

COURT FILE NO.: CV-17-11812-00CL
DATE: 20210727

SUPERIOR COURT OF JUSTICE – ONTARIO

(Commercial List)

RE: ANTHONY ZANARDO in his capacity as the Estate Trustee for the ESTATE OF
LUIGI GAMBIN

Applicant

AND:

Di BATTISTA GAMBIN DEVELOPMENTS LIMITED, RAY Di BATTISTA,
ANTHONY Di BATTISTA, JULIA BABENSKY, WHITWOOD
DEVELOPMENTS LTD. and GREYSTAR DEVELOPMENTS INC.

Respondents

BEFORE: Koehnen J.

COUNSEL: Edmond Lamek Counsel, for the Appointed Liquidator

Robert Malen for Ray DiBattista

HEARD: July 27, 2021

ENDORSEMENT

[1] This is a motion by a court appointed Liquidator to approve the sale of the property at 333 Fairhill Ave. in Brampton, authorizing the Liquidator to extend a listing agreement with Colliers McCauley Nichols Inc., approve the Liquidator's Sixth Report and the activities described therein, approve the fees and disbursements of the Liquidator and its counsel and

obtain a sealing order with respect to certain confidential appendices to the Liquidator's Sixth Report.

Sale of the Fairhill Property

- [2] The most contentious issue is the sale of the Fairhill property. For the reasons set out below, I approve the proposed sale.
- [3] The issue arises out of a breakdown in the relationship between Ray DiBattista and the estate of his former business partner, Luigi Gambin. As a result of the breakdown of that relationship, a Liquidator was appointed to liquidate the assets of the business that Mr. DiBattista and Mr. Gambin pursued together over many years.
- [4] One of those assets is the Fairhill property.
- [5] The Liquidator proposes to sell the Fairhill property to a purchaser referred to as Ron Ajula during the hearing. He is purchasing in trust for a corporation to be incorporated.
- [6] Mr. DiBattista opposes the sale. Mr. DiBattista says the sale is undervalue and that he has presented superior offers since which should be preferred over that of the proposed sale. I am not able to accept that proposition.
- [7] Mr. DiBattista compares the price in the Ajula sale to the range of prices prepared by various listing agents in 2019 and notes that the Ajula purchase price is at the lower end of the range that agents proposed in 2019. He also points to other offers that he has brought to the table since the Ajula offer became firm.

- [8] The fact that a sales price is at the lower end of what listing agents had proposed is not in any way determinative. Listing agents are trying to obtain a listing. They may inflate their prices; they may overestimate the market appetite for property.
- [9] To me the better indicator of value is what the market is willing to pay. Here, the Liquidator engaged in a credible process to market the property. It retained an internationally recognized real estate agent, Colliers. It prepared an investment summary, a virtual data room and a confidential information memorandum setting out detailed information about each of the properties. Colliers sent email blasts concerning the properties to 1701 recipients on March 12, 2020; further emails to 1293 recipients on March 17, 2020; and further emails to 1692 recipients on April 2, 2020. A total of 65 parties had executed confidentiality agreements with Colliers and have access the data room.
- [10] Colliers received four offers for the Fairhill property. Two were, on their face, inferior to the Ajula offer. A third offer was, on its face, slightly superior to the Ajula offer but required the payment of a commission to another agent. Once that commission was taken into account, the net proceeds available for distribution were less than under the Ajula offer.
- [11] I am satisfied that the Liquidator conducted a sales process that complied with the principles articulated in *Royal Bank v Soundair Corp.* 1991 CarswellOnt 205 (Ont. C.A.).
- [12] Mr. DiBattista suggests there was something inadequate about the Liquidator's sales process because the Ajula offer was lower than what the Liquidator had hoped for. The fact that a vendor receives a price lower than it had hoped for does not mean that its sales

process was inadequate. It simply means that the market did not value the property the same way as the vendor or did.

[13] In addition, Mr. DiBattista points to the following statement of Saunders J. quoted in *Soundair*:

“If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.”¹

[14] In argument, counsel for Mr. DiBattista took this quotation little further and suggested that a leader, a higher price meant that the trustee had not properly carried out its duty. That is not what Saunders J. said. What he said was at a later, higher offer “may” indicate that the trustee had not carried out its duty.

[15] I am satisfied that is not the case here. The Fairhill property was being marketed in late 2020 and early 2021. Its principal tenant was the Academy School. It occupies 55% of the premises. Its lease was ending in May 2021. Mr. DiBattista had the habit of entering into renewal discussions with tenants only three months before the expiry of the lease. He felt that was the best way of achieving business success. Mr. DiBattista continued to be intimately involved in the operation of the Fairhill and other properties notwithstanding the presence of the Liquidator. His involvement included responsibility for tenant

¹ *Soundair*, supra at para. 116, citing Saunders, J. in *Re Beauty Counsellors of Canada Ltd.* (1986) C.B.R. (N.S.) 237 (Ont. S.C.)

relationships. Mr. DiBattista chose not to try to renew the Academy lease before the Fairhill property was marketed.

- [16] It comes as no great surprise that a property whose major tenant has a lease that is about to expire may attract a lower price than a property that is fully tenanted for the long term. Mr. DiBattista chose to proceed in a certain way. He cannot now blame the Liquidator if proceeding in the way he wanted resulted in a lower price for the property.
- [17] After the Liquidator accepted the Ajula offer, Mr. DiBattista went out and looked for other offers. By that time, however, he had renewed the Academy lease. It comes as no great surprise that he might be able to get a better sales price after having renewed the lease of his major tenant than before having renewed that lease.
- [18] In addition to the foregoing, the offers that Mr. DiBattista obtained are all conditional. They would in effect renew the entire sales negotiation process.
- [19] In my view, it is not appropriate to do that here. Doing so would undermine the reliability and certainty of judicially supervised sales. Here, the Liquidator acted responsibly to market the property. The Liquidator accepted the best offer available after a broad market canvas. The offer was consistent with valuation evidence the Liquidator obtained in 2021. After having accepted an offer, it would be inappropriate for the Liquidator to reject it simply because a better potential offer came along at a later stage. The concept of court approval of offers in circumstances like this is not to give liquidators an out if superior potential offers arise later. If that were the case, it would be extremely difficult to sell anything in a court supervised sale.

[20] Mr. DiBattista's next objection to the Ajula offer is that, according to Mr. DiBattista, it was an offer that should have been linked to an offer for two other properties. Ajula initially made a conditional offer on three properties that the Liquidator had offered for sale. The price on the Fairhill property was not as high as the Liquidator had hoped to obtain but was nevertheless acceptable because it was part of the sale of three properties. Ajula later declined to purchase the other two properties.

[21] Mr. DiBattista suggests that the Liquidator somehow failed in its duty by failing to create a binding contractual link between the Fairhill offer and the two other offers. On the evidence before me, I do not accept that suggestion. The fact remains that the single offer for the Fairhill property remained the best offer that was available after a wide-ranging market canvas and was consistent with recent valuation evidence.

[22] No one can be held to a standard of perfection evaluated with the benefit of hindsight. There is no evidence before me to suggest that the Liquidator in any way fell short of his standard of care nor do I see anything to suggest that he fell short of any standard of care.

[23] I note that Mr. DiBattista has always been an unwilling participant in the liquidation process. Liquidation was imposed upon him. It is perhaps not surprising that he is not happy with the process as a whole. I agree that liquidation is not the ideal way of selling properties, but that is where the parties arrived at.

[24] I note that counsel for the estate was present at the motion and supported the Liquidator's motion. It appears that the estate prefers the certainty of the Ajula offer to the uncertainty of potential offers all of which are broadly conditional on due diligence satisfactory to the purchaser.

Renewal of the Listing Agreement

[25] All parties agree that the listing agreement with Colliers can be renewed until November 1, 2021; the date on which Mr. DiBattista has brought a motion to replace the Liquidator. The renewal will be retroactive to the termination date of the prior listing agreement.

Estate Costs

[26] Counsel for the estate recently incurred costs cross-examining Mr. DiBattista. They ask for the cost of those cross examinations to be deferred to the judge hearing the November 1 motion to replace the Liquidator. Mr. DiBattista opposes that relief. In my view it is appropriate for the judge hearing the motion on November 1 to decide whether the estate should get costs incurred on this motion. I simply do not have enough information about the motion to replace the Liquidator, the steps the estate took on this motion and the relationship between the two to determine the question.

Sealing Order

[27] The Liquidator seeks an order sealing certain confidential appendices to its Sixth Report.. No one opposes that relief.

[28] In *Sherman Estate v. Donovan*, 2021 SCC 25 the Supreme Court of Canada held at para. 38 that an applicant for a sealing order must establish that:

- (i) court openness poses a serious risk to an important public interest;
- (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[29] I am satisfied that the sealing order should be granted based on the test in *Sherman Estate*. The confidential appendices contain information about the valuation of the Fairhill property, and information about other offers. In the event the Ajula offer does not close, the disclosure of the confidential appendices will potentially prejudice a further sale of the property. There is no other mechanism to prevent that risk other than a sealing order. Sealing orders are commonly granted in those circumstances. A sealing order is proportionate to the at issue at hand. The vast majority of the file remains accessible to the public. The only portion affected by the sealing order is limited to confidential commercial information. Sealing such information will improve the chances of a higher price for the property on a subsequent sale. As a result, the benefits of the order outweigh whatever limiting effects it has on the open court principle.

Approval of Liquidator's Conduct and Fees

[30] The Liquidator seeks an order approving his conduct to date, his fees and those of his counsel. The liquidator has already been paid its fees as have his counsel. The only thing at issue is court approval.

[31] Mr. DiBattista asks that court approval be deferred to the motion to replace the Liquidator. I tend to agree that that is the more appropriate time at which to address court approval of the Liquidator's actions and fees. That said, however, I am approving the sale of the Fairhill property pursuant to the Ajula offer. I am implicitly also approving the steps the Liquidator took to get to that sale.

A handwritten signature in blue ink, appearing to be 'KJ', is written above a horizontal line.

Koehnen J.

Date: July 27, 2021