

Court File No.: CV-23-00004031-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PEAKHILL CAPITAL INC.

Applicant

- and -

1000093910 ONTARIO INC.

Respondent

**IN THE MATTER OF AN 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**

**OVERVIEW OF SUBMISSIONS OF THE RECEIVER
(Motion originally returnable June 12, 2024)**

June 14, 2024

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Lawyers for KSV Restructuring Inc.,
solely in its capacity as Court-
appointed Receiver and not in its
personal capacity

TO: THE SERVICE LIST

OVERVIEW OF SUBMISSIONS OF THE RECEIVER

1. KSV Restructuring Inc. (“**KSV**”), in its capacity as Court-appointed receiver and manager (in such capacity, the “**Receiver**”), over 1000093910 Ontario Inc. (the “**Debtor**”), and all of the assets, undertakings and properties of the Debtor, including the property municipally known as 20 Regina Road, Vaughan, Ontario (collectively, the “**Property**”), files this overview of submissions to assist the Court in connection with the Receiver’s motion originally returnable June 12, 2024 at 9:30 a.m. (ET) (the “**Receiver’s Motion**”), and now traversed to June 14 at 12:30 pm.

2. The Receiver’s Motion was served on the Service List on May 31, 2024 – more than 12 calendar days before its originally scheduled return date.¹

A. Background

3. The procedural history of these receivership proceedings (the “**Receivership Proceedings**”) is long, complex and marked with attempts by the Debtor to interfere with the Receiver’s administration of the Property. A summary of the procedural background related to the Receivership Proceedings is provided in the Second Report of the Receiver dated May 31, 2024 (the “**Second Report**”) which can be found at Tab 2 of the Receiver’s Motion Record dated May 31, 2024 and filed in support of the Receiver’s Motion.² Terms used but not otherwise defined herein have the meaning ascribed to them in the Second Report.

4. The principal asset of the Debtor is the property municipally known as 20 Regina Road, Vaughan, Ontario (the “**Real Property**”).³ On September 13, 2023 the Debtor *consented* to a Receivership Order in respect of the Debtor, which Order became effective on October 2, 2023.

¹ Affidavit of Service of the Receiver sworn June 7 2024 [Master A976, Current A402].

² The Second Report of the Receiver dated May 31, 2024 [Second Report] [Master A592, Current A18].

³ *Ibid* at section 1.0 at para 2 [Master A595, Current A21].

5. On December 20, 2023, the Court granted the Sale Process Approval Order, which, among other things:

- (a) approved the sale process for the Real Property (the “**Sale Process**”);
- (b) approved the retention of Jones Lang LaSalle (“**JLL**”) as the listing agent to sell the Real Property in the Sale Process; and
- (c) approved a Stalking Horse Agreement between 2557904 Ontario Inc. (“**255**”) and the Receiver dated November 13, 2023, as amended by the Amending Agreement dated June 11, 2024 (the “**Stalking Horse Agreement**”), to purchase the Real Property, which acted as the “stalking horse bid” in the Sale Process.⁴

6. The Sale Process Approval Order was granted by the Court notwithstanding that, at approximately 3:55 p.m. (ET) on December 19, 2023 (being the afternoon before the return of the Receiver’s motion seeking the Sale Process Approval Order), the Debtor delivered a cross-motion (the “**First Cross-Motion**”) seeking, among other things, an order approving the Original APS and directing the Receiver to permit the Debtor to complete the purchase transaction as contemplated by the Original APS.⁵ The endorsement issued in connection with the Sale Process Approval Order noted that the Court would not consider the First Cross Motion for several reasons, including: (i) the fact that it was not served on proper notice; (ii) it was not properly scheduled with the Court; and (iii) it had “little chance of success”.⁶

⁴ *Ibid* at section 1.0 at para 4 [Master A596, Current A22].

⁵ *Ibid* at section 4.1 at paras 5 and 6 [Master A600, Current A26].

⁶ *Ibid* at section 1.0 at Appendix “B” [Master A645, Current A71].

7. The Sale Process Approval Order was subsequently appealed (the “**Appeal**”) by the Debtor on the asserted basis that, among other things:

- (a) the learned Motion Judge, notwithstanding the late delivery of the First Cross-Motion, ought to have considered the merits of the First Cross-Motion;
- (b) the learned Motion Judge erred in law in failing to consider, or properly consider, the interests of the Debtor; and
- (c) the learned Motion Judge erred in law by failing to apply, or consider, the principles outlined in *Soundair*.⁷

8. On April 2, 2024, the Court of Appeal unanimously dismissed the Appeal, with reasons issued April 9, 2024.⁸

9. Following the dismissal of the Appeal, the Receiver conducted and completed the Sale Process in accordance with the Sale Process Approval Order. The Receiver now brings the Receiver’s Motion seeking, among other things, the AVO and the Distribution and Discharge Order.⁹

The Second Cross-Motion

10. On June 10, 2024 at 3:52 p.m. (being the afternoon two days before the return of the Receiver’s Motion, this time), the Debtor and the Tenants (as defined below) served a Responding

⁷ *Ibid* at section 4.1 at Appendix “I” [Master A829, Current A255].

⁸ *Ibid* at section 4.1 at para 9 [Master A600, Current A26].

⁹ *Ibid* at section 4.2 at para 3 [Master A601, Current A27].

and Cross-Motion Record in connection with the Receiver's Motion (the "**Second Cross-Motion**").¹⁰ In the Second Cross-Motion, the Debtor seeks, among other things:

- (a) an adjournment of the Receiver's Motion;
- (b) an interim order staying the Receivership Order and the Sale Process Approval Order¹¹ pending completion of the "Refinance" (as defined in the Second Cross-Motion materials) or, in the alternative, an interim order staying the Sale Process Approval Order until June 30, 2024, and without prejudice to the Debtor's right to bring a further motion to extend the stay to complete the Refinance;
- (c) an order discharging the Receiver on completion of the Refinance upon the filing of a discharge certificate; and
- (d) on completion of the Refinance, an order terminating the Stalking Horse Agreement.¹²

11. Despite being on notice of the return of the Receiver's Motion and the June 12, 2024 for some time, the Second Cross-Motion, similar to the First Cross-Motion, was not served on anything close to proper notice, was not scheduled or confirmed with the Court, and does not include a form of draft order. The extremely late service also does not allow time for responding material or cross-examination on the Debtors affidavit. In its Reasons for Decision when dismissing the Appeal in respect of the First-Cross Motion, the Court of Appeal noted that:

¹⁰ Affidavit of Service of the Respondent sworn June 10, 2024 [Master B-1-374, Current B-1-268].

¹¹ It is of note that, as was noted in the Second Report and earlier in this overview of submissions, the Sale Process and all other matters contemplated under the Sale Process Approval Order have been completed or satisfied, as the case may be.

¹² Notice of Motion of the Respondent dated June 10, 2024 paras 2-13 [Master B-1-124, Current B-1-18].

“[3] The motion judge’s decision not to hear the cross-motion was an exercise of her discretion. It should not be overturned unless she erred in law, misapprehended the evidence in a material way, or was clearly wrong: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 MCBA 46, at para. 12. Decisions by judges supervising insolvency and restructuring proceedings are, in particular, entitled to considerable deference: *Re Harmon International Industries Inc.*, 2020 SKCA 95, at para. 40. This court will intervene only if the motion judge committed a demonstrable error: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 18, citing *Ravelston Corporation Limited (Re)*, 2007 ONCA 135, at para. 3.

[4] The appellant has not established that the motion judge erred in refusing to hear the cross-motion. Both the receivership order and the Rules of Civil Procedure required the appellant to give seven days notice of its cross-motion. [...]. The appellant served its notice of cross-motion and supporting materials minutes before 4:00 p.m. on the eve of the hearing date set for the receiver’s motion. As the motion judge observed, the receiver did not have any opportunity to respond to the cross-motion nor had the court had time to read the materials. In addition, the hearing list that day was already full”.¹³

Simply put, this motion is déjà-vu all over again as the Debtor once again, at the last minute, seeks to obstruct these proceedings and block the proper conclusion of the Receiver’s court-authorized sale of the Real Property.

12. Moreover, initially the Debtor’s Second Cross-Motion sought to seal the entirety of the Commitment Letter (the “**FCC CL**”) provided by Firm Capital Corporation (“**FCC**”), and the

¹³ Second Report, *supra* note 2 at Appendix “K” at para 4 [Master A851, Current A277].

Receiver was not provided with a copy thereof.¹⁴ Following service of the Second Cross-Motion materials, the Receiver even proposed that the Debtor provide it with a redacted copy of the FCC CL that would redact all commercially sensitive information, but the Debtor initially failed to provide even that. On June 11, 2024 at 8:09 p.m. (ET) (again, on the eve of the Receiver's Motion), following the Receiver's series of requests, the Debtor provided the FCC CL.¹⁵

13. The Debtor has now inappropriately served a further affidavit at 4:15 p.m. (ET) on June 13, 2024 (being one day *after* the return date of the Receiver's Motion), which attached an updated – and now signed – commitment letter from FCC (the "**Second FCC CL**"). Justice Lavine's endorsement on June 12 (traversing this matter to Justice Sutherland on June 14) did not provide for the filing of further evidence, from the Debtor or anyone else. In the limited time to review the purported new affidavit, the Receiver notes that: (i) there is no evidence that the fee payable upon signing the Second FCC CL has been paid; and (ii) the Second FCC EL is highly conditional.¹⁶ By way of example with respect to conditionality, the Second FCC CL is conditional on receipt of an appraisal report satisfactory to FCC (the "**FCC Appraisal Report**") confirming the value of the Real Property is at least \$27,000,000.00.¹⁷ There is nothing in evidence to indicate that the FCC Appraisal Report condition has been satisfied – or that it has even been commissioned – and the Receiver notes that the highest price obtained in the comprehensive court-supervised market Sale Process was \$24,255,000.00 – significantly less than the minimum amount required under the FCC Appraisal Report. In other words, no credible appraisal could ever be obtained fulfilling that key condition of refinancing.

¹⁴ Affidavit of Ravi Aurora sworn June 10, 2024 at para 8(a) [June 10 Aurora Affidavit] [Master B-1-140, Current B-1-34].

¹⁵ *Ibid* at Exhibit "A" [Master B-1-393, Current B-1-287].

¹⁶ Affidavit of Ravi Aurora sworn June 13, 2024 at Exhibit "A" [June 13 Aurora Affidavit] [Master B-1-539, Current B-1-433].

¹⁷ *Ibid* at Exhibit "A" [Master B-1-541, Current B-1-435].

14. Additionally, the Receiver notes that the Second FCC CL is conditional on, among other things:

- (a) a copy of financial statements for the past 2 years of the Borrower and corporate Guarantors (the most recent of which must be audited),¹⁸ which the Debtor has already told the Receiver do not exist;
- (b) an Environmental Site Assessment of the Real Property confirming that the site is free of all environmental contaminants, which appears not to have been prepared or even commissioned;
- (c) a Building Inspection Report for the Real Property on the structural and mechanical condition of the building, which appears not to have been prepared or even commissioned; and
- (d) any further reasonable documentation that FCC deems necessary to complete the underwriting of the loan on property similar in nature to the Real Property (collectively, the “**FCC CL Conditions**”).¹⁹

15. There is currently no evidence that any of the FCC CL Conditions have been met or can be satisfied in advance of the Second FCC CL’s July 12, 2024 funding deadline.²⁰

16. There is also significant risk that FCC may walk away altogether. The Second FCC CL is also subject to a Syndication Clause such that FCC has 10 business days following the acceptance of the Second FCC CL, and upon receipt of the requested underwriting information,

¹⁸ Mr. Aurora, the principal of the Debtor, has advised the Receiver that there are no current financial statements available for the Debtor.

¹⁹ June 13 Aurora Affidavit, *supra* note 16 at Exhibit “A” [Master B-1-543, Current B-1-437].

²⁰ *Ibid* at Exhibit “A” [Master B-1-540, Current B-1-434].

to syndicate a portion of the loan contemplated thereunder in an amount to be determined by FCC, failing which, the Second FCC CL will be cancelled.²¹

17. In other words, the Second FCC CL is essentially a “thing written in water”. It is plain and obvious that key conditions cannot and will never be satisfied, and that the proposed Second FCC CL is nothing more than an effort to delay the approval of the Successful Bid selected in accordance with, and following the culmination of, the court-supervised Sale Process. ***Very importantly, the Debtor has had 8 months to come up with fully committed, unconditional refinancing if it were able to, and has not done so.*** The last-stab effort to block the Receiver’s sale approval motion should be treated for what it is – an empty vessel.

18. In their Factum, the Debtor cites to Justice W.D. Black’s recent decision in [*Vector Financial Services v 33 Hawarden Crescent*](#).²² As were the circumstances in that case, the Receiver has satisfied the requisite elements of the *Soundair* test.²³ The Receiver conducted a thorough and robust court-approved Sale Process which has resulted in a favourable purchase price for the Real Property – there is no basis identified by the Debtor or any other party that the integrity of the process was in any way compromised nor is there any evidence of unfairness. The case law is clear that in order for any redeeming party to have any possibility of being provided with a right to redeem in these circumstances, it must come to the court, at the critical juncture with **cash in hand ready to pay the relevant debt**. In this case, not only does the Debtor not have cash in hand, the evidence it has filed to support the proposition that a proposed Refinance is possible is not remotely credible nor does it support the proposition that the proposed Refinance can be achieved. In stark contrast, the AVO and the Transaction

²¹ *Ibid* at Exhibit “A” [Master B-1-542, Current B-1-436].

²² Factum of the Respondent and Tenants dated June 10, 2024 at para 1 [Master B-1-108, Current B-1-2].

²³ Factum of the Receiver dated June 6, 2024 at para 31 [Master A962, Current A388].

contemplated thereby with 255 is ready to proceed and close on its terms five days after the granting of the AVO – the Transaction is in the best interest of all stakeholders.

19. It is also highly relevant that two of the moving parties in the Second Cross-Motion are Countertop Solutions Inc. (“**Countertop**”) and Grafco International Laminating Corp. (“**Grafco**” and together with Countertop, the “**Tenants**”), each a non-arms length party to the Debtor who are also the sole tenants occupying the Real Property. The Tenants have not paid *any rent* since at least the commencement of the Receivership Proceedings despite multiple requests from the Receiver.²⁴ The Tenants, in connection with the Second Cross-Motion, are for the first time advancing an argument of set-off as the reason for non-payment of their rental obligations.²⁵ Despite their failure to pay rent, principals of the Debtor and Tenants via a related company have somehow managed to advance \$950,000.00 to its lawyers in trust in connection with the Refinance.²⁶ The Debtor, Countertop and its principals do not come to the Court with clean hands.

The Receiver’s Motion

20. In light of the foregoing, among other things, the Receiver respectfully submits that the Second Cross-Motion should not be entertained, just as the First Cross-Motion was not entertained by Justice Valee which decision was upheld by the Court of Appeal, and the Receiver’s Motion should proceed as scheduled (and all relief be granted).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June, 2024.


Bennett Jones LLP

²⁴ Second Report, *supra* note 2 at section 2.0 at paras 3 and 4 [Master A598, Current A24].

²⁵ Affidavit of Ravi Aurora sworn June 12, 2024 [Master B-1-405, Current B-1-299].

²⁶ June 10 Aurora Affidavit, *supra* note 14 at para 8(c) [Master B-1-141, Current B-1-35].

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