



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00665128-00CL DATE: 28 November 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: **DUCA FINANCIAL SERVICES CREDIT UNION LTD. v.
BAYVIEW CREEK (CIM) LP et al**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
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Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE KIMMEL:

1. msi Spergel Inc. ("Spergel") in its capacity as court-appointed receiver (the "Receiver") of all the assets, undertakings and properties of Bayview Creek (CIM) LP, CIM Invests Development Inc. and CIM Bayview Creek Inc. (collectively, the "Debtors"), brings a motion for broad relief with a view to the termination of this receivership and its ultimate discharge, including:
 - a. approving the third report of the Receiver dated November 17, 2023 and the appendices thereto (the "Third Report") and the activities of the Receiver, statement of receipts and disbursements as at November 13, 2023 and the fees of the Receiver and its counsel from July 1, 2023 to November 10 and 15, 2023, respectively, and their estimated fees and disbursements up to the date of discharge, and the payment of any excess (unanticipated) professional fees up to the date of discharge with the consent of the fulcrum secured creditor Fengate Redevelopment Fund GP Inc., as general partner of and on behalf of LPF Conversion Fund ("Fengate"), as described therein;
 - b. authorizing and directing BLG to pay to the Receiver the amount of \$2,000,000, plus any interest earned thereon (the "Retained Deposit") currently held by BLG in trust for the Receiver on account of the forfeiture of the Deposit, as defined in the Agreement of Purchase and Sale dated as of June 2, 2023 (the "Sale Agreement") between the Receiver, as vendor and Sunny Communities (Bayview Creek) Inc., as purchaser (the "Purchaser") and appended to the Second Report of the Receiver dated July 14, 2023, in connection with the incomplete closing of the sale transaction contemplated by the Sale Agreement in respect of the Property (as defined in the Sale Agreement, the "Property");
 - c. authorizing the Receiver to make certain proposed distributions (the "Proposed Distributions") to priority creditors from the Retained Deposit in substitution of the corresponding distributions that had been authorized pursuant to paragraphs 4, 5, 6, 7 and 8 of the Order of Penny J. dated August 1, 2023 (the "Administration and Interim Distribution Order"), with those paragraphs of that earlier order to be set aside in their entirety;
 - d. approving a distribution of any surplus funds from the Retained Deposit ("Surplus Funds") to Fengate (the "Fengate Distribution");
 - e. approving the reimbursement and funding agreement between the Receiver and Fengate dated November 16, 2023 in the form attached as Appendix 10 to the Third Report (the "Reimbursement and Funding Agreement");
 - f. authorizing the Receiver to immediately terminate and disclaim the Listing Agreement dated July 28, 2022 with Colliers Macaulay Nicolls Inc.;
 - g. authorizing the Receiver to consent to a lifting of the stay of proceedings (the "Stay of Proceedings") imposed pursuant to the Appointment Order, to permit Fengate to serve a Statement of Claim in connection with a foreclosure action in respect of the Property (the "Foreclosure") and pursue the Foreclosure in respect of, among other things, the subsequent ranking registered encumbrances set out in Schedule "B" to the Discharge Order;
 - h. authorizing the Receiver to accept service of the Statement of Claim in respect of the Foreclosure and to not serve a Statement of Defence, Notice of Intent to Defend, or any other objection to the Foreclosure action;
 - i. sealing certain Confidential Appendices to the Third Report;
 - j. terminating various previously approved charges in favour of participants in this Receivership (namely the DIP Lender's Charge, the Receiver's Borrowing Charge, and Receiver's Charge); and
 - k. discharging and releasing the Receiver upon the filing of the Receiver's Discharge Certificate.

2. Most of the relief sought is typical in the context of the termination of a receivership and discharge of a receiver. It is supported by Fengate, the senior secured creditor of the Debtors whose outstanding debt currently is in excess of \$60 million.
3. The Receiver's motion was served on the service list, which included, among other stakeholders, counsel for the Debtors, the priority creditors, creditors with encumbrances registered subsequent to Fengate, the Purchaser that paid the Retained Deposit and Colliers. No objections were raised and no one appeared to oppose the relief sought. No every aspect of the relief sought will be addressed specifically in this endorsement. Whether mentioned or not, the relief sought is approved for the reasons set out herein, and on the basis more particularly set out in the written submissions of both the Receiver and Fengate and in the Receiver's Third Report, and on the basis that none of it is opposed.
4. Over the last sixteen months, the Receiver has run a robust, court-approved sale process to sell the key asset in this receivership: real property on Bayview Avenue in Richmond Hill over which Fengate holds both the first and second mortgage (the "Property"). Unfortunately, that process has not resulted in any completed sale transaction.
5. Most recently, the proposed Purchaser in the one transaction for the Property identified by the Receiver and approved by this court (after having been satisfied that the Transaction met the factors set out in *Soundair*, in an Approval and Vesting Order made on August 1, 2023) failed to close and the Purchaser forfeited its deposit (the Retained Deposit). The Receiver has been unable to complete a sale of the Property for an amount that would satisfy the amounts due and payable to Fengate and the prior-ranking amounts. Even if the Transaction had closed, the amounts owed to Fengate exceeded the purchase price that would have been paid under the Transaction.
6. The Receiver is proposing, subject to the court's approval, to distributed the Retained Deposit to satisfy all claims ranking in priority to Fengate's mortgage indebtedness. The proposed Distributions correspond with those previously approved by this court in the Administration and Interim Distribution Order.
7. Based on the appraisal value of the Property, Fengate will suffer a significant shortfall with respect to its security. In light of the lack of success in the court-supervised sales process and other factors complicating a sale transaction, and given that the mortgage indebtedness is well in excess of the market value of the Property based on appraisals obtained by the Receiver, Fengate has concluded that it is appropriate to commence foreclosure proceedings in respect of the Property and to terminate these receivership proceedings.
8. The written submissions of Fengate outline the jurisdiction and summarize the rationale for the court to grant the core orders that are sought, that will permit Fengate to initiate foreclosure proceedings and eventually, once completed, will result in the discharge of the Receiver and the termination of these receivership proceedings. That is:
 - a. There is precedent in other cases that have recognized that it is appropriate to allow a secured creditor to pursue alternate forms of enforcement and to discharge a receiver where there has been an unsuccessful sale process and the secured creditor concludes there is no further purpose for the receiver to continue. See for example, *Romspen Investment Corp. v. Edgeworth Properties*, 2012 ONSC 4693 and *BMO v. Can United Consulting Corporation*, 2023 ONSC 4773; and *West Face Capital Inc. v. Chieftain Metals Inc.*, 2020 ONSC 5161 (O.N.S.C.).
 - b. The market was sufficiently canvassed by the Receiver for a period of 16 months and no sale transaction was completed.
 - c. All prior-ranking claims will be satisfied by the Proposed Distribution, if approved by this Court.
 - d. The Receiver is not aware of any amounts secured by the property of the Debtors that ranks in priority to Fengate that will not be satisfied by the Priority Distributions or the payment of fees and disbursements provided for in the requested order.
 - e. Fengate, as the secured creditor with the only remaining economic interest in the Property, no longer wishes to continue to incur the costs associated with a receivership proceeding and

believes it is appropriate, in light of the failed sale process, the value of the Property relative to its debt and other factors complicating a sale transaction, to pursue a foreclosure process instead.

- f. The Receiver and Fengate are both supportive of the Receiver being discharged and no opposition from any party has been received.
 - g. Fengate intends to pursue a foreclosure process, which is a court-supervised process on notice to affected parties.
9. As the court stated in *Romspen* (at para. 16): “In the circumstances, I conclude, there is no benefit to be gained by incurring further professional costs associated with the receivership which will only reduce potential recoveries for all of the stakeholders”.
 10. In *West Face*, the SCJ Chief Justice was similarly concerned that: “The Receiver has concluded that incurring the cost necessary for the continuation of the receivership is no longer beneficial to the stakeholders of the Companies, including the secured creditor West Face. With no credible and interested parties willing to pursue a transaction to acquire the Project, the further costs of administering the Receivership cannot be justified at this time. West Face intends to continue in its efforts to find or develop a private-sector solution.”
 11. The situation is the same here. The Receiver appears to have exhausted all prospects of a market transaction despite its good faith and diligent efforts. Fengate wishes to cut its losses and sees a foreclosure action as the best and most efficient way to Fengate exercising its right to pursue a credit bid after an extensive Sales Process has been concluded. The SCJ Chief Justice emphasized in *Elleway Acquisitions Ltd. v 4358376 Canada Inc.*, 2013 ONSC 7009, at para 38, that Canadian insolvency law has well-established the principle that a secured creditor is permitted to credit bid its debt *in lieu* of providing cash consideration. See also *8527504 Canada Inc. v Liquibrands Inc.*, 2015 ONSC 5912 at paras. 22-24.
 12. I agree that the proposed Foreclosure, which is similar in its effect to a credit bid, aligns with established legal principles and practices in Canadian insolvency law, particularly regarding the rights of secured creditors in receivership proceedings.
 13. Lifting the Stay of Proceedings to facilitate the Foreclosure is a necessary corollary. See *North Bend Ventures Ltd. v. Timberland Helicopters Inc.*, 2010 BCSC 1907 at para 48, in which the British Columbia Supreme Court lifted the stay so that a secured creditor could proceed with its foreclosure application over property subject to a mortgage to lease. The court exercised its discretion to lift the stay of proceedings to allow the secured creditor to take possession of the property in satisfaction of the full debt.
 14. Having accepted the Receiver’s recommendation that the Foreclosure represents the best path forward given the outcome of the Sale Process, to give effect to that, the Receiver should also be authorized to consent to a lifting of the Stay of Proceedings, to permit Fengate to serve a statement of claim in connection with the Foreclosure, and should be provided with the associated directions that relieve it of any responsibility to respond or otherwise participate in the Foreclosure proceeding once it has been initiated.
 15. Since the Receiver is currently in possession of the Property that will be the subject of the Foreclosure and will remain as such until the Foreclosure has been completed, the requested orders (lifting the Stay of Proceedings so that service of the statement of claim can be effected and not being required to respond) ancillary to that process are appropriate. The Receiver has advised the court that it will not file its Discharge Certificate until after the Foreclosure has been completed.
 16. The foreclosure proceeding will run its normal course. Nothing in the order sought today is intended to affect the normal course of that proceeding, once service of the statement of claim has been effected upon the court appointed Receiver.
 17. The request for sealing of certain Confidential Appendices to the Third Report is another necessary ancillary order. The Confidential Appendices to the Third Report contain sensitive information in respect of the value of the Property. Accordingly, the sealing of the Confidential Appendices promotes

- an "important commercial interest" that requires protection, since disclosure could result in prejudice to the stakeholders, in the event that the Receiver was required to market the Property in the future.
18. The requested partial sealing order is limited in its scope (only specifically identified Confidential Appendices and only those aspects of those appendices that contain the commercially sensitive information about pricing and the market value of the Property) and limited in time (until the Foreclosure is completed).
 19. The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the Property if the Foreclosure does not proceed or is not completed. These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings.
 20. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with the approval and vesting orders.
 21. The Receiver is directed to ensure that the sealed Confidential Appendices are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the Confidential Appendices can be physically sealed. The Receiver is further directed to ensure that the Confidential Appendices are "unsealed" upon the completion of the Foreclosure and before its discharge.
 22. The fees and disbursements ("fees") claimed for the Receiver and its counsel are supported by affidavits and accounts rendered and reflect the work that they have done since the commencement of these proceedings. The professional fees for which approval is sought are commensurate with the tasks performed and the time spent and are consistent with comparable professionals' rates. The Receiver has reviewed BLG's accounts and given the numerous issues that both the Receiver and BLG were required to deal with in this matter, the Receiver is of the view that the work carried out by BLG was necessary and the fees charges by BLG are reasonable. The hourly rates of the lawyers who worked on this matter were reasonable, in light of the services required, and the services were carried out by lawyers with the appropriate level of experience. Further, a rate cap was provided by BLG, which resulted in a significant saving on costs, as compared to the rates charged by other large law firms.
 23. I find the fees of the Receiver and its counsel for which approval is sought, including estimate future fees and disbursements, to be fair, reasonable and justified in the circumstances. Any unanticipated fees beyond the estimates will be subject to the consent of Fengate (the only stakeholder with an economic interest) or further court order.
 24. The approval of the Third Report and the activities of the Receiver described therein has been made subject to the standard qualification that has become the Commercial List practice to include in these types of orders. The statement of receipts and disbursements appears to be in order.
 25. I have amended the release language in the proposed draft order to exclude gross negligence and willful misconduct, as is the practice of this court for these release orders.
 26. The Discharge (and Ancillary Matters) Order signed by me today may be issued and entered. It shall have immediate effect, without the necessity of issuance and entry.



KIMMEL J.