COURT OF APPEAL FOR ONTARIO

Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 558
DATE: 20240711
DOCKET: M55244 & M55245 (COA-23-CV-0671)

Brown J.A. (Motion Judge)

BETWEEN

Peakhill Capital Inc.

Applicant (Respondent/
Responding Party/Responding Party by way of cross-motion)

and

1000093910 Ontario Inc.

Respondent (Respondent/
Responding Party/Moving Party by way of cross-motion)

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

Kevin D. Sherkin and Mitchell Lightowler, for the appellant/moving party (M55244)/responding party by way of cross-motion (M55245) 2557904 Ontario Inc.

Gary M. Caplan and Aram Simovonian, for the respondent/responding party (M55244)/moving party by way of cross-motion (M55245) 1000093910 Ontario Inc.

Dominique Michaud, for the respondent/responding party/responding party by way of cross-motion Peakhill Capital Inc.

Richard B. Swan and Aiden Nelms, for the Receiver, KSV Restructuring Inc.

D.J. Miller, for Firm Capital Corporation

Laura Culleton, for the second mortgagee, Zaherali Visram

Jason Squire, for Ren/Tex Realty Inc. and ReMax Premier Inc.

Heard: July 10, 2024 by video conference

ENDORSEMENT

OVERVIEW

[1] Yesterday, I heard two motions in an appeal involving the receivership of 1000093910 Ontario Inc. (the "Debtor"), whose main asset is an industrial property in Vaughan, Ontario. At the end of yesterday's hearing, I 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.

[2] The proximate events that have prompted this case conference were two orders made by Sutherland J. in this receivership on July 4 and 9, 2024 (the "Sutherland Orders"). Briefly stated, those orders declined to grant the approval and vesting order sought by the court-appointed receiver, KSV Restructuring Inc. (the "Receiver"), in its notice of motion dated May 31, 2024, and initially returnable June 12, 2024. In that notice of motion, the Receiver had sought orders:

(i) approving the agreement of purchase and sale between the moving party, 2557904 Ontario Inc. ("255") and the Receiver dated November

13, 2023 (the "Stalking Horse Agreement") to purchase the assets of the Debtor, as defined in that agreement;

(ii) vesting the purchased assets in 255;

(iii) distributing the sale proceeds to repay the full amount owing to the applicant first mortgagee, Peakhill Capital Inc. ("Peakhill"), and part of the amount owing to the second mortgagee, Zaherali Visram; and

(iv) related relief, including the discharge of the Receiver.

[3] Instead of approving the Receiver's recommended Stalking Horse Agreement, on July 4, 2024, Sutherland J. terminated that agreement and approved a transaction under which the Debtor would refinance the first mortgage using Firm Capital Corporation ("Firm Capital") as the main lender (the "Refinancing Transaction").

[4] Shortly after that order was made, on July 4, 2024, 255 filed a notice of appeal from the order of Sutherland J.

[5] That appeal prompted the Debtor to move to seek the inclusion of a term granting provisional enforcement of the July 4 order in the settled formal order, notwithstanding any appeal that 255 might take. Sutherland J. granted such relief by order dated July 9, 2024.

[6] 255's appeal seeks to set aside the Sutherland Orders and replace them with an approval and vesting order that enables the Receiver to complete the Stalking Horse Agreement transaction.

[7] These reasons explain the decision that I have made regarding both motions brought in the context of 255's appeal. My decision is as follows:

(i) I refer the following issues to a panel of this court for hearing and determination next Friday, July 19, 2024:

(a) whether the appellant, 255, has standing to appeal the July 4 and 9, 2024 Sutherland Orders;

(b) if 255 has standing, does it have an automatic right to appeal the Sutherland Orders pursuant to ss. 193(a)-(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") or does it require leave to appeal pursuant to *BIA* s. 193(e)?

(c) If it requires leave, should leave to appeal be granted?

(d) 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?

(e) Did the motion judge err in varying his July 4 order, following the filing of a notice of appeal by 255, to include a provisional enforcement term that overrode the automatic stay on appeal provided by *BIA* s. 195?

(ii) I continue, until the panel's determination of those issues, my stay under *BIA* s. 195 of the provisional execution granted by Sutherland J. in his order dated July 9, 2024.

The motions

[8] As mentioned, 255 filed a notice of appeal dated July 4, 2024, from the order of Sutherland J. dated July 4, 2024, that permitted the Debtor to redeem the first mortgage on its Vaughan industrial property notwithstanding that the Receiver was seeking an approval and vesting order to convey the property to 255, the successful bidder in the court-approved sale process for the property. The order also terminated the Stalking Horse Agreement and put in place a mechanism by which to discharge the Receiver.

[9] On July 4, 2024, Sutherland J. released very brief reasons for his decision, paras. 3 to 5 of which state:

> 3. My disposition is that the [Debtor] be permitted to redeem the first mortgage to pay fully the amount owing on the first mortgage, the cost and fees of the Receiver which on Tuesday July 2 2024, the total amount was $23,450,000 which includes the sum of $250,000 to be paid into either Court or held in trust for the benefit of the prospective purchaser 23557904 Ontario Inc. per the Sale Agreement or Second Report.
>
> 4. I was also advised that the parties have a draft Order that has been approved to deal with the redemption of the first mortgage. That order, approved as to form and content by all parties, to be sent to me for my

> review and signature. The draft approved Order to be sent to my judicial assistant...
>
> 5. I anticipate releasing my reasons within the next few weeks.

[10] As of the date of yesterday's case conference, the motions judge had not yet released reasons for his July 4 order approving the Debtor's Refinancing Transaction. Consequently, as matters stand, for purposes of appellate review, no reasons explain why Sutherland J. rejected the Receiver's approval and vesting order motion and allowed the Debtor's cross-motion to redeem the first mortgage.

[11] After that order was made and the notice of appeal filed later on July 4, 2024, the Debtor moved before Sutherland J., requesting that his issued order include a term permitting provisional enforcement of the order, pursuant to *BIA* s. 195, notwithstanding 255's appeal. Sutherland J. granted such relief on July 9, 2024, issuing an order that dismissed the Receiver's approval and vesting order motion, terminated the Stalking Horse Agreement, approved the refinancing of the Debtor's indebtedness and its proposed Refinancing Transaction, and included the following para. 9:

> THIS COURT ORDERS that, having regard to the significant interest accruing: (i) on the existing mortgages to be repaid and refinanced through the Refinance Transaction; and (ii) the new mortgages for which funding has been committed to permit the Refinance Transaction to occur, the continuation of which would render this Court's approval of the Refinance Transaction moot if it was not capable of being immediately implemented, pursuant to section 195 of the *Bankruptcy and Insolvency*

> *Act* (Canada), the terms of this Order and the closing of the Refinance Transaction as defined herein shall be implemented forthwith notwithstanding any motion to vary, notice of appeal or notice of motion for leave to appeal that may be sought. For greater certainty, this Order is subject to provisional execution and if any of the provisions of this Order shall be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a " Variation"), such Variation shall not in any way impair, limit or lessen the protections, priorities, rights and remedies of the parties providing funding in connection with the Refinance Transaction and any advances made or obligations incurred prior to such Variation, and all parties shall be entitled to rely on this Order as issued, for all actions taken in connection with the Refinance Transaction. [Emphasis added].

[12] By reasons dated July 9, 2024, Sutherland J. explained why he granted provisional enforcement of his July 4 order. He wrote:

> [24] I agree with the respondent, the second mortgagee, the financial lender, the tenants and the guarantors, that the circumstances here are exceptional. The fact that the respondent has a cheque in hand to pay the applicant in full, the receiver in full, the amount for 255 is exceptional. No party has provided a case where the factual matrix that a cheque in hand has been provided to pay all required with a request for provisional execution.
>
> [25] Moreover, looking at the irreparable harm or prejudice, it is clear to me that there would be irreparable harm or prejudice to the applicant, respondent, second mortgagee, and guarantors if provisional execution is not granted. The financing would fall away. The applicant would incur further costs and interest which may or may not be paid. The applicant would have to wait longer for its money. The second mortgagee would have a loss. The respondent would lose the property. Existing tenants will have to find alternate premises. The guarantors would be liable for any deficiency with the applicant and the second mortgagee. If the respondent is permitted to

redeem, as accepted by this Court and that redemption can finalize before July 12, 2024, costs and interest would be limited and would come to an end. The applicant would be paid in full. The tenants would remain in the premises. The second mortgagee would not have a deficiency and the guarantors would not be subject to any deficiency on the first mortgage and without question, the second mortgage.

[26] In contrast, 255 would lose the purchase of the property. It would still have the Break Fee, costs and disbursements of $250,000 which it can claim as an agreed quantification for its costs and expenses in the Second Agreement. It also still has the outstanding proceeding with the realtor on the First Agreement. But again, it is not certain that the realtor would be successful in that proceeding and if it is successful, against whom.

[27] Having said this, I am cognizant that 255 has not delayed this proceeding. 255 is a prospective purchaser that followed the procedure of the bidding process. But it was not hidden that the closing of the purchase pursuant to the Second Agreement was always a risk that could not happen without approval of this Court. It is for this reason, I presume, why the Break Fee and amount for legal costs and disbursements was negotiated and included as a term in the Second Agreement.

[28] Taking all these circumstances into consideration, I conclude that the irreparable harm or prejudice that would be suffered by the respondent, the guarantors, the applicant and the second mortgagee if provisional execution is not granted outweighs any harm or prejudice that may be suffered by 255.

[29] The harm and prejudice to the parties other than 255 are real and immediate. The harm or prejudice to 255 on the realtor proceeding is not certain. The loss of the purchase of the property exists but there was no evidence before me that indicates any real costs or harm that 255 will suffer if the property is not sold to it, other than the amount agreed upon in the Second Agreement.

> [30] Accordingly, I conclude that in these circumstances the balancing favours and the general interest of justice favours the granting of provisional execution.
>
> [31] I therefore grant provisional execution in the draft order provided by the receiver that has been approved as to form and content by all interested parties except 255. Draft order signed by me this day.

[13] The issuance of the July 9 order prompted the request for an urgent case conference. Prior to the case conference, both 255 and the Debtor filed competing motions:

- 255's motion seeks an order from a single judge of this court: (i) advising whether it requires leave to appeal the Sutherland Orders; (ii) if it does, granting leave to appeal; and (iii) a stay of the Sutherland orders pending the hearing of its appeal;

- The Debtor's cross-motion seeks an order from a single judge of this court: (i) dismissing 255's motion and appeal on the basis that 255 lacks standing to bring the motion and appeal; or (ii) alternatively, an order that 255 requires leave to appeal and the denial of such leave.

[14] An email communication from the parties to the court before the case conference advised that 255 and the Debtor agreed that the case conference should address the following issues:

(a) to set a date for 255's motion to stay the order of Sutherland J. dated July 9, 2024 pending hearing of its appeal;

(b) to set a date for the Debtor's cross-motion seeking, in effect, to quash 255's appeal;

(c) if required, to set the dates for the hearing of 255's appeal; and

(d) an interim order, sought by 255, to preclude the enforcement of the Sutherland Orders pending the hearing of 255's motion.

[15] The urgency for the case conference has been prompted by two commercial realities:

(i) First, the Receiver took the position that it intended to close the redemption Refinancing Transaction by 4:00 p.m. on July 10, 2024, absent an order from the court;

(ii) Second, the Firm Capital commitment letter that the Debtor relies on as the main source of funds to redeem the first mortgage set July 12, 2024 as the date by which funds must be advanced "failing which this Commitment will be cancelled or extended at FCC's sole option."

HISTORY OF THE RECEIVERSHIP

The appointment of the Receiver

[16] The parties' motion requests must be understood in the context of this receivership, which started out on a consent basis but subsequently became highly litigious.

[17] The Debtor had executed a consent agreement with Peakhill to the appointment of a receiver over the Debtor and its property, including a commercial property located at 20 Regina Road, Vaughan. The Debtor was the landlord of the property, which was leased to non-arm's length tenants, which were in default of payment of rent.

[18] By the terms of the Debtor's consent, the appointment order would not become effective until the earlier of either the Debtor's breach of certain obligations, specified in the consent, or October 2, 2023. The terms of the consent included, *inter alia*, a provision that enabled the Debtor to pay the full amount owing under Peakhill's first mortgage on the property until September 29, 2023.

[19] The Debtor did not satisfy the terms of the consent agreement. Consequently, the appointment order became effective on October 2, 2023 and the Receiver assumed control over the property at that time.

[20] The appointment order authorized the Receiver to market and sell the property and to seek a vesting order to convey the property: paras. 3(k)-(m).

[21] However, it emerged that about a week prior to the granting of the appointment order, the Debtor had entered into an agreement to sell the property to 255, with a closing date of December 21, 2023 (the “Pre-Appointment APS”).

The Stalking Horse Agreement

[22] After its appointment became effective, the Receiver sought to amend the Pre-Appointment APS. 255 was not prepared to consent to the amendments sought by the Receiver. As a result, the Receiver entered into the November 13, 2023, Stalking Horse Agreement with 255. The purchase price under the Stalking Horse Agreement was less than the purchase price stated in the Pre-Appointment APS: 2024 ONCA 59, at paras. 8-11. Whereas the Debtor contended the proceeds from the Pre-Appointment APS would have satisfied in full, both the first and second mortgages and other creditors, the proceeds from the Stalking Horse Agreement would not have fully satisfied the Debtor’s obligations to the second mortgagee and certain other creditors.

The Sale Process order and the Debtor’s appeal

[23] By order dated December 20, 2023, Vallee J. granted a Sale Process Approval Order that approved a process to sell the property and approved the Stalking Horse Agreement. Late on the afternoon of December 19, 2023, the Debtor filed a cross-motion that sought to compel the Receiver to complete the

Pre-Appointment APS. Vallee J. refused to hear the Debtor's motion given its late timing and the Receiver's execution in November of the Stalking Horse Agreement.

[24] On December 29, 2023, the Debtor filed a notice of appeal from the December 20, 2023 order of Vallee J. The Debtor sought to set aside the order and, in its place, obtain an order from this court that allowed the Receiver or Debtor to enforce the terms of the Pre-Appointment APS.

[25] By reasons dated January 24, 2024, Simmons J.A., sitting as a motion judge, concluded that the Debtor had an automatic right to appeal the Sales Process Approval Order to this court and directed that its appeal be expedited: 2024 ONCA 59. Subsequently, Harvison Young J.A. granted 255 leave to intervene in the appeal.

[26] By Reasons for Decision dated April 9, 2024, this court dismissed the Debtor's appeal, concluding that Vallee J. had not made any error in principle in granting the December 20, 2023 order: 2024 ONCA 261. The court observed, at paras. 5 and 6:

> The motion judge moreover found that the cross-motion had little chance of success:
>
> > [The cross-motion] concerns a different real estate transaction entered into six days before the receivership order. The closing date is tomorrow. The receiver states that it could not close this transaction because of certain terms that it contains. Another agreement of purchase and sale entered

> into by the receiver and 2557004 Ontario Inc. dated November 13, 2023, referred to as the "stalking horse agreement", is now in play. The receiver's motion concerns this transaction. The purchaser states that it would refuse to close the earlier transaction, which it considers null and void.
>
> The appellant has not identified any error in the motion judge's findings, which are amply supported on the record. Indeed, 255 Ontario sought and obtained leave to intervene in this appeal to confirm that it had refused to consent to changes to the September APS required following the receivership order and that, in its view, "the deal is dead".

The results of the sale process

[27] The sale process did not result in the receipt of any qualified bids by the bid deadline of May 7, 2024. One non-qualifying bid was submitted, but for an amount ($19 million) substantially less than the purchase price in the Stalking Horse Agreement ($24.255 million). As a result, the Receiver determined that 255 was the successful bidder with its Stalking Horse Agreement and moved before the court for an approval and vesting order ("AVO").

The Receiver's motion for an approval and vesting order

[28] The Receiver's May 31, 2024, Second Report, filed in support of its motion for an AVO, advised that the Debtor had informed the Receiver that "it has a commitment letter to repay Peakhill and cover the costs of the receivership", as a result of which the Debtor intended to repay Peakhill and bring a motion to

discharge the Receiver. The Debtor had not done so by the time the Receiver filed its AVO motion.

[29] The Receiver's AVO motion was returnable on June 12, 2024. Late on the afternoon of June 10, the Debtor filed a cross-motion. The Debtor was joined in its motion by its principals, who had guaranteed the first and second mortgages, and by the non-arm's length tenants, owned by the Debtor's principals, which occupied the property. The cross-motion sought to stay the receivership, discharge the Receiver, and permit the Debtor time to complete the Refinancing Transaction with Firm Capital.

[30] In its notice of motion, the Debtor stated that it had "raised sufficient funds and is ready, willing and able to repay all relevant creditors and discharge the Receiver". It represented that it had arranged a new first mortgage with Firm Capital, for a net amount less than the amount outstanding under the Peakhill first mortgage and negotiated further funding with the second mortgagee.

[31] The Firm Capital commitment letter disclosed by the Debtor contains several conditions, including receipt of a satisfactory appraisal report confirming the Real Property has a value of at least $27 million. As noted, (i) the endorsement of Simmons J.A. stated that the Pre-Appointment APS had a purchase price of $31 million and the Stalking Horse Agreement set the minimum sale price at $24.255 million, and (ii) the Receiver's Second Report advised that the only bid received

was for $19 million. As well, closing of the financing is conditional on the Debtor confirming a pro forma net operating income of not less than $1.25 million.

[32] Although the Debtor's notice of motion did not expressly seek an order allowing it to redeem the first mortgage, the relief it sought effectively amounted to a request for an opportunity to redeem. Mr. Ravi Aurora, the Debtor's principal, deposed that he was seeking to "'redeem' the receivership".

[33] Mr. Aurora's affidavit in support of the Debtor's cross-motion did not contain a valuation of the property or information about the Debtor's pro forma net operating income.

[34] On the return of the Receiver's motion, Lavine J. adjourned it to June 14, 2024.

[35] On June 14, 2024, the court was advised that Peakhill supported the Receiver's motion, while the second mortgagee (who would extend further financing) supported the Debtor's cross-motion. The court adjourned the matter to June 28, and subsequently released reasons for the adjournment: 2024 ONSC 3566.

[36] An examination of Mr. Aurora was conducted before the return of the motions. On June 28, Sutherland J. further adjourned the motions to July 2, 2024. It appears that Mr. Aurora had not yet provided answers to the undertakings he

had given on his examination. Copies of the transcript of that examination and the undertaking responses were not included in the materials filed before me.

[37] On July 2, 2024, Sutherland J. heard the Receiver's AVO motion and the Debtor's cross-motion for redemption of the first mortgage. The motions judge released a brief endorsement simply stating that "Decision reserved". According to an affidavit filed by 255 in this court, it was on July 2 that "the Debtor confirmed that, as of July 2, 2024, it had received the financing to discharge the Receivership."

[38] At yesterday's case conference, the parties confirmed that the funds necessary to complete the refinancing transaction are being held in escrow and the Debtor now has access to the funds needed to close that transaction. Counsel for Firm Capital advised that her client was not prepared to extend the closing of the refinancing past July 12, 2024, due to its concern about mounting interest and other costs.

ANALYSIS

[39] The motions before me raise two sets of issues: (i) threshold procedural issues, specifically whether 255 has the standing to appeal the Sutherland Orders and, if it does, whether it has an automatic right of appeal or requires leave to appeal; and (ii) the issue of whether, pursuant to *BIA* s. 195, I should vary or cancel the provisional execution ordered by Sutherland J.

[40] I think the threshold procedural issues are best left to a panel to decide. The issue of whether 255 enjoys an automatic right of appeal or requires leave to appeal does not raise jurisdictional concerns; the jurisprudence of this court confirms that it is open to a single judge to grant such orders: *Cardillo v. Medcap Real Estate Holdings Inc.*, 2023 ONCA 852. However, the Debtor's request that I dismiss 255's appeal on the basis that 255 lacks standing to appeal strikes me as moving into territory that is the functional equivalent of asking a single judge to quash an appeal. Under Ontario's appellate review structure, such a request is best brought before a panel, not a single judge. Since a panel is available to hear those issues next week, on Friday, July 19, I see no need to wander onto jurisdictional thin ice.

[41] That said, I am satisfied that 255, as the successful bidder recommended by the Receiver for approval, has standing to request the interim relief sought in its motion pursuant to *BIA* s. 195: *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.); *Winick v. 1305067 Ontario Limited* (2008), 41 C.B.R. (5th) 81 (ON Commercial List), at paras. 3 and 4.[1]

[42] The panel would also be able to hear the appeal on the merits. If 255 has the standing to appeal and enjoys a right of appeal or can persuade the panel to

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[1] The principles discussed by this court in *Skyepharma PLC v. Hyal Pharmaceutical Corporation* (2000), 47 O.R. (3d) 234 (C.A.) were made in the context of a consideration of appeal rights for "final orders" under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, not the appeal rights set out in *BIA* s. 193 and, also, were confined to the position of a bidder who was unsuccessful in the sale process.

grant it leave, then a final determination of the contested issues in this receivership can be made through the panel hearing next week.

[43] This leads me to regard the main issue on these motions to be whether I should continue the *BIA* s. 195 variation or cancellation of the July 9 provisional execution order of Sutherland J. until the hearing date in a week's time. *BIA* s. 195 provides:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper. [Emphasis added].

[44] I will proceed on the basis that the analysis applicable to a request to vary or cancel a provisional enforcement order contains elements similar to those that govern a request to cancel or lift a *BIA* s. 195 automatic stay. Accordingly, in the present case, 255 bears the burden of establishing compelling reasons to support a variation or cancellation of Sutherland J.'s July 9, 2024, provisional enforcement order. I summarized those elements in *Grillone (Re)*, 2023 ONCA 844, at para. 35:

> The *BIA* s. 195 jurisprudence identifies several factors courts should consider when dealing with a request to lift an automatic stay:

- The appellant's litigation conduct, including whether the appellant is diligently prosecuting the appeal;

- The merits of the appeal;

- The relative prejudice to the parties of cancelling the stay. This typically involves applying a variation of the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 applied on stay applications, specifically whether: (i) there is a serious issue to be appealed; (ii) the applicants would suffer irreparable harm if the stay is not lifted; and (iii) the applicants would suffer greater harm than the respondents if the stay is not lifted;

- However, while all or part of the tripartite test may be relevant, the discretion granted by *BIA* s. 195 is broader. Accordingly, a contextual approach is appropriate that considers all the facts of the case, not merely those that engage the tripartite test, and the interests of justice generally.

[45] I shall consider the evidence filed on this motion in light of those factors.

Lack of diligent prosecution

[46] This is not a factor in the present case.

The merits of the appeal

[47] As I read the parties' materials, the main issue raised by the appeal is whether the motions judge erred in terminating the Stalking Horse Agreement for which the Receiver sought an AVO, instead allowing the Debtor to redeem the first mortgage.

[48] Consideration of this factor is complicated by the motions judge's failure to deliver "real-time reasons" that explained why he granted his July 4 order. The absence of reasons might prompt the panel to review the July 4 order on a *de novo* basis: *Adams v. Adams*, 1996 CanLII 1006 (Ont. C.A.). Or, the panel might attempt to deduce the basis for the order from other materials in the record: *Reynolds v. Alcohol and Gaming (Registrar)*, 2019 ONCA 788, at para. 7.

[49] For example, in his June 20, 2024, reasons explaining why he had adjourned the Receiver's AVO motion, Sutherland J. relied on the statement of principles about a mortgagor's ability to redeem in the course of a receivership set out by the Superior Court of Justice in *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635. However, *Vector Financial* did not mention the statement of principles set out the year before by this court in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548 where, at paras. 9 and 10, a panel of this court stated:

> We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:
>
> - In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
>
> - 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; and
>
> - In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.
>
> We adopt the rationale for those guiding principles articulated 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.), where the court stated, at para. 22:
>
> 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 common place, 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.

[50] Neither the motions judge's June 14 adjournment reasons, nor his July 9 reasons settling the order, refer to this court's decision in *Rose-Isli*. Absent reasons to explain his July 4 order, one cannot discern whether the motions judge was aware of, let alone guided by, the principles stated by this court in *Rose-Isli*.

Whether a panel looking at the matter *de novo* through the lens of the *Rose-Isli* principles would reach the same result as the motions judge did on July 4 is an open question. I need not express a view on the matter, save to observe that this is an arguable ground of appeal raised by 255.

The relative prejudice to the parties of varying or staying the provisional enforcement order

[51] 255 contends it would suffer several kinds of prejudice should the provisional execution order not be varied. First, 255 argues that it played by the court-approved sale process rules, ended up as the successful bidder with its Stalking Horse Agreement, yet, at the last minute, was set to one side by the motions judge when he approved the Debtor's Refinancing Transaction. Second, 255's affiant, Mr. Anthony Marcucci, described in his affidavits aspects of the "considerable financial hardship" for 255 that would result from termination of the Stalking Horse Agreement. Finally, the Debtor is now taking the position that 255 would not be entitled to a $250,000 break fee, contemplated by s. 14.2 of the Stalking Horse Agreement, because the Receiver did not accept any other successful bid, which was the only condition circumstance entitling 255 to a break fee.

[52] The Debtor also contends that the termination of the Stalking Horse Agreement by the Sutherland Orders did not prejudice 255 because s. 16.3 of the Stalking Horse Agreement contemplated the possible termination of the

agreement. Termination was a risk built into the Stalking Horse Agreement so, argues the Debtor, 255 cannot suffer any prejudice from the motions judge's termination of that agreement. It strikes me that the strength of this argument ultimately will turn on an appellate decision as to whether the motions judge erred in terminating the Stalking Horse Agreement.

[53] On its part, the Debtor submits it would suffer significant prejudice should the provisional execution order be varied or stayed. It points to the July 12, 2024 closing date contained in the Firm Capital commitment letter, as well as Firm Capital's position that it will not extend the closing date, even though the language of the commitment letter would permit it to do so.

[54] I cannot base my analysis on speculation about how Firm Capital may or may not act over the next 36 hours. It made its position clear during the hearing of the motions. At the same time, Firm Capital did not file any evidence, and there was some suggestion at the case conference that Firm Capital refused to produce a representative for examination. I would merely observe that the Debtor consented to the appointment of the Receiver by the court and, in so doing, consented to the court's process for adjudicating its legal dispute with Peakhill. This court has been asked by one of the affected parties to perform an appellate review of the Sutherland Orders. The risk of such a request is a normal risk of our court process. In response to that request by an affected entity, this court is making available a panel to consider a number of issues raised by the litigants

approximately two weeks after it received notice of that request. As a practical matter, this court cannot act more quickly, and our appellate process (and fairness) does require considering the interests of all affected parties.

[55] I would make two further observations. First, there is a public policy dimension to the argument advanced by the Debtor and Firm Capital. The commitment letter was not put in place until well over a month after the deadline in the court-approved sales process. Permitting the July 9 provisional execution order to continue, thereby ensuring the closing of the Refinancing Transaction prior to next week's panel hearing, could give rise to a public policy risk: namely, some debtors might conclude that they could circumvent the requirements of a court-approved realization process by filing last-minute redemption requests on the return of receiver's AVO motions, even in cases where the debtor had consented to the court appointment of a receiver. That would not be a salutary development for court-supervised realization processes.

[56] Second, based on the record before me, it is difficult to understand, with any degree of precision, how the two scenarios – approval of the Stalking Horse Agreement and completion of the Debtor's Refinancing Transaction – differ in their financial effects:

(i) The Second Report of the Receiver pre-dates the Debtor's securing of the Firm Capital commitment letter and the Receiver has not filed any further report that compares the two scenarios;

(ii) In its Second Report, the Receiver reported that, at the date of the appointment order, the Debtor owed Peakhill approximately $20 million on the first mortgage and approximately $4 million on the second mortgage held by Zaherali Visram. The purchase price under the Stalking Horse Agreement is $24.255 million. The Receiver reported that, if the court approved the Stalking Horse Agreement transaction, Peakhill would be paid in full and a distribution would be made to Mr. Visram, but the Receiver did "not expect to have sufficient proceeds to repay Zaherali Visram in full."

(iii) In his June 10, 2024 affidavit Mr. Ravi Aurora deposed, at para. 8:

> By my arithmetic, the Debtor has about $23,070,000 available to it from the Refinance compared to approximately $22,775,000 which I estimate to be the amount of money necessary to pay Peakhill, the Receiver, and the Break Fee in the Stalking Horse APS. As such, I verily believe that the Debtor has raised sufficient funds and is ready, willing and able discharge the Receiver.

[57] Based on the record before me, it therefore would appear that the main financial effect of the two different scenarios would not be on the applicant senior secured creditor, Peakhill, or the Receiver. They would be paid in full. The main

effect would be felt by the second mortgagee who, according to the Receiver, would not receive payment in full from the proceeds of the Stalking Horse Agreement sale and apparently intends to protect its current loss exposure by advancing a further $3 million to the Debtors in the Refinancing Transaction. I say "apparently" because the second mortgagee did not file any evidence on the motions before Sutherland J. or on the motions before me. I cannot find a calculation of the second mortgagee's potential loss in the record before me (which makes it difficult to understand the potential exposure of the Debtor's principals on any guarantees). I would also note that the Receiver's First and Second Reports stated that the Debtor had informed it that there were no current financial statements for the company; as a result, the record indicates the Receiver did not have a statement of the company's indebtedness to the second mortgagee.

Interests of justice and conclusion

[58] In the present case, the absence of reasons from the motions judge explaining what led him to permit the Debtor to redeem the first mortgage after the Receiver had completed the court-approved sale process and was seeking an approval and vesting order raises the serious question on appeal as to whether the motions judge ignored or considered controlling appellate authority and principles. The jurisprudence required the motions judge to consider, as part of his balancing analysis, the impact of permitting the redemption of the first mortgage

on the integrity of the court-approved receivership process. It is unclear, on the record before me, whether he did.

[59] While varying, by staying, the July 9 provisional execution order to permit a panel of this court to consider that question may well prejudice the interests of the second mortgagee, and derivative interests of Debtor-related guarantors, in my view, the existence of integrity-of-process issues swings the balance in favour of granting 255's request to vary the July 9 provisional execution order by staying that order until the panel's hearing of the issues I have identified in para. 7 above next week, on Friday, July 19, 2024.

DISPOSITION

[60] Accordingly, for the reasons set out above, I dispose of the motions by 255 and the Debtor by:

(i) Referring to the panel on Friday, July 19, 2024, the issues identified in para. 7 above, including the merits of 255's appeal if the panel decides 255 is entitled to an appeal hearing;

(ii) Continuing, pursuant to *BIA* s. 195, the variation through a stay of the orders of Sutherland J. dated July 4 and 9, 2024, until the panel hearing on Friday, July 19, 2024 or further order of this court;

(iii) Setting the following timetable for the filing of materials for the panel's consideration:

(a) 255 shall file its appeal book and compendium, factum and authorities no later than 12 noon on Monday, July 15, 2024;

(b) The Debtor shall file its responding materials no later than 5 p.m. on Wednesday, July 17, 2024;

(c) The Receiver, Peakhill, Firm Capital, and the second mortgagee may file factums of no more than five pages in length no later than 12 noon on Thursday, July 18, 2024; and

(d) 1.5 hours is allocated for oral argument; the parties shall agree on a fair division of that time.

[61] The costs of the motions at the case conference are reserved to the panel next week.