

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

B E T W E E N:

ZAHERALI VISRAM

Applicant

– and –

2220277 ONTARIO INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED

**UNOFFICIAL TRANSCRIPT OF THE ENDORSEMENT OF THE HONOURABLE
JUSTICE MCEWEN**

November 3, 2017

K. Kraft / S. Van Allen for A. Farber & Partners Inc., Court-appointed Receiver of 2220277 Ontario Inc.

H. Chaiton for Applicant

A. Schorr for Respondent and E. Karras

O. Karafa (Food Society)

J. Hendriks (A. Farber & Partners Inc., Court-appointed Receiver of 2220277 Ontario Inc.)

I. Aversa for 650 Bay Holdco Inc.

L. Ferreira for CVC Ardellini Investments Inc.

The motion appeared before me yesterday. At that time I granted the two orders sought by the Receiver (with minor changes) approving the stalking horse sale process and terminating the leases with reasons to follow.

Since timing is of importance, I am releasing the reasons by way of a handwritten endorsement.

The two orders sought are the usual type of orders in circumstances such as those found in this case.

I will deal with the objections raised by the Respondent and the tenants at the motion.

First, with respect to the termination of the leases, the two tenants (Food Society and SixFifty Hotel), understandably oppose the motion and wish to continue operating their businesses at the property.¹ Neither however filed any materials.

In any event, it is uncontested that the mortgagees take legal priority over the interests of the leases: ss 93(3) of the *Land Titles Act*². Further, the leases of the two tenants each contain clauses subordinating them to all mortgages against the property. There are no non-disturbance clauses and the mortgages of the Applicant pre-date the leases.

Insofar as the equitable considerations are concerned, they favour termination with respect to the SixFifty Hotel lease it is non-arm's length; controlled by Karras who is the controlling mind of the Respondent; assets were conveyed without consideration; and, based on the record, the lease was not bona fide given the above and other issues of diversion of cash flow from the Respondent to the Hotel.

While the Food Society Lease is an arm's length transaction it too has problems. Food Society has no occupancy permit or liquor licence. It currently is operating under a rent abatement

¹ As noted below, the Respondent and the Hotel concede a right to terminate but submit that it is premature.

² It is worth also noting that the sixth mortgagee supports the Receiver's motions and no mortgagees oppose.

agreement with the Respondent which has it paying no rent. There are also outstanding work permits.

In these circumstances I accept that the leases prevent the Receiver from properly marketing the property to the widest available market. The equities do not favour the leases.

Last, in any event, the Applicant could have forced a sale and I do not believe that the leasees can argue prejudice given the working of the leases noted above.

The Respondent raises a number of other objections with respect to the sales process and I will deal with each.

- 1) That the marketing of the property should be broader than proposed by the Receiver. I disagree. One advertisement in each of the three major Canadian newspapers and the other publications noted in para 5 of the sales process is more than sufficient. Further, the Receiver has agreed to work with the Respondent to obtain broad coverage which, of course, is in everyone's interest.
- 2) That para 11(g) of the sale process be deleted as attached as Schedule "A" to the draft order. Once again, I disagree. The Respondent complains that the clause should be deleted since the stalking horse bidder has not established it has funds for closing. Aside from the fact that s. 11(g) contains standard wording, the bidder has put down a deposit; there is no break-free; and the bid is a result of negotiations with a known entity. Everyone is motivated to proceed.
- 3) The hotel and Respondent submit that while the leases can be terminated they say it is premature to do so now. There is a 30 day notice period which I have amended to add the

requirement of “completing a transaction”. It is also discretionary, in my view, this is reasonable and also necessary to give the Receiver the flexibility it requires to properly market the property. While it is unfortunate that the hotel and particularly the Food Society experience difficulties, the equities, as I have noted favour the mortgagees.

- 4) Although not specifically raised, I also agree that the manner in which the Receiver plans to market the property, i.e. no realtor, is reasonable (as is the proposed fee structure).

Overall, I find that the proposal meets the facts as set out by the Courts in *Brainhunter* and *Soundair*.

I am also satisfied that the sealing order requested meets the *Sierra Club* test and that paras 38 and 40 of the Fifth Report be sealed.

The orders shall therefore go as per the drafts filed and signed as amended.

The Honourable Justice McEwen