



No. H200590  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

MCAP FINANCIAL CORP

PETITIONER

AND

MAIN STREET ARTS INVESTMENTS INC. et al.

RESPONDENTS

**APPLICATION RESPONSE**

**Application response of:** Jim Pattison Developments Ltd. (the "JPD")

**This is a response to:** the notice of application (the "**Application**") of The Bowra Group Inc. (the "**Receiver**"), the receiver of the assets, undertakings, and properties of Main Street Arts Investments Inc., Port Capital Developments (Arts) Inc., and Main Street Arts Development Limited Partnership.

**Part 1: ORDERS CONSENTED TO**

JPD consents to the granting of the orders set out in paragraph 1 of Part 1 of the Application without the amendment proposed at paragraph 13 of Part 4 of the application response of Main Street Arts Investment Inc., Port Capital Development (Arts) Inc., Main Street Arts Development Limited Partnership, Port Capital Development Inc., and Macario Teodoro Reyes (collectively, the "**Respondents**").

**Part 2: ORDERS OPPOSED**

JPD does not oppose the granting of any of the orders set out in paragraph 1 of Part 1 of the Application.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

JPD takes no position on the granting of the orders set out in no paragraphs of Part 1 of the Application.

### Part 3: FACTUAL BASIS

1. JPD submitted the successful Bid (the "JPD Bid") for the Mortgaged Lands (as defined below) that were marketed by the Receiver with the assistance of Cushman Wakefield ULC ("Cushman") in a public and transparent manner pursuant to a sale process approved by this Court (the "Court-approved Sale Process") in an order granted on January 8, 2021 (the "Receivership Order").

2. As described in the Affidavit of Mario Mainella sworn January 6, 2021 (the "Receiver's January Affidavit"), the property subject to the Court-approved Sale Process consisted of land and commercial properties (the "Mortgaged Lands"). Shares or equity interests in the Respondents were not marketed as part of the Court-approved Sale Process, and prospective bidders were not provided with the flexibility to make equity, financing, or restructuring bids.

3. In the Receiver's January Affidavit, the Receiver advised this Court as follows:

[...] a practice has developed in relation to Court ordered sales whereby specific sales process orders are made so as to provide certainty to participants within the market of potential purchasers of high value lands. In the case of the Mortgaged Lands it is my view that a procedure should be invoked whereby all potential purchasers should be directed to submit offers to purchase by a defined date from which the Receiver can select what it views to be the highest and best offer for acceptance and then to bring that accepted offer to the Court for approval.

It is my view that the marketing strategy set out by Cushman in Exhibit "B" is sufficient to achieve the desired objective to elicit the highest and best offer (all terms being considered) for the Mortgaged Lands and it would be the intention of the Receiver upon appointment to engage in the procedures set out in Exhibit "B" with an expected 60-day marketing period.

**Receiver's January Affidavit, paras. 7-8. Emphasis added.**

4. The Receivership Order approved the sale process proposed by the Receiver. In accordance with the Court-approved Sale Process, the Receiver marketed the Mortgaged Lands for a 60-day marketing period commencing on February 8, 2021, and imposed an April 8, 2021 bid deadline on all prospective bidders.

**Receivership Order, para. 3.**

5. The Respondents did not oppose the granting of the Receivership Order or the terms of the Court-approved Sale Process.

6. JPD was one of seven bidders who submitted offers to purchase the Mortgaged Lands on April 8, 2021. On April 12, 2021, the Receiver accepted the JPD Bid as being the highest and best bid. The Respondents to JPD's knowledge did not submit a competing bid in the Court-approved Sale Process.

**Affidavit #2 of Mario Mainella, sworn April 13, 2021 (the "Receiver's April Affidavit"), paras. 17 – 18.**

7. In its application for approval of the contract of purchase and sale dated April 12, 2021 entered into by the Receiver, as vendor, and JPD, as purchaser, with respect to the JPD Bid (the "**JPD Sale Agreement**"), the Receiver disclosed the details of the JPD Bid and the other six bids received, including the relevant purchase prices, advised this Court that the Receiver is satisfied as to the ability of JPD to complete the transaction that is the subject of the JPD Sale Agreement, and recommended that this Court approve the JPD Sale Agreement.

**Receiver's April Affidavit, paras. 17 – 20 and 24.**

8. On April 13, 2021, the Receiver filed its Application for approval of the JPD Sale Agreement.

9. On April 23, 2021, one business day before the scheduled hearing of the Application, the Respondents filed an application response in which they advise, among other things, that:

- (a) the Respondents expect by the April 27, 2021 hearing date to have secured an offer to purchase the Mortgaged Lands from a third-party (the "**Late Alternate Bid**");
- (b) the Late Alternate Bid is to be structured as a purchase of the beneficial ownership of the Mortgaged Lands by a special purpose entity formed for that purpose, and a purchase of the shares of the application respondent Main Street Arts Investment Inc., which holds legal title to the subject property as bare trustee and nominee;
- (c) the Late Alternate Bid is to be conditional upon this Court granting a "reverse vesting order", which would purportedly relieve the proposed purchaser from the obligation to pay property transfer taxes in connection with the transfer of the Mortgaged Lands.

10. Details as to the specifics of the Late Alternate Bid, including the specific relief being sought with respect to it at the April 27, 2021 hearing of the Application, and the legal basis for such relief in the circumstances, are lacking as of the time of the filing of this application response.

**Part 4: LEGAL BASIS**

***No Legal Basis for Considering the Late Alternate Bid***

11. There is no legal basis in the circumstances upon which this Court can reopen the Court-approved Sales Process to consider, let alone approve, the Late Alternate Bid.

12. The JPD Sale Agreement is the outcome of a public and transparent Court-approved Sale Process of which the Respondents had notice for over three months. Acceding in the Respondents' last-minute maneuvering in submitting the Late Alternate Bid would change the Court-approved Sale Process from a sale by a receiver, subject to court approval, into an auction conducted by the court at the Application. This would be unfair to JPD who has entered in good faith into the JPD Sale Agreement with the Receiver and to the six other bidders who relied upon the integrity of the process that this Court put in place.

13. The Respondents' suggestion that this Court pays "less deference to a receiver's sale process where a late bid is well secured and there is a significant difference in price" than other Canadian courts is not an accurate statement of the law.

**Respondents' Response, Part 5, para. 3**

14. The applicable principles this Court will follow in applying the *Soundair* test are as follows:

1. When considering the efforts of a receiver in obtaining offers for the purchase of property the Court must consider the following factors:
  - (a) whether the receiver has made sufficient efforts to get the best price and has not acted improvidently;
  - (b) the interests of all parties;
  - (c) the efficacy and integrity of the process by which offers were obtained; and
  - (d) whether there was unfairness in the sale process.
2. In considering whether the receiver has acted providently the Court should examine the conduct of the receiver in light of the information in the possession of the receiver when it agreed to accept the offer. The Court should be very cautious before deciding the receiver's conduct was improvident based on information that has come to light after the receiver made his or her decision: *Soundair*, at para 21.
3. There should be deference given to the receiver's judgment and his or her decision ought not to be set aside merely because a later and higher bid is made. This deference is appropriate because it allows for certainty and finality with receivership sales: *Cameron v. Bank of Nova Scotia* (1981) 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 313 (S.C.) at para. 36. I would add, however, that our Court of Appeal has suggested this deference is more of a factor where the difference in price is not significant and the later bid is, for example, less well secured than the recommended one: See *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317 (CanLII) at para. 40.
4. Late offers may be considered by the Court on an application to approve a sale only for the limited purpose of considering whether the price obtained by the receiver was a reasonable one. In some cases a disparity may be so great as to call into question the adequacy of the sale process: *Soundair* at paras. 26 and 30.
5. The primary interest to be considered by the Court is that of the creditors, and to see that the best possible price is obtained, though the interests of all parties, including the debtor and the receiver's recommended purchaser, must also be considered: *Soundair* at paras. 39-40. While the primary concern is the interests of the creditors, as noted earlier a secondary but still important consideration is the integrity of the process. Integrity of the process includes

the object of reasonably ensuring that there is certainty and finality in sales by receivers: *Soundair* at paras 42-46.

***Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058, para. 31, citing *Royal Bank v. Soundair*, 1991 CanLII 2727. Emphasis added.**

6. The *Soundair* factors are underpinned by the policy that “it is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers.”

***Soundair*, at para. 72, per McKinlay J.A. (concurring in result).**

7. Consistent with this principle, the Ontario Court of Appeal in *Soundair* held that:

[...] the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they [i.e., late offers] should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

***Soundair*, paras. 30-31. Emphasis added.**

8. In other words, as stated by the Ontario Court of Appeal in *Soundair*, “when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver.”

***Soundair*, para. 62. Emphasis added.**

9. In the present case, the Late Alternate Bid does not fall within the narrow exceptions to this Court's ability to consider late bids for several reasons.

10. First, neither the Respondents nor any other party has raised issues with respect to the Receiver's and Cushman's efforts to obtain the best market price for the Mortgaged Lands, the efficacy and integrity of the Court-approved Sale Process by which bids were solicited and obtained, or otherwise suggested any unfairness in the working out of the Court-approved Sale Process.

11. Second, the Late Alternate Bid does not appear to be “significantly” higher than the purchase price in the JPD Sale Agreement. While details are lacking, it appears that the Late Alternate Bid is structured to appear to be higher than the JPD Sale Agreement because it “will fully satisfy the mortgage indebtedness owed to the petitioner.” However, the Petitioner’s estimated shortfall is only \$503,000 – an amount that is approximately 2% of the \$23 million purchase price under the JPD Sale Agreement. For reference, this Court has held that a 20% price increase is not sufficient for the acceptance of a late bid made outside of an approved receivership sale process. Decisions of this Court where late or non-compliant bids have been displaced compliant but lower bids includes cases where such late or non-compliant bids were 40%, 46%, and (in the case of the authority relied upon by the Respondents) more than 100% higher than the bid submitted in accordance with the applicable process. It is only in the case of such significant discrepancies that the integrity of the receiver’s sale process is called into question.

**Receiver’s April Affidavit, at para. 23; *Gene Drennan Ltd. v. Med Grill Ltd.*, 2001 BCSC 117; *Re Modatech Systems Inc.*, 1995 CarswellBC 1140 (B.C.S.C); *Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058; *British Columbia v. Barron Enterprises Ltd.*, 2000 BCCA 317**

12. Third, the appearance of the Late Alternate Bid being a “higher” bid than the JPD Sale Agreement may be illusory when legitimate property transfer taxes are considered. The property transfer tax payable by JPD is approximately \$668,000.00. The Late Alternate Bid seeks this Court’s assistance to avoid this amount, a remedy which (as discussed below) JPD and six other bidders who followed the rules were not given the opportunity to pursue under the Court-approved Sales Process, and which this Court in any event lacks the jurisdiction to grant in the circumstances. If the Court were to excuse the seven other bidders who followed the rules from paying their taxes, presumably some of them would be prepared to bid more.

13. Fourth, the Late Alternate Bid is also not more well secured than the JPD Sale Agreement. To the contrary, there are serious questions about the viability of the Late Alternate Bid. While the Respondents claim to be ready to close, there is no evidence that the proposed purchaser, described only as an affiliate of Synvest Capital Corporation, has conducted any of the Receiver’s recommended due diligence. There is also no indication that the Receiver has had an adequate opportunity to complete its own due diligence on the purchaser given the last-minute nature of the Late Alternate Bid.

14. Finally, and in any event, properly assessed for *the limited purpose of considering whether the price obtained by the Receiver was a reasonable one*, the Late Alternate Bid does not disclose a purchase price disparity that is “so great as to call into question the adequacy of the sale process.” As noted above, if it can be said to be higher at all, the Late Alternate Bid is well within the range of the bids put forward as part of the Court-approved Sale Process, demonstrating that the Court-approved Sale Process worked as intended.

15. More fundamentally, the present case is not one where the terms of the Receiver’s sale process are under scrutiny. In this case, this Court imposed the Court-approved Sale Process which called for the imposition of a bid deadline to ensure a public and fair bidding process. Seven bidders including JPD complied with the Court-approved Sale Process. There can be no question that the Respondents who elected not to participate in the Court-approved Sale Process were fully aware of its terms including the bid deadline and the process for seeking any extensions or modifications to its terms. The Respondents’ conduct in sitting on their hands until the Court-

approved Sale Process ran its course and JPD's successful purchase price was disclosed before starting to work "earnestly" to cobble together a bid of their own is completely unreasonable. The Court-approved Sale Process would be stood on its head were the Respondents' late maneuvering allowed.

***PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 3367, para. 44.**

16. Significantly, the Late Alternate Bid is also not merely a late offer. Rather, it proposes a fundamentally different transaction structure than the one contemplated by the Court-approved Sale Process in which seven parties participated in good faith. Specifically, the Late Alternate Bid proposes a share sale and a "reverse vesting order" in furtherance of a legally dubious tax avoidance strategy. If the Respondents consider their proposed sale structure to be legally permissible and the best way to maximize value, it is inexplicable that they did not suggest this to the Receiver or the Court on the application for the Court-approved Sale Process so that other bidders had the opportunity to bid on that sale structure as opposed to the one that was put before them in the Court-approved Sale Process.

17. The Respondents' statement that the Late Alternate Bid is apparently supported by the holder of the certificate of pending litigation registered against the Mortgaged Lands and by the Respondents' equity investors also carries no weight in the circumstances.

18. While there may be circumstances where the support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, there is insufficient transparency in this case as to the reason for why these stakeholders support a Late Alternate Bid structured to pay a different creditor to the benefit of Respondents who may be exposed to deficiency claims on their guarantees.

19. In any event, this is a case where the Receiver has acted properly and in a provident way. As in *Soundair*, "it would make a mockery out of the judicial process", under which a mandate was given to this Receiver to sell the Mortgaged Lands, if the support of certain stakeholders for a last-minute Late Alternate Bid were permitted to carry the day over the integrity of a Court-approved Sale Process.

***Soundair*, para. 68.**

20. In *Gene Drennan Ltd. v. Med Grill Ltd.*, this Court has specifically held that creditor support for a late bid that was 20% higher than the compliant bid was not a reason for disregarding approved bidding procedures:

Having heard all the evidence and re-considered this matter *de novo*, I am of the view and find that in the context of fairness to all of the bidders, and in the interests of the integrity of the process, Moxie's bid of \$652,000 plus inventory, must be accepted. To hold otherwise would be to make mockery out of the tender process that is the integral and basic part of the procedure.

At bar it is not known whether other secured creditors will, of necessity, be affected. All that is known is that there is a potential that they may or may not be affected. Even though this is so, and even though the offer submitted before the Master at the hearing is 20% higher, I do not find that

sufficient for me to accept Sophie's higher bids made outside the tendering process.

There are tendering rules and it is the public interest that, save in exceptional circumstances, by and large, they should be obeyed.

***Gene Drennan Ltd. v. Med Grill Ltd.*, 2001 BCSC 117, paras. 56 – 58.**

21. In summary, to allow the Respondents to submit the Late Alternate Bid in these circumstances would be to turn the Court-approved Sale Process on its head, make a mockery of the integrity of court-approved sale processes, undermine the interests of both commercial morality and the future confidence of business persons in their dealings with receivers, and cause commercial chaos to the detriment of future receivership proceedings.

***Soundair*, paras. 22, 72.**

***No legal basis for approving the "reverse vesting order" sought by the Respondents***

22. Without citing any supporting authority, or at this time sufficient detail of transaction mechanics, the Respondents propose that this Court approve a unique and controversial "reverse vesting order" procedure for implementing the transaction contemplated by the Late Alternate Bid.

23. The legal basis and purpose for granting reverse vesting orders, which are a significant departure from this Court's *Model Approval and Vesting Order*, has been considered by this Court in the context of proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**"), where reverse vesting orders have been held to be appropriate in "complex and unique circumstances." The authority for granting this relief flows from the CCAA court's broad powers under section 11 of the CCAA.

***Quest University Canada (Re)*, 2020 BCSC 1883, paras. 127 - 173, leave denied in *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.**

24. The Respondents have not put forward any case or statutory authority to suggest that this Court has the jurisdiction to grant them a reverse vesting order in the context of receivership or commercial foreclosure proceedings either at all or on the facts presently before it.

25. There are no "complex", "unique", or "exceptional" circumstances" warranting the granting of extraordinary relief in the form of a reverse vesting order as there were in *Quest University Canada (Re)*. This is a standard transaction for the court-approved sale of real property like those this Court sees regularly. JPD and six other bidders put in offers to acquire the assets in question without the aid of a reverse vesting order through an asset sale as contemplated by the Court-approved Sale Process.

26. The only basis put forward for the granting of a reverse vesting order in this case is that it allegedly "facilitates a greater economic recovery because it ensures that all municipal approvals associated with the subject property are acquired and also because property transfer tax is not triggered by the transaction." This is smoke and mirrors.

***Respondents' Response, Part 4, para. 11.***

27. A reverse vesting order is not necessary to transfer the municipal approvals in question. Again, JPD and six other bidders were prepared to bid on the assets in question without the aid of a reverse vesting order through an asset sale as contemplated by the Court-approved Sale Process. This Court's *Model Approval and Vesting Order* has been utilized to transfer commercial real estate developments countless times. The same holds for other common law jurisdictions. The Respondents provide no evidence and no authority that a reverse vesting order is legally required for this purpose.

28. In substance, the Respondents are seeking or propose to subsequently seek this Court's blessing of a reverse vesting order transaction in furtherance of a tax avoidance strategy to benefit them personally. There is no jurisdictional or legal basis for this Court to grant such relief. Were it to do so, this Court would be issuing a precedent that would open the floodgates to every purchaser of commercial real property in British Columbia in the context of court-approved sale transactions seeking to avoid legitimate property transfer taxes contrary to the term of this Court's *Model Approval and Vesting Order* and decades of precedent in this and other provinces. Again, the Respondents have provided no evidence and no authority that would justify such a radical departure from the existing law and foreclosure and receivership practice in the circumstances of this case.

***No basis for granting the Respondents an extension to the equitable right of redemption***

29. In a further attempt to disrupt the Court-approved Sale Process, the Respondents alternatively seek an order that they be permitted to redeem the mortgage indebtedness in the period following the granting of the Approval and Vesting Order but prior to the closing of the sale to JPD. This could terminate the JPD Sale Agreement at the Respondents' option.

30. Courts have consistently refused to grant this kind of relief on the basis that it is an affront to the integrity of the receiver's sales process, based on the same concerns expressed in the case law cited earlier. For example, Pepall J of the Ontario Superior Court stated as follows in response to a request by a party seeking to exercise the right of redemption at a hearing to approve the sale of a property by a receiver following a sales process:

A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

***B&M Handelman Investments Limited v. Mass Properties Inc., 2009 CanLII 37930 (O.N.S.C.), para. 22. See also BDC v Marlwood Golf & Country Club, 2015 ONSC 3909, paras. 25-28; Home Trust Company v. 2122775 Ontario Inc., 2014 ONSC 1039, para. 9. Emphasis added.***

31. Again, the Respondents provide no evidence and no authority for why they are entitled to the extraordinary relief they seek from this Court. Granting them this relief would have a significant negative impact on the commercial certainty inherent in a court-approved sales process. It would also be highly prejudicial to JPD, who has invested considerable time and expense in this process to date and will continue to have to do so leading up to closing on the faith of this Court's orders.

32. In any event, even outside of the Receivership context, there is authority that this Court lacks the jurisdiction to grant the relief requested by the Respondents with respect to the extension of the redemption period. Indeed, the conclusion of the Court of Appeal in *Montréal Trust Co. v. Brown* state that this Court does not have the authority to grant an order allowing for redemption of the mortgage after an order has been granted with respect to the sale of the subject property:

[...] a British Columbia court has no jurisdiction to allow a mortgager of lands to redeem after a judicial sale of the property under court order where no further confirmation is needed and the order provides for a vesting in the purchaser.

***Montréal Trust Co. v. Brown*, 1974 CanLII 1108 (B.C.C.A.), para. 14.  
See also *Morguard Mortgage Investments Limited v. Faro Development Corporation Ltd.*, 1974 CanLII 1182 (A.B.C.A).**

33. Further, the right of redemption is a form of equitable relief. The order that the Respondents seek therefore requires consideration of whether their conduct in this case warrants equitable protection. In this regard, it is a commonly accepted maxim that "equity aids the vigilant and not those who slumber on their rights". Similarly, this Court must also consider whether the Respondents can be said to have come to court with "clean hands" and themselves acted in an equitable manner, as "he who seeks equity must do equity".

34. In JPD's submissions the Respondents have not acted equitably. There is no evidence that they took any steps to attempt to redeem the lands in the three-month period from the granting of the Receivership Order until the Receiver's approval of the JPD Sale Agreement. Nor is there any evidence that they made any efforts to participate in the Court-approved Sale Process. Rather, the evidence is that the Respondents lay in wait until the Court-approved Sale Process ran its course, and the successful purchase price was disclosed, only to then pounce with a dubious Late Alternate Bid based on a questionable transaction structure.

#### Part 5: MATERIAL TO BE RELIED ON

35. The pleadings filed in this Action; and

36. Affidavits #1 and #2 of Mario Mainella, filed January 6, 2021 and April 13, 2021.

JPD estimates that the Application will take two hours.

THIS APPLICATION RESPONSE is prepared and delivered by Peter Bychawski of the firm Blake, Cassels & Graydon LLP, Barristers & Solicitors, counsel for Jim Pattison Developments Ltd., whose ADDRESS FOR SERVICE is Suite 2600, Three Bentall Centre, 595 Burrard Street, Vancouver, BC V7X 1L3; Email: Vancouver.service@blakes.com / peter.bychawski@blakes.com

Date: April 26, 2021

  
Signature of Peter Bychawski / Claire  
Hildebrand, lawyers for JPD