Court of Appeal File No.: 23-CV-1357 / M54775
Court File No.: CV-23-00004031-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant
(Respondent on Appeal)

- and -

1000093910 ONTARIO INC.

Respondent
(Appellant)

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

FACTUM OF THE RECEIVER, AS RESPONDENT

(Appeal Returnable April 2, 2024)

March 8, 2024

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FACTUM OF THE RECEIVER (AS RESPONDENT)

PART I: OVERVIEW

1. The Order under appeal concerns a discretionary decision made by a motion judge in an insolvency proceeding to decline to determine and grant an unscheduled, last-minute motion by the debtor for a mandatory order to unilaterally amend and close a private real estate transaction (served in the late afternoon the day before the proposed return date); instead, the motion judge granted a scheduled motion brought by the court-appointed receiver permitting the receiver to run a normal public sale process in respect of the real estate.

2. The principal purpose of the receivership proceeding is to realize on a real estate asset held by the debtor (now appellant). This real estate is the debtor's primary asset over which the applicant first mortgagee holds more than $19 million of security. The mortgage expressly

provides for the appointment of a receiver in the event of default, and the debtor did not oppose the appointment of the receiver. Prior to the receivership order being granted, but after the debtor had notice that the applicant was bringing a receivership application, the debtor entered into an agreement of purchase and sale with a purchaser to sell the real estate. However, because of the intervening receivership, the proposed transaction could not be closed without substantive amendments to the agreement of purchase and sale, including as to the identity of the vendor, the mechanics of closing, and lease-back provisions. The purchaser later refused the receiver's requests to amend.

3. The receiver therefore pursued an alternative albeit typical method for realization – an open public sale process with a stalking horse bidder (the same purchaser) – and sought approval from the motion judge for that purpose on a scheduled motion on December 20, 2023. Despite having weeks to move if it intended to do so, on the late afternoon on the day before the receiver's motion was heard, the appellant served a cross-motion attempting to piggy-back on the receiver's scheduled motion, with the appellant seeking an order to attempt to force the purchaser to close the original agreement of purchase and sale, with unilateral substantive amendments. In other words, the appellant was seeking extraordinary relief amounting to specific performance or a mandatory order, with no law or convincing evidence to support the point, and no opportunity for the receiver, the applicant, the purchaser or any other party to file responding material or submissions, or to cross-examine on the debtor's affidavit. Moreover, the outside closing date in the original agreement of purchase and sale was the very next day, December 21. In other words, the appellant had left matters such that the relief it sought in its motion, on essentially no notice, either had to be granted on that day or the agreement would expire. Importantly, the appellant debtor has never offered any reason or explanation for why it served its motion at the very last

moment and created the circumstance of its own making before the motion judge.

4. In these circumstances, where none of the parties had been given any opportunity to cross-examine or respond, and with the "ultimatum" that the agreement of purchase and sale would expire the following day and the debtor insisted that its cross-motion proceed, the motion judge determined she could not properly determine the last-minute and improperly advanced cross-motion and found that it had little chance of success in any event. The motion judge instead granted the order sought by the receiver, which relief was fully supported on the material before her. These were discretionary decisions entitled to deference. Although the debtor seeks to cast blame on the receiver, the debtor was the master of its own destiny, including by failing to proceed in a timely manner, which ultimately put the Court in a position where it could not properly consider the last-minute motion before the agreement expired.

5. The standard of review indicates that this Court should not grant the appeal unless it finds that the Order was "clearly wrong" or a "demonstrable error". The receiver submits that the motion judge's decision was indeed reasonable, supported by the material before her, and is entitled to significant deference as a discretionary decision made within an insolvency proceeding.

6. This appeal should be dismissed with costs.

PART II: FACTS

A. The Receivership Proceedings

7. On September 13, 2023, the Ontario Superior Court granted a receivership order on consent (the "**Receivership Order**") pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*, appointing KSV Restructuring Inc. as receiver and manager (in such capacity, the "**Receiver**") over 1000093910 Ontario Inc. (the "**Debtor**" or the

"**Appellant**") and all of its Property (as defined in the Receivership Order), including the real property known as 20 Regina Road, Vaughan, Ontario (the "**Real Property**").[1]

8. Peakhill Capital Inc. ("**Peakhill**") is the Debtor's senior secured creditor. It holds a first mortgage on the Real Property in the principal amount of $19 million (the "**Peakhill Mortgage**"). In addition to Peakhill, Zaherali Visram has a $4 million charge registered on the Real Property subordinate to the Peakhill Mortgage.[2] There are also unpaid property taxes in the amount of $162,786.[3]

9. The Receivership Order was precipitated by the Debtor breaching and defaulting on the Peakhill Mortgage by, among other things:

(a) failing to repay the outstanding amounts owing on the Peakhill Mortgage on its maturity date on May 1, 2023; and

(b) failing to pay the full monthly interest payments owing on the Peakhill Mortgage for the month of August 1, 2022.

10. These breaches and defaults lead to Peakhill seeking the appointment of the Receiver, which is expressly provided for in, among other Peakhill documents, the Peakhill Mortgage. The Receivership Order was obtained on consent of the Debtor and became effective on October 2, 2023, when the Debtor breached the terms of the Consent Order, which was appended to the Endorsement of Justice S. Lavine dated September 13, 2023.[4]

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[1] First Report of the Receiver dated December 13, 2023 [First Report] at page 53, section 1.0, para 1, Appeal Book and Compendium of the Appellant dated January 31, 2024 [ABCA] at Tab 5.2.
[2] First Report at page 55, section 3.1, paras 1 and 2, ABCA at Tab 5.2.
[3] First Report at page 55, section 3.2, para 1, ABCA at Tab 5.2.
[4] First Report at page 53, section 1.0, paras 1-3, ABCA at Tab 5.2.

11. The Debtor's principal asset is the Real Property, and the sale of the Real Property is the principal purpose of the Receivership proceedings.[5] The Real Property is an industrial property where certain non-arm's length tenants operate a variety of businesses. None of the tenants have paid rent since the commencement of the Receivership, despite several requests and demands by the Receiver.[6]

B. The Original APS and the Stalking Horse APS

12. Six days prior to the Receivership Order being granted, and following service of Peakhill's application record, the Appellant, as vendor, and 2557004 Ontario Inc. ("**255 Ontario**"), as purchaser, entered into an Agreement of Purchase and Sale dated September 7, 2023 (the "**Original APS**") for the Real Property for $31 million. The Original APS provided for a deposit of $1,500,000, and had a closing date of December 21, 2023. [7]

13. As a result of the intervening Receivership, the Original APS could no longer be closed on its existing terms, including as to the identity of the vendor, closing mechanics, and a lease-back provision. The Receiver therefore approached 255 Ontario seeking its consent to amend the Original APS to, among other things: (i) add a mutual condition that the Original APS was conditional on the Receiver obtaining an approval and vesting order vesting title in the Real Property to 255 Ontario; and (ii) address the closing mechanics required in a receivership sale.[8]

[5] First Report at page 53, section 1.0, para 4, ABCA at Tab 5.2.
[6] First Report at pages 54 and 55, section 2.0, paras 3-5, ABCA at Tab 5.2.
[7] First Report at page 56, section 5.0, para 1, ABCA at Tab 5.2.
[8] First Report at page 57, section 5.0, para 3, ABCA at Tab 5.2.

14. 255 Ontario advised the Receiver that it was not prepared to agree to such amendments, and therefore the transaction contemplated by the Original APS could not close in accordance with its terms.[9]

15. The Receiver subsequently entered into discussions with 255 Ontario to determine whether it was still interested in acquiring the Real Property within the Receivership proceedings. 255 Ontario advised the Receiver that it was prepared to purchase the Real Property but only at a reduced purchased price. The Receiver was not prepared to, nor could it in good faith and in accordance with its duties and obligations, recommend a transaction for Court approval at a reduced price that would not provide for a market test in order to determine if a better offer could be obtained.[10]

16. Therefore, the Receiver determined that it needed to conduct an open public sale process with bidding procedures (the "**Sale Process**") to obtain the best possible price for the Real Property. As part of the proposed Sale Process, following consultation with the applicant and negotiations with 255 Ontario, the Receiver entered into a stalking horse agreement of purchase and sale, dated November 13, 2023, with 255 Ontario at a price of $24.255 million (the "**Stalking Horse APS**"). The Stalking Horse APS is to act as the stalking horse (or guaranteed floor) bid in the Sale Process.[11] While it sets a minimum for the price of the Real Property, it is hoped that the Sale Process will garner bids in excess of the Stalking Horse APS.[12]

[9] First Report at page 57, section 5.0, para 3, ABCA at Tab 5.2.
[10] First Report at page 57, section 6.1, para 1, ABCA at Tab 5.2.
[11] First Report at page 57, section 6.1, paras 1 and 2, ABCA at Tab 5.2.
[12] First Report at page 61, section 6.4, para 1, ABCA at Tab 5.2.

C. Communications Between the Receiver and the Debtor, and the Cross-Motion

17. Notwithstanding the foregoing, the Receiver and its legal counsel continued to engage extensively with counsel to the Debtor regarding the Original APS.[13] The Receiver's legal counsel, on multiple occasions, advised counsel to the Debtor that the Receiver did not believe it could close the transaction that the Debtor had entered into prior to Receivership, absent the consent of 255 Ontario to amend the Original APS.[14] And 255 Ontario refused to consent.[15] At no time did the Debtor or its counsel express a different view.

18. On November 20, 2023, counsel to the Receiver advised the Debtor's counsel again that the Receiver could not enforce the Original APS. However, given the Debtor's persistence, the Receiver again suggested that if the Debtor wished, it could bring a motion to seek relief if it thought it thought appropriate. The Receiver further advised that it would consider its position once it had the benefit of the Debtor's motion materials, or at least its fulsome proposal.[16]

19. On December 6, 2023, counsel to the Debtor advised the Receiver that it intended to bring a motion to either: (i) seek the discharge of the Receiver; or (ii) seek to vary the Receivership Order to potentially allow the Debtor to complete the transaction contemplated by the Original APS.[17] The Debtor was aware of the Receiver's intention to seek the relief provided for in the sale process Order. Having received no materials from the Debtor, the Receiver continued with its planned course of action to seek approval of the Sale Process and related relief.[18]

20. The Debtor did not serve a Cross-Motion until December 19, 2023 at 3:56 p.m. (ET) – less

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[13] First Report at page 61, section 6.3, para 4, ABCA at Tab 5.2.
[14] Respondent's Cross-Motion Record dated December 19, 2023 [Respondent's CMR] at page 332, ABCA at Tab 6.
[15] First Report, *supra* note 1 at page 57, section 5.0, para 4, ABCA at Tab 5.2.
[16] Respondent's CMR, *supra* note 14 at page 331 and 332, ABCA at Tab 5.2.
[17] Motion Record of the Responding Party [Responding MR] dated January 15, 2024 at page 41, Appeal Book and Compendium of the Respondent dated March 8, 2024 [ABCR] at Tab 2
[18] Endorsement of the Honourable Madam Justice Simmons dated January 24, 2024 [Simmons Endorsement], para 15, ABCA at Tab 8.

than 24 hours before the return of the Receiver's motion for the Order. The Cross-Motion was not scheduled, was not served on any reasonable notice, nor was it accompanied by any law to support the relief sought.[19] Given the timeframe, the Receiver was unable to cross-examine on the supporting affidavit, prepare any responding materials, or fully consider its position.

D. The Order Under Appeal

21. The Receiver's motion record was served on December 13 and heard on December 20, 2023.[20] The motion judge declined to determine the Debtor's Cross-Motion, in circumstances where none of the responding parties had any opportunity to cross-examine or respond, and faced with the closing of the Original APS the next day, but also concluded the Cross-Motion had little chance of success. The motion judge granted the Receiver's motion and associated Order which, among other things, approved the Sale Process for the Real Property, and the Stalking Horse APS, for the purpose of acting as the stalking horse bid in the Sale Process. [21] The final sales price for the Real Property remains to be determined following the conclusion of the Sale Process, and could ultimately be higher or lower than the Original APS but, at a minimum, it will be not less than the Stalking Horse APS.[22]

22. The motion judge granted an endorsement the same day which held:

> "The receiver brings a motion for various relief relating to an agreement of purchase and sale dated November 13, 2023. As of late yesterday, the motion was unopposed. At 3:56 p.m. the respondent served a cross-motion. For several reasons, I will not consider the cross-motion.
>
> Motions require 7 days' notice to give other parties an opportunity to respond and to give the court an opportunity to read the materials. The cross motion was served at 3:56 p.m. yesterday, which is essentially no notice.

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[19] Endorsement of the Honourable Madam Justice Vallee dated December 20, 2023 [Valle Endorsement] at pages 29 and 30, ABCA at Tab 4.
[20] Simmons Endorsement, supra note 18 at page 363, para 15, ABCA at Tab 8.
[21] Valle Endorsement at pages 29 and 30, ABCA at Tab 4.
[22] First Report, *supra* note 1 at pages 62 - 65, section 6.5, para 4, ABCA at Tab 5.2.

> A cross motion cannot be piggybacked on to a motions list. It has the effect of adding a motion to what might be an already full list.
>
> The facts on which the cross-motion is based have been known for some time. A motion could have been brought earlier.
>
> The cross-motion has little chance of success. It 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 to be null and void."[23]

23. Importantly, as noted in the endorsement, while the motion judge stated that she was not determining the Cross-Motion for numerous reasons, the motion judge also concluded that the Cross-Motion had "little chance of success" because, among other things, "[t]he purchaser states that it would refuse to close the earlier transaction, which it considers to be null and void."[24] While the motion judge's endorsement indicates she was not determining the Cross-Motion, the motion judge did hear substantive oral submissions on the Cross-Motion.

24. While the Receiver was also seeking an order terminating the Original APS, such relief was not granted as it was not unopposed and, given that the closing date contemplated under the Original APS was the next day, it was also seen as unnecessary.[25] As expected, on December 21, 2023, the Original APS did not close in accordance with its terms.

PART III: ISSUES

25. The issues to be considered on this appeal are as follows:

(a) What is the appropriate standard of review?

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[23] Valle Endorsement, *supra* note 19 at pages 29 and 30, ABCA at Tab 4.
[24] Valle Endorsement at pages 29 and 30, ABCA at Tab 4.
[25] Valle Endorsement at pages 29 and 30, ABCA at Tab 4.

(b) Did the motion judge err in stating that she would not hear the Appellant's Cross-Motion?

(c) If yes, or in any event, did the motion judge err in stating that the Cross-Motion had little chance of success?

(d) Did the motion judge err in granting the Order sought by the Receiver?

(e) If yes, what is the appropriate remedy?

PART IV: LAW AND ANALYSIS

A. Standard of Review

26. The issues before this Court are all matters of discretion for which significant deference is owed; overlaying this appeal is that "[b]ankruptcy and insolvency matters stand apart from other forms of secured debt collection and are governed by their own standard of review, which accords considerable deference to the Chambers judge".[26]

27. A decision of a motion judge that is an exercise in judicial discretion is entitled to considerable deference; the Court of Appeal should only intervene if the motion judge "erred in law, misapprehended the evidence in a material way or was clearly wrong."[27] This Court has also stated that substantial deference is to be given to "judges supervising insolvency and restructuring proceedings" and the Court of Appeal will not "intervene absent demonstrable error".[28]

28. The Appellant must therefore prove a demonstrable error, with the additional consideration of deference shown to judges in insolvency proceedings.

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[26] *Re Harmon International Industries Inc.*, 2020 SKCA 95 at para 40.
[27] *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 MCBA 46 at para 12. ["*Royal Bank*"]
[28] *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para 18 ["*Marchant*"] citing *Ravelston Corporation Limited (Re)*, 2007 ONCA 135 at para 3.

29. The Appellant submits "that the failure to be heard is an error of law"[29] and the "motion judge erred in law"[30] in failing to apply the *Soundair* principles.[31] No potential error of law is in fact before the Court: a motion judge's decision to decline to determine, an unscheduled and improperly advanced cross-motion, which prevented any cross-examination or response, is discretionary[32] and does not abrogate the right to be heard – indeed considerable argument was advanced. And a motion judge's decision to approve a normal sale process order within a receivership proceeding is also discretionary and not a question of law.[33]

B. Hearing the Cross-Motion was Within the Judge's Discretion

30. All parties agree that the Appellant's Cross-Motion was very late-served. But the context of that late service is equally important. The Cross-Motion was served just before 4:00 p.m. the day before the Receiver's motion which was scheduled for 9:30am the next morning, i.e. with being scheduled and with essentially no notice to the parties.[34] It was therefore impossible for the Receiver (or any other interested party) to appropriately cross-examine on, respond to, and prepare submissions in respect of the relief being sought by the Appellant.

31. Moreover, while the Appellant states that "the urgency of the matter"[35] necessitated the hearing of its motion, no new circumstances arose to justify the late service. As established by the evidence set out above, the Appellant had advised that it was contemplating bringing a motion for a considerable time and engaged in extensive discussions with the Receiver and Receiver's counsel.[36] No urgency can be justified solely because the Appellant decided to file its unscheduled

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[29] Factum of the Appellant dated January 31, 2024 [Appellant Factum] at page 11, para 35.
[30] Appellant Factum at page 12.
[31] *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA). ["*Soundair*"]
[32] Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, s. 37.07(5) ["*Rules*"]; *Grier v The Canada Trust Company*, 2021 ONSC 3297 at para 25. ["*Grier*"]
[33] See e.g. *IceGen Inc., Re*, 2016 ONCA 907 at para 20.
[34] Valle Endorsement, *supra* note 19 at page 29, ABCA at Tab 4.
[35] Appellant Factum, *supra* note 29 at page 10, para 32.
[36] Responding MR, *supra* note 17 at page 41, ABCR at Tab 2.

Cross-Motion less than 24 hours before the Receiver's motion was scheduled to be heard. As held by the motion judge: "The facts on which the cross-motion is based have been known for some time. A motion could have been brought earlier."[37]

32. The *Rules of Civil Procedure* provide, and courts have confirmed, that a judge has the discretion not to determine or to dismiss a motion where it has not been served or is improperly served.[38] Chaos would ensue if parties served substantive motions the evening before a hearing scheduled for related matters. Very importantly, the Appellant has offered absolutely no reason or excuse to justify its extremely late service of the Cross-Motion. And the consequences of that action were obviously prejudicial because the other parties could not cross-examine or respond, and the outside closing date in the Original APS was the following day. The Appellant was the author of its own circumstances.

33. It was therefore entirely appropriate and within the discretion of the motion judge to decline to determine the Cross-Motion. In consideration of the above circumstances in which the Cross-Motion was brought, the motion judge's decision was reasonable and does not constitute a "demonstrable error".

C. The Cross-Motion Would Not Have Succeeded

34. In any event, the motion judge also concluded that the Cross-Motion had "little chance of success"; this was an understandable conclusion.[39] The motion sought to unilaterally compel substantive amendments to the Original APS, as well as a mandatory order to compel the purchaser to complete an involuntarily amended transaction, that the purchaser had made clear it opposed.[40]

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[37] Valle Endorsement, *supra* note 19 at page 29, ABCA at Tab 4.
[38] *Rules* at s. 37.07(5); *Grier* at para 25.
[39] Valle Endorsement, *supra* note 19 at page 29, ABCA at Tab 4.
[40] Respondent's CMR, *supra* note 14 at page 237-321, ABCA at Tab 6.

Therefore, the motion judge's approach to the Cross-Motion, if it had been determined, would not have changed the outcome of the Order under appeal. As noted, there were oral submissions made on the point.

35. The motion judge's written endorsement was brief. That is not uncommon for a court-supervised real-time receivership proceeding.[41]

36. But even with that context, the motion judge did provide reasons why the Cross-Motion could not succeed, which are fully supported in the record. As held by the motion judge: "[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…The purchaser states that it would refuse to close the earlier transaction, which it considers to be null and void."[42]

37. The closing date for the Original APS was the day after the motion was heard and, due to the intervening Receivership, the Original APS was incapable of closing without substantive amendments. The purchaser refused to amend the Original APS, taking the position that it was "null and void". [43] The record is clear that the Receiver made reasonable efforts to amend the Original APS such that the transaction could be closed within the context of the Receivership proceeding.[44] But this became impossible.

38. Therefore, what the Appellant was really asking the Court to do was to direct substantive amendments to the Original APS and then make a mandatory or specific performance order to

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[41] See also *R. v. G.F.*, 2021 SCC 20 at para 70: "[i]f the trial reasons do not explain the 'what' and the 'why', but the answers to those questions are clear in the record, there will be no error."
[42] Valle Endorsement, *supra* note 19 at pages 29 and 30, ABCA at Tab 4.
[43] First Report, *supra* note 1 at page 56 and 57, Section 5.0, paras 1 and 3, ABCA at Tab 5.2.
[44] First Report at page 61, section 6.3, para 4, ABCA at Tab 5.2.

compel the purchaser to close the unilaterally amended Original APS. That is the remedy that would have been required for the Appellant's desired outcome.

39. However, the Cross-Motion did not contain any legal basis to substantiate an amendment order and the related mandatory relief, and in any event none of the other parties had any opportunity to respond to such a request, including the purchaser against whom, for all intents and purposes, this relief was being sought. It would have been a plainly reversible error for the court to unilaterally amend the Original APS and grant a mandatory order enforcing the amended Original APS in circumstances where the purchaser did not consent and was not able to cross-examine or file responding material or written submissions.

40. The Appellant does not in its appeal factum suggest that the motion judge should have adjourned the motion, nor did it do so on the argument of the putative Cross-Motion; rather, it insisted that the motion judge determine the motion that day because the outside closing date in the Original APS was the next day. With that context in mind, the motion judge's approach is understandable and reasonable.

41. The Appellant, however, now submits on this appeal that the Original APS remained alive and capable of completion because "where neither party is ready, willing, and able to close, the contract remains alive and the parties may reset a closing date."[45] For this point, the Appellant relies upon *King et al v Urban & Country Transport Ltd. et al* ("***King***"), a 1973 decision, for the proposition that the Court could have fixed a new closing date for the Original APS.[46] *King*, however, does not apply on the present facts.

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[45] Appellant Factum, *supra* note 29 at page 14, paras 46 and 47.
[46] *King et al v Urban & Country Transport Ltd. et al*, 1973 CanLII 740 (ON CA). ["*King*"]

42. In *King*, the purchaser was not ready to close on the closing date, however, the vendor was also in default and not entitled to rely on the time of the essence provision in the contract. In that instance, the Court opted to resolve the stalemate by applying two propositions:

(a) when time is of the essence and neither party is ready to close on the agreed date, the agreement remains in effect; and

(b) either party may reinstate time is of the essence by setting a new date for closing and providing reasonable notice to the other party.[47]

43. More recently, in *2174372 Ontario Ltd. v. Dharamshi*[48] ("***Dharamshi***"), Charney J. reasoned that the principle in *King* was not applicable because, notwithstanding the fact that the purchaser repudiated the agreement of purchase and sale in question, the vendor refused to accept such termination. In light of the foregoing, the purchaser in *Dharamshi* remained ready to close but, due to default under the agreement of purchase and sale, the vendor could not. As a result, both parties were obligated to abide by the original terms of the agreement of purchase and sale and no new closing date could be set.[49]

44. When considering the case at hand in the context of *King* and *Dharamshi*, the present facts are very different because *the Original APS could not close without substantive amendments*, to which the purchaser was not prepared to agree.[50] Moreover, as a result of the Receivership Order, the Appellant was not merely unready or unprepared to close, but was *legally unable* to do so.[51] As a result, time remained of the essence and the parties were required to abide by the terms of the

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[47] *2174372 Ontario Ltd. v. Dharamshi*, 2021 ONSC 6139 at para 95 ["*Dharamshi*"] citing *King*.
[48] *Dharamshi* at paras 98-100.
[49] *Dharamshi* at para 100.
[50] First Report, *supra* note 1 at page 57, section 5.0, para 3, ABCA at Tab 5.2.
[51] Receivership Order and Endorsement [Receivership Order] at pages 68-84, ABCA at Tab 5.2.1.

Original APS with an outside closing date of December 21, 2023, with closing thereunder legally impossible in view of the Receivership Order. The principle in *King* does not apply. Notably, in light of the circumstances, the Appellant impressed on the motion judge that its Cross-Motion had to be heard on December 21, 2023 and decided expeditiously in light of the outside closing date in the Original APS.

D. There was no Error in Granting the Order

45. The Appellant must also demonstrate that the motion judge's decision to grant the Order was a "demonstrable error" or "clearly wrong". Overlaying the motion judge's endorsement is that the decision of a receiver, being a court-appointed officer, is to be given significant deference:[52]

> While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. **The court should not intervene in the decision of the receiver except in an exceptional case**.[53]

46. And as stated by this Court, "judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will not intervene".[54]

47. The Receiver did not undertake the Sale Process lightly. As noted above, it engaged in significant efforts to try to address the Original APS, but when that was seemingly impossible, it was required to pursue other avenues in accordance with its obligations and duties as a Receiver.[55]

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[52] See *Royal Bank* at para 11.
[53] *Royal Bank* at para 11.
[54] *Marchant* at para 19.
[55] First Report, *supra* note 1 at page 57, section 5.0, para 3, ABCA at Tab 5.2.

This course of conduct was expressly authorized by, and contemplated within, the Receivership Order:

> 3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> …
>
> (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> …[56]

48. As set out in detail in the Receiver's Report, and in its submissions before the motion judge, the Receiver believed that it was in the best interests of the Debtor's stakeholders to move matters forward towards the best possible outcome available by seeking the Order and pursuing the Sale Process, including the Stalking Horse APS.[57]

49. The Appellant submits that the motion judge erred in failing to consider the principles set forth in *Soundair*. First, the case law indicates that *Soundair* is not directly applicable to the approval of a sale process – as distinct from the approval of a proposed sale which is what was in issue in *Soundair*. Rather, the *Soundair* factors are to be taken into account, or kept in mind, when assessing the reasonableness and adequacy of a sale process. The case law, primarily the leading case of *CCM*, indicates that "when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (a) the fairness, transparency and integrity of the proposed process;

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[56] Receivership Order, *supra* note 51 at pages 68-84, ABCA at Tab 5.2.1.
[57] First Report, *supra* note 1 at page 65, section 7.0, para 1, ABCA at Tab 5.2.

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale."[58]

50. In addition, it is well-recognized that the use of stalking horse bids to set a baseline for the bidding process "has been recognized by Canadian courts as a reasonable and useful element of a sales process."[59]

51. This test, along with the *Soundair* factors, were expressly put before the motion judge in the factum of the Receiver (dated December 18, 2023) for the December 20th motion[60]. The Receiver in its factum below then proceeded to outline, with specific reference to the evidence, how each of the requisite factors were met:

> 32. Each of the factors outlined in *Soundair* and *CCM* support the approval of the Sale Process at this time:
>
> (a) *Whether the Sale Process is commercially efficient* - The Sale Process is proposed to be overseen and conducted by the Receiver and JLL, who is a reputable broker and familiar with the Real Property. The involvement and assistance of JLL will ensure that the Sale Process is efficient and value maximizing.
>
> (b) *Whether the Sale Process is fair and transparent* – The proposed Sale Process is a fair, open and transparent process that contemplates a broad marketing of the Real Property where the Receiver and JLL will engage with potential purchasers who, subject to the execution of a Confidentiality Agreement, will be provided with detailed information including a Confidential Information Memorandum and access to a virtual data room. The proposed Sale Process includes clear guidance on what will be considered a Qualified Bid. Any Successful Bid and the related transaction will be subject to Court approval at the Sale Approval Motion. The proposed Sale Process is consistent with many other sale processes approved by the Court for real property.
>
> (c) *Whether the Sale Process optimizes the changes of securing the best possible price* – The proposed Sale Process is structured to ensure that JLL is best positioned

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[58] *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 at para 6 ["*CCM Master*"]; *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 5338 at para 7; *Choice Properties Limited Partnership v Penady (Barrie) Ltd.*, 2020 ONSC 3517 at para 16.

[59] *CCM Master* at para 7.

[60] Factum of the Receiver dated December 18, 2023 [Factum of the Receiver] at pages 18 and 19 , para 29, ABCR at Tab 1.

> to market the Real Property as broadly as possible. The timelines contemplated in the proposed Sale Process will ensure that the Real Property is canvassed for the appropriate amount of time while also ensuring that it is adequately succinct so as to provide interested buyers with transaction certainty. Importantly, the Sale Process is not proposed to launch until the new year following the holiday season so as to ensure that the opportunity receives as much market attention as possible.[61] [citations omitted]

52. The same was done for approval of the Stalking Horse APS:

> 40. Approval of the Stalking Horse APS, including the Expense Reimbursement and Break Fee, is appropriate given that:
>
> (a) the Stalking Horse APA will serve as an appropriate backstop and valuable floor for bids in the proposed Sale Process;
>
> (b) the Receiver believes that: (i) the consideration provided under the Stalking Horse APS is fair and reasonable; and (ii) the Expense Reimbursement and the Break Fee are fair and reasonable in view of the benefits of having a stalking horse bid capable of assuring a sale, the expenses incurred and to be incurred by 255 Ontario in connection with its Stalking Horse APS, and the risks attending 255 Ontario's participation in the Sale Process;
>
> (c) the amount of the Expense Reimbursement and the Break Fee represent approximately 1% of the aggregate consideration provided under the Stalking Horse APS, which is well within a range of reasonableness;
>
> (d) the Receiver believes that: (i) the Expense Reimbursement and Break Fee are reasonable; and (ii) the Stalking Horse APS' approval is in the best interests of the Debtor's stakeholders as it will protect downside risk while facilitating the submission of potentially superior bids in the Sale Process; and
>
> (e) Peakhill is supportive of the approval of the Stalking Horse APS (for the purposes of acting as the stalking horse bid in the Sale Process), the Expense Reimbursement and the Break Fee.[62] [citations omitted]

53. The Supreme Court has held that a "judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties".[63] The test for approval of a sale process, and the factors to be considered for using a stalking horse bid within that sale process, are well-settled and uncontroversial. The Receiver's evidence that the requisite test and factors were

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[61] Factum of the Receiver at page 19 and 20, para 32, ABCR at Tab 1.
[62] Factum of the Receiver at page 22 and 23, para 40, ABCR at Tab 1.
[63] *R. v. M (RE)*, 2008 SCC 51 at paras 19-20.

met was untested and unchallenged. There was therefore no need for the motion judge to repeat this analysis within her reasons, nor is there any error in not doing so. A judge is presumed to know the law, including the settled principles with which they are regularly confronted.[64]

54. The Receiver's Report sets out the basis for approval of the Sale Process and associated relief.[65] Therefore, the motion judge's finding is supportable on the evidence, apparent from the circumstances before her (particularly in the context of an insolvency proceeding with deference owed to the court-appointed Receiver), and was not "clearly wrong".

E. The Appropriate Remedy

55. The Receiver submits that the appeal should be dismissed, for the reasons set out above.

56. Strictly in the alternative, should this Court determine that its intervention is necessary, the Receiver submits that the only appropriate remedy is to send the matter back to the Superior Court for determination, due to the fact that the Receiver (and any other interested party, including 255 Ontario) was unable to cross-examine, file responding material, and file written submissions in respect of the Cross-Motion. A favourable determination for the debtor would in any event appear to be a considerable challenge for it in view of the fact that the contractual closing date has long passed.

PART V: ORDER REQUESTED

57. The Receiver requests that the Appellant's appeal be dismissed with costs.

58. In the alternative, should this Court determine that the appeal should be allowed, the Receiver requests that the matter be sent back to the motion judge for determination, with an

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[64] *R. v Tessier*, 2022 SCC 35 at para 45.
[65] First Report, *supra* note 1 at pages 64 and 65, section 6.5.3, para 1, ABCA at Tab 5.2.

allowance for proper response and briefing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF MARCH, 2024.

Bennett Jones LLP

Bennett Jones LLP

SCHEDULE "A"

LIST OF AUTHORITIES

Cases Cited

1. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750
2. *Choice Properties Limited Partnership v Penady (Barrie) Ltd.*, 2020 ONSC 3517
3. *Grier v The Canada Trust Company*, 2021 ONSC 3297
4. *IceGen Inc., Re*, 2016 ONCA 907
5. *King et al v Urban & Country Transport Ltd. et al*, 1973 CanLII 740 (ON CA)
6. *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375
7. *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 5338
8. *R. v. G.F.*, 2021 SCC 20
9. *R. v. M (RE)*, 2008 SCC 51
10. *R. v Tessier*, 2022 SCC 35
11. *Ravelston Corporation Limited (Re)*, 2007 ONCA 135
12. *Re Harmon International Industries Inc.*, 2020 SKCA 95
13. *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 MCBA 46
14. *2174372 Ontario Ltd. v. Dharamshi*, 2021 ONSC 6139

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194

s. 37.07(5)

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

Court of Appeal File No.: 23-CV-1357 / M54775
Court File No.: CV-23-00004031-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant
(Respondent on Appeal)

- and -

1000093910 ONTARIO INC.

Respondent
(Appellant)

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

CERTIFICATE PURSUANT TO RULE 61.12(3)(f)

1. an Order pursuant to subrule 61.09(2) is not required;

2. the Respondent on Appeal requires 1 hour for its argument, not including reply;

3. the Factum of the Respondent on Appeal complies with subrule 5.1;

4. the Factum of the Respondent on Appeal contains 6,509 words between Part I-V, including footnotes; and

5. the Counsel signing this Certificate are satisfied of every authority listed in Schedule "A".

March 8, 2024

Bennett Jones LLP

Bennett Jones LLP

Court of Appeal File No.: 23-CV-1357 / M54775
Court File No.: CV-23-00004031-0000

PEAKHILL CAPITAL INC. - and - **1000093910 ONTARIO INC.**
Applicant (Respondent on Appeal) Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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Court of Appeal File No.: 23-CV-1357 / M54775
Court File No.: CV-23-00004031-0000

PEAKHILL CAPITAL INC. Applicant (Respondent on Appeal)	- and -	**1000093910 ONTARIO INC.** Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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