

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

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**

**SUPPLEMENTARY FACTUM OF 2557904 ONTARIO INC.  
(returnable JUNE, 28, 2024)**

June 25, 2024

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TO: **SERVICE LIST**

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**SUPPLEMENTARY FACTUM OF 2557904 ONTARIO INC.**

**PART I - OVERVIEW**

1. This supplementary factum, filed on behalf of 2557904 Ontario Inc. ("**255**"), is being filed to augment 255's original factum which was filed on an urgent basis in response to the Moving Parties cross-motion filed and served a day before the Receiver's motion for approval of the Stalking Horse Agreement. Defined terms used herein but not otherwise defined shall have the meaning given to those terms in 255's factum dated June 11, 2024.

2. It is respectfully submitted that the Court should not exercise its discretion to allow the Moving Parties to exercise a right of redemption after a Court ordered sale process has commenced and a bid has been accepted. The time for such a request has come and passed. Had the Moving Parties wanted to redeem, they ought to have done so during the Sale process. They did not.

3. The Debtor and the other moving parties consented to the Receivership Order made on September 13, 2023. The Receivership Order contemplated that a sale process would

take place. Throughout the stalking horse process, none of the Moving Parties – not the Debtor, the Tenants, or any other party, made a bid as part of the process. 255, on the other hand, made a bid in good faith which was accepted by the Receiver. In addition, the Justice Vallee has already found that the Receiver has complied with the principles outlined by the Court in [Soundair](#).<sup>1</sup>

4. In the circumstances, recent appellant authority has confirmed that late breaking requests to redeem ought not to proceed on the basis that to do so would undermine the integrity of the sale process. It is respectfully submitted that the Court should follow established precedent and refuse to grant the Moving Parties cross-motion.

## **PART II - ISSUE AND ANALYSIS**

5. It is respectfully submitted that, should the Court decide to exercise its discretion to hear the Moving Parties late-breaking cross-motion (notwithstanding the significant issues raised in 255's original factum), the issue for determination should not be whether the moving parties have a right to redeem. Instead, the Court ought to address the more pragmatic issue of whether the Moving Parties should be permitted to exercise that right once the court-approved sales process has run its course and the Receiver has entered into an agreement with a successful bidder.<sup>2</sup>

6. This was the very question the Ontario Court of Appeal addressed in [Rose-Isli Corp. v. Smith](#) ("**Rose-Isli**"), a late 2023 Ontario Court of Appeal case that affirmed the Court's findings in [B&M Handelman Investments Limited v. Mass Properties Inc.](#)<sup>3</sup> (2009), 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

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<sup>1</sup> [Royal Bank of Canada v. Soundair Corp.](#), (1991), 4 O.R. (3d) 1 (C.A.).

<sup>2</sup> [Rose-Isli Corp. v. Smith](#), 2023 ONCA 548.

<sup>3</sup> [B&M Handelman Investments Limited v. Mass Properties Inc](#) (2009), 55 C.B.R. (5th) 271 (Ont. S.C.)

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.<sup>4</sup>

7. [Rose-Isli](#) was not cited by Black J. in Vector which was decided in 2024. Justice Kimmel in the lower court takes a different view of the case law cited by Black J. from British Columbia. While the recent cases confirm the ability of a debtor or creditor to request leave from the Court to redeem, as discussed below, the Court of Appeal places greater emphasis on the integrity of the sale process rather than the right to redeem when the right to redeem is purportedly exercised so late in the sale process.

8. In circumstances very similar to the instant case, [Rose-Isli](#) concerned the appeal of an approval and vesting order issued by the motions judge that authorized the receiver to proceed with a sale of a property in receivership. Like this case, the appellants consented to the appointment of the receiver. Also like this case, one of the appealing parties was a party that held a second mortgage on the property and who wanted to redeem and who claimed that they were in funds to do so.

9. The receivership order in [Rose-Isli](#), like this case, contemplated that the Receiver would engage in a sales process for the property. Again, as in this case, the receiver secured court approval for the sales process, conducted the sales process, and then sought court and then sought court approval of the successful bid. At this point, the appellants brought a cross-motion that opposed the proposed sale and, instead, sought an order that the second mortgagee could redeem the first mortgage or, alternatively, be recognized as a successful creditor bidder. The motions judge (Kimmel J) granted the receiver's approval motion and dismissed the appellants' cross-motion for redemption.

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<sup>4</sup> [Rose-Isli Corp. v. Smith, 2023 ONCA 548, para. 10](#) quoting [B&M Handelman Investments Limited v. Mass Properties Inc. \(2009\), 55 C.B.R. \(5th\) 271 \(Ont. S.C.\) at para. 22.](#)

10. On appeal, the appellants argued that the motions judge erred in dismissing their cross-motion because the second mortgagee had an absolute right to redeem the first mortgage at any time, even where a court-approved sales process has been undertaken and the receiver was seeking court approval of the successful bid.

11. The Court disagreed with the appellants and dismissed the appeal. The Court found that the appellants had sought the appointment of the receiver, the receiver had undertaken the sales process approved by the court; and the receiver had not been discharged. Accordingly, the Court found that the ability of the second mortgagee “to exercise a right of redemption has to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee.”<sup>5</sup>

12. Critically, the court found no error in Kimmel J’s conclusions that the balance favoured protecting the integrity of the sales process over the appellants’ right to redeem. This is in line with recent case law on this issue. What emerges from the more recent cases is that, the longer a sales process progresses, when the sale process is approved by the court, bids canvassed, a purchaser identified and an approval motion pending, the more crucial maintaining the integrity of the court approved sale process becomes. If a court ordered sale process is found to be sound, it should not be permitted to be interfered with by a later attempt to redeem.<sup>6</sup> The case law also focuses on the importance of the timing of the process in relation to the purported exercise of the right to redeem. For instance, in [\*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.\*](#)<sup>7</sup>, on the issue of the timing of a purported request to redeem, the Court found:

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<sup>5</sup> [\*Rose-Isli Corp. v. Smith\*, 2023 ONCA 548, para. 8.](#)

<sup>6</sup> [\*Rose-Isli Corp. v. Frame-Tech Structures Ltd.\*, 2023 ONSC 832, at para. 82.](#) Affirmed in [\*Rose-Isli Corp. v. Smith\*, 2023 ONCA 548.](#)

<sup>7</sup> [\*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc\* 2020 ONSC 3659.](#)

[35] The Receiver points [\*to B&M Handelman Investments Limited v. Mass Properties Inc., 2009 CanLII 37930\*](#), where Pepall J. (as she then was) dealt with language similar to paragraph 11 and held:

In the face of these provisions, Ms. Singh does not have an automatic right to redeem. 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.

[\*BDC v. Marlwood Golf & Country Club, 2015 ONSC 3909\*](#) and [\*Home Trust Company v. 2122775 Ontario Inc., 2014 ONSC 1039\*](#) are to similar effect.

[36] The Receiver fairly volunteers that the issue arose in [\*Handelman\*](#) and the cases that follow it at a much later stage than it does with respect to Clover. **In *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally. Here the debtor is seeking to redeem before a SISP is approved. (Emphasis added)**<sup>8</sup>

13. In this case, the Moving Parties had ample time (nearly 9 months) to engage with other lenders to secure financing. The Moving Parties were aware of the sales process, having consented to an order where this was contemplated. The Moving Parties were also kept informed of the Receiver's efforts to sell the Property. It is respectfully submitted that the time for the Moving Parties to redeem was well before the Stalking Horse Agreement had been agreed. Waiting until the last minute, literally a day away from a sale approval motion date, has not found favour with the Courts in recent case law.

14. 255 submits that that, in light of the above case law, the Court ought not to exercise its discretion to allow the Moving Parties to redeem. The Moving Parties:

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<sup>8</sup> [\*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at para. 35 – 36.\*](#)

- a. consented to the Receivership Order made on September 13, 2023;
- b. The Receivership Order contemplated that a sale process would take place.
- c. Throughout the stalking horse process, none of the Moving Parties – not the Debtor, the Tenants, or any other party, made a bid as part of the process.
- d. 255, on the other hand, made a bid in good faith which was accepted by the Receiver;
- e. Justice Vallee already found that the Receiver had complied with the principles outlined by the Court in [Soundair](#); and
- f. 255 will experience financial prejudice if the transaction is not able to close on the terms reached with the Receiver.

15. Recent case law has established that late breaking requests to redeem ought not to proceed on the basis that to do so would undermine the integrity of the sale process. It is respectfully submitted that the Court should follow established precedent and refuse to grant the Moving Parties cross-motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25th day of June, 2024



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Kevin Sherkin  
**MILLER THOMSON LLP**

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.).
2. *Rose-Isli Corp. v. Smith*, 2023 ONCA 548.
3. *B&M Handelman Investments Limited v. Mass Properties Inc* (2009), 55 C.B.R. (5th) 271 (Ont. S.C.)
4. *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832
5. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc* 2020 ONSC 3659.



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Court File No. CV-23-00004031-0000

Applicant

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PROCEEDING COMMENCED AT NEWMARKET

**SUPPLEMENTARY FACTUM OF 2557904  
ONTARIO INC.  
(returnable JUNE, 28, 2024)**

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