

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

PACE SAVINGS AND CREDIT UNION LIMITED

Applicant

- and -

**NOBLE HOUSE DEVELOPMENT CORPORATION, 2307400 ONTARIO INC., AND
2209326 ONTARIO LTD.**

Respondents

**FACTUM OF THE APPLICANT
(Distribution and Allocation Motion, returnable June 25, 2021)**

June 15, 2021

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TO: SERVICE LIST

PART I - NATURE OF MOTION

1. This is a motion by the Applicant, Pace Savings & Credit Union Limited ("**Pace**", or the "**Credit Union**"), for the following relief:
 - (a) That the time for service, filing and confirmation of the Notice of Motion and the Motion Record be abridged so that this motion is properly returnable today, and dispensing with further service and confirmation hereof;
 - (b) An Order, directing the distribution and allocation of the Holdback (as defined below) as between Pace and the Luongo Creditors (as defined below);
 - (c) The Applicant's costs of this motion; and,
 - (d) Such further and other relief as counsel may request and this honourable court may permit.

2. The motion concerns a dispute as between Pace and the Luongo Creditors regarding the allocation of sale proceeds from the sale of real property municipally known as 3 Crescent Road, Huntsville, Ontario (the "**Crescent Road Property**" and the "**Sale Proceeds**", respectively), sold pursuant to an Agreement of Purchase and Sale dated November 10, 2020 (the "**Crescent Road APS**" and the "**Crescent Road Sale**", respectively).

3. There is a dispute as between Pace and the Luongo Creditors regarding allocation and distribution of a certain portion of the Sale Proceeds. Pursuant to the endorsement of the Honourable Justice Dunphy dated May 26, 2021, the amount in dispute as between Pace and the Luongo Creditors has been held back from any amounts to be otherwise distributed by the Receiver, pending the outcome of this motion (the "**Holdback**").

4. It is the position of the Credit Union that the Receiver's allocation of general estate costs, and the Sale Proceeds, including the Holdback, be allocated as between Pace and the Luongo Creditors based on the purchase price allocation set out in the Crescent Road APS, such that 95% of the net Sale Proceeds are allocated to Pace,

and the remainder of approximately 5% are allocated to the Luongo Creditors, for the following reasons:

- (a) The Luongo Creditors became aware of appointment of the Receiver (the “**Receivership**”) soon after the issuance of the Appointing Order. Despite a period of several months, and despite being aware of the sale of the Crescent Road Property, the Luongo Creditors took no steps to carve out the Office Property from the Receivership;
 - (b) The Luongo Valuations (as defined below) are not reliable indicators of the value of the Office Property, nor of its value compared to the remainder of the Crescent Road Property;
 - (c) The sale price of the Crescent Road Property is the most reliable indicator of value, and the sale price was allocated on a square-footage basis by the purchaser of the Crescent Road Property (the “**Purchaser**”). Despite the allegations set out in the June Luongo Affidavit (as defined below), neither the Receiver nor Pace was responsible for this allocation, which allocation was completed by the Purchaser;
 - (d) The Luongo Creditors have directly benefitted from the Receivership, due to the difficulty and liability they would have encountered selling the Office Property in the face of, *inter alia*, environmental contamination, the requirement for serious repairs to the roof of the Crescent Road Property, and serious deficiencies under the *Condominium Act*;
 - (e) It would be manifestly unfair, and would not be in the interests of justice in the circumstances to require Pace to suffer a shortfall on its security, while allowing the Luongo Creditors full recovery.
5. It is respectfully submitted that the allocation of the Sale Proceeds ought to be fair and even-handed among Pace and the Luongo Creditors, upon an objective basis of allocation based on the allocation set out in the Crescent Road APS.

PART II - THE FACTS

6. msi Spergel inc. was appointed as Receiver over the real and personal property of the Respondents on February 20, 2020, pursuant to the Appointing Order of the Honourable Justice Hainey (the “**Appointing Order**”), and including the Crescent Road Property.

Affidavit of Paul Waters sworn June 5, 2021 (the “Waters Affidavit”), para 2 and Exhibit “A” thereto.

7. The Crescent Road Property is a condominium property consisting of fourteen (14) storage units (the “**Storage Units**”) and an office unit (the “**Office Property**”). Pace is the first mortgagee of the Storage Units. Pasquale Luongo, Bruno Rositano, and Cristina Rositano (collectively, the “**Luongo Creditors**”) are the first mortgagees of the Office Property.

Waters Affidavit, paras 3-4 and 8.

8. On or about the time of the Appointing Order, the Receiver was aware of several deficiencies relating to the Crescent Road Property, including non-compliance with the provisions of the *Condominium Act*, and serious repairs required for the roof.

Waters Affidavit, paras 5 and 7 and Exhibits “B” and “G” thereto.

First Report of the Receiver dated December 21, 2020 at paras 26-28, at Exhibit “G” to the Waters Affidavit (the “First Report”).

9. After taking possession of the Crescent Road Property, the Receiver also determined that there were significant environmental issues affecting the Crescent Road Property.

Waters Affidavit, para 6 and Exhibit “G” thereto.

First Report at paras 28-30.

Crescent Road Sale

10. The Crescent Road Sale was approved by the Court on January 11, 2021 with the issuance of an Approval and Vesting Order of the same date (the “**Approval and Vesting Order**”).

Waters Affidavit, para 9 and Exhibits "C" and "D" thereto.

11. Pursuant to the Crescent Road APS, the purchase price of the Crescent Road Sale was allocated approximately 95% to the Storage Units, and approximately 5% to the Office Property, and was based on square footage.

Waters Affidavit, para 10 and Exhibit "E" thereto.

12. The method of allocation in the Crescent Road APS was determined through discussions between the listing agent for the Receiver, and the real estate agent for Purchaser.

Second Report of the Receiver dated June 8, 2021, at para 19.

Affidavit of Jeffrey (Jay) Finch sworn June 14, 2021 at paras 4-6 (the "Finch Affidavit").

13. This method of allocation was chosen as the best representation of value for each component of the Crescent Road Property as the agents considered that other approaches, such as the income valuation preferred by the Luongo Creditors, were unreliable, and price per square foot appeared to be the most objective metric.

Finch Affidavit, at para 4.

14. Ultimately, the precise allocation of the purchase price in the Crescent Road APS was set at the behest of the Purchaser, and was not influenced by the Receiver or its counsel.

Finch Affidavit, at paras 5-6.

15. At the May 25, 2021 motion before the Honourable Justice Dunphy, it was determined that the Receiver should proceed with its motion for distribution of the Sales Proceeds and seek its discharge, subject to the herein motion determining allocation of the Holdback of approximately \$379,000.

PART III - ISSUE, LAW AND ARGUMENT

A. Issue

16. The issue before the Court is the allocation of the Holdback amount:
- (a) It is the position of Pace that the Holdback should be based on the purchase price allocation set out in the Crescent Road APS;
 - (b) It is the position of the Luongo Creditors that the Holdback should be allocated such that the entire Holdback is paid to the Luongo Creditors in full satisfaction of their charge over the Office Property.

B. Pace's Position

17. It is Pace's position that the Holdback should be allocated based on the allocation of the purchase price as set out in the Crescent Road APS, and that such an allocation represents the most objective and fair allocation of value as between the Storage Units and the Office Property.
18. Pace respectfully submits that this approach represents the only allocation which is reasonable and fair to all creditors of the Respondents, and that this Honourable Court should not approve an allocation which would preference the interests of the Luongo Creditors over those of Pace.
19. Pace further submits that the objections on behalf of the Luongo Creditors to the allocation sought by Pace do not evidence prejudice to the Luongo Creditors, misconduct by Receiver, or a valuation of the Office Property, which would support the allocation of the entire Holdback to the Luongo Creditors.

Service and Carve-Out

20. It is the position of the Luongo Creditors that they were not provided with proper notice of the Receivership proceedings, and would have sought to have the Office Property excluded or carved out from the Receivership had they been aware of same.

Reference: *Affidavit of Giuseppe Luongo sworn June 9, 2021 at paras 7-9 (the "June Luongo Affidavit").*

21. While the Luongo Creditors were not provided with notice of the application, they became aware of the Receivership shortly after the issuance of the Appointing Order, in or about May, 2020.

Reference: *Waters Affidavit at para 12.*

22. Despite extensive communications with the Receiver regarding the Office Property, the Luongo Creditors decided to leave the Office Property under the ambit of the Receivership proceedings.

Reference: *Waters Affidavit at paras 13-15.*

23. At no time did the Luongo Creditors take steps to carve out the Office Property from the Receivership. While reserving rights regarding allocation, the Luongo Creditors did not oppose the sales process for the Crescent Road Property, the Crescent Road Sale itself, or the related Approval and Vesting Order approving same.

24. It is respectfully submitted that the Luongo Creditors attorned to the Receivership and by doing so, accepted the actions of the Receiver in disposing of the Crescent Road Property and benefitted from the Court-approved sale of same. As no steps were taken to carve out the Office Property from the Receivership over a period of roughly six to eight months, the Luongo Creditors cannot now claim prejudice from lack of service to challenge the allocation of the Sale Proceeds.

Valuation of the Crescent Road Property

25. The Luongo Creditors take the position that, absent the Receivership, they would have sold the Office Property for a value sufficient to repay their mortgage (and all costs).

Reference: *June Luongo Affidavit, at paras 13-16.*

26. The Luongo Creditors state that the evidence submitted indicates that the Office Property has a significantly higher value than the Storage Units, and that the Holdback should be allocated accordingly.

Reference: *June Luongo Affidavit, at paras 20-23 and 29-34.*

27. Pace submits that the only reliable and objective valuation of the Crescent Road Property was that set by the open market and memorialized in the Crescent Road APS.

Appraisals and Valuations

28. While the Luongo Creditors reserved their right to challenge the allocation of the Sale Proceeds on the sale approval motion, they did not raise objections to the Crescent Road Sale itself, nor did they submit any evidence to support a position that the Crescent Road Sale was improvident.

29. In support of their position regarding allocation, the Luongo Creditors rely, in part, on the following evidence of value:

- (a) Appraisal Report dated August 16, 2018 and assigning a market value of \$400,000 to the Office Property (the “**Luongo Appraisal**”); and,
- (b) Opinion of Value from a real estate agent dated January 6, 2021 and assigning a market value of \$440,000 to the Office Property (the “**Luongo Real Estate Agent Opinion**”);
- (c) Letter from James F.H. Barnes dated March 15, 2021 and estimating a market value of \$750,000 (the “**Luongo Estimate Letter**”).

(collectively, the “**Luongo Valuations**”)

Reference: *Waters Affidavit, para 16 and Exhibits “J” and “K” thereto.*

June Luongo Affidavit, at paras 20-23 and 29-34, and Exhibits “H” to “K” thereto.

30. Each of the Receiver and the principal of the Respondent, Noble House, obtained additional appraisals for the Crescent Road Property as whole, in 2014, 2017, and 2019, respectively, and which assigned a value to the Crescent Road Property ranging between \$4,100,000 and \$8,000,000.

Reference: Waters Affidavit, paras 17-19 and Exhibits “L” and “M” thereto.

Evidentiary Value

31. It is respectfully submitted that a recognized principle in Ontario Courts is that, where a Receiver markets a property and makes a sufficient effort to obtain the best price for same, appraisals “cease to have much significance in the valuation process”, as the sale price in a provident sale is always a better indicator of value.

Reference: Royal Bank of Canada v. Atlas Block Co., 2014 ONSC 1531, at para 37. [“Atlas Block”].

B & M Handelman Investments Ltd. v. Mass Properties Inc. (2009), 56 C.B.R. (5th) 313 (Ont. S.C.J.), at para. 13.

Bank of America Canada v. Willann Investments Ltd., 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List]), at para. 5.

32. Further, where a party seeks to rely on an appraisal, but either fails to file that appraisal into evidence or files only a small portion of it into evidence, the evidentiary value of same is significantly undermined.

Reference: Atlas Block, supra, at para 35.

33. The principle set out at paragraph 31, above, holds especially true where the appraisals in question are stale-dated, or do not take into account critical factors which would affect the fair market value of the property in question. In this Court’s decision in *Atlas*

Block, the Court found that appraisals as recent as two (2) years prior to the sale of the property in question were considered stale.

Reference: *Atlas Block, supra, at para 35.*

34. In the present situation, the most recent full appraisal of the Office Property relied on by the Luongo Creditors was over two years prior to the Crescent Road Sale, and the more recent opinions of value were summary in nature.
35. With regard to the Luongo Estimate Letter, not only is this document short and summary in nature, but it also refers to an appraisal which has not been entered into the evidentiary record, and therefore cannot be analyzed. Pace submits that this valuation cannot be relied on by this Court in any material way.
36. The Credit Union submits that the above-noted appraisals and opinions of value, including the Luongo Valuations, contain the following critical deficiencies with regard to their usefulness as determinators of (a) the market value of the Crescent Road Property, and (b) the allocation of market value as between the Office Property and the Storage Units:
 - (a) They do not address the following factors:
 - (i) The serious repairs required for the roof of the Crescent Road Building;
 - (ii) The substantial environmental issues affecting the Crescent Road Property;
 - (iii) The above-noted deficiencies under the *Condominium Act*, and,
 - (iv) The impact of the COVID-19 pandemic on the local real estate market.
 - (b) The most recent full appraisal of the Office Property included in the record was over two years prior to the Crescent Road Sale;

37. With regard to the Luongo Valuations in particular, it is respectfully submitted that they are only three of several different appraisals of or relating to the Crescent Road Property, with materially varying market values.
38. The stated value by the Luongo Creditors of \$440,000, based on Luongo Real Estate Agent Opinion, is unreasonable even if the above-noted deficiencies in the Luongo Valuations are ignored, in that:
 - (i) The Luongo Real Estate Agent Opinion is summary in nature and shows a substantial increase in value compared to the Luongo Appraisal, indicating an inflated value;
 - (ii) The Luongo Appraisal contemplated, and rejected, an income valuation approach in favour of a direct comparison approach, while the Luongo Real Estate Agent Opinion only appears to have considered an income approach;
 - (iii) The income approach was considered and rejected by the listing agent and the Purchaser's agent in the Crescent Road Sale as being unreliable and a less objective measure of value than per-square footage;
 - (iv) It would have been difficult, if not impossible, to determine the income value of the Storage Units, given that the Receiver took no active steps to lease the Storage Units in the face of the substantial environmental contamination discovered. As such, it is not possible to make a reasonable comparison between the income value of the Storage Units and of the Office Property for the purposes of allocation.
39. Further, none of the Luongo Valuations opine on the value of the Office Property compared to the Crescent Road Property as a whole, severely limiting their utility in determining any allocation of value as between Pace and the Luongo Creditors.

40. As a result of the above, it is respectfully submitted that the Luongo Valuations cannot be fully relied on to determine the market value of the Crescent Road Property, or of the Office Property as a percentage thereof.
41. Given the noted deficiencies in the above appraisals, including the Luongo Valuations, and the structure of the Crescent Road Sale, it is respectfully submitted it is not possible to determine the fair market value of the Office Property alone given the evidence available.
42. Pace respectfully submits that the strongest evidence of value is the market value of the Crescent Road Property as set out in the Crescent Road APS, which was for the Crescent Road Property as a whole, with the purchase price allocated by way of square footage by the Purchaser. There is no reliable evidence on which to determine the value of the Office Property alone, aside from this metric.

Allegations Against the Receiver

43. In the June Luongo Affidavit, the Luongo Creditors allege that the Receiver set or influenced the purchase price allocation in the Crescent Road APS, and as such, (i) this allocation does not represent market value, and (ii) reliance on this allocation by Pace is a “self-serving exercise”.

Reference: June Luongo Affidavit, at paras 24-28.

44. It is clear from the Finch Affidavit that the June Luongo Affidavit mischaracterizes the discussions which led to the allocation set out in the Crescent Road APS. The allocation resulted from discussions between the real estate agents (absent the influence of the Receiver), and was ultimately set at the preference of the Purchaser, based on the Purchaser’s determination of market value.
45. The Finch Affidavit further evidences that the approaches preferred by the Luongo Creditors – such as income value approach – were considered and rejected as being less objective metrics of value than a per-square footage allocation.

46. Pace submits that reliance on the allocation set out in the Crescent Road APS represents the market value of the Crescent Road Property and its constituent components, being the allocation set by the Purchaser in a provident and Court-approved sale.
47. Pace further submits that reliance on this allocation is not “self-serving”, as neither the Receiver nor Pace influenced this determination of value by the Purchaser.

Benefit from the Receivership

48. The Luongo Creditors take the position that absent the Receivership, they would have sold the Office Property pursuant to their own private enforcement measures, and for a sum sufficient to repay their charge in full. The Luongo Creditors submit that the Receivership proceedings denied them the opportunity to complete such a sale, that the allocation as suggested by Pace would result in an unjust shortfall.

Reference: June Luongo Affidavit, at paras 12-16.

49. As set out above, Pace states that it is unreasonable to assume that the Luongo Creditors would have completed a sale of the Office Property alone, and for a price sufficient to repay their Charge in full. It is respectfully submitted that the noted *Condominium Act* deficiencies, the status of the Office Property as one unit in a larger complex, the required repairs, and environmental contamination would have reduced the value of the Office Property on the open market.
50. The Luongo Creditors also directly benefitted from the Court-approved sales process conducted by the Receiver, in that they were not exposed to any liability for the significant environmental contamination noted in the First Report.
51. The Luongo Creditors have failed to address the impact of the above factors on the market value of the Office Property and the corresponding benefit to the Luongo Creditors to having had the sale of the Office Property proceed through the Receivership. The sole exception to this is the comment of Giuseppe Luongo that, based on images of the Crescent Road Property found online, the environmental

concerns noted in the reports commissioned by the Receiver do not appear as serious as he believed them to be.

52. It is respectfully submitted that that the evidentiary value of this statement is minimal in comparison to the environmental reports of the Receiver, and should be disregarded accordingly.
53. Pace further respectfully submits that the Luongo Creditors have benefitted from the Crescent Road Sale under the Receivership, and have not evidenced any prejudice suffered as a result thereof. The Luongo Creditors should not be entitled to a windfall at the expense of Pace, as the other secured creditor of the Crescent Road Property.

Allocation

54. It is respectfully submitted that that the only reasonable method of allocating the proceeds of the Crescent Road Sale is by square footage, which represents the market value of the Crescent Road Value as a whole.
55. This sales process and the allocation of the purchase price as agreed to by the Purchaser under the Crescent Road APS were all based on a square-footage value for the Crescent Road Property as a whole, and not on a valuation based on the market value of each individual unit. As stated by the Court in *Atlas Block*, this method of valuation is the most reliable indicator of value, in particular in comparison with appraisals and valuations such as the Luongo Valuations.
56. Pace states that the same approach should be taken with regard to the allocation of costs and the Sales Proceeds, and that this approach is the only reasonable one in the circumstances.
57. Pace states that in the circumstances described, it would be unfair and not in the interests of justice to require Pace and Pace alone to suffer a shortfall, and that the Luongo Creditors are not entitled to a full recovery at the expense of the other secured creditors of the Debtors.

58. Pace submits that the Luongo Creditors have not put forward any evidence or facts which would indicate that the allocation in the Crescent Road APS was unreasonable, and have failed to show both (i) that the allocation in the Crescent Road APS was meant to preference one creditor of the Respondents over another, or (ii) any reasonable alternative to determine the value of the Office Property for the purposes of allocation.
59. Absent any evidence of improvident sale, this allocation should be taken as the strongest and most objective representation of the comparative value of the Storage Units and the Office Property.

Fairness of Allocation

60. The Luongo Creditors have stated that an allocation pursuant to the purchase price allocation in the Crescent Road APS would result in a significant shortfall to them, and therefore the Holdback should be allocated to the Luongo Creditors in its entirety.

Reference: *June Luongo Affidavit, at paras 34-37*¹

61. The obligation on a Receiver in undertaking allocation in an insolvency proceeding is to exercise its discretion in an equitable manner that does not readjust the priorities between the creditors. The allocation:
- (a) Should be fair and equitable; and,
 - (b) Should not ignore the benefit or detriment to any creditor.

Reference: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp. (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.), at para 42.*

¹ The June Luongo Affidavit contains multiple paragraphs 34-36. These cited paragraphs include the second set labelled as paras 34-36.

Atlas Block, supra, at para 43.

62. Each case must be judged on its own facts. It is equitable rather than equal treatment which is the objective of the allocation by a Receiver.

Reference: Hunters Trailer & Marine Ltd., 2001 ABQB 1094, at para 15.

63. Where the allocation is *prima facie* fair, the onus should be on any objecting creditor to satisfy the Court that they are unfair or prejudicial.

Reference: Re Hunjan International Inc. (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), at para 73.

64. In *Atlas Block*, the Court also noted that, where a creditor obtains a benefit from a sale under Receivership, this also weakens any objection to a proposed method of allocation which would see the objecting creditor receive a windfall.

Reference: Atlas Block, supra, at para 47.

65. Pace respectfully submits that the position taken by the Luongo Creditors runs contrary to established law in Ontario, and would not result in an allocation that is fair, equitable, and objective as between Pace and the Luongo Creditors. Such an allocation would instead readjust the priorities between Pace and the Luongo Creditors such that the Luongo Creditors receive full recovery on their security, to the detriment of Pace, and after the Luongo Creditors have already benefitted from the Court-approved sale of the Crescent Road Property under the Receivership.

66. It is respectfully submitted that the allocation proposed by the Luongo Creditors would result in a windfall to the Luongo Creditors in the circumstances. The allocation of purchase price set by the Purchaser in the Crescent Road APS is a *prima facie* objective measure of value of the Crescent Road Property and its constituent components.

67. Absent compelling evidence of unlawful prejudice to the Luongo Creditors, which Pace respectfully submits has not been provided by the Luongo Creditors, Pace respectfully submits that the allocation set out in the Crescent Road APS should be followed in determining the allocation of the Holdback.
68. Pace submits that the allocation should be conducted in a manner that is fair to all creditors of the Respondents, who will each suffer a shortfall under the allocation of value set out in the Crescent Road APS.

PART IV - ORDER REQUESTED

69. The Receiver requests the following Order:
- (a) An Order directing the Receiver to distribute the Holdback using the same allocation of value found in the Crescent Road APS.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of June, 2021.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531.
2. *B & M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 56 C.B.R. (5th) 313 (Ont. S.C.J.).
3. *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List]).
4. *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.).
5. *Hunters Trailer & Marine Ltd.*, 2001 ABQB 1094.
6. *Re Hunjan International Inc.* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.).

PACE SAVINGS & CREDIT UNION LIMITED

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Applicant

Respondents

Court File No. CV-20-00635946-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT
(MOVING PARTY)**

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