

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

BETWEEN:

PACE SAVINGS & CREDIT UNION LIMITED

Applicant

- and -

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

Respondents

FACTUM OF THE COURT-APPOINTED RECEIVER

January 5, 2021

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PART I – NATURE OF THE APPLICATION AND MOTION

1. This factum is filed in support of a motion (the “**Motion**”) to, amongst other things, approve the sale of the Purchased Assets (as defined below) to F.P.A.D. Corporation (the “**Purchaser**”), which Motion is brought by msi Spergel inc., in its capacity as the Court-appointed receiver (in such capacity, the “**Receiver**”) of Noble House Development Corporation, 2307400 Ontario Inc. and 2209326 Ontario Ltd. (collectively, the “**Debtors**”).

2. In connection with the above, the Receiver seeks Orders, substantially in the forms attached to the Receiver’s Motion record:

- (a) if necessary, abridging the time for service and filing, and dispensing with further service of the notice of the Motion;

- (b) approving the First Report of the Receiver dated December 21, 2020 (the “**First Report**”) and the actions of the Receiver described therein;
- (c) approving the agreement of purchase and sale between the Receiver, as vendor, and Shaffiq Dar in trust for the Purchaser, as purchaser, dated November 10, 2020 (the “**Sale Agreement**”), and authorizing the Receiver to complete the transaction contemplated thereby (the “**Transaction**”);
- (d) upon completion of the Transaction (as evidenced by the Receiver filing a certificate certifying same), vesting the Purchased Assets (as defined in the Sale Agreement) in the Purchaser;
- (e) sealing the Confidential Appendices to the First Report (the “**Confidential Appendices**”) until closing of the Transaction or further Order of this Court;
- (f) excluding the Additional Muskoka Properties (as defined in the First Report) from the stay of proceedings contained in the Receivership Order (as defined below) and directing the discharge of the registration of the Receivership Order from title to the Additional Muskoka Properties;
- (g) direction regarding certain books and records;
- (h) approving the fees and disbursements of the Receiver and its counsel; and
- (i) such further and other relief as counsel may request and this Court may permit.

PART II – FACTS

3. On February 20, 2020, The Honourable Mr. Justice Hainey issued an Order (the “**Receivership Order**”) appointing msi Spergel inc. as the Receiver, without security, of all the Property (as defined in the Receivership Order) of the Debtors.

First Report, at paras. 7-9.

The Proposed Transaction and Associated Marketing and Sale Process

4. Pursuant to the Receivership Order, the Receiver is authorized to, amongst other things, market any or all the Property, including advertising and soliciting offers in respect of the Property and negotiating such terms and conditions of sale as the Receiver, in its discretion, deems appropriate.

First Report, at para. 37.

5. The Property includes, amongst other things, the real property municipally known as 3 Crescent Road, Huntsville, Ontario (PINs 48880-0001 to 48880-0015 inclusive) (the “**Real Property**”). The Real Property is the subject of the proposed Transaction with the Purchaser. The Receiver understands that a business called “Huntsville Heated Mini Storage” operated from at least part of the Real Property.

First Report at paras. 2-5.

6. The First Report summarizes the marketing and sale process conducted by the Receiver, including:

- (a) the engagement by the Receiver of Colliers International Realty Advisors Inc. to conduct a full narrative appraisal of the units in the Real Property (the “**Colliers Appraisal**”), a copy of which has been appended to the First Report as one of the Confidential Appendices;
- (b) the review by the Receiver of an expired listing of the Real Property, which was in effect from May 2016 to May 2017 without a sale being consummated, a copy of which has also been appended to the First Report as one of the Confidential Appendices;
- (c) the request by the Receiver of listing proposals from Cushman and Wakefield ULC and Lennard Commercial Real Estate (“**Lennard**”), both of which were provided with a copy of the Colliers Appraisal (upon execution of a non-disclosure agreement) in advance of submitting their listing proposals;
- (d) the decision by the Receiver to enter into an MLS Listing Agreement with Lennard, given, amongst other things, its significant previous experience with the marketing and sale of public storage unit facilities, which previous experience is summarized in detail in the First Report;
- (e) the creation by Lennard of a data room, which contained sales and marketing materials in addition to the Building Condition Report (as defined and discussed in the First Report);
- (f) the advertisements placed by Lennard in the Globe and Mail on two separate publication dates, and the implementation of a broad marketing campaign to in

excess of 1,000 key condominium conversion purchasers and self-storage operators and investors;

- (g) the delivery to all prospective purchasers who submitted competitively priced offers of the Phase 1 and 2 Environmental Reports and the Mould Investigation Report (as defined and discussed in the First Report);
- (h) the five purchase offers ultimately presented to the Receiver and/or Lennard, as discussed in the First Report and as summarized in the marketing summary and offer matrix that has been appended to the First Report as one of the Confidential Appendices; and
- (i) the Sale Agreement that was ultimately accepted by the Receiver, subject to Court approval, which Sale Agreement is otherwise unconditional and has been appended to the First Report, including an unredacted version as one of the Confidential Appendices.

First Report at paras. 37-45.

7. The Real Property has been broadly marketed. The Transaction contemplated by the Sale Agreement is at a price that was acceptable to the Receiver using its reasonable business judgment, in that it was the highest price received for an unconditional deal and represents a sale price equal to or greater than the appraised value of the units to be sold in a single asset sale.

First Report at para. 46.

8. The Real Property is operating at a deficit and has required the Receiver to borrow funds. There is presently \$254,000 owing on account of realty taxes, which the Receiver is

unable to pay and which amount will continue to accrue until such time as the Real Property is sold. In addition, on-going maintenance relative to the Real Property and on-going professional fees will continue to have a negative impact on the realizations for stakeholders should the Transaction not be approved and concluded.

First Report at para. 47.

Ancillary Relief regarding the Additional Muskoka Properties

9. The Property over which the Receiver is appointed also includes the Additional Muskoka Properties. The Receiver did not learn of the existence of the Additional Muskoka Properties until after its appointment, and, based on the information garnered by the Receiver, the Receiver has concluded that there is no equity in the Additional Muskoka Properties. This determination was subsequently conveyed to solicitors for the mortgagees, all of whom had been in contact with the Receiver subsequent to the registration on title of the Receivership Order. The Additional Muskoka Properties are not part of the proposed Transaction.

First Report at paras. 6 and 31-36.

10. The Receiver is seeking an order of this Court to exclude the Additional Muskoka Properties from the stay of proceedings contained in the Receivership Order and to direct the Land Titles Office to discharge the registration of the Receivership Order from title to the Additional Muskoka Properties, so that the mortgagees can deal with these properties without the Receiver's involvement. The Receiver understands that the Land Titles Office generally requires an order to discharge the registration of an existing order (i.e., the Receivership Order).

First Report at para. 36.

Ancillary Relief regarding the Abandoned Records

11. Despite numerous requests, the Receiver has had limited production of books and records from the Debtors, including but not limited to details of self-storage payments, computer access, banking information, copies of tenant leases and post-dated cheques in the possession of the Companies. Attached to the First Report are copies of emails sent by the Receiver and/or its counsel to the Debtors' principal, Ray Jarvis, and/or his counsel, requesting books and records for the Debtors. To date very limited financial or other records have been produced by Mr. Jarvis to the Receiver.

First Report at para. 21.

12. There are presently in storage on-site at the Real Property approximately 200 banker boxes of books and records pertaining to Mr. Jarvis' various business dealings ("**Abandoned Records**"), including the now defunct real estate brokerage, Re/Max North Country. The Receiver has attempted to retrieve the records it requires for the purpose of this receivership from the Abandoned Records.

First Report at para. 22.

13. The Receiver has been advised that Re/Max North Country is presently under some sort of investigatory proceeding of the Real Estate Council of Ontario ("**RECO**"). No party has claimed the Abandoned Records; however, the Receiver was contacted by counsel for Ray Jarvis and counsel for Lloyds Underwriters and 3303128 Canada Inc. t/a Alternative Risk Services (collectively, "**Lloyds**") seeking to take possession of the Abandoned Records. As discussed in the First Report, Lloyds previously obtained an order to lift the Receivership Order's stay of proceedings for certain limited purposes and subject to certain terms and conditions, with the

substantive purpose of permitting Lloyds to continue the prosecution of a claim against certain of the Debtors (and other parties, including Mr. Jarvis), including injunctive relief in the form of a Mareva Order.

First Report at paras. 17-20 and 23.

14. The Receiver has served RECO, counsel for Ray Jarvis and counsel for Lloyds with the Receiver's motion record and seeks direction from the Court as to how to deal with the Abandoned Records. No rent has been paid for the storage units containing the Abandoned Records and the Receiver recommends that anyone who takes possession of the Abandoned Records be required to pay both the storage costs and the Receiver's costs in dealing with same, in the absence of which the Receiver seeks an order permitting it to remove and destroy the Abandoned Records prior to the closing of the Transaction.

First Report at paras. 23-25.

PART III – ISSUES

15. In addition to the ancillary relief addressed above, the real substantive issues to be considered by this Court in respect of the Transaction are:

- (a) whether the Court should approve the Sale Agreement and the Transaction, and vest the Purchased Assets in the Purchaser; and
- (b) whether the Court should seal the Confidential Appendices.

PART IV – LAW AND ARGUMENT

(a) This Court Ought to Approve the Sale Agreement and the Transaction

16. In determining whether to approve a proposed sale of assets by a receiver, Ontario courts have consistently and uniformly applied the principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*] (CanLII: <http://canlii.ca/t/1p78p>).

17. *Soundair* establishes that, in reviewing a proposed sale of assets by a receiver, the Court must consider the following:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

Soundair, at para. 16.

18. In the present case, each element of the *Soundair* test has been met:

- (a) *Efforts to Obtain the Best Price:* As detailed above, the Receiver undertook a thorough marketing process for the Real Property, conducted in accordance with the terms of the Receivership Order. The Receiver, through its agent, actively marketed the Real Property for a prolonged period to a wide audience, and

through various channels, and the market was thoroughly tested. The Receiver has made efforts to obtain the best price possible, particularly in light of the current state of the economy in Ontario.

- (b) *Interests of All the Parties:* In the circumstances, the economic benefits of the Sale Agreement are in the interests of the parties with an economic interest in the Real Property. There is no evidence which would suggest that a preferable offer would be received if the Sale Agreement is not completed, particularly in light of the continued negative impact of the COVID-19 pandemic.
- (c) *The Efficacy and Integrity of the Process:* As detailed above, the Receiver's marketing process was widespread, and the Receiver then identified and selected the bid that would have the most certainty of closing and that would maximize the value realized to the estate. Amongst other things, the Receiver considered: (i) the purchase price and how it compares to other bids after the market was thoroughly tested; (ii) the impact of, and risk associated with, the Covid-19 pandemic; (iii) the limited conditions to closing the Transaction; and (iv) the provision of a meaningful deposit.
- (d) *Whether the Process was Unfair:* The Receiver believes that there was no unfairness in the process. The Receiver's rationale for its acceptance of the Sale Agreement as the best available offer reflects sound business judgment.

First Report and Confidential Appendices thereto.

19. The principles in *Soundair* have been satisfied and the Transaction is commercially reasonable in light of the circumstances. This Court’s approval of the Sale Agreement and the Transaction contemplated therein, and the vesting of the Purchased Assets in the Purchaser, are in the best interests of the Debtors’ stakeholders. This Motion falls within “*the general principle that the court will be loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court.*”

Morganite Canada Corp. v. Wolfhollow Properties Inc. (2003), 47 CBR (4th) 89 (ONSC) at para. 7 (CanLII: <http://canlii.ca/t/4gkp>).

B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581 at para. 43 (CanLII: <http://canlii.ca/t/hsp9r>).

(b) This Court Ought to Seal the Confidential Appendices

20. The Confidential Appendices contain commercially sensitive information, which the Receiver seeks to have sealed and be treated as confidential until the Transaction is completed or until further Order of this Court.

First Report at para. 49.

21. A Court may order that any document filed in a civil proceeding, be treated as confidential, sealed and that it not form part of the public record.

Courts of Justice Act (Ontario), s. 137(2).

22. The test for determining whether a sealing order ought to be granted in a commercial context was set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*. A confidentiality order should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 at para. 53 [*Sierra Club*] (CanLII: <http://canlii.ca/t/51s4>).

23. Three elements are subsumed under the first branch of the test:

- (a) the risk in question must be real and substantial, in that the risk is well grounded in evidence, and poses a serious threat to the commercial interest in question;
- (b) in order to qualify as an “*important commercial interest*,” the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and
- (c) the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible while preserving the commercial interest in question.

Sierra Club, at paras. 54-57.

24. Sealing the Confidential Appendices will protect against compromising the integrity of the marketing process and potential prejudice to stakeholders in the event that the Transaction does not close and a new purchaser must be sought.

First Report at para. 49.

25. In the present case, a sealing order is appropriate for the following reasons:

- (a) the information subject to the sealing request contains commercially-sensitive information, which if disclosed would prejudice all stakeholders in the event that the Transaction does not close for any reason. For example, if the Transaction does not close, it is likely that another marketing and sale process may be required, and, in the absence of a sealing order, future bidders would have access to the Transaction's purchase price amount, thereby adversely affecting any such future realization; and
- (b) there is no other reasonable alternative associated with preventing the Confidential Appendices from becoming public.

26. The Receiver respectfully submits that the principles in *Sierra Club* have been satisfied and that the sealing of the Confidential Appendices is necessary herein to ensure the integrity of the process and to avoid any prejudice to stakeholders in the event that the Transaction does not close and a new purchaser must be sought. It is respectfully submitted that this Court should approve and authorize the sealing of the Confidential Appendices, in accordance with the recommendations of the Receiver.

PART V – RELIEF REQUESTED

27. The Receiver respectfully requests that this Court should grant the relief sought by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2021.

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SCHEDULE “A”

LIST OF AUTHORITIES

Jurisprudence

1. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).
2. *Morganite Canada Corp. v. Wolfhollow Properties Inc.* (2003), 47 CBR (4th) 89 (ONSC).
3. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581.
4. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Courts of Justice Act, R.S.O. 1990, c. C-34, as amended.

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

...

137.(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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