

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Siller v. MacKillop, 2014 NSSC 43

**Date:** 20140121  
**Docket:** SYDJC332410  
**Registry:** Sydney

**Between:**

Jean Siller

Applicant

v.

Gordon MacKillop, Laurie Lewis,  
Donald MacKillop and Noel MacKillop

Respondent

**Judge:** The Honourable Justice Frank Edwards

**Heard:** January 15, 2014 in Sydney, Nova Scotia

**Written Decision:** February 3, 2014

**Counsel:** Vincent Gillis for Gordon MacKillop  
and Laurie Lewis; Respondent/Movers  
Ralph Ripley for Jean Siller in her personal  
capacity as beneficiary  
John G. Khattar for Jean Siller, Trustee of the  
Estate of Stewart B. MacKillop  
Noel MacKillop, self-represented

**By the Court:**

[1] This is a motion by Gordon MacKillop (Gordon) Laurie Lewis (Laurie), and Donald MacKillop (Donald) for an Order requiring the property located at 875 Coxheath Road, Sydney, Nova Scotia (a property held in an Estate Trust) to be conveyed to Gordon and Laurie, the successful bidders for the property at an auction held on July 23, 2013 in accordance with the Order of Justice Coady dated May 27, 2013.

[2] The first four paragraphs of Schedule A of Justice Coady's Order read as follows:

- 1) Open bid auction to be held on or before July 20, 2013;
- 2) Each bidder to provide a letter from a bank or other financial institution confirming bidder's ability to pay the amount of their bid;
- 3) An individual's bid may not exceed the amount confirmed in the letter from his/her bank/financial institution;
- 4) Successful bidder to pay for the property within forty-five (45) days of acceptance of his/her bid, with Deed to be delivered upon payment in full.

[3] Counsel for Gordon, Laurie, and Donald, and Counsel for Jean Siller (Jean) in her personal capacity, (Jean is also Trustee of the Estate of her late father, Stewart B. MacKillop), and Noel MacKillop (Noel), on her own behalf, consented

to Justice Coady's Order. Although the Order reads "Consented As to Form" above the consenting signatures, it is clear that the signatories were consenting as to form and content. Their actions, up to and including the time of sale on July 23, 2013 demonstrate that they all had agreed to abide by the content of the Order.

[4] Further to Schedule "A", Mr. Khattar, Counsel for the Trustee, provided a letter dated July 11, 2013 addressed to Counsel (but not to Noel). The letter reads as follows:

"I am enclosing a copy of the Order issued by Justice Kevin Coady pertaining to the sale of the property. Attached to it are our instructions for the bidding which calls for the auction to be held on or before July 20, 2013. As this date falls on a Saturday, it is agreed by all parties that the auction will now take place on Tuesday, July 23<sup>rd</sup> at 10:00 o'clock in the morning at the Celtic Room, Cambridge Suites, 380 Esplanade, Sydney, N.S.

The bidding instructions will be strictly adhered to. It is important that each bidder come with a letter confirming their ability to pay at least the amount of their bid. Before the bidding is finalized all parties will be required to provide proof of their ability to pay to ensure that all bidding took place in good faith.

Once the bidding has been completed and the winning party decided, all parties must realize that this then becomes a binding contract between the Estate and the successful bidder.

In the event the successful bidder does not complete the purchase, for whatever reason, then a new bid must take place immediately upon the Trustee's being advised that the successful bidder does not intend to complete the sale, no later than 45 days after July 23<sup>rd</sup>. At the new bid the bidder, who won the original bid, but cannot complete the purchase, will not be allowed at the subsequent sale.

If there is any questions pertaining to the sale, they should be addressed in advance. I would ask anyone with any questions to ensure they are addressed to me prior to July 19, 2013.”

[5] On July 23, 2013, Laurie and Gordon made the highest bid, \$158,000. Noel was second with a bid of \$152,000.00. Following the auction, in compliance with Paragraph 2 of Schedule “A” of the Order, Counsel for Laurie and Gordon produced a letter dated July 22, 2013 signed by a senior mortgage broker from “The Mortgage Centre.” The letter provided that...”Kenneth Lewis (Kenneth) and Clair MacKillop (Clair) are approved for a \$200,000.00 mortgage to purchase the property at 875 Coxheath Road...” The named individuals are the spouses of Laurie and Gordon. Clair MacKillop was present at the auction; Kenneth Lewis was not, but was in the local area and could have been contacted.

[6] Jean’s Counsel noted that the letter did not name Laurie and Gordon. Mr. Khattar then convened a meeting with only the lawyers present and, unfortunately, excluded Noel who was self-represented. At that meeting, Jean’s Counsel agreed that if Laurie and Gordon could produce proof of acceptable financing within 24 hours, he would not object to the regularity of the auction. Regrettably, Counsel

did not provide the revised letter, naming Laurie and Gordon with their spouses until July 25, that is, more than 24 hours after the disputed auction.

[7] Mr. Khattar provided a letter dated July 23, 2013 to Counsel for Laurie and Gordon which states in part:..."The successful bidder were the clients of Mr. Gillis (Laurie and Gordon) who bid a final amount of \$158,000.00." He further noted that the transaction would close once title migration had been completed.

[8] Jean and Noel now take the position that a new auction should be held at which Laurie and Gordon would not be permitted to bid. Noel, in a letter dated July 26, 2013 to Mr. Khattar, says that the process was "...totally unfair" and "I do not feel that I would have been given the same courtesy" (ie., more time to clarify her proof of financing). Noel understandably objects to having been excluded from the "lawyers-only" meeting.

**Issue:**

1. Did the July 22, 2013 Mortgage Centre letter provided on July 23, 2013 comply with Justice Coady's Order?

**Analysis:**

[9] This was not a public auction at which any member of the public with approved credit could participate. This was a private auction restricted to beneficiaries of the Estate of Stewart B. MacKillop. The beneficiaries were all siblings who knew each other and their respective spouses.

[10] Accordingly, on July 23, 2013, all concerned would have known that the persons named in the original Mortgage Centre letter were the spouses of Laurie and Gordon. All present would have been aware that the letter probably meant that Laurie and Gordon with their spouses had arranged the requisite financing. They would all know that any possible doubt about financing could be easily resolved. The mortgage broker was local. Clair was present. Kenneth was not present but could have been contacted.

[11] It is troubling that Noel was excluded even though all the lawyers knew she was self-represented. It appears that none of the lawyers copied correspondence to her. In particular, as noted, Mr. Khattar did not address his letter of July 22, 2013

to Noel. However, Noel's letter of July 26, 2013 to Mr. Khattar references Mr. Khattar's letter. Noel likely was aware of its contents prior to July 23.

[12] I have carefully considered Noel's exclusion and its possible effect on the validity of the auction. The temptation is to find that she was treated unfairly, the process is tainted, and there should be another auction. But that would be to allow form to trump substance. The truth is that Noel showed up at the auction at the appointed time. She had a fair opportunity to bid against Laurie and Gordon (Jean only participated by putting in a reserve bid of \$80,000). Noel stopped bidding at \$152,000.00 and apparently could not or would not try to bid more than the winning bid of \$158,000.00. In short, her exclusion had no bearing on her ability to fully participate in the bidding.

[13] Noel argues that, had she attended the "lawyers-only" meeting after the auction, she would have objected to giving Laurie and Gordon 24 hours, or any time, to clarify their proof of financing. In the circumstances, that objection would have been completely unreasonable and untenable.

[14] It is clear that Laurie and Gordon acted in good faith to secure the requisite proof of financing prior to the auction. I am satisfied that the failure of the July 22 Mortgage Centre letter to name Laurie and Gordon was likely due to inadvertence. I am satisfied that Laurie and Gordon were confident that they had the proof of financing they needed when they attended the auction. There is no evidence (nor was there any suggestion) that, for example, the letter contained only the spouses' names so that Laurie and Gordon could later repudiate the sale. I am satisfied that any unfairness suffered by Noel did not affect the validity of the auction.

[15] Likewise, I am satisfied that the failure to provide the second Mortgage Centre letter within 24 hours is inconsequential. There is no reason to insist that 24 hours is okay but 48 hours is not. The second Mortgage Centre letter, also dated July 22, 2013, confirms and clarifies that Laurie and Gordon had secured the financing required by Justice Coady's Order prior to the auction.

[16] The parties had apparently anticipated that the successful bidder might choose "for whatever reason" (Khattar July 11, 2013 p.2) not to complete the purchase. In that case, a new bid would occur within 45 days at which time the defaulting bidder would not be allowed to participate. That is not the case here.



Laurie and Gordon have been prepared to complete the sale since July 23 (subject to title migration). Therefore, even if I were inclined to order a new auction, there would be no reason to exclude Laurie and Gordon.

[17] To order a new auction with the highest bidders excluded would be detrimental to the trust. There would be no one to oblige Noel to repeat her \$152,000.00 bid. Conceivably, Noel could be the highest bidder with a bid just over the reserve bid of \$80,000.00. (Assuming Jean would again enter such a reserve bid). Alternatively, to rule that Noel be deemed the successful bidder as of July 23 would also see the trust short-changed.

[18] **Caselaw:** Counsel have provided a number of cases but they are of limited assistance. The factual situation here is very particular and has little in common with a public mortgage auction, or a call for qualified tenders by a municipality or government department.

[19] In **MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.**, 1999 Carswell Alta 301, [1997] S.C.J. No. 17, a public tendering case, the bid in question was deemed non-compliant because the bidder had attached a

handwritten note to the bid which effectively qualified the bid. The qualification would have allowed the bidder to change the price bid and therefore was not a mere clarification. In our case, the letter presented on July 23 needed only to be clarified by confirmation that it applied to the bidders and not just to their spouses.

[20] In **Chandos Construction Limited v. Alberta (Minister of Infrastructure)** 2006 Carswell Alta 91, 2006 A.B.C.A. 41, the Court of Appeal allowed the appeal of the second lowest tenderer and awarded it damages for lost profit where the Minister had wrongly accepted a non-compliant tender. The present circumstances, where the conditions called for acceptance of the highest bid, is analogous to the **Chandos** decision, as the only difference is that the highest, rather than the lowest bid, was the object of the auction.

[21] In **Chandos**, the Court of Appeal found that the trial judge erred by deeming irregularities in the accepted tender as minor or inconsequential. In fact, the winning bid was substantially non-compliant. (One deficiency would have increased the tender price by almost \$24,000.00 and there were other deficiencies.) Thus, there was a breach of the duty to treat all bidders fairly and equally. The context of the present case was a family situation where everyone knew all the

others, and where the impugned letter could be readily confirmed to apply to the bidders as of the date of the auction. In this factual context, I am satisfied that the deficiency in the first July 22 Mortgage Centre letter was clearly minor and easily clarified.

[22] In Levesque v. Daigle (1978) 21 N.B.R. 467 (NBQB), bidders at a mortgage auction sale were required to have “cash at sale”. The Plaintiff did not have the cash with him so the sheriff gave him an hour to raise it. When the Plaintiff failed to produce the cash within the hour, the sheriff re-opened the bidding and sold the property to another. The Court dismissed the Plaintiff’s action against the sheriff because the Plaintiff had not complied with the condition.

[23] Levesque is distinguishable. “Cash at sale” leaves no room for interpretation. In the case at bar, the successful bidder produced a letter stating their spouses had the requisite financing. It could have been readily clarified that the letter also covered the eligible bidders. In fact, that is what occurred with the delivery of the second Mortgage Centre letter.

[24] Or, the lawyers present could have devised something for the spouses (Kenneth and Clair) to sign to confirm that Laurie and Gordon were covered by the approved financing and /or that Kenneth and Clair would bind themselves to close the transaction. I suspect that those present at the time realized there was really no substantive problem. How else to explain Mr. Khattar's July 23 letter confirming the successful bidders.

[25] The factual issue here is whether the letter provided on July 23 was compliant with Justice Coady's Order. The letter required clarification but the bottom line is that when Laurie and Gordon made their bid they had already arranged for the financing to cover it. That was the intent behind the condition set out in Paragraph 2 of Schedule A of Justice Coady's Order. I am satisfied that the winning bid was compliant. I therefore allow the motion and direct that the subject property be conveyed to Laurie and Gordon.

**Costs:** The parties shall each bear their respective costs.

Order Accordingly,

J.

**Sydney, Nova Scotia**