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Our File: 264207

June 30, 2025

The Honourable Justice Darlene Jamieson
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water St.
Halifax, NS B3J 1S7

My Lady:

Re: Blue Lobster Capital Limited et al
(Hfx No. 538745)

We are counsel to Shannon Lynch ("**Ms. Lynch**") in connection with this matter.

The Court has scheduled a hearing to take place herein **July 7, 2025** at **9:30 am** in relation to two separate Motions:

1. A Motion filed by the Monitor seeking an Approval and Vesting Orders as regards the proposed sale of the assets of 3284906 Nova Scotia Limited ("**Spirit Co**"), 4318682 Nova Scotia Limited ("**Cider**"), and 3343533 Nova Scotia Limited ("**Winery**"), together with other ancillary relief; and

2. A Motion brought by the Applicants seeking an Order terminating the current CCAA proceeding.

Ms. Lynch has filed an Affidavit sworn herein on June 30, 2025. Please accept the following as Ms. Lynch's pre-hearing memorandum.

Standing

It is submitted that, as a "successful bidder", Ms. Lynch enjoys standing before the Court as regards both of the Motions which are currently before the Court.

Reference is made to the Decision of the Ontario Court of Appeal in ***Peakhill Capital Inc. v. 1000093910 Ontario Inc.*** (24 ONCA 584), in which the Court consider an appeal by a "successful bidder" from the dismissal of a Receiver's Motion seeking an Approval and Vesting Order. The Court stated (at paras. 6-7):

> "We disagree that 255 lacks the standing to appeal the Order. 255 provided the stalking horse bid for the court – approved sale process pursuant to an agreement it entered into with the Receiver (the "Stalking Horse Agreement"). At the completion of the sale process, the Receiver selected 255 as the successful bidder. The Receiver then moved for an AVO to complete the Stalking Horse Agreement transaction.
>
> The motion judge's Order, which dismissed the Receiver's motion and terminated the Stalking Horse Agreement, adversely affected 255 as the successful bidder in a court–approved sale process. 255 thereby has an interest in the subject matter of the proceeding that entitles it to seek appellate review of the Order: *Royal Bank of Canada v Sound Air Corp.* (1991), 40.R. (3d) 1 (c.a.), 1991 Carswell ONTL 205, at paras: 39 – 40; *Winick v 1305067 Ontario Limited* (2008), 41C. B.R. (5th) 81 (OMT.s.c.), at Paras. 3 and 4."
>
> (emphasis added)

While ***Peakhill*** considered a Sale Approval Motion in the context of a receivership, it is submitted that it is equally applicable to similar Motions in CCAA proceedings. The Court confirmed the legal standing of the successful bidder to appeal from a decision by the Motions Judge – which necessarily presupposes standing on the Motion itself.

Ms. Lynch's position as successful bidder is to be distinguished from that of an unsuccessful "bitter bidder", and it is submitted that she has a legitimate interest and legal standing as regards each of the present Motions.

Sale Approval

Ms. Lynch supports the Monitor's Motion seeking the issuance of Approval and vesting Orders as regards each of the pending transactions.

The SISP process was conducted by the Monitor pursuant to and in accordance with the March 7, 2025 Order of the Court. There is no suggestion of any error or omission on the part of the Monitor, or of any deficiency in its administration of the process.

All interested parties had an opportunity to put their best foot forward as part of the process, and the Monitor received and reviewed all offers submitted and selected the successful bids, subject to Court approval.

It is submitted that the Monitor's Motion merits the approval of this Honourable Court.

Applicants' Motion

The Applicants have filed a Motion seeking to terminate the current CCAA proceeding – which would necessarily negate the approval and completion of the sale transactions currently before the Court.

To describe the Applicants' Motion as "11th hour" would be an understatement – it was filed after the Bid Deadline under the SISP had passed, after the successful bidders had been selected, and after the Monitor had filed Motion pleadings seeking an Approval and Vesting Order.

Ms. Lynch acknowledges that this Honourable Court possesses a discretionary power to terminate the CCAA proceeding if it considered it appropriate to do so. Ms. Lynch submits, however, that the Court should decline to do so in the present case.

Reference is made to the decision of the Ontario Court of Appeal in *Rose-Isli Corp. et al v Smith et al.* (2023 ONCA 548) where the Court stated (at paras 8-10):

"8. The motions judge recognized that the issue for determination was not whether 273 Ontario had a right to redeem but the more pragmatic issue of whether it should be permitted to exercise that right once the court-approved sales process had run its course and the Receiver had entered into an agreement with the successful bidder: Reasons, at paras. 73-74. This properly framed the issue: 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 ability of 273 Ontario to exercise a right of redemption had to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee.

9. 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.

10. 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.*"
>
> (emphasis added throughout)

It is submitted that, although ***Rose-Isli*** was decided in the context of a receivership proceeding, these principles are equally applicable in the present case. The fundamental concern of the Court as regards the integrity of court–approved sale processes is common to both statutory regimes.

It is submitted that allowing the termination of the CCAA proceeding at this late stage would be unfair to the successful bidders and would undermine confidence if court-approved sale processes in future cases, with unfortunate results.

It is also noted that, in this case, the Monitor's Supplement Report confirms that the sale transactions being recommended by the Monitor would provide a better recovery for unsecured creditors than the alternate proposal being advanced by the Applicants.

It is accordingly submitted that the Applicants' Motion seeking to terminate the current CCAA proceedings should be dismissed.

Reasonable Compensation

If, notwithstanding our prior submissions, the Court grants the Applicants' Motion and terminates the CCAA proceeding, it is submitted that the Applicants would be obliged to provide compensation for her "throw away costs" (***Peakhill, supra,*** at paras. 12-13).

These costs are set out in her Affidavit, and totaled **$171,022.40** as of June 29, 2025. Additional time and expense were also incurred thereafter, and are also to be taken into account.

All of which is respectfully submitted.

Yours very truly,

McINNES COOPER

SL

Stephen Kingston

Cc. Shannon Lynch
Service List

2024 ONCA 584
Ontario Court of Appeal

Peakhill Capital Inc. v. 1000093910 Ontario Inc.

2024 CarswellOnt 10850, 2024 ONCA 584, 14 C.B.R. (7th) 230, 2024 A.C.W.S. 3898

Peakhill Capital Inc. (Applicant / Respondent) and 1000093910 Ontario Inc. (Respondent / 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

David Brown, A. Harvison Young, S. Gomery JJ.A.

Heard: July 19, 2024
Judgment: July 22, 2024
Docket: CA COA-24-CV-0671

Proceedings: varied *Peakhill Capital Inc. v. 1000093910 Ontario Inc.* (2024), 2024 CarswellOnt 16741, 2024 ONSC 3887 (Ont. S.C.J.)

Counsel: Kevin D. Sherkin, Mitchell Lightowler, for Appellant, 2557904 Ontario Inc.
Gary M. Caplan, Aram Simovonian, for Respondent, 1000093910 Ontario Inc.
Dominique Michaud, Joseph Jamil, for Respondent, Peakhill Capital Inc.
Richard B. Swan, Aiden Nelms, for Receiver, KSV Restructuring Inc.
D.J. Miller, for Firm Capital Corporation
George Benchetrit, Laura Culleton, for Second Mortgagee, Zaherali Visram
Jason Squire, for Ren/Tex Realty Inc. and ReMax Premier Inc.
Ran He, for 20 Regina JV Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Property

Headnote

Bankruptcy and insolvency --- Administration of estate — Miscellaneous

Debtor was involved in bankruptcy proceedings — Bidder and receiver agreed to sale process, however, debtor redeemed mortgage at eleventh hour — Debtor's motion to redeem mortgage on industrial property was granted, receiver's motion to approve vesting order was dismissed — Bidder in vesting process appealed — Appeal allowed in part — Bidder had interest in proceedings and had standing to bring appeal, without leave — Trial judge's findings regarding redemption were otherwise reasonable, but did not take into account $250,000 break fee and legal costs of stalking horse agreement — Bidder was entitled to compensation for costs thrown away in sale process, in amount of $300,000 — Exceptional circumstances for granting provisional enforcement of order approving refinance transaction did not exist.

Table of Authorities

Cases considered:

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 3659, 2020 CarswellOnt 8665, 81 C.B.R. (6th) 283 (Ont. S.C.J.) — referred to

Business Development Bank of Canada v. Astoria Organic Matters Ltd. (2019), 2019 ONCA 269, 2019 CarswellOnt 5177, 69 C.B.R. (6th) 13 (Ont. C.A.) — referred to

Cardillo v. Medcap Real Estate Holdings Inc. (2023), 2023 ONCA 852, 2023 CarswellOnt 19788, 10 C.B.R. (7th) 1 (Ont. C.A.) — referred to

Kingsett Mortgage Corp. v. 30 Roe Investment (February 16, 2023), Doc. Toronto CV-21-00674810-00CL (Ont. S.C.) — referred to

Peakhill Capital Inc. v. 1000093910 Ontario Inc. (2024), 2024 ONCA 59, 2024 CarswellOnt 936 (Ont. C.A.) — referred to

Peakhill Capital Inc. v. 1000093910 Ontario Inc. (2024), 2024 ONCA 261, 2024 CarswellOnt 4952, 13 C.B.R. (7th) 1 (Ont. C.A.) — referred to

Peakhill Capital Inc. v. 1000093910 Ontario Inc. (2024), 2024 ONCA 558, 2024 CarswellOnt 10345 (Ont. C.A.) — referred to

Rose-Isli Corp. v. Smith (2023), 2023 ONCA 548, 2023 CarswellOnt 12803, 9 C.B.R. (7th) 53 (Ont. C.A.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

Winick v. 1305067 Ontario Ltd. (2008), 2008 CarswellOnt 900, 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 193 — referred to

s. 193(c) — referred to

s. 193(e) — referred to

s. 195 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 6(1)(b) — referred to

s. 134 — referred to

s. 134(1)(a) — referred to

s. 134(1)(c) — referred to

APPEAL by bidder in bankruptcy proceedings from order approving redemption of mortgage on property.

***Per curiam*:**

REASONS FOR DECISION

OVERVIEW

1 2557904 Ontario Inc. ("255"), the stalking horse bidder in the court-approved sale process in the receivership of 1000093910 Ontario Inc. (the "Debtor"), appeals the July 9 order (the "Order") of the motion judge that: (i) dismissed the motion of the court-appointed receiver, KSV Restructuring Inc. (the "Receiver"), for an approval and vesting order ("AVO") to transfer the purchased assets of the Debtor to 255, the successful bidder in the sales process; and, (ii) instead, approved the Debtor's motion seeking approval to redeem the first mortgage held by Peakhill Capital Inc. on the Debtor's Vaughan industrial property (the "Refinancing Transaction"), which had formed the subject matter of a cross-motion by the Debtor in response to the Receiver's AVO motion. The Debtor plans to effect the redemption through a combination of funding obtained from Firm Capital Corporation, pursuant to a Letter of Commitment dated June 13, 2024 and amended on July 12, 2024, together with other sources, including the existing second mortgagee.

2 The history of this receivership and the motions that led to this appeal are set out in prior reasons of this court and need not be repeated: 2024 ONCA 59; 2024 ONCA 261; and 2024 ONCA 558.

3 The appeal was heard on an expedited basis pursuant to the July 11, 2024 directions of this court: 2024 ONCA 558.

4 255 raises two main grounds of appeal: (i) the motion judge committed reversible error by dismissing the Receiver's motion for an AVO and, instead, granting the Debtor the opportunity to redeem the first mortgage; and (ii) the motion judge erred by varying his July 4 redemption approval to provide for provisional execution of the order under s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), notwithstanding that 255 had already filed a notice of appeal with this court.

5 As a preliminary matter, the Debtor submits that this court should not hear the appeal filed by 255 because (i) 255 lacks standing to bring an appeal and (ii) if 255 does have standing, it requires leave to appeal pursuant to *BIA* s. 193(e), which should be refused.

STANDING OF 255

6 We disagree that 255 lacks the standing to appeal the Order. 255 provided the stalking horse bid for the court-approved sale process pursuant to an agreement it entered into with the Receiver (the "Stalking Horse Agreement"). At the completion of the sale process, the Receiver selected 255 as the successful bidder. The Receiver then moved for an AVO to complete the Stalking Horse Agreement transaction.

7 The motion judge's Order, which dismissed the Receiver's motion and terminated the Stalking Horse Agreement, adversely affected 255 as the successful bidder in a court-approved sale process. 255 thereby has an interest in the subject matter of the proceeding that entitles it to seek appellate review of the Order: *Royal Bank of Canada v. Soundair Corp.*(1991), 4 O.R. (3d) 1 (C.A.), 1991 CarswellOnt 205, at paras. 39-40; *Winick v. 1305067 Ontario Limited*, (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), at paras. 3 and 4. [1]

APPLICABLE AVENUE OF APPEAL

8 The Debtor submits 255 does not have an automatic right to appeal the Order under *BIA* s. 193 but requires leave to appeal, which should be refused. Again, we disagree. According to the table set out in section 3.0 of the Supplement to the Receiver's Second Report, the Order approved a Refinancing Transaction that would result in proceeds of approximately $23.788 million, while dismissing the Receiver's AVO motion which, had it been approved, would have resulted in proceeds of $24.255 million. Accordingly, the Order brings into play a difference in the realized value of the Debtor's property in excess of $10,000 that would entitle 255 to appeal as of right: *BIA* s. 193(c); *Cardillo v. Medcap Real Estate Holdings Inc.*, 2023 ONCA 852, at para. 21. In any event, if 255 required leave to appeal, we would grant leave for a number of reasons: 255 raises an issue of general importance to insolvency practice, namely, the reasonableness of granting a debtor leave to redeem at the 11th hour in the face of a receiver's recommendation to proceed with a transaction resulting from a court-supervised sales process; the appeal certainly raises a serious question; and given the expedited scheduling of this appeal, the appeal would not hinder the progress of the receivership proceeding: *Cardillo* , at para. 50. 255 is entitled to seek appellate review of the Order.

FIRST GROUND OF APPEAL: PERMITTING THE DEBTOR TO REDEEM THE FIRST MORTGAGE

9 Regarding the merits of 255's appeal, the motion judge's reasons explain why he permitted the Debtor to redeem. They disclose that he correctly identified the governing principles as those summarized by this court in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at paras. 9 and 10. In applying those principles, the motion judge engaged in the required circumstance-specific balancing of the factors relating to a mortgagor's right to redeem with those concerning the integrity of a court-supervised receivership process. He concluded that, in the exceptional circumstances of this case, the integrity of the receivership process would not be undermined by permitting the redemption. Although other judges might have weighed the applicable factors differently and reached a different result, for the most part, the motion judge's weighing of the factors in the circumstances of this case was not unreasonable.

10 However, the reasoning underpinning the Order was legally deficient in one respect, which prompts us to intervene and vary it.

11 On one reading of paras. 33 to 35 of his July 15 reasons, the motion judge suggested that permitting the Debtor to redeem would not have a significant impact on the integrity of the receivership process as the Break Fee and legal costs totalling $250,000, as contemplated by s. 14.2 of the Stalking Horse Agreement, would be paid into court as security for 255, the stalking horse bidder. However, the motion judge's reasons ultimately left 255's entitlement to the $250,000 unresolved and his Order did not deal with that issue.

12 In our respectful view, in the circumstances of this case, where the Debtor made an 11th hour attempt to redeem the first mortgage, the motion judge erred by approving the Refinancing Transaction without ensuring that 255, as the successful stalking horse bidder recommended by the Receiver for an AVO, would receive reasonable compensation for its costs thrown away in the sale process that culminated in the July 9 Order.

13 In our view, it was necessary for the motion judge to order payment of such compensation to 255 from the proceeds of the Refinancing Transaction in order to adequately protect the integrity of the court-supervised receivership process. Without ordering such compensation, approval of the Debtor's 11th hour redemption request should not have been granted.

14 The Debtor's redemption motion was made at the 11th hour. By that point in time: the Receiver had entered into the Stalking Horse Agreement with 255; the Receiver had obtained court approval of a sale process that used 255's stalking horse bid, that approval had been upheld on appeal by this court, and the process had run its course. When the sale process concluded in early May 2024, 255's stalking horse bid emerged as the successful bid, and the Receiver then filed a motion for an AVO with the court to complete the transaction with 255 as set out in the Stalking Horse Agreement. Only then did the Debtor bring its early June cross-motion for redemption, and the Debtor was only able to confirm to the court "cheque in the hand" financing in early July after it had sought, and received, several adjournments of the Receiver's motion.

15 There is no suggestion that the sale process failed to comply with the *Soundair* principles. In our view, to permit a debtor to redeem at the 11th hour and, at the same time, to reject a receiver's AVO motion without requiring the debtor, as a condition of redemption, to compensate the successful bidder in a *Soundair*-compliant court-approved sale process for its costs thrown away in that process would amount to sanctioning an abuse of the court-supervised receivership process, thereby undermining the integrity of that process.

16 The Debtor contends that 255 is not entitled to any compensation for its costs thrown away in the sale approval process as the Stalking Horse Agreement only entitled 255 to a Break Fee and legal costs in the event it was not the successful bidder. That is an unreasonable submission. It is true that the Stalking Horse Agreement talked in terms of compensation if 255 was not the successful bidder. However, there can be no doubt that the agreement did not deal with compensation in the event 255 was the successful bidder because, in the ordinary course, court approval of the stalking horse transaction would follow. Last-minute derailments of a court-approved sale process by a debtor's request to redeem are not common — there "may be a 1% chance", as put by the Debtor's counsel in oral submissions. However, 255's entitlement to reasonable compensation for costs thrown away in the sale process is not limited to the terms of the Stalking Horse Agreement. In the circumstances of this case, as described, protecting the integrity of the receivership sale process required the court to impose, as a condition of properly exercising its judicial discretion to grant an 11th hour redemption request, the obligation that the redeeming Debtor pay the successful bidder's reasonable costs thrown away. The motion judge erred by failing to so condition his approval of the Debtor's Refinancing Transaction. [2]

17 As to the quantum of 255's reasonable costs thrown away, we are not prepared to remit the issue of the amount of such compensation to the court below. This proceeding has consumed a disproportionate amount of court time since the Receiver filed its AVO motion, a situation caused by the Debtor's 11th hour redemption cross-motion. We shall fix the amount of the reasonable compensation to which 255 is entitled: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a) and (c) ("*CJA*").

18 The Stalking Horse Agreement fixed the amount of costs thrown away at $250,000 up until the end of the sale process. It is beyond question that 255 has incurred further, unforeseen, legal costs as a result of the Debtor's 11th hour redemption cross-motion and the resulting numerous attendances that followed the original June 12, 2024, return date of the Receiver's AVO motion, largely driven by the Debtor's adjournment requests in order to win time to obtain "cheque in the hand" funding. 255 is entitled to reasonable compensation for those costs thrown away. Taking this into account, the Debtor should be required to pay 255 a total of $300,000 in costs thrown away as a condition of closing the Refinancing Transaction.

19 Although 255 submits that its compensation should take into account its exposure for the deposit currently held in escrow by Ren/Tex Realty Inc. in respect of the September 2023 Pre-Appointment Agreement of Purchase and Sale between 255 and the Debtor, we do not regard that amount as a cost thrown away by 255 as a result of its participation in the receivership sale process as the stalking horse bidder.

20 Consequently, we vary para. 3 of the July 9 Order approving the Refinancing Transaction to include that, as conditions of closing the Refinancing Transaction, the Debtor pay the following two amounts:

> (a) to Receiver's counsel, the Receivership expenses — Professional Fees, including Additional Fee Accrual, Receivership expenses, and Broker work fee — as set out in the table in para. 1 of section s. 3.0 of the Receiver's Supplement to its Second Report; and
>
> (b) to counsel for 255, in trust for his client, the sum of $300,000 as compensation for 255's costs thrown away in the receivership sale process.

PROVISIONAL ENFORCEMENT PROVISION IN THE ORDER

21 The motion judge granted the Debtor's redemption motion by order made on July 4, 2024. The same day, 255 filed a notice of appeal. By his further Order dated July 9, 2024, the motion judge, at the Debtor's request, varied his July 4 order to include a term for provisional execution pursuant to *BIA* s. 195. That section 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.

22 Paragraph 9 of the motion judge's July 9 Order stated, in part:

> [T]he 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.

23 255 submits the motion judge erred in granting provisional enforcement of his order approving the Refinance Transaction. We agree with its submission. This was not an appropriate case for the motion judge to grant provisional enforcement of the Order. There was nothing extraordinary or exceptional about the circumstances of the case: in order to save its interest in a property, a debtor engaged in a last-minute scramble to secure financing; there had been no history of delay by the successful bidder, 255, who was eager to complete the sale process; and the only "deadline" that emerged after the Receiver filed its AVO motion was the artificial one created by the Debtor as part of its 11th hour financing scramble.[3] As well, it was not appropriate for the motion judge to grant provisional enforcement after 255 had filed notice of appeal from his July 4 order. In those circumstances, the motion judge should not have interfered with the ordinary-course automatic stay and lift stay provisions

contained in *BIA* s. 195. Our court operates its motions list on a virtually open basis, so a party is able to obtain a quick attendance to seek a lift-stay order, if the circumstances warrant.

24 Accordingly, we set aside para. 9 of the Order.

ADDITIONAL ISSUES

25 The filings before us indicate that the Firm Capital Corporation commitment letter has been amended to set 5 p.m. on Monday, July 22, 2024, as the "Final Outside Date" for closing the Refinancing Transaction.

26 Peakhill submits, in effect, that if the Refinancing Transaction does not close, then this court should exercise its powers under *CJA* s. 134 to grant the Receiver the authority to close the Stalking Horse Agreement transaction.

27 We accept that submission. Given the ongoing accumulation of interest and other costs, finality must be brought to the treatment of the Debtor's property and undertaking. No party has suggested that the sale process run by the Receiver did not comply with the *Soundair* principles. Accordingly, in the event the Refinancing Transaction does not close by 5 p.m. on Monday, July 22, 2024, on the terms as varied by these reasons, then the July 9 Order is set aside and, in its place, we grant the AVO and Distribution and Discharge Order sought by the Receiver in its May 31, 2024 motion, varied to reflect the updated Receiver's expenses.

DISPOSITION

28 By way of summary, we allow the appeal in part and make the following orders:

(a) Paragraph 3 of the July 9 Order is varied to include that, as conditions of closing the Refinancing Transaction, the Debtor pay the following two amounts:

(i) to Receiver's counsel, the Receivership expenses — Professional Fees, including Additional Fee Accrual, Receivership expenses, and Broker work fee — as set out in the table in para. 1 of section 3.0 of the Receiver's Supplement to its Second Report; and

(ii) to counsel for 255, in trust for his client, the sum of $300,000 as compensation for 255's costs thrown away in the receivership sale process;

(b) Paragraph 9 of the July 9 Order is set aside; and

(c) In the event the Refinancing Transaction does not close by 5 p.m. on Monday, July 22, 2024, on the terms as varied by these reasons, then the July 9 Order is set aside and, in its place, we grant the AVO and Distribution and Discharge Order sought by the Receiver in its May 31, 2024 motion, varied to reflect the updated Receiver's expenses.

29 Only 255 and the Debtor sought an order for the costs of the appeal: Peakhill advised it would add its costs to the mortgage debt and the Receiver advised its costs would come out of the Receivership estate. 255 sought appeal costs of $25,000; the Debtor submitted that in view of the divided success on the appeal, there should be no order as to the costs of the appeal. We accept the Debtor's submission; there shall be no order as to costs of the appeal as between 255 and the Debtor.

30 We repeat our indebtedness to counsel for the assistance provided by their submissions, both written and oral.

Appeal allowed in part.

Footnotes

1 *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, (2000), 47 O.R. (3d) 234 (C.A.) does not apply to the situation of a successful bidder. It considered whether an unsuccessful "bitter bidder" had the standing to appeal, concluding it did not. The court in *Skyepharma* distinguished *Soundair* on the basis that the latter decision dealt with the situation of a successful bidder: at para. 28. As well, the analysis in *Skyepharma* proceeded under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, whereas the determination of

standing and appeal rights in the present case is governed by *BIA* s. 193: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13.

2 As 255 points out in its supplementary factum, the case of *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, 2020 ONSC 3659, relied on by the motion judge involved quite a different circumstance than the present case. (It was not a "similar situation" as incorrectly suggested by the motion judge at para. 23 of his July 15 reasons.) As Koehnen J. noted in *BCIMC*, in that case the debtor offered to pay the costs of BCIMC, including the reasonable costs BCIMC had incurred in preparing a stalking horse bid.

3 *Kingsett Mortgage Corp. v. 30 Roe Investment* (16 February 2023), Toronto, CV-21-00674810-00CL (Ont. S.C), where Steele J. wrote at para. 15:

15. I agree with the Company. The sales of properties subject to approval and vesting orders are common occurrences in insolvency proceedings. The fact that there is an upcoming closing date for a sale of a property is not sufficient as to constitute the type of extraordinary circumstances necessary to alter a party's appeal rights. There is a statutory scheme regarding appeals in the BIA. Although section 195 of the BIA contemplates that an order may be subject to provisional execution, it is clear from the few cases cited that this is an extraordinary provision.

End of Document

2023 ONCA 548
Ontario Court of Appeal

Rose-Isli Corp. v. Smith

2023 CarswellOnt 12803, 2023 ONCA 548, 2023 A.C.W.S. 4149, 9 C.B.R. (7th) 53

Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation and 2735440 Ontario Inc. (Applicants / Appellants) and Michael J. Smith, Frank Servello, 2735447 Ontario Inc., Capital Build Construction Management Corp. and Frame-Tech Structures Ltd. (Respondents / Respondents)

C.W. Hourigan, David Brown, P.J. Monahan JJ.A.

Heard: August 14, 2023
Judgment: August 21, 2023
Docket: CA COA-23-CV-0222

Proceedings: affirming *Rose-Isli Corp. v. Frame-Tech Structures Ltd.* (2023), 6 C.B.R. (7th) 129, 2023 CarswellOnt 1532, 2023 ONSC 832, Kimmel J. (Ont. S.C.J. [Commercial List])

Counsel: Jason Wadden, Carlos Sayao, Theodore Milosevic, for Appellants
Mordy Mednick, for Respondents, Frame-Tech Structures Ltd., Frank Servello, Capital Build Construction Management Corp. and 2735447 Ontario Inc.
Sharon Kour, Brendan Bissell, for Receiver, Ernst & Young Inc.
Nathaniel Read-Ellis, for Ora Acquisitions Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Debtor engaged in joint venture for development of proposed six-story mixed use residential and commercial development — Secured fulcrum creditor held second mortgage on property, and first mortgage was later assigned to secured fulcrum creditor's financier — Receiver was appointed under oppression remedy in Business Corporations Act — Receiver engaged in sale process, in which secured fulcrum creditor participated but ultimately did not make bid that was accepted — After receiver approved sale to purchaser, secured fulcrum creditor claimed it wished to redeem mortgage on property — Receiver brought motion to approve sale and for related relief; secured fulcrum creditor brought cross-motion to redeem property, resulting in motion being granted and cross-motion being dismissed — Trial judge found secured fulcrum creditor only sought to redeem at end of sale process that it was consulted on and participated in, after it became apparent that it was not able to make competitive bid by time of extended bid deadline — Trial judge found if sale process is sound, it should not be permitted to be interfered with by later attempt to redeem — Trial judge found other stakeholder interests were either neutral or militated in favour of preserving integrity of sale process — Trial judge found order made to approve deemed termination of unit purchaser agreements in development — Trial judge found principles for approving sales agreement were met — Ancillary orders including sealing order were approved — Secured fulcrum creditor appealed — Appeal dismissed — Exercise of right of redemption had to take into account reality that property remained subject to active receivership, which engaged interests beyond those of second mortgage — Proper principles were considered in determining whether redemption should be allowed — Determination that sales process was fair was reasonable.

Table of Authorities

Cases considered:

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 3659, 2020 CarswellOnt 8665, 81 C.B.R. (6th) 283 (Ont. S.C.J.) — referred to

Ron Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) — considered

Rose-Isli Corp. v. Frame-Tech Structures Ltd. (2022), 2022 ONSC 4135, 2022 CarswellOnt 10439, 100 C.B.R. (6th) 246 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Statutes considered:

Mortgages Act, R.S.O. 1990, c. M.40

s. 2 — referred to

APPEAL by creditor from order approving sale of property reported at *Rose-Isli Corp. v. Frame-Tech Structures Ltd.* (2023), 2023 ONSC 832, 2023 CarswellOnt 1532, 6 C.B.R. (7th) 129 (Ont. S.C.J. [Commercial List]).

***Per curiam*:**

1 The appellants appeal the approval and vesting order issued by the motions judge that authorized the receiver, Ernst & Young Inc., to proceed with a sale of the property in receivership, as well as a related ancillary order.

2 The appellants had sought the appointment of the Receiver over the property. One of the appellants, 2735440 Ontario Inc. ("273 Ontario"), held a second mortgage on the property. The order appointing the Receiver contemplated it would engage in a sales process for the property. The Receiver secured court approval for a sales process, conducted a sales process, and then sought court approval of the successful bid.

3 At this point, the appellants opposed the proposed sale and, instead, sought an order that 273 Ontario could redeem the first mortgage or, alternatively, be recognized as a successful creditor bidder. The motions judge granted the Receiver's approval motion and dismissed the appellants' cross-motion for redemption. The appellants submit the motions judge erred in so doing.

4 As an initial matter, it is worth recalling how the judge who granted the appointment order described the "lay of the land" at the time the appellants requested the appointment of a receiver over the property. At para. 11 of his reasons, *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2022 ONSC 4135, the appointment judge stated:

> It is common ground that the relationship between and among the parties has irrevocably broken down... Indeed, the fact that the relationship has broken down is reflected in the relief sought, one way or the other, by all parties today: they all agree that the Rosehill Project should be sold, and that the sale process should be undertaken by a court-appointed officer.

5 The appellants submit the motions judge erred in dismissing their cross-motion because the second mortgagee, 273 Ontario, pursuant to s. 2 of the *Mortgages Act*, R.S.O. 1990, c. M.40, had an absolute right to redeem the first mortgage at any time, even where a court-approved sales process had been undertaken and the receiver was seeking court approval of a bid.

6 We disagree.

7 273 Ontario, as one of the applicants for the appointment of a receiver, consented to the Appointment Order. Section 9 of the Appointment Order qualified any encumbrancer's right to redeem a mortgage on the properties under receivership. The section states that "all rights and remedies against the Company, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court." See also: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.* 2020 ONSC 3659, at paras. 33 and 41.

8 The motions judge recognized that the issue for determination was not whether 273 Ontario had a right to redeem but the more pragmatic issue of whether it should be permitted to exercise that right once the court-approved sales process had run its course and the Receiver had entered into an agreement with the successful bidder: Reasons, at paras. 73-74. This properly framed the issue: 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 ability of 273 Ontario to exercise a right

of redemption had to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee.

9 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), 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.

10 We adopt the rationale for those guiding principles articulated in *Ron Handelman Investments Ltd. v. Mass Properties Inc.*200955 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.

11 We see no error in the motions judge's identification of the interests at play in the required balancing exercise: Reasons, at paras. 84-95.

12 The appellants repeat before us the numerous complaints they made below about the lack of fairness in the sales process. The motions judge canvassed those complaints in considerable detail and found no merit in any of them. Her conclusion that the conduct of the sales process met the *Soundair* criteria was reasonable and free of palpable and overriding error, anchored as it was in the specific evidence before her: Reasons, at paras. 97-131.

13 Finally, we see no reversible error in the motions judge's conclusion that the balance favoured protecting the integrity of the sales process over 273 Ontario's request to redeem, including her treatment of the last-second assignment of the first mortgage to 273 Ontario's financier, Toronto Capital.

14 The appeal is dismissed.

15 The appellants shall pay the Receiver its costs of the appeal fixed in the amount of $35,000.00, inclusive of disbursements and applicable taxes.

Appeal dismissed.

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