

**ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

BOBCAYGEON SHORES DEVELOPMENTS LTD.

Respondent

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990.
C. C-43**

**FACTUM OF THE RECEIVER
(Approval of Sale)**

June 25, 2019

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Lawyers to msi Spergel inc., in its capacity Court-
Appointed as Receiver of Bobcaygeon Shores
Developments Ltd

PART 1- OVERVIEW

1. Pursuant to an Order (the “**Receivership Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on May 30, 2018 under the *Bankruptcy and Insolvency Act* (the “**BIA**”) and the *Courts of Justice Act*, msi Spergel Inc. was appointed as receiver and receiver and manager (in such capacities, the “**Receiver**”) of the property, assets and undertakings of Bobcaygeon Shores Development Ltd. (the “**Debtor**”).
2. The Debtor’s sole asset is a parcel of vacant residential development land comprising 82.341 acres on the south side of the Bobcaygeon River, within the Village of Bobcaygeon, within the rural City of Kawartha Lakes (the “**Property**”).
3. This factum is filed by the Receiver in connection with its motion returnable on June 27, 2019, for an Order seeking, among other things,
 - (a) approval of the sale of the Property pursuant to an agreement of purchase and sale (the “**Sale Agreement**”) dated as of May 8, 2019 between the Receiver and 2696948 Ontario Inc., as purchaser (the “**Purchaser**”);
 - (b) vesting in the Purchaser, or as it may direct, the Debtor’s right, title and interest in and to the Property, free and clear of any claims and encumbrances;
 - (c) authorizing and directing the Receiver to distribute the proceeds from the sale transaction to: (i) Bank of Montreal (“**BMO**”), the secured creditor and applicant in these proceedings on account of any Receiver borrowings; (ii) CBRE Limited, on account of any real estate commissions; (iii) BMO on account of its secured indebtedness; (iv) the proven claims, if any, of any unsecured creditors; and (v) the

Debtor to the extent that there are any surplus proceeds less any amounts incurred by the Receiver for the remainder of the receivership proceedings;

- (d) approving the fees and disbursements of the Receiver and the counsel to the Receiver; and
 - (e) effective upon the filing of a certificate by the Receiver certifying that all outstanding matters to be attended to in connection with the Receivership have been completed to the satisfaction of the Receiver, discharging the Receiver and releasing the Receiver from any and all liability on the terms of the draft Order submitted to this Honourable Court.
4. Given that the Property is the sole asset of the Debtor, the approval by the Court of the Sale Agreement and the transactions contemplated therein (the “**Transaction**”), is an important piece of these proceedings.
5. For the reasons set out herein and in the First and Final Report of the Receiver dated June 14, 2019, as supplemented, the Receiver recommends and requests that this Honourable Court grant the relief, as set out in the Receiver’s Notice of Motion and draft Order.

PART II- FACTS

Sale Process

6. Prior to the Receiver’s appointment, the Property was marketed for sale by the Debtor for a number of years through more than one MLS listings. However, no sale of the Property was ever consummated.

Record, Tab 2; p. 14]

7. Following the appointment of the Receiver, on or about June 12, 2018, the Receiver engaged the services of Colliers International Realty Advisors Inc. (“**Colliers**”) and Cushman and Wakefield ULC (“**Cushman**”) to conduct full narrative appraisals of the Property.

First and Final Report of the Receiver, at section 3.0.1 [Motion Record, Tab 2; p. 16]

8. At that time, the Property was subject to a draft plan, approved by the City of Kawartha Lakes, which provided for the development of the Property as a residential subdivision of 271 single-family detached dwellings within five phases, as well as a 0.95-acre commercial block (the “**Draft Plan**”).

First and Final Report of the Receiver, at section 1.0.2 [Motion Record, Tab 2; p. 14]

9. The appraisals initially obtained by the Receiver were conducted at a time when the Draft Plan was valid (the approval for the Draft Plan expired December 31, 2018 and was not renewed by the City). The Receiver received the appraisals on or about the end of July, 2018.

First and Final Report of the Receiver, at section 1.0.4 [Motion Record, Tab 2; p. 14]

10. Thereafter, the Receiver solicited listing proposals from CBRE Limited (“**CBRE**”), Colliers and Cushman. Ultimately, the Receiver decided to list the Property with CBRE given CBRE’s prior involvement with the Property and given that its commission rate was the lowest of the three listing agents.

First and Final Report of the Receiver, at section 3.0.3 [Motion Record, Tab 2; p. 16]

11. CBRE, with the Receiver, developed a marketing and sales process to solicit offers to maximize the value of the Property (the “**First Sales Process**”). The First Sales Process comprised of the creation of a data room by CBRE that contained sales and marketing

materials that were available online and were emailed to numerous prospective purchasers.

First and Final Report of the Receiver, at section 3.0.4 [Motion Record, Tab 2; p. 16]

12. The First Sales Process elicited several enquiries, the execution of several confidentiality agreements and ultimately resulted in two offers.

First and Final Report of the Receiver, at section 3.0.4 [Motion Record, Tab 2; p. 16]

13. The Receiver accepted a conditional offer on October 31, 2018. The offer was conditional on the proposed purchaser's due diligence of the Property. This offer however, was ultimately withdrawn by the bidder in December 2018. At that time, the Receiver and CBRE decided to suspend the listing of the Property until the spring of 2019.

First and Final Report of the Receiver, at section 3.0.5 [Motion Record, Tab 2; p. 17]

14. As noted above, the City of Kawartha Lakes refused to renew the Draft Plan with respect to the Property when it expired on December 31, 2018. In discussions with CBRE, it was determined that the failure to renew the Draft Plan had a severe impact on the realizable value of the Property. Accordingly, the Receiver sought revised appraisals from both Colliers and Cushman taking into account the absence of the approval by the City of the Draft Plan.

First and Final Report of the Receiver, at section 4.0.1 [Motion Record, Tab 2; p. 17]

15. On or about April 12, 2019, the Receiver entered into a revised listing agreement for the Property with CBRE (the "**Second Sale Process**").

First and Final Report of the Receiver, at section 4.0.2 [Motion Record, Tab 2; p. 17]

16. In the Second Sale Process, CBRE again created a data room that contained sales and

marketing materials that were available online and were emailed to prospective purchasers. These marketing efforts elicited several enquiries and resulted in the signing of several confidentiality agreements and the receipt of five offers.

First and Final Report of the Receiver, at section 4.0.4 [Motion Record, Tab 2; p. 18]

17. On or about May 29, 2019, the Receiver accepted the offer from the Purchaser that resulted in the execution of the Sale Agreement, subject to Court approval.

First and Final Report of the Receiver, at section 4.0.5 [Motion Record, Tab 2; p. 18]

Sealing Order

18. To protect the Receiver's ability to negotiate with other parties if the Transaction does not close as intended, the Receiver is requesting that Confidential Appendices "1-5" to the First and Final Report be sealed until the Receiver files the Receiver's Sale Certificate.

Proposed Distribution

19. As of July 10, 2019, the Debtor is projected to be indebted to BMO in the amount of \$1,237,102.61, inclusive of the Receiver's borrowings.

Supplement to the First and Final Report of the Receiver, at section 1.06 [Supplemental Motion Record, Tab A].

20. The Receiver obtained a legal opinion from its independent legal counsel stating that, subject to the usual qualifications and assumptions, BMO's security with respect to Bobcaygeon's indebtedness to BMO is valid and enforceable.

First and Final Report of the Receiver, at section 10.0.1 [Motion Record, Tab 2; p. 20]

21. From the adjusted sale proceeds, the Receiver proposes to pay any valid encumbrance ranking in priority to the security held by BMO against the Property, the Receiver's borrowings, the fees and disbursements of the Receiver and its counsel (both to-date and accrued to completion), the commission payable to CBRE and the balance due to BMO accrued to the date of payout in accordance with the statements provided by BMO to the Receiver.

First and Final Report of the Receiver, at section 10.0.3 [Motion Record, Tab 2; p. 20]

22. The Receiver believes that there is no liability owing to Canada Revenue Agency (the "CRA") by the Debtor. The Receiver has received written confirmation that the Debtor does not appear to have a debt owing to CRA on account of HST or withholding tax obligations which could have priority over BMO. The Receiver believes there is no liability owing to CRA based on a review of financial statements of the Debtor for the fiscal year ending December 31, 2019. The fact the sole assets of the Debtor is vacant land, and that it has no employees or revenue which could attract HST or corporate tax.

First and Final Report of the Receiver, at section 10.0.4 [Motion Record, Tab 2; p. 20]

Supplement to the First and Final Report of the Receiver, at section 1.05 [Supplemental Motion Record, Tab A].

23. Once the amount owing to any unsecured creditors, if any, have been quantified and paid, and upon completion of the administration of the receivership estate, the Receiver proposes to pay any surplus remaining in the estate to the Debtor. As the Property comprises vacant land, is the sole asset of the Debtor and there are no employees, the Receiver does not anticipate the existence of any unsecured claims.

First and Final Report of the Receiver, at section 10.0.6 [Motion Record, Tab 2; p. 21]

Receiver's Fees & Disbursements

24. The fees and disbursements of the Receiver and its counsel are summarized in the First and Final Report.
25. Detailed invoices are appended to the First and Final Report. The fees of the Receiver and its counsel were incurred in connection with the administration of this receivership.

First and Final Report of the Receiver, at section 7.0 and 8.0 [Motion Record, Tab 2; p. 19]

26. For the last year from May 30, 2018 to and including June 7, 2019, the amount of \$66,658.70 inclusive of disbursements and HST was charged by the Receiver. This represents a total of 124.3 hours at an average rate of \$474.58 per hour.

First and Final Report of the Receiver, at section 7.0 and 8.0 [Motion Record, Tab 2; p. 19]

27. For the period from September 17, 2018 to and including June 7, 2019, the amount of \$9,999.11 inclusive of disbursements and HST was charged by counsel to the Receiver. This represents a total of 13.80 hours at an average rate of \$640.58 per hour.

First and Final Report of the Receiver, at section 7.0 and 8.0 [Motion Record, Tab 2; p. 19]

PART III- THE ISSUES

28. The issues before this Court, and addressed below, are:
 - (a) Should this Court should approve the Transaction and grant a vesting order?

- (b) Should this Court approve the Distribution?
- (c) Should this Court seal the order summary and the unredacted APA on the terms requested?
- (d) Should this Court approve the fees and disbursements of the Receiver and its counsel that were incurred in connection with the administration of the receivership?

PART IV- LAW AND ARGUMENT

This Court should approve the Transaction and Grant a vesting order

29. Section 243 of the BIA provides jurisdiction to the Court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser.

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508, para 85, Receiver's Brief of Authorities, Tab 1.

30. In addition, receivers have the powers set out in the orders appointing them. The Receivership Order in these proceedings provides for the power of the Receiver to sell the property of the Debtor.

Receivership Order, Section 3(j).

31. Section 100 of the *Courts of Justice Act* (Ontario) also provides the Court with the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 100.

32. It is settled law that where a Court is asked to approve a transaction in a receivership context, the Court is to consider the following principles (collectively, the "***Soundair Principles***"):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp., (1991), 4 O.R. (3d) 1 (C.A.), Receiver's Brief of Authorities, Tab 2.

Skyepharm PLC v. Hyal Pharmaceutical Corp., (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), Receiver's Brief of Authorities, Tab 3.

33. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a Court is to grant deference to the recommendation of a receiver to sell a debtor's assets. Only in such exceptional circumstances will a Court intervene and proceed contrary to the recommendation of its officer.

Royal Bank of Canada v. Soundair Corp., (1991), 4 O.R. (3d) 1 (C.A.), Receiver's Brief of Authorities, Tab 2, Paras. 14 and 21.

Skyepharm PLC v. Hyal Pharmaceutical Corp., (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), Receiver's Brief of Authorities, Tab 3, Paras. 3 and 4.

Integrated Building Corp. v. Bank of Nova Scotia (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.), Receiver's Brief of Authorities,

Tab 4, Paras. 1-3.

Battery Plus Inc. (Re.), [2002] O.J. No. 731, Receiver's Brief of Authorities, Tab 5, Paras. 2-3 and 22-23.

34. This Court should approve the Transaction, the Sale Agreement and grant a vesting order based on the application of the *Soundair* Principles to the present case:

- (a) ***Sufficient effort was made to obtain the best price.*** The goal of the First Sale Process and the Second Sale Process was to obtain the best price possible. With the implementation of both Sale Processes and given that the Property was marketed prior to the appointment of the Receiver for many years, the market was canvassed extensively and parties that may have had an interest were given a reasonable time to review the opportunity, conduct due diligence, and make an offer. The Receiver's view is that the price achieved is fair and reasonable given the time on the market and the fact that the Draft Plan was not renewed by the City. In the circumstances, any further marketing efforts are unlikely to result in a superior purchase price.
- (b) ***Interests of all parties have been served.*** The Transaction provides for the best outcome in the circumstances, for all parties with an economic interest in these proceedings, as it will result in a payment in full of the indebtedness owed to the sole secured creditor, BMO, and pending the determination of amounts, if any, owing to to any unsecured creditors, there will amounts available for the Debtor.
- (c) ***The process was run with integrity.*** The Property was extensively marketed. All interested parties were given the opportunity to participate in both the First Sale

Process and the Second Sale Process and were provided with access to data rooms upon executing the appropriate confidentiality arrangements. The Sale Agreement was negotiated in good faith and is the best and highest price under the circumstances. No one has objected to either the First Sale Process or the Second Sale Process and BMO supports the approval of the Transaction.

- (d) ***There was no unfairness.*** The Receiver implemented both the First and Second Sale Process with the assistance of CBRE as listing agent. The Receiver obtained the necessary appraisals for the Property had direct involvement in negotiating the terms and conditions of the Sale Agreement, and believes they are fair and reasonable under the current circumstances.

35. Based on the foregoing, it is respectfully submitted that the Transaction satisfies the *Soundair* Principles and it is appropriate in the circumstances for the Transaction to be approved by this Honourable Court.

This Court should approve the Interim Distribution

36. Orders granting distributions are routinely granted by courts in receivership proceedings.
37. In *Re Abitibibowater Inc.*, Justice Gascon considered a number of factors in deciding whether to approve a distribution under the *Companies' Creditors Arrangement Act* that is equally applicable to a receivership proceeding, including whether the payee's security is valid and enforceable and whether the distribution will leave the estate with sufficient liquidity.

Receiver's Brief of Authorities, Tab 6, at para. 75.

38. In this circumstance, BMO's security has been reviewed by counsel to the Receiver and subject to the standard assumptions and qualifications contained in the opinion of Brauti Thorning LLP, the security granted by the Debtor creates a valid and enforceable security interest in the Property.
39. Following the proposed distribution to BMO, there will be sufficient liquidity to fund any remaining receivership costs and the proven claims of any unsecured creditors if any.
40. As the Property comprises undeveloped lands, the Property is the sole asset of the Debtor, and the fact that there were no employees of the Debtor, it is not likely that there are any unsecured claims. To the extent that there are residual funds after payment to BMO, as well as, any other costs of the Receivership and related to the Transaction including any claims that rank in priority to BMO and any unsecured creditors, the Receiver intends to distribute such funds to the Debtor as approved by this Court.

This Court should seal the offer summary and the unredacted Sale Agreement on the terms requested

41. The Receiver requests that the Confidential Appendices be sealed until further order of this Court.
42. Pursuant to section 137(2) of the *Courts Justice Act*, R.S.O. 1960090, c. C.43, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.
43. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*,

held that a sealing order may be granted when:

- (a) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
- (b) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), [2002]
2 S.C.R. 522, Receiver's Brief of Authorities, Tab 7, Para. 53.

- 44. Sealing the summary of the original and revised appraisals, the offer summary for the Second Sale Process and the unredacted version of the Sale Agreement until further Order of this Court is necessary to preserve the integrity of the sales process in these proceedings and any subsequent attempts to market and sell the Property (in the event that the Transaction does not close) and to avoid any prejudice that might be caused by publicly disclosing the confidential and commercially-sensitive information contained therein. There is no other reasonable alternative to prevent this information from becoming publicly available.
- 45. The Receiver is not aware of any party that will be prejudiced if the information is sealed, in light of the terms of the Sale Agreement that are being publicly disclosed.

This Court should approve the fees and disbursements

- 46. Pursuant to the Receivership Order, the fees and disbursements of the Receiver and its legal counsel are authorized to be paid on a periodic basis subject to any final approval as ordered by the Court.

47. The Receiver is seeking approval of the Court for the fees and disbursements of the Receiver and its legal counsel.
48. The accounts meet the technical requirements established by prior case law:
- (a) the accounts disclose the name of each person who rendered services, the rate charged and the total charges for each of the categories of services rendered;
 - (b) the accounts are in a form that can be easily understood by those affected by the receivership or by the judicial officer required to assess the accounts; and
 - (c) both the Receiver's and its counsel's accounts are verified by an affidavit.

Confectionately Yours Inc., Re, 2002 CarswellOnt 3002 (C.A.),
Receiver's Brief of Authorities, Tab 8, at paras. 37-38.

49. A Receiver is entitled to be paid its fees and disbursements, along with those of its counsel, where the amount charged is fair and reasonable in the circumstances.
50. Courts will consider the following factors in making a determination to approve fees: (a) the nature, extent and value of the assets handled; (b) the complications and difficulties encountered; (c) the degree of assistance provided by the company, (d) the receiver's knowledge, expertise and skill, (e) the diligence displayed, (f) the responsibilities assumed; (g) the results of the Receiver's efforts and (h) the cost of comparable services when performed in a prudent and economical manner.

Confectionately Yours Inc., Re, 2002 CarswellOnt 3002 (C.A.),
Receiver's Brief of Authorities, Tab 8, at para. 42.

51. For the last year from May 30, 2018 to and including June 7, 2019, the amount of \$66,658.70 inclusive of disbursements and HST was charged by the Receiver. This represents a total of 124.3 hours at an average rate of \$474.58 per hour.
52. For the period from September 17, 2018 to and including June 7, 2019, the amount of \$9,999.11 inclusive of disbursements and HST was charged by counsel to the Receiver. This represents a total of 13.80 hours at an average rate of \$640.58 per hour.
53. The hourly rates of the Receiver and its counsel were reasonable in light of the services required and the circumstances of the Receivership process. With respect to legal services, the services were carried out by lawyers with the appropriate level of experience and expertise.

PART V- ORDER REQUESTED

54. For the reasons set forth herein and in the First and Final Report, the Receiver respectfully requests the granting of the Orders substantially in the forms contained in the Receiver's motion record as may be amended and presented at the return of this Motion.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned below the text of item 54.

BANK OF MONTREAL
Applicant

and

BOBCAYGEON SHORES DEVELOPMENT LTD.
Respondent

Court File No. CV-18-597299-00CL

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