

**CITATION:** Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Limited, 2013 ONSC 147  
**COURT FILE NO.:** CV-11-9456-00CL  
**DATE:** 20130107

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**(COMMERCIAL LIST)**

**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**

**RE:**           **FIRM CAPITAL MORTGAGE FUND INC., Applicant**

**AND:**

**2012241 ONTARIO LIMITED, Respondent**

**BEFORE:**   **CUMMING J.**

**COUNSEL:** **John D. Marshall, for the Receiver**

**B. Whealen, for the Applicant, Firm Capital Mortgage Fund Inc.**

**Lakhwinder Gill, for some purchasers of units**

**B. Tannenbaum, of the Receiver**

**L. Kenley, for some purchasers of units**

**HEARD:**     **JANUARY 7, 2013**

**ENDORSEMENT**

[1] Deloitte & Touche Inc. (the "Receiver"), brings a motion, *inter alia*, to approve a sale transaction by the Receiver in respect of the real property of the debtor, 2012241 Ontario Limited (the "Debtor") and New Bond Properties Inc. In Trust ("New Bond"), as purchaser.

[2] (It is noted that the Receiver is a substituted receiver, replacing Ira Smith Trustee & Receiver Inc., the former receiver.)

- [3] The purchase price is by way of a vendor-take-back mortgage for the entire amount in favour of Firm Capital Mortgage Fund Inc. ("Firm Capital"), the existing first mortgagee in respect of the subject property. The New Bond purchase agreement is, in essence, a credit bid.
- [4] The nominee purchaser is a non-arm's length, related, party to Firm Capital.
- [5] The subject property is an inchoate commercial condominium project with 64 units in respect of which some 29 units were pre-sold by the Debtor. The subject property is substantially complete but has not yet been registered as a condominium.
- [6] The Receiver was authorized to market the property by an Appointment Order dated May 10, 2012 in a marketing process approved by the court by an order dated August 30, 2012.
- [7] The Receiver completed the marketing process and received four offers, as set forth in a summary seen in Appendix "L" of the Second Report of the Receiver dated December 14, 2012, together with the Receiver's confidential information memorandum seen in Appendix "T" thereof (both Appendixes being made subject to a sealing order pursuant to this Endorsement).
- [8] The highest of these four offers is substantially below the amount outstanding on the Firm Capital mortgage. The present outstanding amount of the mortgage of Firm Capital is about \$14.3 million.
- [9] The Receiver is of the view that the marketing process has been exhausted and that the highest offer received "is the best price that could be expected on the open market in the present circumstances". The Receiver notes as well that the Debtor attempted unsuccessfully to refinance the project and sell the units for a considerable time prior to the initial receivership order in November 2011.
- [10] Firm Capital, the primary secured creditor, has now presented the offer under immediate consideration whereby New Bond would purchase the property for a purchase price equal to the highest purchase price received by the Receiver through the marketing process.
- [11] The Receiver states that "based on the offers received...it is evident that there would not be a full recovery for Firm Capital... and there would be no recovery at all for the other subordinate or unsecured creditors of the Debtors were any of those offers accepted".
- [12] It is obvious that Firm Capital has a very significant shortfall on its outstanding mortgage and, in the circumstances, it is reasonable that the motion of the Receiver to approve Firm Capital's offer be granted.
- [13] The Receiver has substantial funds on hand representing deposits from prospective purchasers of units. These deposits were held in trust by the Debtor's law firm, Sikder Professional Corporation, pending the closing of the sales of the units.
- [14] The trust deposits of some \$1,153,415.17 are now held by the Receiver's real estate counsel, Meyer, Wasenaar & Banach LLP.

[15] The Receiver has done an extensive "Analysis of Refunds Payable by Reference to Sikder Professional Corporation ("Sikder") Summary of Trust Ledger Balances as on November 25, 2011" ( Appendix "P" to the Receiver's Second Report).

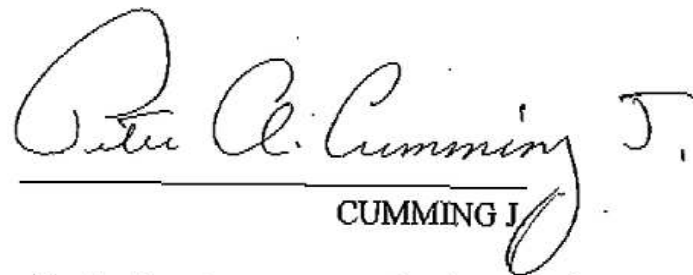
[16] The parties represented at the present hearing expressly agree (and no opposition is raised by other interested parties not present, all of whom have been given notice of the hearing at hand) that the Receiver's motion for approval to distribute the trust monies to the purchasers of units as named in Schedule E (other than where Sikder Professional Corporation is named as payee) to the requested order, be granted.

[17] By the agreement of all parties present, the funds referenced in Schedule E to Sikder Professional Corporation as payee in respect to units 112, 216, 217, 205, 208, 209, 201 218 and 219 , totalling some \$156,363.00, are to be paid into court to the credit of Court File 11-9456-00CL pending a further order of the court. The Receiver was unable to gain sufficient certainty through its analysis and tracing efforts as to whom these monies are properly payable and in what amounts.

[18] These unit holders will have to agree between themselves as to the distribution of these remaining funds or have their respective rights determined through litigation. Reportedly, there are also a number of persons who claim that monies paid on deposit have not been properly accounted for by the Debtor, its principals and/or agents or were improperly paid by the Debtor, its principals and/or agents in breach of trust obligations. Two actions, CV-12-468081 and CV-12-468731, have already been commenced.

[19] The parties present agree that these alleged claims have nothing to do with the Receiver and agree that the Receiver's motion is to be granted.

[20] The quantum of the Receiver's fees, and the fees of its counsel, are approved, as requested. It is noted that the Receiver and its counsel have expressly stated for transparency that there is no contractual agreement by Firm Capital or New Bond to pay their outstanding fees pursuant to the order requested. The Receiver and its counsel reserve their legal rights and may, of course, advance any claim for indemnity from Firm Capital they may have at law.

  
CUMMING J.

Date: January 7, 2013