

Court of Appeal File No.
Commercial List Court File No. CV-20-00651299-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

2615333 ONTARIO INC.

Applicant
(Respondent)

and

**CENTRAL PARK AJAX DEVELOPMENTS PHASE 1 INC., 9654488 CANADA INC.,
9654461 CANADA INC., 9654372 CANADA INC., 9617680 CANADA INC. AND 9654445
CANADA INC.**

Respondents
(Appellants)

NOTICE OF APPEAL

THE APPELLANTS appeal to the Court of Appeal from the order of the Honourable Justice Cavanagh (the “**Application Judge**”), of the Superior Court of Justice (Commercial List), dated April 15, 2021 (“**Order**”), and made at Toronto, appointing RSM Canada Limited as receiver (“**Receiver**”) over certain real property (“**the Ajax Properties**”) belonging to the Appellants.

THE APPELLANTS ASK that the Order be set aside and an Order be granted as follows:

1. Dismissing the application dated November 13, 2020 brought by the Applicant, 2615333 Ontario Inc. (the “**261 Ontario**”), that sought various relief including appointing the Receiver in respect of the Ajax Properties (the “**Receivership Application**”);
2. Awarding the Appellants’ costs of:
 - a. This appeal on a substantial indemnity basis; and,
 - b. The Receivership Application below on a substantial indemnity basis;
3. Such further and other relief as counsel may request and that seems just to this Honourable Court.

THE GROUNDS OF APPEAL are as follows:

4. The Application Judge erred (all definitions not otherwise defined herein have the meaning set out in the Endorsement of Justice Cavanagh, dated April 15, 2021):
 - a. In granting the Order;
 - b. In finding that 261 Ontario was a creditor of the Appellants and not an equity investor in the Project;
 - c. In failing to find that the Notices of Intention to Enforce Security (“**Notices**”) delivered by 261 Ontario were “stale dated” and/or spent, and therefore without effect, as no steps were taken with respect thereto until more than two years after their delivery;
 - d. In finding that the doctrine of laches did not apply in the within case with respect to the Notices;

- e. In failing to find that there was no need for the appointment of the Receiver as 261 Ontario had already commenced a legal proceeding against the Appellants, and the Appellants had similarly commenced a legal proceeding against 261 Ontario, which proceedings remain outstanding and ongoing for more than a year, and which provide the proper forum for the adjudication of the dispute between the parties;
 - f. In failing to find that 261 Ontario acted in bad faith in commencing enforcement proceedings against the Appellants, and in particular, that the Receivership Application was brought in bad faith;
 - g. In including as part of the assets subject to the receivership certain real property that is the subject of a Master Development Agreement (“**MDA**”), which is not an asset of the Appellants, but rather of a different corporation, which is not a party to the litigation;
 - h. In finding that the repurchase rights of the Town of Ajax (“**Ajax**”) have priority over the mortgages registered on title to the various properties;
 - i. In providing Ajax with de facto control and a veto over any transaction for the sale and purchase of the real property that is the subject of the receivership, by requiring that any purchaser wishing to purchase real property from the Receiver shall first enter into a development agreement with Ajax on certain terms, which must include a right of repurchase in favour of Ajax similar to that found in the MDA; and,
 - j. In exercising his discretion to appoint the Receiver based on a fundamental misunderstanding of the facts and the evidence;
- 5. The decision to appoint the Receiver was clearly wrong;
 - 6. Section 193 of the *Bankruptcy and Insolvency Act* (“**BIA**”);

7. Such further and other grounds as counsel may advise and this Court permit.

THE BASIS OF THE JURISDICTION OF THE COURT OF APPEAL IS:

8. This is an appeal as of right pursuant to s. 193 (a) – (c) of the BIA;

9. The Order appealed from was interlocutory, but involved the appointment of a Receiver;

10. Leave is not required for the commencement of this appeal under ss. 193(a) to (c) as:

a. Matters raised in the within appeal involve future rights, including:

i. The right of Ajax to de facto control the sale of the real property that is the subject of the receivership, by requiring that any purchaser of the real property enter into a development agreement with Ajax on certain terms, including a right of Ajax to repurchase the property similar to that found in the MDA; and,

ii. The right of Ajax to repurchase certain real property having priority over mortgages registered against title to those properties;

b. The Order is likely to affect other cases of a similar nature in the proceeding. The finding that Ajax's repurchase right is in priority to other mortgages will likely impact other aspects of this proceeding, including the priority of funds, and the right of Ajax to impose its will in the receivership, and will also affect those with an economic interest in the debtors and with claims in the receivership. Similarly, the inclusion of the MDA in the receivership impacts LeMine's ability to exercise its consent and other rights in the MDA in the receivership, including in any sale process and beyond;

c. The value of the property that is the subject of the Order and that is involved in this appeal exceeds ten thousand dollars. The Order is not procedural in nature, and the grounds of appeal are largely substantive, concerning priorities and the inclusion of

assets in the receivership to the detriment of other entities. The Order pertains to property not belonging to the debtors and has the effect of giving Ajax veto rights to any sale agreement, which thereby puts into play the value of the Appellants' property. For the same reasons, the Order affects any sale and amounts to a determination of the economic interests of the Appellants' claimants resulting in a gain for some parties, such as Ajax, and a loss for others, such as LeMine as well as other creditors and investors;

11. In the alternative, if leave is required under section 193(e) of the BIA, the Appellants seek leave to appeal the Order, and ask that the leave application be heard at the same time as the appeal.

12. It is appropriate that leave be granted because the appeal:

- a. Is of general importance to the practice of bankruptcy/insolvency matters and/or to the administration of justice as a whole;
- b. Is *prima facie* meritorious; and,
- c. Would not unduly hinder the progress of the herein proceedings;

13. This appeal raises issues that go beyond the parties themselves and are of general importance to the practice of insolvency law, namely:

- a. Whether a Notice of Intention to Enforce Security under the BIA expires after more than two years of inaction;
- b. Whether a court may include in a receivership order property of a corporation that is not itself a party to the proceeding;

c. Whether a municipality ought to have the right in a receivership proceeding to require that a purchaser enter into a prior agreement with the municipality, to the detriment of the creditors; and,

d. Whether a receiver ought to be appointed in circumstances where there is outstanding, protracted litigation between the parties involving the very same issues raised in the receivership;

14. In addition, the appeal concerns issues important to the administration of justice as a whole, specifically whether:

a. Steps taken in a receivership proceeding would have the effect of compromising a party's rights in parallel litigation; and,

b. The equitable remedy of appointing a receiver should be granted when there is evidence that the party seeking the relief acted in bad faith;

15. The appeal is *prima facie* meritorious because the Application Judge made a number of factual and legal errors in reaching the conclusion that it was just and equitable to appoint the Receiver, as set out above;

16. The appeal would not unduly hinder the proceedings in a meaningful way. The Ajax Properties are not in jeopardy of wasting or deteriorating in any way, and can be dealt with in the parallel litigation pending the appeal. Furthermore, this matter is not time sensitive. The litigation between the parties has been ongoing for more than a year and 261 Ontario did not seek the appointment of a receiver in the parallel litigation.

DATE: April 26, 2021

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PHASE 1 INC. et al.**
Respondents (Appellants in Appeal)

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Proceeding Commenced in Toronto

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