

COURT FILE NO.: 07-CL-7044

DATE: 20080829

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)****IN THE MATTER OF AN APPLICATION UNDER SECTION 116(1)6 OF THE SOCIAL
HOUSING REFORM ACT, 2000, S.O. 2000, c. 27****RE: THE REGIONAL MUNICIPALITY OF YORK (Applicant) – and –
THORNHILL GREEN CO-OPERATIVE HOMES INC. (Respondent)****BEFORE: MORAWETZ J.****COUNSEL: Douglas O. Smith, Roger Jaipargas, and Brendan Y. B. Wong, for the
Applicant, The Regional Municipality of York****Murray Klippenstein and Basil Alexander, for the Respondent, Thornhill
Green Co-Operative Homes Inc. and CHF Canada****Mervyn D. Abramowitz and L. Viet Nguyen for the Receiver, Mintz and
Partners Ltd.****HEARD: July 18, 2008****ENDORSEMENT**

[1] Thornhill Green Co-Operative Homes Inc. (“Thornhill Green”) and the Co-operative Housing Federation of Canada (“CHF”), (collectively “the Moving Parties”) move for an interlocutory injunction restraining the sale by Mintz and Partners Ltd., in its capacity as court-appointed receiver (the “Receiver”) of the Co-op property located in Markham (the “Property”) currently owned by Thornhill Green, pending the hearing of an (Intended) Application For Judicial Review.

[2] Thornhill Green is a social housing project governed by the *Social Housing Reform Act* (the “SHRA”). The only major asset of Thornhill Green is the Property.

[3] On July 16, 2006, The Regional Municipality of York (“Region”) appointed Mintz as Receiver pursuant to s.116(1)5 of the SHRA. The appointment of the Receiver followed a determination by the Region that three triggering events under s.115 of the SHRA existed with respect to Thornhill Green, namely that: (i) Thornhill Green was unable to meet its obligations

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as they became due, (ii) Thornhill Green had incurred a material and excessive deficit and (iii) Thornhill Green had failed to operate the housing project properly.

[4] During the course of the receivership appointment under s.116(1)5, no judicial review of the appointment of the Receiver was ever sought by Thornhill Green.

[5] On June 26, 2007, the Region obtained an order from Pepall J. (the "Appointment Order") appointing Mintz as Receiver pursuant to s.116(1)6 of the *SHRA* and s.101 of the *Courts of Justice Act*.

[6] Thornhill Green did not take any steps to oppose the Appointment Order, despite being served with the Application Record. No attempt has been made to appeal, set aside, reverse, or vary the Appointment Order.

[7] By Notice of Motion dated May 15, 2008, the Receiver brought a motion to sell the Property to Housing York Inc. ("HYI") in exchange for HYI's assumption of the current mortgage indebtedness secured against the Property (the "Proposed Sale"). HYI is a wholly-owned subsidiary of the Region. The Moving Parties want to stop this motion from being heard.

[8] The issue to be determined is whether the motion for an injunction pending the hearing of the intended Application for Judicial Review should be granted.

[9] For the following reasons, I have concluded that the injunction should not be granted and the motion should be dismissed.

[10] In order to succeed with the motion, the Moving Parties have to satisfy the *RJR-MacDonald* test and demonstrate that: (i) there is a serious issue to be tried; (ii) irreparable harm will result if the injunction is not granted; and (iii) the balance of convenience favours the moving parties.

[11] I have not been persuaded that there is a serious question to be tried. I am in agreement with the submissions of counsel for the Region that even accepting (which the Region does not) the evidence put forward by the Moving Parties and their arguments thereon, the intended application discloses no valid basis at law for judicial review.

[12] The decisions made by the Region which Thornhill Green intends to submit for judicial review are as follows:

- (i) the Region's initial decision to appoint the Receiver as a "private" Receiver;
- (ii) the Region's subsequent decision to apply to court to appoint the Receiver;
- (iii) the Region's decision to "purchase and consent" to the sale of Thornhill Green's assets and liabilities from the Receiver.

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[13] I am in agreement with the submission of counsel for the Region to the effect that decisions (ii) and (iii) above, are not reviewable as they are not "statutory powers of decision" for the purposes of the *Judicial Review Procedure Act* ("*JRPA*").

[14] Section 1 of the *JRPA* defines "statutory power of decision". In my view, it is clear that the Region's decision to apply to court pursuant to s.116(1)6 for an order appointing the Receiver and the Region's decision to support the sale of the property pursuant to s.95 of the *SHRA* are non-statutory powers of decision because those decisions do not decide or prescribe the legal rights, powers, privileges, immunities, duties or liabilities of Thornhill Green. The decision to apply for a court appointment of a Receiver did not prescribe the legal rights, powers, privileges, immunities, duties and liabilities of Thornhill Green. That authority rests with the court.

[15] The power to apply to court to seek an order appointing a receiver cannot be equated with the power to decide whether a receiver should be appointed by the court.

[16] Similarly, the support of the Region for the sale does not prescribe the legal rights, powers, privileges, immunities, duties or liabilities of Thornhill Green. This result will only occur if the court orders the sale of the Property.

[17] Section 95 of the *SHRA* delineates the duties of housing providers. The *SHRA* defines "housing provider" as a person who operates a housing project. The Region is not a housing provider. It is difficult to see how a statutory power of decision could arise out of a statutory provision which deals with the duties of a housing provider.

[18] The Region is a service manager. The criteria for a service manager to appoint a receiver and to apply for a court-appointed receiver is enumerated in s.120 of the *SHRA*.

[19] The Region moved under s.116(1)6 of the *SHRA* and s.101 of the *CJA* for a court order appointing a receiver. The motion was heard on June 26, 2007 by Pepall J. Justice Pepall determined that the appointment of Mintz was "just and convenient" in all of the circumstances.

[20] Thornhill Green did not oppose the Appointment Order and there has been no attempt to appeal, set aside, reverse or vary the Appointment Order.

[21] It seems to me that a court, on judicial review, could not come to the conclusion as urged by the Moving Parties that it was unreasonable for the Region to privately appoint the Receiver under s.116(1)5 or to apply for a court appointment under s.116(1)6 without coming into conflict with the decision of Pepall J. that the appointment was warranted under both the *SHRA* and the *CJA*.

[22] It seems to me that the Appointment Order is binding and conclusive on the issue of the reasonableness of the Region's decision to "privately" appoint the Receiver and subsequently to apply for the court appointment. The intended application for judicial review is, in my view, tantamount to a collateral attack on the Appointment Order. (See: *Garland v. Consumers' Gas Co.*, [2000] 185 D.L.R. (4th) 536 (S.C.J.) and *R. v. Wilson*, [1983] 2 S.C.R. 594).

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[23] Further, the applicable statutory time period for the appointment of the Receiver by the Region has expired. A private appointment under s.116(1)5 shall not exceed one year, and the receivership terminates at that time unless the court orders otherwise on the application of the service manager made before the expiry of the one-year period. The appointment period of the Receiver by the Region has expired and, in my view, the judicial review application of that appointment is moot.

[24] The appointment of the Receiver pursuant to s.116(1)5 commenced on July 19, 2006. The Appointment Order effectively terminated the term of the Receiver's appointment by the Region and converted same to a court-appointed receivership as of June 26, 2007.

[25] In my view, there would be no useful purpose served by quashing the s.116(1)5 appointment.

[26] The Moving Parties place great significance on the April 27, 2006 resolution by Regional Council. In fact, the Region disagrees with the significance placed by the Moving Parties on this issue, but takes the position that this injunction application is not the appropriate forum for debating that issue. Accordingly, I will not deal with this point in detail, other than to comment that I have doubts as to whether the passing of the resolution equates to exercising a remedy under s.116.

[27] The chronology as set out in the Second Report of the Receiver states that the notice of triggering events is dated March 9, 2006. The Resolution of Council is dated April 27, 2006. The Resolution provides that upon receipt of the requisite consent from the Minister of Municipal Affairs and Housing, the Region appoint a receiver to operate Thornhill Green and that the Region retain the services of Mintz and Partners to act as Receiver.

[28] On May 11, 2006 (by letter dated May 4, 2006), the Thornhill Green Board of Directors responded to the notice of triggering events. On July 6, 2006, the Ministry of Municipal Affairs and Housing, consented to the appointment of the Receiver and on July 19, 2006, the Region appointed Mintz as Receiver. The consent provided by the Ministry as well as the formal engagement of Mintz occurred subsequent to the 60-day period referenced in s.117 of the *SHRA*.

[29] The substance of the matter cannot be ignored. No steps were taken by the Moving Parties to challenge any of the steps taken by the Receiver or the Region, until after the Receiver's application for sale and vesting the purchased assets was brought.

[30] Thornhill Green relies upon the decision in *Labourview Co-operative Homes Inc. v. Chatham-Kent (Municipality)*, (2007) 37 MPLR 4th 156 (SCJ) and urges that the outcome of this case should be similar. In *Labourview*, the Divisional Court concluded that no "triggering events" having occurred, the service provider had no jurisdiction to intervene in the management of the Co-operative and its decision to do so was quashed. The argument put forth by the Moving Parties is summarized at paras. 62-69 of its factum.

[31] In my view, the *Labourview* case is distinguishable. In *Labourview*, the applicants promptly brought an application for judicial review. The Divisional Court rendered its ruling

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within the first year of the receivership. In this case, not only has the statutory period for the private appointment expired, but the court appointment has been in place for over a year.

[32] Further, *Labourview*, involved a private receiver, whereas these proceedings arise out of the Appointment Order, which has not been challenged by the Moving Parties. As stated by the Divisional Court in *OPSEU v. Ontario Ministry of Labour*, (2001), 71 CLRBR 2nd 207 at 208, "judicial review is an equitable and discretionary remedy and an obligation remains upon an applicant to bring the matter before the court without undue delay".

[33] The Moving Parties argue that it only recently came to their attention that the Resolution was passed on April 27, 2006, which they argue is within the 60-day period specified by s.117. However, this submission does not address nor explain the absence of any challenge to the receivership until after the Receiver's application for sale vesting the purchased assets was brought. It seems to me that that there has been significant delay in bringing this matter before the court. In my view, the position of the Moving Parties is devoid of substance.

[34] The Moving Parties have failed, in my view, to establish that there is a serious question to be tried. In light of this conclusion, it is not necessary to consider the other two parts of the *RJR-MacDonald* test.

[35] In addition, Thornhill Green and CHF have not provided an undertaking as to damages and asked to be excused from the usual requirement due to public interest concerns. CHF is a proposed applicant in the intended Notice of Application to Divisional Court for Judicial Review and has an overall budget of several million dollars. I agree with the submission of counsel for the Region that there are no exceptional circumstances that would exempt CHF from providing the usual undertaking as to damages.

[36] Finally, I am in agreement with the position set forth by counsel to the Region at paras. 10-18 that an interlocutory injunction is not the appropriate remedy in this case.

[37] In the result, the Motion for an Interlocutory Injunction is dismissed. The Receiver's sale motion should proceed.

[38] If the parties are unable to agree on the issue of costs, brief written submissions (maximum four pages) can be filed within 30 days.


MORAWETZ J.

DATE: August 29, 2008