

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

RE: Credit Union Central of Ontario Limited (Applicant) v. Heritage Property Holdings Inc. and Heritage Properties Development Inc. (Respondents)

BEFORE: Justice Cumming

COUNSEL: *M. Valente*, for the Interim Receiver

Derek Schmuck, for Construction Lien Holders

H. Whiteley, for the Applicant mortgagee

R. Weston, for the Respondent Heritage Companies and for The Federated Guaranty and Trust Company, mortgagee

Heard: June 21, 2007

ENDORSEMENT

CUMMING J.

The Motions

[1] My Endorsements dated My 17 and 31, 2007 set forth the history of this Receivership to date: see *Credit Union Central of Ontario Ltd. v. Heritage Property Holdings Inc.*, [2007] O.J. No. 1974 and No. 1978.

[2] Two motions were heard June 21, 2007.

The Fees claimed by the Receiver and its Counsel

[3] First, the Receiver and the Receiver's counsel each seeks approval of fees to date.

[4] Federated asks that the issue of approval of the fees be adjourned with Federated reserving the right to challenge the fees before an assessment officer. I have refused this request.

[5] Federated was advised before May 29, 2007, the previous hearing date, as to the quantum of fees being sought. Federated then received the full details of the claimed fees in the Receiver's Motion Record served June 14, 2007. Federated now raises a general complaint of excessive and unreasonable fees without any responding record and specificity. Reference was made orally by

Federated to fees relating to research of a trade mark issue (being ownership of the name of the subject property, a golf course, "Mystic"): however, the Receiver advises this trade mark issue was raised in the first instance by the principal of Federated, Mr. Berger, necessitating the legal research by the Receiver.

[6] Neither the Credit Union, nor the lien claimants, oppose the Receiver's motion.

[7] In my view, the fees claimed by the Receiver and its counsel are fair and reasonable and properly to be approved. Accordingly, I have signed an Order approving the said fees.

The Issue of Priority as between the Mortgagees, being the Credit Union and Federated

[8] Second, on consent in the course of submissions, Federated agrees that the Credit Union's security has priority to the security of Federated and that on any distribution by the Receiver, the Credit Union is to be paid in priority to Federated. An Order will issue to this effect.

Issues raised, to be dealt with at a further Hearing, July 19, 2007

The Quantum of the Credit Union's Claim

[9] The Credit Union has an existing certificate of proof of claim of some \$5.268 million but has a total quantum claimed of some \$5.728 million taking into account accrued interest and costs. Federated has reserved its right to challenge the quantum of the Credit Union's claim. Federated is to have the opportunity to respond to the Credit Union's materials filed in this regard, and a determination as to any continuing dispute as to the quantum of the Credit Union's claim will be made at the hearing July 19, 2007.

The Contingent Liability for Property Taxes upon a Reassessment

[10] The Court is advised by the Receiver that the City of Hamilton is in the process of making a property tax reassessment of the subject property and that there may well be a dispute as to whether this contingent tax liability relating to the period prior to the closing of the sale transaction is payable by the Receiver as vendor or Golfnorth as purchaser.

[11] This potential contingent liability issue as between vendor and purchaser will be considered at the hearing scheduled July 19, 2007 and the Receiver is to make the required motion if necessary, with notice to Golfnorth, for a determination by the Court.

[12] The Receiver is also directed to speak to the City of Hamilton and determine whether the City will fix a maximum amount the City will be claiming (to facilitate the determination of a proper reserve or holdback in protecting the City when contemplating any distribution of funds of the estate of the Receivership).

The Funds in the Estate of the Receivership

[13] There is reportedly at present a net of about \$7.5 million to the credit of the estate of the Receivership from the sale of the subject golf course. The Receiver estimates that there will be a surplus of roughly \$1.42 million after taking into account the Credit Union's and the City of Hamilton's claims.

[14] The Credit Union states that it will be seeking a distribution of monies in the estate to it at the hearing July 19, 2007.

[15] Counsel for the four construction lienholders states that their claims, inclusive of interest and anticipated costs, if fully successful, would be less than \$1 million.

[16] Counsel for the lienholders states that there should not be any distribution to the Credit Union until the lien claims have been determined by this Court in Hamilton. Counsel for the lienholders says that the lienholders will be prejudiced if the Credit Union receives a distribution prior to a determination of the lien claims.

[17] Interest on the Credit Union mortgage is accruing at prime plus four percent.

[18] (It is noted incidentally that there will be substantial legal costs accruing with the continuing presence of the Credit Union as a defendant in the lienholders' action. The main issue in that action would seem to be one of priority as between Federated and the lienholders in respect of the remaining surplus after payment of the claims of the Credit Union and the City of Hamilton).

[19] Federated supports a distribution being approved for the Credit Union at the hearing July 19, 2007 (subject to proof of the proper quantum of the Credit Union's total claim) because any amount determined in the lienholders' action as being subject to a priority in favour of the lienholders will ultimately result in a corresponding shortfall to Federated. Federated recognizes the burden of the accruing interest and legal costs until the Credit Union receives a distribution in satisfaction of its claim.

[20] Claims for legal costs by the Credit Union and/or the lienholders will be dealt with at the hearing July 17, 2007.

[21] The Receiver will report, with its recommendations, upon the matter of a possible distribution and reserve(s), together with the other issues referred to herein, for the purpose of dealing with the issues under consideration at the hearing set for July 19, 2007.

DATE: June 22, 2007

CUMMING J.