



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-22-00685439-00CL DATE: 4 July 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: THE TORONTO DOMINION BANK v. 2314251 ONTARIO INC. ET AL.

BEFORE: JUSTICE CAVANAGH

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Miranda Spence	Applicant - TD Bank	mspence@airdberlis.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jonathan Rosenstein	Respondents – 2314251 Ontario Inc.	jrosenstein@rosensteinlaw.ca

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Melinda Vine	Receiver – msi Spergel Inc.	mvine@harrisonpensa.com
Mukul Manchanda (Receiver)		mmanchanda@spergel.ca

ENDORSEMENT OF JUSTICE CAVANAGH:

Msi Spergel inc., in its capacity as court-appointed Receiver of the assets, undertakings and property of 2314251 Ontario Inc. (the "Debtor") pursuant to an order of this Court dated November 15, 2022 (the "Appointment Order"), moves for an order (a) approving the First Report of the Receiver dated June 5, 2023 and the activities and conduct of the Receiver set out therein; (b) increasing the Receiver's Borrowings Charge under the Appointment Order from \$300,000 to \$400,000; (c) approving the sales and marketing process in respect of the Property (as defined in the Appointment Order) including the Real Property (as defined in the Appointment Order); (d) approving the Statement of Receipts and Disbursements as detailed in the First Report; and (e) approving the fees of the Receiver and its counsel and payment of same.

The Toronto-Dominion Bank ("TD Bank") is the senior secured creditor of the Debtor. Prior to the appointment of the Receiver, the Debtor operated a gas station from the Real Property which is owned by the Debtor.

This motion was scheduled to be heard on June 14, 2023. On that day, the Respondents requested an adjournment of the motion for four weeks because they had not received the amount of notice required by the Rules and they wished time to consider their position after reviewing the motion materials in more detail. The Receiver opposed the requested adjournment and submitted that environmental remediation is needed for the Real Property and there is a risk of migration of contaminants if the remediation is not undertaken immediately. I granted the requested adjournment.

On July 3, 2023, the Respondents uploaded to CaseLines an offer to purchase the Real Property in accordance with the terms of an agreement of purchase and sale by 1000581554 Ontario Inc. ("554") for a purchase price calculated based on its best estimate of all amounts outstanding and owing by 2314251 Ontario Inc. to all valid creditors. The covering letter that accompanied this offer from the lawyer for 554 states that 554 is prepared to adjust the purchase price as may be required to account for any additional amounts which may be validly owing to creditors by 2314251 Ontario Inc. Counsel for 554 attached to his letter a trust ledger showing proof of funds and a direction executed by 554 with respect to the funds held in trust. The covering letter states that the deposit provided for by the offer shall be paid upon acceptance of the offer and will be paid with funds separate from and in addition to the amount currently held in trust.

The Respondents, through a letter from their counsel, confirmed to the Receiver that they consent to the sale to 554. Counsel asked the Receiver to amend its motion to seek approval of the sale to 554. Given the timing of this offer, counsel for the Respondents offered to adjourn the hearing of the Receiver's motion to allow the Receiver to consider the matter. Counsel for the Respondents advised in his letter that if the Receiver is not inclined to amend the motion to seek approval of the sale to 554, his instructions are to oppose the Receiver's motion.

At the hearing, counsel for the Receiver advised that the Receiver does not need more time to consider the matter or to negotiate terms of a sale to 554, and that it wishes to proceed with the hearing of the motion. The Receiver is not willing to amend the relief claimed on this motion to seek approval of a sale to 554. Counsel for the Applicant, TD Bank, supports the Receiver's position and asks that the motion proceed without a further adjournment.

Counsel for the Respondents submits that the offer from 554 (in the form presented or in a form to be negotiated to provide for a process for payment of bona fide unsecured creditors) is preferable to a process involving environmental remediation of the Real Property and a sales process through a listing broker on the multiple listing service in accordance with a marketing plan of the listing agent because a sale to 554 would result in payment of the claims of secured and unsecured creditors, the cost of environmental clean up would be saved, the cost of real estate commissions would be saved, and the costs of the Receiver and its counsel during the clean-up and sales process would be saved. The Respondents submit that these costs are for their account because if they are incurred and the proceeds of sale are insufficient to satisfy the claims of creditors, they will suffer the shortfall (the individual Respondents are personal guarantors).

The Receiver submits that environmental remediation of the Real Property is required and that, in the Receiver's judgment, the interests of all stakeholders will be best promoted through a process that involves necessary environmental remediation of the Real Property and a sales process designed to achieve the highest sale price for the Real Property after exposure to the marketplace. The Receiver submits that the Respondents have had ample time to put themselves into a position to move to discharge the Receiver and they have failed to do so. The Receiver is not willing to enter into negotiations with 554 exclusively with a view to completing a sale to 554 outside of a process that involves environmental remediation and exposure of the Real Property to the marketplace. The Receiver recommends that necessary environmental remediation be approved and proceed and that the recommended sales process be approved and implemented.

When reviewing the recommendations of a court-appointed receiver in connection with a sale, the courts should exercise considerable caution and should only interfere in special circumstances. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. See *Regal Constellation Hotel Ltd. (Re)*, [2004] O.J. No. 2744 (C.A.).

I am not satisfied that the Receiver's recommendations are ill-considered or inappropriate having regard to the interests of all stakeholders. This is not one of the exceptional cases where the court should second-guess the Receiver's considered judgments. I decline to order that the Receiver depart from its recommended course of action and negotiate with 554 with a view to completing a sale to 554 (subject to court-approval). Of course, 554 is at liberty to participate in the sale process and to offer to purchase the Real Property in that process.

I am satisfied that the Receiver's activities in these proceedings have been undertaken in furtherance of its duties and are consistent with the Receiver's powers as set out in the Appointment Order. I am satisfied that the Receiver's activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible. I approve the activities of the Receiver as set out in the First Report.

I am satisfied that the environmental remedial work described in the Receiver's First Report is necessary in order to obtain optimal value upon the sale of the Real Property.

When a Court is asked to approve a transaction in a receivership context, the court is to consider: (i) whether the party made a sufficient effort to obtain the best price and to not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which the party obtained offers; and (iv) whether there has been unfairness in the working out of the process. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ON CA), at para. 16; *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*, [2012] O.J. No. 1165, at para. 6. I am satisfied that the proposed sale process satisfies the *Soundair* factors considered in the context of a motion to approve a sale process. In this regard, I accept the submissions at para. 34 of the Receiver's factum.

I am satisfied that the Receiver's borrowing charge should be increased from \$300,000 to \$400,000 as recommended, for the reasons set out in the First Report.

I am satisfied that the Receiver's and its counsel's fees and disbursements are fair, reasonable and justified in the circumstances and that they accurately reflect work done by the Receiver and its counsel in connection with the receivership.

Order to issue in form of Order signed by me today.