Court of Appeal File No.: COA-24-CV-0671
OSCJ Court File No. CV-23-00004031-0000

ONTARIO
COURT OF APPEAL

B E T W E E N:

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

RESPONDENT'S FACTUM ON APPEAL

(returnable July 19, 2024, 12:30 p.m., in person, Courtroom One)

July 17, 2024

SCALZI CAPLAN LLP
20 Caldari Road, Unit 2
Vaughan, ON L4K 4N8
Gary Michael Caplan (19805G)
E: gary@sclawpartners.ca
Derek Ketelaars
E: derek@sclawpartner.com

Lawyers for the Respondent

LIMA LAW PC
Aram Simovonian (73974D)
E: asimovonian@limalaw.ca

Agent for Scalzi Caplan LLP

TO: **SERVICE LIST**

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PART I: OVERVIEW STATEMENT DESCRIBING NATURE OF THE CASE AND ISSUES

1. On July 11, 2024, Justice D. Brown, sitting as a single Justice of the Court of Appeal for Ontario, ordered the following issues to be referred to this panel for hearing and determination:[1]

   a. whether the Appellant, 2557904 Ontario Inc. ("**255**" or "**Stalking Horse Buyer**"), has standing to appeal the Orders of Justice Sutherland dated July 4, 2024, and July 9, 2024;[2]

   b. assuming standing, does 255 have an automatic right to appeal the July 4, and July 9, 2024, Orders, to this Court, pursuant to s.193(a)-(d) of the BIA, or is leave required pursuant to s.193(e) of the BIA;

   c. if leave is required, should it be so granted; and

   d. did the motion Judge err in terminating the Stalking Horse Agreement ("**SHA**") made between the Receiver and the Stalking Horse Buyer in favour of the Debtor's right to refinance the debt and pay the expenses of the Receivership.

2. At the time of the making of Justice Brown's Endorsement, Justice Sutherland had not released his reasons for his Endorsement which was released on July 4, 2024. The reasons of Justice Sutherland were released on July 15, 2024, after the Appellant, 255, had already launched an appeal from the two orders of Justice Sutherland.[3]

3. This appeal arises in the context of a receivership in which KSV Restructuring Inc. is the Court-Appointed Receiver, Peakhill Capital Inc. is the first mortgagee, Zaherali Visram is a second mortgagee, and 1000093910 Ontario Inc., is the Debtor. 255 is the Stalking Horse Buyer which had negotiated its contract with the Receiver prior to the SISP.

4. Ravi Aurora, Akash Aurora, and Nakul Aurora ("**Aurora Brothers**"), are the guarantors under the first and second mortgage.

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[1] Appeal Book and Compendium of the Appellant ("**ABC**"), Tab 28.
[2] ABC, Tab 2, 4, and 5.
[3] Amended Appeal Book and Compendium, Tab 05.1, Decision on Motions of Justice Sutherland, dated July 15, 2024.

5. The Aurora Brothers own the two commercial tenants which occupy the Property, Countertop Solutions Inc. and Grafco International Laminating Inc. ("**Commercial Tenants**").

PART II: CONCISE SUMMARY OF THE FACTS RELEVANT TO THE ISSUES

THE PROCEDURAL HISTORY

6. The Debtor is a single asset real estate holding company.

7. On or about April 29, 2022, the Debtor purchased a 64,204 square foot warehouse located at 20 Regina Road, Vaughan, Ontario, ("**Property**") for $24,171,000.[4]

8. To finance the purchase, the Debtor gave to Peakhill a first mortgage in the sum of $19,000,000, guaranteed by the Aurora Brothers. The Peakhill Mortgage was registered on April 29, 2022, as Instrument Number YR3416767.

9. The Debtor leased a portion of the premises to the Commercial Tenants which are two affiliated companies.

10. On July 7, 2023, the Debtor, along with the guarantors (Aurora Brothers) of the Peakhill Mortgage, entered into a Forbearance Agreement with its first mortgagee, Peakhill. The Debtor was allowed until July 31, 2023, and on the satisfaction of certain conditions, until August 15, 2023, to deliver a refinancing proposal acceptable to Peakhill.

11. A second mortgage was registered on title to the Property on or about August 8, 2023, as Instrument Number YR3582894, in favour of Zaherali Visram in the sum of $4,000,000, which was also guaranteed by the Aurora Brothers. On September 18, 2023, and registered as Instrument Number YR35948469, the principal sum of the second mortgage was increased to $8,000,000.

12. On or about August 23, 2023, the Debtor, as vendor, entered into a listing agreement with Ren/Tex Realty Inc., as realtor, for the Property.

13. On August 31, 2023, Peakhill issued its Application in Newmarket Court to appoint KSV as the Court-Appointed Receiver over the Property. The Application was returnable on September 13, 2023.

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[4] Exhibit Book of the Appellant ("**EXB**") at Tab 7, Affidavit of Ravi Aurora, sworn on June 10, 2024, at para 4.

14. On September 7, 2023, the Debtor, as vendor, entered into an unconditional Agreement of Purchase and Sale, with 255, as purchaser, for the purchase of the Property for the price of $31,000,000 ("**Original APS**"), with a deposit of $1,000,000, to be paid to Ren/Tex. The closing date was to be December 21, 2023.

15. On September 13, 2023, Justice Lavine, on the return of Peakhill's appointment Application, signed a Consent Order appointing KSV as Court-Appointed Receiver, but which suspended the implementation of the Receivership. The Debtor was allowed until October 2, 2023, to provide certain payments and pay a forbearance fee whereupon the maturity date of the Peakhill Mortgage would be extended to November 1, 2023.

16. The Debtor was unable to meet the terms of the Consent Order, dated September 13, 2023, and as a result, the Receivership Order and the Receiver's appointment became effective on October 2, 2023.

17. The Receiver and 255 then entered into certain negotiations with respect to the Original APS. 255 refused to complete the Original APS with the Receiver.

18. As a result, the Receiver and 255 entered into a SHA dated November 13, 2023, that set a floor price for the Property at $24,255,000 (a delta of about $7,000,000 from the Original APS).

19. The SHA contained the usual provision for a break-fee should a competing higher bid be accepted.

20. The break fee was $200,000 plus $50,000 for 255's expenses. The SHA also contained a provision terminating the SHA if the Court did not grant the approval and vesting order ("**AVO**"). If terminated, 255's remedy was the return of its deposit. These provisions are as follows:

> **8.1 Conditions in Favour of the Receiver**
>
> The obligation of the Receiver to complete the Transaction is subject and conditional to the satisfaction of the following conditions on or before the Closing Date:
>
> (e) the Court shall have issued the Bidding Procedures Order and Approval and Vesting Order, which Approval and Vesting Order shall provide for the termination of the Leases, and the operation and effect of such orders shall not have been stayed, amended, modified, reversed or dismissed at the Time of Closing.

14.2 Break Fee and Expense Reimbursement

In consideration for the Purchaser's expenditure of time and money and agreement to act as the initial bidder through the Stalking Horse Bid, and the preparation of this Agreement, and in performing due diligence pursuant to this Agreement, and subject to Court approval, the Purchaser shall be entitled to (a) a break fee in the amount of $200,000 (inclusive of HST) of the amount of the Purchase Price in the event that the Purchaser is not the Successful Bidder, and (b) an expense reimbursement amount for legal expenses and disbursements actually incurred, such amount not to exceed $50,000 (inclusive of HST), in each case payable by the Receiver to the Purchaser only in the event that a Successful Bid for any of the Purchased Assets other than the Stalking Horse Bid is accepted by the Receiver, approved by the Court and completed. The payment of the foregoing amounts shall be approved in the Bidding Procedures Order and shall be payable to the Purchaser out of the sale proceeds derived from and upon completion of the Successful Bid for all of the Purchased Assets. Each of the Parties acknowledges and agrees that the foregoing amounts represent a fair and reasonable estimate of the costs and damages that will be incurred by the Purchaser as a result of the Purchaser not being the Successful Bidder, and is not intended to be punitive in nature nor to discourage competitive bidding for the Purchased Assets. The Purchaser agrees to indemnify and hold harmless the Receiver from and against any Tax, interest and penalties assessed, reassessed or imposed upon the Receiver as a result of or in connection with the failure to withhold or remit any amount required to be withheld and remitted under Part XIII of the ITA in respect the break fee or expense reimbursement payable pursuant to this Section 14.2.

16.3 Termination If No Breach of Agreement

If this Agreement is terminated other than as a result of a breach of a representation, warranty, covenant or obligation of a Party, then the parties hereto shall be released from all obligations and liabilities hereunder, other than their obligations under Article 6, and:

(a) all obligations of each of the Receiver and the Purchaser hereunder shall end completely, except those that survive the termination of this Agreement;

(b) the Purchaser shall be entitled to the return of the Deposit without deduction, which shall be returned to the Purchaser forthwith; and

(c) neither Party shall have any right to specific performance, to recover damages or expenses or to any other remedy (legal or equitable) or relief other than as expressly provided herein.

21. The Receiver then brought a motion, returnable December 20, 2023, to have the Original APS terminated, and to approve a sales process ("**SISP**") which included the SHA.

22. However, on December 19, 2023, the day before the Receiver's motion to approve the SISP, and to terminate the Original APS, the Debtor, served and filed a Cross-Motion seeking, *inter alia*, the following Orders:

a. amending the Receivership Order to allow it to close the Original APS;

b. approving the Original APS; and

c. directing the Receiver to permit the Debtor to complete the purchase transaction with 255 (the SHA Buyer) as contemplated by the Original APS.

23. The Honourable Justice Vallee, by Endorsement dated December 20, 2023,[5] denied the Debtor's Cross-Motion due to its late service/filing, and what Her Honour believed to be its limited chances of success, and granted the Receiver's motion for the approval of the SISP (which included the SHA). However, the Court did not expressly terminate the Original APS.

24. On December 29, 2023, the Debtor served and filed a Notice of Appeal from the decision of Justice Vallee, relying on s. 193(c) and s.195 of the BIA and Rule 31 of the BIGR.[6]

25. On January 2, 2024, the Receiver took the position that the service of a Notice of Appeal was improper and that there was no automatic stay of the Order because the Order appealed from was procedural. The Debtor then brought a motion before a single Justice of the Court of Appeal pursuant to s.193 of the BIA to determine whether leave to appeal was required.

26. On January 19, 2024, Justice Simmons, sitting as a single Justice of this Court, held that the Debtor had an automatic right to appeal, and therefore, the Order below was automatically stayed.[7]

27. The Debtor's appeal, from the Order of Justice Vallee, was heard, by this Court, on April 2, 2024. 255 was permitted to intervene and make submissions before the Court of Appeal. The essence of the Debtor's argument was that Justice Vallee ought to have fully heard the Debtor's late-filed Cross-Motion, and in the circumstances, should have permitted the Debtor or Receiver to close the $31,000,000 Original APS. The Receiver and 255 opposed the appeal.

28. The Court of Appeal dismissed the Debtor's appeal on April 2, 2024, with reasons to follow.[8]

29. The Debtor accepts as essentially correct the following description of the chronology of events for the period between April 10 and July 11, 2024, as described by the Receiver in its

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[5] ABC, at Tab 18.
[6] ABC, at Tab 20.
[7] *Peakhill Capital Inc. v 1000093910 Ontario Inc.*, 2024 ONCA 59 (CanLII).
[8] *Peakhill Capital Inc. v. 1000093910 Ontario Inc.,* 2024 ONCA 261 (CanLII).

Supplement to its Second Report, dated July 14, 2024 (which, of course, was not before Justice Sutherland, but, was prepared in the course of this appeal). Reference to appendices are omitted and comments with respect to the contents are set out in the footnotes below.

> *1. On April 10, 2024, the Receiver's counsel advised the Service List that it had booked with the Superior Court in Newmarket the date of June 12, 2024 for a sale approval motion in respect of the successful bid arising from in the Court-approved sale process, which was still in progress. On or about May 8, 2024, the Receiver's counsel advised counsel for the Debtor that the Stalking Horse Purchaser was the successful bidder with its bid for $24.255 million (there was no other qualifying bid, and only one nonqualified bid, for $19 million, in the process), and further advised that the Receiver intended to proceed with its sale approval motion scheduled for June 12, 2024.*
>
> *2. The Receiver then brought its Motion for an order approving the sale to 255 (in such capacity, the "Stalking Horse Purchaser"), vesting title in the Purchased Assets to Stalking Horse Purchaser free and clear of encumbrances, and granting certain other relief directed toward the conclusion of the Receivership Proceedings. The Receiver's Motion Record was served on the Service List on May 31, 2024, with a scheduled return date before the Court in Newmarket on June 12, 2024.*
>
> *3. On June 10, 2024, shortly before 4 p.m. (two days before the return of the Receiver's Motion), the Debtor, along with its related company-tenants Countertop Solutions Inc. and Grafco International Laminating Corp., served a Responding and Cross-Motion Record in connection with the Receiver's Motion (the "Cross-Motion"). The Debtor had not scheduled any time with the Court for its Cross-Motion.[9] The affidavit[10] filed in support of the Cross-Motion attached an*

[9] Counsel for the Debtor did attempt to secure additional time with Newmarket court for the hearing of the Cross-Motion, returnable June 12, 2024, but was advised that none was available. Nonetheless, the Debtor uploaded the Cross-Motion to Caselines immediately and filed the materials with the Court.

[10] The Affidavit of Ravi Aurora filed in support of the Cross-Motion explained: i. that from April 2, 2024 (the date that the Court of Appeal dismissed the Debtor's Appeal from the Order of Justice Lavine), to June 10, 2024, the Debtor and Guarantors had "scrambled" to find a lender which would provide sufficient financing to redeem the first and second mortgages and to pay the Receiver's fees and disbursements. In addition, the Debtor had undergone

unsigned Commitment Letter with Firm Capital Corporation ("Firm Capital") for a refinancing to permit a redemption. In the Second Cross-Motion, the Debtor sought, among other things:[11]

a) an adjournment of the Receiver's Motion;

b) an interim order staying the Receivership Order and the Sale Process Approval Order pending completion of the Debtor's proposed refinance transaction (the "Refinance Transaction") to permit it to redeem the first mortgage, 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 Transaction;

c) an order discharging the Receiver on completion of the Refinance Transaction upon the filing of a discharge certificate; and

d) on completion of the Refinance Transaction, an order terminating the Stalking Horse Agreement.

4. On June 12, 2024, the parties appeared by videoconference before Justice Lavine (who had granted the original consent Receivership Order on September 13, 2023) on the return of the Receiver's Motion. At that time the Debtor did not have a binding and unconditional commitment for refinancing from Firm Capital, its proposed new lender. Each of the Receiver, Peakhill and the Stalking Horse

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negotiations with the second mortgagee, VISRAM, to convince him to refinance his mortgage and to provide the additional financing required to discharge the Receivership. At that time, the Refinance consisted of the following: i. A commitment for a new first mortgage from Firm Capital Corporation which would advance approximately $18,620,000, net of fees and costs. ii. A Mortgage Amending Agreement from the second mortgagee, VISRAM. VISRAM was prepared to lend an additional $3,500,000 under his second mortgage, postpone to the proposed new first mortgage from Firm Capital, and extend the maturity date of the Second Mortgage to match the maturity date of Firm Capital's new mortgage; and iii. $950,000 in cash to be advanced by a company related to the Guarantors which funds were to be held in trust and which can be made available and to be used to cover the balance required to discharge the Receivership.

[11] The purpose of the Cross-Motion, returnable on June 12, 2024, and heard by Justice Lavine, was not only to redeem the security, but it was also to pay the costs and expenses of the entire Receivership, including the payment into Court of the SHA break fee pending determination of whether it was payable at all, so as to result in the discharge of the Receiver.

Purchaser made submissions opposing the Debtor's requested adjournment and seeking the granting of the relief in the Receiver's Motion for, the AVO and Distribution and Discharge Order. Referencing the lack of court time available to hear the Receiver's Motion on a contested basis and the Cross-Motion (it had been anticipated prior to June 10, 2024 that the Receiver's motion would proceed without opposition), the Court adjourned the Receiver's Motion and the Debtor's Cross-Motion for two days to June 14, 2024, before Justice Sutherland. [appendix omitted]

5. On June 13, 2024, the Debtor filed a new affidavit[12] *attaching an updated and signed Commitment Letter with Firm Capital, but had not yet satisfied several of the conditions in the Commitment Letter, and did not have funds to close the Refinancing Transaction and permit a redemption.*

6. In connection with the return of the motions on June 14, 2024, the Receiver filed an Overview of Submissions of the Receiver, [appendix omitted].

7. On June 14, 2024, parties appeared by videoconference before Justice Sutherland. The Debtor did not have sufficient funds to close the Refinancing Transaction and permit a redemption as several conditions in the Commitment Letter with Firm Capital were not satisfied. The Debtor therefore sought a further adjournment to permit it more time to attempt to complete the Refinancing Transaction and proposed redemption of the first mortgage. The Receiver, Peakhill and the Stalking Horse Purchaser once again opposed the Debtor's requested adjournment and sought approval of the Receiver's proposed AVO and Discharge and Distribution Order in respect of the sale to the Stalking Horse Purchaser. The

[12] The Debtor confirmed on the return of the Receiver's Motion and the Debtor's Cross-Motion, returnable July 2, 2024, that it had "cash in hand" of $23,321,853.19, and that this was sufficient to pay the Peakhill debt, the Receiver's accrued costs and expenses and contingencies, the fees and expenses of the lawyers for Peakhill, plus $250,000 to be put into Court pending a determination as to whether the break fee was owing to 255. The source of the funds, on that date, included: a. $18,484,853.19, in net available funds under a new proposed first mortgage from Firm Capital; b. $3,500,000 in net available funds arising from the successful renegotiation of the second mortgage to VISRAM; and c. $1,337,000 in cash that had been advanced into the Debtor's counsel's trust account (an increase of $387,000).

Court did not adopt the submissions of the Receiver, Peakhill and the Stalking Horse Purchaser and instead further adjourned the Receiver's Motion and the Debtor's Cross-Motion for a further two weeks to June 28, 2024, to permit the Debtor more time to attempt to finalize the Refinancing Transaction to permit a redemption [appendix omitted].

8. On June 21, 2024, following the receipt of the Justice Sutherland's Decision on Adjournment, the Receiver served on the Service List a Notice of Examination for the principal of the Debtor, Mr. Ravi Aurora, on his affidavits, returnable on Tuesday June 25, 2024 (the "Cross Examination"). [appendix omitted]. *Over the course of the Cross Examination, Mr. Aurora indicated that certain conditions of the Commitment Letter remained unfulfilled. A number of undertakings and advisements were given, with a commitment by Debtor's counsel to provide responses by 4 p.m. on June 26, 2024, in view of the June 28, 2024 return date of the motions. The Debtor's answers to undertaking were not provided at that time (and ultimately were answered after 5 p.m. on June 28, after the court attendance on the morning of June 28). All of the advisements from the cross examinations were refused, including all questions directed to the variability of the timing of the original second mortgage transaction.* [appendix omitted].

9. On June 27, 2024, the Receiver filed Supplementary Submissions of the Receiver in connection with the Receiver's Motion and the Debtor's Cross-Motion, returnable the following day. [appendix omitted].

10. On June 28, 2024, the parties again appeared before Justice Sutherland on the Receiver's Motion and the Debtor's Cross-Motion. The Debtor's counsel indicated that he believed that the Debtor now had sufficient funds to close the Refinancing Transaction and proceed with a redemption, in view of the fact that Firm Capital had waived certain conditions in the Commitment Letter, and other conditions, such as an appraisal with a minimum property value of $27 million, had now been fulfilled. However, it turned out that the Debtor did not have sufficient refinancing funds given that further expenses and costs had been incurred by both Peakhill and

the Receiver over the course of the multiple unanticipated court attendances and events during the month of June. Given uncertainty over the Refinancing situation, the Court then further adjourned the matter to Tuesday July 2, 2024. [appendix omitted].

11. On July 2, 2024, the parties again appeared before Justice Sutherland on the Receiver's Motion and the Debtor's Cross-Motion. The Receiver advised the Court that the Debtor was approximately $130,000 short of having the necessary funds to close the Refinancing Transaction and redeem. The Debtor briefly took issue with the additional expenses incurred during June, but the Court then indicated that in the absence of the Debtor having full and sufficient funds to redeem the Court would proceed to hear the Receiver's motion for the AVO and Discharge and Distribution Order. The Debtor then asked for a very brief adjournment and returned approximately 10 minutes later to indicate that an additional approximately $130,000 had been wired into the Debtor's counsel's trust account, and that it now had a sufficient amount, with an approximately $1,000 surplus, to redeem.

12. With the Debtor apparently having sufficient funds to redeem, the Debtor's Cross-Motion was now supported by Peakhill and the second mortgagee, Visram (as defined below), but opposed by the Stalking Horse Purchaser who indicated that if the Court was inclined to approve the Refinance Transaction, that it would be obliged to appeal immediately. ***The Receiver, in light of divergent stakeholder interests and the fact that the Debtor purportedly had sufficient funds to consummate the Refinance Transaction, took no formal position on the Cross-Motion but made submissions to the Court based on a variety of legal and factual considerations, referencing the Court of Appeal's decision Rose-Isli, and noting the need to balance the Debtor's interests in redeeming with the importance of the integrity of the court-approved sale process.*** **[emphasis added]** *On July 4, 2024, following the hearing on July 2, 2024, the Court issued a brief endorsement (the "July 4 Endorsement"), with reasons to follow, which, among other things,*

dismissed the Receiver's Motion, allowed the Debtor's Cross Motion and approved the underlying Refinance Transaction and redemption. [appendix omitted].

13. On July 4, 2024, the Stalking Horse Purchaser filed a Notice of Appeal with the Ontario Court of Appeal. [appendix omitted].

14. In accordance with paragraph 4 of the July 4 Endorsement, the parties attempted to settle the form of Order (the "Redemption Order") to be granted following the disposition by Justice Sutherland, such that the Order was in a form and content agreeable by all parties. However, the Debtor and the Stalking Horse Purchaser were unable to agree on the form and content of the Redemption Order. Among other issues, the parties disagreed on the following:

> *a) the inclusion of a term for provisional execution of the Redemption Order under section 195 of the Bankruptcy and Insolvency Act (Canada) ("BIA") (the "Provisional Execution Relief");*
>
> *b) the general content of the Redemption Order in light of the Endorsement and the contents thereof, specifically in light of the Stalking Horse Purchaser's intention to seek an urgent appeal and a stay, if required; and*
>
> *c) other ancillary issues.*

15. In light of the foregoing, the Receiver, at the express request of the Debtor and Firm Capital, on July 4 asked the Court for an urgent case conference (the "Urgent Case Conference") in order to obtain the Court's direction and instruction with respect to the Redemption Order including the proposed Provisional Execution Relief. Following this request, the Debtor on the morning of Friday July 5 served a further Notice of Motion, returnable the afternoon of July 5, 2024 (the "Debtor's Further Motion"), seeking, among other things, approval and issuance of the Debtor's proposed draft of the Redemption Order, including the proposed Provisional Execution Relief. Senior counsel to the Stalking Horse Purchaser was travelling and not available on the afternoon of July 5; however, the Urgent Case Conference was scheduled and the Debtor's Further Motion was heard by the

Court at 1:30 p.m. on July 5, 2024. ***The form of Redemption Order and the Debtor's Further Motion were supported by Peakhill, Visram, and Firm Capital, and were opposed by the Stalking Horse Purchaser, who had junior counsel in attendance.*** **[emphasis added]** *The Receiver, while agreeable to the form and content of the remainder of the Redemption Order in view of the Court's July 4 Endorsement, took no position on the Provisional Execution Relief but provided the Court with legal submissions on the issue. To that end, the Receiver filed a Case Conference Brief with the Court to help navigate the relevant case law and underlying considerations.* [appendix omitted].

16. On Monday July 8, 2024, Justice Sutherland scheduled a further case conference, specifically to allow senior counsel to the Stalking Horse Purchaser to make submissions with respect to the Debtor's Further Motion and as to the form and content of the Redemption Order. Counsel for Stalking Horse Purchaser opposed the inclusion of the Provisional Execution Relief, specifically in light of the fact that it was not included in the Debtor's Notice of Cross-Motion and was only sought after the Stalking Horse Purchaser had filed its Notice of Appeal. 17. On July 9, 2024, Justice Sutherland released his Decision (the "July 9 Decision") on the Redemption Order along with a signed copy of the form of Redemption Order provided by the Debtor to the Court. His Honour adopted the Debtor's request for the Provisional Execution Relief [appendices omitted].

18. On July 9, 2024, following an urgent request for a case conference convened by a Judge of the Ontario Court of Appeal by the Debtor and the Stalking Horse Purchaser, and the filing of their respective materials, the Ontario Court of Appeal on the evening of July 9 scheduled a case conference before Justice Brown for the afternoon of July 10, 2024 (the "ONCA Case Conference"). Following the July 10 ONCA Case Conference, Justice Brown made the following endorsement: "Reserve my decision. Will release reasons tomorrow. Pursuant to BIA s. 195, orders of Sutherland J. dated July 4 and 9, 2024 are stayed until 5 p.m. tomorrow, July 11, 2024, or such further order of this court."

19. On July 11, 2024, Justice Brown issued a 29-page endorsement (the "ONCA Endorsement") which, among other things:

a) Referred the following issues to a panel of the Ontario Court of Appeal for hearing and determination on July 19, 2024:

i. Whether the appellant, 255 (the Stalking Horse Purchaser), has standing to appeal the July 4 Endorsement and July 9 Decision.

ii. If 255 has standing, does it have an automatic right to appeal the Sutherland Orders pursuant to ss. 193(a)-(d) of the BIA or does it require leave to appeal pursuant to BIA s. 193(e)?

iii. If 255 requires leave, should leave to appeal be granted?

iv. Did the motion judge err in terminating the Stalking Horse Agreement between the Receiver and 255 and, instead, approving the Debtor's proposed Refinancing Transaction with Firm Capital?

v. Did the motion judge err in varying the July 4 Endorsement, following the filing of the Notice of Appeal, to include a provisional enforcement term that overrode the automatic stay on appeal provided by BIA s. 195?

b) Continued, until the panel's determination of the aforementioned issues, the stay under BIA s. 195 of the provisional execution granted by Sutherland J. in the Redemption Order. [appendix omitted].

30. Justice Sutherland's decision released on July 15, 2024,[13] can be summarized as follows:

a. After reviewing the procedural history of the Receivership, Justice Sutherland fairly described the issue before him to be a choice between (i) the Debtor's right to redeem the security and pay for the costs and expenses of the Receivership;

[13] Amended Appeal Book and Compendium, Tab 05.1, Decision on Motions of Justice Sutherland, dated July 15, 2024.

and (ii) the Receiver's motion to approve the Stalking Horse Agreement with 255 and vest the title in the Property to it.

b. The Court noted that, notwithstanding the solicitation of over 5,000 potential purchasers, and the making of 37 NDAs, there were no Qualified Bids, other than the SHA.

c. The Court also noted that the Receiver was taking "no position" with respect to the Debtor's Cross-Motion to redeem.

d. Alive as he was, to this Court's decision in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548 (CanLII) which approved of the observation of Pepall J. in *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.) , the learned motion Judge concluded, correctly, that the Debtor / Mortgagor's right to redeem should prevail because, as in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, the legal and financial interests of all stakeholders could be satisfied when compared to the losses which would be suffered by some of the stakeholders should the Stalking Horse Buyer prevail.

e. Although, Justice Sutherland did not expressly refer to the *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), principles in his reasoning, he did undertake an analysis of comparative prejudice in weighing the grant of redemption against the risk to the integrity to the receivership process. In this regard, he found that, in the unusual and unique circumstances of this case (with which all the parties, other than 255, agreed), there was little risk to the integrity of the receivership process and the Debtor's right to redeem should prevail.[14]

f. With respect to 255, Justice Sutherland found that "*there is a risk that the agreement will not be accepted by the Court, and it is for that reason, it appears,*

[14] Amended Appeal Book and Compendium of the Appellant, Tab 05.1, Decision on Motions of Justice Sutherland, dated July 15, 2024, at para 35(a).

why a Break Fee and reimbursement for costs and legals are an included term in the Stalking Horse Agreement."

31. It is respectfully submitted that the learned motion Judge: (i) applied the applicable law and principles; (ii) performed an analysis that weighed the private commercial interests of the parties, against the sanctity of the receivership process; (iii) concluded, correctly, that in the unique circumstances of this case (full payment of the stakeholders' commercial interests including the costs of the Receiver and the lawyers; compensation to 255; and, no qualified disappointed bidders), the Debtor's hallowed right to redeem should prevail.

PART III: ISSUES AND THE LAW

ISSUE ONE: THE STALKING HORSE BUYER HAS NO STANDING IN THE COURT OF APPEAL AND THIS APPEAL, WHETHER WITH OR WITHOUT LEAVE, SHOULD BE QUASHED[15]

32. The Court of Appeal, in *Skyepharma PLC v Hyal Pharmaceutical Corporation*, 2000 CanLII 5650 (ON CA), set out three reasons why, except in limited circumstances, an unsuccessful buyer has no standing in a sale and approval hearing. The *Skyepharma* Court also distinguished its decision in *Soundair* where it appeared that an unsuccessful buyer had in fact been granted standing.

33. In *230 Travel Plaza Inc. (In Bankruptcy)*, 2002 CanLII 29600 (ON SC), Panet J., extended *Skeypharma*, to hold that a successful buyer has no standing on an approval motion.

34. But, in *Winick v 1305067 Ontario Limited*, 2008 CanLII 6937 (ON SC), Pepall J. as she then was, found that *Soundair* and *Skyepharma* were in conflict, and that the finding in *230 Travel* was unfounded. Her Honour rationalized the cases to mean that only a successful buyer has standing in an approval and vesting order hearing, but an unsuccessful one does not. Presumably, the theory is that a successful buyer has a purchaser's lien or contingent legal interest in the land which crystallizes when the AVO is issued and entered. In other words, a conditional future interest in land is sufficient to grant standing.

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[15] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.134(3).

35. But, that interest in land is extinguished when the right to redeem is found to prevail. In the contest between the mortgagor's right to redeem the equity of redemption which is an interest in land, and a purchaser's contingent and conditional purchaser's lien, the former must prevail over the latter.

36. In any event, the "successful-unsuccessful" dichotomy appears artificial and not rationally connected to the policy goals of standing in the receivership context. As the Court said in *Skyepharma*:

> [*30] There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.*

37. This is the exact situation here.

38. Finally, it should be noted that in *BCIMC* the Receiver opposed the Debtor's right to redeem, and raised the concern that granting the right to redeem would imperil the receivership process. But, in the instant case, the Receiver took no such position and remained "neutral". The *lis,* or contest, between redemption or sale belongs exclusively to the Receiver and a party to the receivership. It cannot belong to the purchaser whose juridical horizon is limited to the fairness and outcome of the sales process. If a Receiver, as here, does not pursue its motion for sale approval, then there is no procedural foundation to support the buyer's standing. To find otherwise, is to allow the buyer to step into the shoes of the Receiver to argue for an approval order that the Receiver has elected not to pursue. The buyer is not the proxy for the Receiver, nor its delegate.

39. 255 had no standing before Justice Sutherland in the lower Court and has no standing here.

ISSUE TWO: IF THE STALKING HORSE BUYER HAS STANDING TO APPEAL, IT REQUIRES LEAVE AND LEAVE OUGHT NOT TO BE GRANTED

40. Assuming standing, does 255 have a direct right of appeal under s.193 (a) - (d) of the *BIA* or does it require leave under s.193(e) of the *BIA*?

41. In the receivership context, appellants have an automatic right to appeal if the circumstances of the case fall under subsections 193(a) or (c), failing which they must apply for leave under subsection 193(e).

42. Section 193(c) has been interpreted to exclude Orders that: (1) are procedural in nature; (2) do not bring into play the value of the debtor's property; or (3) do not result in a loss.

43. The Redemption Order appealed from results in no loss to any party and does not touch upon the value of the property. 255 is compensated, as provided in its Stalking Horse Agreement, and all other stakeholders are paid. The issue of the priority of rights does not speak to the value of the land, as it did in the motion before Simmons J.A., in these proceedings.

44. The Appellant therefore needs leave to appeal.

ISSUE THREE: LEAVE TO APPEAL SHOULD BE REFUSED

45. The case law holds that leave will be granted in circumstances that the appeal is *prima facie* meritorious and would not unduly hinder the progress of the proceedings.

46. As will be set out below, this appeal is not *prima facie* meritorious.

ISSUE FOUR: THE ORDERS APPEALED FROM ARE NOT INCORRECT IN LAW

Law must be stable, and yet it cannot stand still: Roscoe Pound.

THE STANDARD OF REVIEW

47. The Appellant raises two substantive law issues: (i) was Justice Sutherland "correct" in law in granting the Debtor the right to redeem; (ii) was Justice Sutherland correct in including a provisional execution term in the Redemption Order.

48. The Respondent submits that the second issue is now moot as this Court has before it an argument on the merits of the appeal.

49. The standard of review in this case proceeds along two vectors:

a. First, did the learned motion judge "correctly" engage the applicable legal tests in arriving at the decision he did? Correctness allows the full substitution of the views of the reviewing Court for that of the Judge below.

b. Second, if he did, was his application of the law to the facts before him, reasonable? Reasonableness allows only for the substitution of the reviewing Court if no reasonable Court could have reached the same conclusion.

50. In the receivership context, an appeal Court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations.[16]

APPLYING THE STANDARD OF REVIEW

51. It is submitted that this is a case of mixed fact and law and hence a reasonableness standard of review applies.

52. It is respectfully submitted that the learned motion judge made no reviewable error in law. Justice Sutherland correctly applied this Court's decision in *Rose-Isli*. Justice Sutherland weighed the Debtor's right to redeem against the risk of the sanctity to the receivership process and in finding that the circumstances of this case were exceptional, reasonably found that the right to redeem should prevail.

53. The reasoning process brought to bear by Justice Sutherland is precisely that which had been employed by Justice Kimmel in *Rose-Isli*. Each of them considered the public policy impact of the sales process; each of them looked at the efficiency of the choices before them; each of them weighed the various competing factors to arrive at a decision. Justice Kimmel was satisfied that in the facts and circumstances of the case before her the integrity of the sales process should trump the second mortgagee's right to redeem or purchase through a credit bid. Justice

[16] *HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of)* (2004), 2004 CanLII 206 (ON CA), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.), at para 22 and *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 ONCA 713 (CanLII).

Sutherland, on the other hand, found that the right to redeem, in the circumstances before him, was paramount.

54. Having applied the correct legal principles, the decision of Justice Sutherland is *reasonable* and falls squarely within that spectrum of outcomes which the law permits. It is submitted therefore, that in the circumstances of this case, this Court ought not to interfere with the decision below.

55. The Appellant would, apparently, have this Court impose a blanket rule that the Debtor loses the right to redeem after a SISP is approved. There is no room for context. The juridical foundation for the Appellant's argument is derived from the *Handelman* concern that once market resources are engaged in the approved sale process, the exercise of a redemption right will fetter the operation of a *laissez faire* market.

56. The Appellant sees no nuance where the debtor or subsequent encumbrancer seeks to redeem the security *simpliciter*, and where the debtor seeks to redeem the entire receivership, and make all stakeholders whole. To the Appellant, the risk to the sanctity of the receivership process trumps both circumstances.

57. The Respondent submits that the principles engaged in a receivership context are as follows:

a. The equitable right to redeem is an interest in the mortgaged land and is not lightly to be put aside.[17] This right is perceived as a fundamental one and it is jealously guarded by the Courts.[18] It is not only the mortgagor who has a right to redeem - a subsequent encumbrancer or a subordinate security holder also has the right.

---

[17] *Petranik v Dale* 1976 CanLII 34 (SCC).

[18] BCIMC at para 38-40: *Numerous courts have commented on the importance of the equity of redemption. […] What emerges from the DeBeck case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see Falconbridge, Law of Mortgages (3rd. ed. 1942), pp. 50-53. […] I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, The Law of Real Property (3rd ed.) at p. 885, and Cheshire's Modern Real Property (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem. […] An owner's right to redeem remains a core principle of real estate law.*

b. The purpose of a Court-Appointed receivership is to preserve and protect a debtor's property on an interim basis pending the resolution of the issues between the parties. In most cases, the receivership seeks the recovery of money through the sale of the debtor's assets or seeks to manage and return the property at the end conclusion of the dispute.[19]

c. Receivers are Officers of the Court, not litigants. They function as fiduciaries to multiple parties with different interests, including the mortgagor. They are neutral custodians of business assets and are there to give the Court advice on matters of business judgment. They derive their authority from the Court and the statute appointing them. Receivers have no stake in the litigation.[20]

d. The Receiver is to maximize the return to all creditors and in so doing, must take control of and administer the assets of the debtor, realize upon them, and distribute the proceeds to the creditors.[21] But, to be sure, the Receiver owes duties of fairness to the debtor and must have due regard to its interests.

58. The current state of the law in Ontario appears to be:

a. A court may permit a debtor to redeem the security at a motion to approve an SISP, provided that it also pays the costs and expenses of the receivership. This was the case in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659 (CanLII) where Koehnen J., after considering *Handelman, BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909 and *Home Trust Company v. 2122775 Ontario Inc.*, 2014 ONSC 1039, held as follows:

> *[52] In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and*

[19] Bennet on Receiverships, 4th ed, pages 1-6.
[20] *Jethwani v Damji*, 2017 ONSC 1702 (CanLII).
[21] *Royal Bank of Canada v. Delta Logistics Transportation Inc*. 2017 ONSC 368.

> *the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid.*

b. But, this court, in *Rose-Isli*,[22] denied the right to redeem the security *simpliciter* after the court approved sales process had run. Should the meaning of *Rose-Isli* be expanded to include circumstances where the debtor, as in *BCIMC*, redeems both the security and the costs of the receivership? That is the crux of this appeal. The justification for such an expansion, a position advocated by the Appellant, rests on the following observations of the Court:

> *Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in Royal Bank of Canada v. Soundair Corp.*, (*1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the Soundair principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor.*

59. In *Rose-Isli*, the Court of Appeal endorsed the following observation of Pepall J., as she then was, in *Handelman*:

> *A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is commonplace,*

[22] In the Court below, Justice Kimmel had to weigh the right of a second mortgagee (and which was a joint venture participant of the mortgagor) to redeem the mortgage or to approve its credit bid in the Court approved sales process. The second mortgagee argued that the sales process was unfair, but, in the end, Justice Kimmel found that the *Soundair* principles had been complied with. The Receiver opposed the motion on the grounds that the second mortgagee had exercised its right to redeem too late. The Court found that the second mortgagee could have engaged in the bid process earlier than it did, a factor which is not present in this appeal. Having weighed all the commercial interests of the parties, and having found no irregularity in the sales process, and having applied the *Soundair* principles, and having due regard in the integrity of the sales process, the Court accepted the Receiver's recommendation with respect to a sale to a third party: *Rose-Isli Corp. v. Frame-Tech Structures Ltd*., 2023 ONSC 832 (CanLII).

> *subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.*

60. The question of whether the right to redeem should be permitted or foreclosed in such circumstances was the "dilemma" referred to by Justice W.D. Black in *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635 (CanLII).

> *[100] In my view there could still be an interesting choice in circumstances in which the contest is between a Debtor who attends at a Receiver's motion for approval of a sale with "a cheque" as in the Hester Creek case[23] (i.e. with sufficient funds to pay out all relevant creditors) versus a Receiver who, as here, has run a lengthy and comprehensive sale process, involving considerable time and expense, to identify a purchaser who is before the court, has paid a substantial deposit, and clearly has the ability to complete the transaction at issue.*
>
> *[101] In that circumstance there would in my view be an interesting dilemma between the important equitable right to redeem and the policy considerations about protecting the integrity and predictability of the receivership sale process*.

61. The question, therefore, before this Court is how can the private commercial interests of the actors in the receivership process be balanced with the public policy of maintaining confidence in the receivership process? Is there some transcendental principle that runs through this binary and which is a bright line for arriving at a just decision?

62. The Debtor respectfully submits that this transcendental principle is that of efficiency. Forsaking a rigid rule for a contextual one, the juridical question is whether the circumstances of the case are such that stakeholders can maximize their economic return with minimal risk to the integrity of the receivership process.

63. The Debtor submits that a distillation of the case law reveals the following non-exhaustive factors that a Court weighs in its analysis:

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[23] *Bank of Montreal v Hester Creek Estate Winery ltd*. 2024 BCSC 724 (CanLII); *Kruger v Wild Goose Vintners Inc*, 2021 BCSC 2021 BCSC 724; *Institutional Mortgage Capital Canada Inc. v 0876242 BC Ltd*. 2022 BCSC 1520 (CanLII).

a. the conduct of the parties;

b. the fairness of the sales process;

c. the timing of the debtor's motion for redemption;

d. the comparative prejudice suffered;

e. the recommendations (if any) of the Receiver;

f. the "*Handelman*" risk to the freedom of contract in the marketplace; and

g. the degree to which the parties will be made financially whole; and

h. the application of the *Soundair* principles.

64. In this case, Justice Sutherland, applying the above, was correct in finding that it was more efficient to permit a redemption than allow 255 to prevail. The redemption results in the complete payout of the creditors, the Receiver, and the lawyers, and avoids the bankruptcy of the Debtor, and eliminates the risk to the Guarantors, while, at the same time, preserving the rights of the Commercial Tenants.

65. By contrast, the sale to 255 results in: (i) a loss to the second mortgagee, (ii) the bankruptcy of the debtor, (iii) the exposure of the Guarantors, (iv) and, the loss to the commercial tenants of their leasehold interests in the Property.

66. Further, a redemption grants to 255 its reliance interest in the deal it made with the Receiver: the Debtor agreed to pay 255's break-fee, if it is entitled to one; or, 255's deposit is returned to it if the deal is terminated because the AVO is not granted.

67. In the chart attached as Schedule "C" to this Factum, the Debtor sets out the expected efficiency comparison between the AVO and the redemption arising from an anticipated closing (to be held as of Friday, July 19, 2024). The Receiver performed a similar analysis in its Supplement to the Second Report.

68. The Appellant, in its factum, raises as an issue the conduct of the Respondent. The Appellant alleges that the Appellant was misled when it entered into the $31,000,000 Original

APS. But, this ought not to be a factor in the analysis. In *BCIMC,* Justice Koehnen had to deal with a similar argument. At para 42 – 44, the learned Judge said this:

> *[42] Supporters of the Receiver's motion point to my findings about the debtor's misconduct in my reasons assigning the projects into receivership. They submit that a debtor who has misled its mortgagee should not be entitled to redeem.*
>
> *[43] While I did make adverse findings against the debtor's conduct in those reasons, misconduct by a debtor gives rise to that degree of remedy necessary to correct the harm done by the misconduct. It does not necessarily mean that the debtor will be deprived of its property.*
>
> *[44] While courts should be mindful of the clean hands principle when considering requests by the debtor in these circumstances, they should be equally mindful of a potentially underlying commercial reality: the possibility that the creditor may have an interest in structuring a receivership to allow it to acquire the property at an attractive price which would enable the creditor to make considerably more money by depriving the debtor of its property than the creditor would ever earn by way of interest under a mortgage.*

69. Put another way, where there is no rational connection between the alleged misconduct and the right to redeem, the alleged misconduct should not figure into any analysis.

70. Turning to the "market risk" factor referred to in *Handelman*, how can one weigh the private commercial interests of the parties, against the public interest in the sanctity of the receivership process?

71. It is respectfully submitted that the risk that Justice Pepall identified in *Handelman*, and which the Appellant champions in this appeal, is the concern that buyers in a court approved sales process might be discouraged from entering into that process if a debtor could, at the 11th hour, snatch the deal away by a redemption.

72. But respectfully, in the commercial world, this may not be the case, and again, context is everything. The Debtor submits that:

a. There is no empirical evidence that such a chilling effect would happen if a debtor is allowed to exercise a right to redeem.[24] In fact, the paucity of cases, such as the one before this Court, speaks loudly to the fact that debtors almost never have the ability to fund out a receivership by the time of the approval and sale motion. As Justice Sutherland found, the facts of this case are unique and exceptional. There is no risk of a floodgates argument.

b. In any event, if the law is that a debtor is allowed to late redeem, a Receiver and buyer, in an open and free market, can always negotiate for a compensatory payment, to be paid by the Debtor, should a debtor redeem. How a Receiver and a prospective purchaser arrive at such a compensatory payment will be the subject of the Receiver's report to the Court. The Appellant, in this appeal, urges this point on this Court, and says that it should be compensated for its time and effort. The Appellant falls into error by ignoring the fact that it contracted for its reliance interest, not its expectation interest in its contract with the Receiver. 255 made its bed and should sleep in it.

c. In truth, buyers in receiverships will not be deterred by the right to redeem because they are motivated by profit, and profit is a function of the following factors: (i) the nature of the assets for sale; (ii) the valuation of the assets; (iii) the bidder's financial liquidity or ability to borrow to finance a purchase; (iv) the amount of time and money to be expended in the due diligence process, and (v) the time and money spent in the negotiations with the Receiver.[25] Moreover, qualified bidders know or ought to know that the completion of their successful bid must be court approved and that any interested party has standing to challenge the fairness or integrity of the process.[26] Redemption is simply one more

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[24] There is some evidence that the use of credit bids and Stalking Horse credit bids in insolvency sales may have a chilling effect on the market. See Jessica L. Cameron et al, "Saddle Up: The Rise of Stalking Horse Credit Bids in Canadian Insolvency Proceedings" 2023 CanLII Docs 3089. See also the reference to Alan Resnick," Denying Secured Creditors the Right to Credit Bid in Chapter 11 Cases and the Risk of Undervaluation, (2012) 63 Hastings L J 323.

[25] Saddle Up: The Rise of Stalking Horse Credit Bids in Canadian Insolvency Proceedings" 2023 CanLII Docs 3089.

[26] Cameron *supra*. See also, for example, *Reciprocal Opportunities (n 7),* where the Court of Appeal overturned a Motion Judge's refusal to approve a sale to the appellant

risk in the approval process. Buyers appreciate that undergoing a court process (where they may or may not have standing) poses a risk to the consummating of the deal.

d. Perhaps an analogy can be drawn to the case law with respect to the power of sale process in a non-receivership context. Here, a mortgagor retains the right to redeem until a sale. In a receivership, the mortgagor loses control over the asset to the receiver who is charged with administering it until final disposition. Given the debtor's loss of control over the asset (although retaining its legal right to the equity of redemption), a Court should more strongly protect the right to redeem than otherwise.

e. In a power of sale / non-receivership context, buyers enter into negotiations with a mortgagee, running the risk that the mortgagor can redeem up to the point in time when a sale is made. There is a line of cases that provide that a mortgagor maintains a right to redeem pending the satisfaction of conditions in a conditional contract, including a vesting out clause.[27] It is difficult to see why there would be a heightened risk of a chilling effect in the receivership context where similar risks of redemption occur in a non-receivership context. Whether one negotiates with an agent alone or with the Receiver, the risk/reward calculus is ever present.

73. It is respectfully submitted that this case is exceptional and the actors in it are situated in a special circumstance, specifically:

a. The Debtor had, as of July 2, 2024, enough money to close at the 11th hour;

b. the Receiver took no opposition to the Debtor's Cross-Motion once it learned that the Debtor would fund out the receivership;

c. the stakeholders are paid;

d. the market did not respond to the sales process at all;

[27] See the discussion in *Armanasco v Linderwood Holdings Inc.*, 2016 ONSC 1605 (CanLII).

e. 255 seeks to take advantage of the $7,000,000 discount which it successfully negotiated with the Receiver; and

f. the only combatants in the Court below were the Debtor, of the one part, supported by all the stakeholders, and 255, of the other part, standing alone; the former holds a hallowed, centuries old, legal right, and the latter holds a conditional and tentative purchaser's lien right. The law drives that the former prevails.

74. In the instant case, the right to redeem, whether known or unknown to the market, would have had no impact on the sales process. The "chilling effect" of a redemption does not apply to the circumstances of this case. That is why Justice Sutherland gave little weight to the public policy concerns in the specific facts of this case.

PART IV: ORDERS REQUESTED

75. The Respondent submits that this Appeal be dismissed with costs to be paid by 255 to this Respondent on a substantial indemnity basis.

76. Further, regardless of outcome, this matter should be remitted back to the Court below to deal with all matters incidental to either the discharge of the Receiver or the granting of an AVO, as the case may be.

77. All matters relating to the administration of the estate by the Receiver, referred to in the Supplement to the Second Report, should be directed to the Court below for disposition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF JULY 2024.

Gary M. Caplan

Gary M. Caplan

SCALZI CAPLAN LLP
20 Caldari Road, Unit 2
Vaughan, ON L4K 4N8
Gary Michael Caplan (19805G)
E: gary@sclawpartners.ca
Derek Ketelaars

E: derek@sclawpartner.com

Lawyers for the Respondent

Aram Simovonian

LIMA LAW PC
Aram Simovonian (73974D)
E: asimovonian@limalaw.ca

Agent for Scalzi Caplan LLP

Court of Appeal File No.: COA-24-CV-0671
OSCJ Court File No. CV-23-00004031-0000

ONTARIO
COURT OF APPEAL

B E T W E E N:

PEAKHILL CAPITAL INC.

Applicant

and

1000093910 ONTARIO INC.

Respondent

CERTIFICATE

I estimate that 30 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) is not required. This factum complies with subrule 5.1. There are 9,210 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

Gary M. Caplan

Gary M. Caplan

SCALZI CAPLAN LLP
20 Caldari Road, Unit 2
Vaughan, ON L4K 4N8
Gary Michael Caplan (19805G)
E: gary@sclawpartners.ca
Derek Ketelaars
E: derek@sclawpartner.com

Lawyers for the Respondent

LIMA LAW PC
Aram Simovonian (73974D)
E: asimovonian@limalaw.ca

Agent for Scalzi Caplan LLP

SCHEDULE "A" – LIST OF AUTHORITIES

1. *230 Travel Plaza Inc. (In Bankruptcy)*, 2002 CanLII 29600 (ON SC).

2. *Armanasco v Linderwood Holdings Inc.*, 2016 ONSC 1605 (CanLII).

3. *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.).

4. *Bank of Montreal v Hester Creek Estate Winery ltd*. 2024 BCSC 724 (CanLII).

5. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659 (CanLII).

6. *BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909.

7. *Home Trust Company v. 2122775 Ontario Inc.*, 2014 ONSC 1039.

8. HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of) (2004), 2004 CanLII 206 (ON CA), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.).

9. *Institutional Mortgage Capital Canada Inc. v 0876242 BC Ltd.* 2022 BCSC 1520 (CanLII).

10. *Jethwani v Damji*, 2017 ONSC 1702 (CanLII).

11. *Kruger v Wild Goose Vintners Inc*, 2021 BCSC 2021 BCSC 724.

12. *Peakhill Capital Inc. v 1000093910 Ontario Inc.*, 2024 ONCA 59 (CanLII).

13. *Petranik v Dale* 1976 CanLII 34 (SCC).

14. *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 ONCA 713 (CanLII).

15. *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832 (CanLII).

16. *Rose-Isli Corp. v. Smith*, 2023 ONCA 548 (CanLII).

17. *Royal Bank of Canada v. Delta Logistics Transportation Inc*. 2017 ONSC 368.

18. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA).

19. *Skyepharma PLC v Hyal Pharmaceutical Corporation*, 2000 CanLII 5650 (ON CA).

20. *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635 (CanLII).

21. *Winick v 1305067 Ontario Limited*, 2008 CanLII 6937 (ON SC).

SCHEDULE "B" – STATUTES, REGULATIONS & BY LAWS

1. Jessica L. Cameron et al, "Saddle Up: The Rise of Stalking Horse Credit Bids in Canadian Insolvency Proceedings" 2023 CanLII Docs 3089.
2. Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3).
3. Bankruptcy and Insolvency General Rules (C.R.C., c. 368).
4. R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE.
5. *Courts of Justice Act*, R.S.O. 1990, c. C.43.

SCHEDULE "C"

AVO Transaction			Refinance Transaction	
Sale Proceeds, AVO	$24,255.00		Net Advance of New First Mortgage, Firm Capital Corporation	$18,800.34
			Net Advance of New Second Mortgage, Zaherali Visram	$3,650.00
			Refinance and Postponement of Second Mortgage, Zaherali Visram	$8,000.00
			Cash Advance, Debtors	$1,357.04
Total Available Funds/Financing	**$24,255.00**			**$31,807.38**
Receivership expenses				
Professional Fees, including the Additional Fee Accrual	($716.50)			($716.50)
Receivership expenses	($53.00)			($53.00)
Broker work fee	($158.00)			($158.00)
Break fee potentially owing to 255	-			($250.00)
Further Fee Accrual (Section 4, Receiver's Supplement to Second Report, July 15, 2024)	($169.50)			($169.50)
Subtotal	($1,097.00)			($1,347.00)
Balance Remaining - to Be Disbursed to Creditors	$23,157.00			$30,460.38
Peakhill – 1st mortgagee	($22,440.00)			($22,430.63)
Zaherali Visram - 2nd Mortgagee	($8,000.00)			($8,000.00)
Net Surplus/Deficiency	($7,283.00)			$29.74

EXCERPT
BENNETT ON
RECEIVERSHIPS

1

Introduction

1. History
2. Method and Purpose of Appointment
3. Engaging a Consultant and Monitor
4. Court-appointed Monitor and Interim Receiver
5. Effect of Receivership
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   (q) The Receiver's Neutrality
   (r) Appeal Routes

1. HISTORY

The term "receiver" is used to describe a person or corporation who has been appointed by the court or by a security holder under a security instrument to take possession and control of property belonging to another where the legal remedies are inadequate. In a court appointment, another purpose of a receiver is to preserve and protect the property on an interim basis pending

resolution of the issues between the parties. The remedy of receivership is flexible. Once appointed, the debtor's property is in the state of receivership. In most cases, this remedy includes the enforcement of rights for the recovery of money through the sale of the debtor's property. In other cases, the remedy is used to manage and return the property at the conclusion of the dispute. In an appointment under a security instrument, referred to as a private or instrument appointment, a security holder appoints a receiver to take possession and control of debtor's property for the purpose of recovering a debt.[1]

Under English law, there was no power in the common law courts to appoint a receiver. Receivership was an equitable remedy available in the Court of Chancery in situations where the common law was inadequate to protect the rights of the parties. Employed mostly in the commercial context, the court would appoint a receiver to collect the income and profits of the debtor. The receiver had the power to collect the debts and sell the inventory and other assets, usually resulting in the cessation of the debtor's business. Therefore, if it was necessary to continue the debtor's business, the court had to appoint a *manager* with power to continue the business.[2]

The historical distinction between a "receiver" and a "manager" is still relevant today. A person who has the power to take possession and dispose of the assets and the power to carry on the business is called a receiver and manager or a receiver/manager. In practice, a receiver is usually appointed as both a receiver and a manager, and therefore reference throughout this book to the term "receiver" is intended to include a "manager" unless otherwise stated.

The Court of Chancery did not permit a wrong to be without a remedy. Consequently, Chancery intervened, for example, to permit a debenture holder to enforce its security against a debtor in default, or to permit an execution creditor to realize on the debtor's property which was not subject to legal execution at common law.[3] Once the Court of Chancery was satisfied that it was necessary to protect the rights of the parties under a contract or to preserve property from some danger, it made an appointment. There were no restrictions as to the types of situations in which the court could make an appointment. As the remedy expanded, the court could appoint a receiver, or a receiver and manager to protect creditors, minors, mental incompetents, shareholders of a corporation, partners (where the business was being dissolved), beneficiaries of a deceased's estate, and vendors and purchasers of real property.

In the Province of Ontario, the Legislature fused the Court of Chancery and the common law courts in 1881 by the *Judicature Act*.[4] Today, subsection 11(2) of the *Courts of Justice Act*[5] provides that the Superior Court of Justice has all

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1 *Canadian Union of Public Employees v. Hachey et al.* (2011), 2011 NBCA 41, 2011 CarswellNB 208 (N.B. C.A.).

2 *Re Manchester & Milford Ry. Co.; Ex parte Cambrian Ry. Co.* (1880), 14 Ch. D. 645 (C.A.).

3 See, for example, *Davis v. Duke of Marlborough* (1818), [1814-23] All E.R. Rep. 13, where the court appointed a receiver for a creditor with respect to a debtor's equitable estate which could not be seized at law.

the jurisdiction, power, and authority historically exercised by courts of common law and equity in England and Ontario. Subsection 101(1) of the *Courts of Justice Act* specifically provides jurisdiction to the court to appoint a receiver, or a receiver and manager by interlocutory order where it appears to be just or convenient to do so. Therefore, the principles upon which the Court of Chancery would exercise its jurisdiction prior to 1881 continue to apply in motions for a court-appointed receiver, or a receiver and manager under this section.[6]

Until the amendments to the then *Bankruptcy Act* in 1992, there were no provisions dealing with the rights and remedies of secured creditors in a receivership situation. Consequently, unsecured creditors and trustees in bankruptcies had to resort to common law remedies and provisions under provincial law to find out what happened to the debtor's assets where a secured creditor appointed a receiver to recover its debt. Accountability was and still remains a significant issue today. There were often complaints about the lack of control over the enforcement of security, about the difficulties in compelling the receiver to comply with its duties, and about the ability of creditors and the debtor in obtaining an accounting of receipts and disbursements from receivers.

In 1992, Parliament created Part XI to the new *Bankruptcy and Insolvency Act*.[7] This Part enables the creditors and a trustee in bankruptcy, now known as a licensed insolvency trustee[8], of the debtor to monitor the appointment of the receiver and the receiver's conduct after the appointment. For Part XI to apply, however, the debtor must be insolvent. and use its property in its business, and the secured creditor must be in a position to enforce its rights against all or substantially all of the debtor's property. The purpose, then, of the amendments was to give the court minimum control over receiverships of insolvent businesses, and in most cases where the debtor gave security over all or substantially all of its property. In addition, Parliament intended to impose a duty on the receiver to report to the creditors on the appointment, to act honestly and in good faith, and to report to creditors on the administration. If Part XI does not apply to the receivership, then the common law and other legislation continue to apply.

In 2005, Parliament enacted Statute of Canada, Chapter 47, and in 2007, enacted Statute of Canada, Chapter 36. However, Parliament delayed proclamation of most of the sections in both statutes pending a Senate review and report; however, the Senate never issued a report. Parliament proclaimed some of the sections, primarily dealing with the Wage Earner Protection

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4 1881 (44 Vict.), c. 5, section 3.
5 R.S.O. 1990, c. C.43.
6 *Holmes v. Millage*, [1893] 1 Q.B. 551 (C.A.).
7 S.C. 1992, c. 27.
8 Since 2016. Office of the Superintendent of Bankruptcy, Directive No. 33: *Trustee Designation and Advertising*, first issued December 2, 2015; modified January 4, 2017: "Are You Compliant?" and "What is a Licensed Insolvency Trustee?", Modified June 26, 2016.

Program, which came into force in July, 2008 and finally, following a recession starting in August 2008, proclaimed the remaining sections of the two chapters in force as of September 18, 2009.[9]

Under Chapters 47 and 36, the *Bankruptcy and Insolvency Act* was substantially amended in various areas including consumer bankruptcies and proposals, commercial proposals and, more particularly, the law on receiverships. First, there is a provision for the appointment of a "national receiver" to facilitate administrations across the country where the debtor has assets and property in more than one province or territory. Until this amendment, a receiver appointed in one province had to apply for recognition and rights to enforce the order in other provinces and territories where the debtor had assets and property. Now a receiver appointed under this Part has the right to appear in all Canadian jurisdictions.

The amendments dealing with the appointment of a national receiver appear to restrict the receiver's powers and duties, rights and remedies. As is presently the case, the provincial and territorial courts continue to develop these issues on a case by case basis until such time as Parliament sees fit to set them out in legislation. On the other hand, this process often leads to inconsistent approaches, forum shopping, and questionable case law.

A second feature of the amending legislation relating to receivers requires that all receivers under the Act be licensed. This licensing feature ensures that the Office of the Superintendent in Bankruptcy has supervisory control over receivers. Receivers, like trustees in bankruptcy, must comply with trustee standards, insofar as they are applicable, administrative review of their conduct, and compliance with the trustee's code of ethics.[10] Receivers who are appointed in situations where Part XI of the Act does not apply need not be licensed but, as before, they are subject to provincial[11] and territorial statutory law and common law where applicable.

Third, there is an expanded definition of the term "receiver" to include powers "to exercise such control over that property, and over the debtor's business, as the court considers advisable."[12] This new definition gives the court a wide discretion in granting powers and duties.

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9 A small number of sections came into force on July 7, 2008 dealing with the *Wage Earner Protection Program Act*, protection of registered retirement savings plans in the event of bankruptcy, student loans, the non-release of certain fraud claims, and equity interests.

10 Section 13.5; Bankruptcy Rules 34 to 53.

11 Part XI of the Act applies to receivers if the debtor is insolvent and all or substantially all of its assets used in its business are covered under a security instrument.

12 Subsection 47(2)(b) — an appointment of an interim receiver after notice of intention to enforce security and subsection 47.1(2)(c) — an appointment of an interim receiver after notice of intention to make a proposal.

Subsection 243(1)(b) provides that a receiver may "exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business" — proclaimed in 2009.

Subsection 243(1)(c) provides that a receiver may "take any other action that the court considers advisable" — proclaimed in 2009.

Significant confusion continues with respect to the use of the term "receiver" and "interim receiver". The word "interim" connotes a period of time between two dates. The provisions of the *Bankruptcy and Insolvency Act* have generated some of this confusion.[13] The Act permits the appointment of an "interim receiver" in several situations in Part II. The Act also gives a creditor the right to apply for the appointment of an interim receiver during the operation of a proposal under Part III of the Act. In another example, the Act refers to an interim receiver appointed between the date of the application for a bankruptcy order and the making of a bankruptcy order. In most cases, an interim receiver under the *Bankruptcy and Insolvency Act* does not have all the usual powers of a receiver and manager. The use of the term receiver is also used in Parts XI [Secured Creditors and Receivers] and XIII [Cross-Border Insolvencies] generally referring to a receiver and manager in a full-blown receivership with numerous powers. There are no restrictions as to powers and duties for this type of receiver and manager.

Formerly, the order declaring the debtor a bankrupt was called a "receiving order" resulting in the appointment of a trustee of the bankrupt estate, rather than the appointment of a receiver.[14] Now, a creditor applies for a bankruptcy order and prior to the making of the order, the creditor can also apply for the appointment of an interim receiver. Once the trustee in bankruptcy is appointed, the trustee is given all the rights of a receiver appointed by the court and the appointment of the interim receiver terminates.[15]

The *Bankruptcy and Insolvency Act* is administered by the Superintendent of Bankruptcy. In each province, the Superintendent delegates his or her powers under the Act to "Official Receivers" who receive and accept voluntary assignments in bankruptcy from debtors and proposals to creditors. Generally the Official Receivers supervise the administration of bankrupt estates by trustees.

Last, the term "receiver" is also used to describe the remedy known as the appointment of a receiver by way of equitable execution. This type of receiver is appointed by the court following judgment as an ancillary method of collecting a debt. Traditionally, such a receiver had no power to manage, and was generally employed where the creditor could not levy execution at common law.[16]

Unlike a privately appointed receiver, a court-appointed receiver and manager is an officer of the court appointed to take possession and control the situation until the parties can resolve their issues, which in most cases, is the enforcement of a loan. The receiver is the "eyes and ears" of the court; the receiver has a fiduciary duty to all stakeholders and must be and remain

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13 R.S.C. 1985, c. B-3, as amended.

14 This was changed in 2004, S.C. 2004, c. 25, section 28. See Chapter 17 "2. Receivership under Part II of the Bankruptcy and Insolvency Act".

15 Subsection 16(4) of the *Bankruptcy and Insolvency Act*.

16 See also Chapter 16 "2. Appointment of Receiver by Way of Equitable Execution under the Courts of Justice Act".

impartial throughout the course of the receivership. In most receiverships, the receiver takes an active role in administering the assets and property; the plaintiff or applicant generally does not initiate proceedings once there is a court appointment in place although it is incumbent on the plaintiff or applicant to establish that there is a debt owing, that it necessary to appoint a receiver and that the debtor has failed to pay or perform the terms of the security agreement.[17]

The role of the receiver as an officer of the court has been described as follows:[18]

> Receivers, trustees in bankruptcy, interim receivers, and the like are Officers of the Court. They are not litigants in the ordinary sense. They hold representative capacities either under a statute or pursuant to a court order. They function as fiduciaries to multiple parties with disparate interests. They are typically appointed to be a neutral custodian of business assets that need independent stewardship under the auspices of the Court while the protagonists engage in a dispute. The Officers of the Court are the Court's eyes, ears, and advisors on matters of business judgment. They maintain a neutral position towards the disputants and seek only to protect the value of assets from being impaired by any activities of the parties to the underlying dispute.
>
> Officers of the Court stand outside the fray. They report to the Court and receive their marching orders from the Court. They have no stake in the parties' litigation. It has therefore been recognized in Ontario, although not throughout the country I note, that receivers and other Officers of the Court do not participate in the proceedings before the Court under the same conditions as the parties who have economic interests in the outcome. Officers of the Court are not required to deliver sworn evidence. They report to the Court concerning their activities and with their recommendations. They are not subject to cross-examination in the ordinary course. Receivers and Officers of the Court respond to questions posed by parties, not to test their evidence as a matter of civil procedure, but to provide transparency as is necessary to maintain the integrity and neutrality of their position as fiduciaries to all.

2. METHOD AND PURPOSE OF APPOINTMENT

There are two methods of appointing a receiver: a private appointment and a court appointment. These methods vary with the purpose of the appointment. In most cases where the debtor has given security over all or substantially all of its assets, the security holder has the right to appoint a

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[17] In most cases of debt enforcement, the plaintiff or applicant rarely obtains a formal judgment or a declaration that the security holder is entitled to enforce its security and that the debtor owes the security holder a sum of money. Except in the case of mortgage receiverships, the debtor rarely redeems the security holder or gets a stay of proceedings pending redemption.

[18] *Jethwani v. Damji*, 2017 ONSC 1702, 46 C.B.R. (6th) 96 (Ont. S.C.J. [Commercial List]) at paras. 8 and 9.

Court of Appeal Court File No.: COA-24-CV-0671

Court File No. CV-23-00004031-0000

PEAKHILL CAPITAL INC. Applicant	and	1000093910 Ontario Inc. Respondent (Respondent on Appeal)

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FACTUM OF THE RESPONDENT ON APPEAL

SCALZI CAPLAN LLP
20 Caldari Road, Unit 2
Vaughan, ON L4K 4N8
Gary Michael Caplan (19805G)
E: gary@sclawpartners.ca
Derek Ketelaars
E: derek@sclawpartner.com

Lawyers for the Respondent

LIMA LAW PC
Aram Simovonian (73974D)
E: asimovonian@limalaw.ca

Agent for Scalzi Caplan LLP