceedings of Annie Yeretsian et al. in Court File No: CV-18-592103-00 CL (the “**Yeretsian Receivership Proceedings**”) and in the receivership proceedings of Skymark Properties 1 Corporation, bearing Court File No: CV-593698-00CL (the “**Skymark Receivership Proceedings**”);
 - (b) in each of the Yeretsian Receivership Proceedings and the Skymark Receivership Proceedings, the Appellant or its affiliates are either owners with an economic interest or are fulcrum secured creditors in respect of the properties subject to each receivership proceeding;
 - (c) the applicants in each of the three referenced proceedings, and their legal counsel, overlap;
 - (d) the Receiver has only considered the interests of the applicants;

- (e) the Receiver has failed to consider the interests of all stakeholders as required;
- 15. the Receiver intends to bring further motions to approve the sale of additional properties in the Yeretsian Receivership Proceedings and the Skymark Receivership Proceedings. Accordingly, the decision of the Motions Judge subject to this Notice of Appeal, will affect the Appellant and its affiliates in those proceedings;

Leave to Appeal, if Necessary

- 16. In the alternative, should section 193(b) of the *BIA* not apply, the Appellant seeks leave to appeal the decision of the Motions Judge pursuant to section 193(e) of the *BIA*;
- 17. Pursuant to section 193(e) of the *BIA*, an appeal lies to the Court of Appeal by leave of a judge of the Court of Appeal;
- 18. Granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way;
- 19. Here, leave should be granted because:
 - (a) The appeal raises issues of general importance to the practice in both bankruptcy and insolvency matters, as well as to the administration of justice as a whole;
 - (b) the appeal is *prima facie* meritorious;

- (c) additional delay in the disposition of the Birchmount Property would not unduly hinder the progress of these receivership proceedings; and
- (d) such further and other grounds as counsel may advise following review of the reasons of the Motions Judge once finalized and released and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- 20. Sections 6(1)(b) and 134 of the *Courts of Justice Act* and Rule 61 of the *Rules of Civil Procedure*;
- 21. The Order being appealed from is final;
- 22. Pursuant to section 193(b) of the *BIA*, leave to appeal is not required;
- 23. In the alternative, if section 193(b) of the *BIA* does not apply, section 193(e) of the *BIA*; and
- 24. Such further and other grounds of jurisdiction as counsel may advise and this Honourable Court permit.

June 7, 2018

BRAUTI THORNING ZIBARRAS LLP

161 Bay Street, Suite 2900
Toronto, ON M5J 2S1

Steven Weisz

LSUC No. 32102C

sweisz@btzlaw.ca

P. James Zibarras

LSUC No. 48856F

jzibarras@btzlaw.ca

Caitlin Fell

LSUC No. 60001H

cfell@btzlaw.ca

Tel: 416.362.4567

Fax: 416.362.8410

**Lawyers for the Appellant,
World Finance Corporation**

TO: THE SERVICE LIST

B&M HANDELMAN INVESTMENTS LIMITED et al
Applicants

-and-

Court File No.

CHRISTINE DROTOS et al
Respondents

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

NOTICE OF APPEAL

BRAUTI THORNING ZIBARRAS LLP

161 Bay Street, Suite 2900
Toronto, ON M5J 2S1

Steven Weisz
LSUC No. 32102C
sweisz@btzlaw.ca

P. James Zibarras
LSUC No. 48856F
jzibarras@btzlaw.ca

Caitlin Fell
LSUC No. 60001H
cfell@btzlaw.ca

Tel: 416.362.4567
Fax: 416.362.8410

**Lawyers for the Appellant,
World Finance Corporation**