Court File No. CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

- and -

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED

Respondents

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

FACTUM OF THE RECEIVER – RETURNABLE JANUARY 20, 2023

January 17, 2023

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PART I – INTRODUCTION

1. This factum is filed by KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of the 23 parties listed on Schedule "B" of the Receivership Order (as defined below) (the "**Receivership Respondents**") in support of the Receiver's motion for two Orders.

2. The first Order proposes the following substantive relief (the "**Aurora AVO**"):

   (a) approval of the agreement of purchase and sale dated December 8, 2022 (the "**Aurora APS**") between the Receiver and 1000086921 Ontario Inc. (the "**Aurora Purchaser**") for the purchase and sale of the real property municipally known as 4951 Aurora Road, Stouffville, ON, and legally described in PIN 03691-0193 (collectively, the "**Aurora Real Property**"), and authorizing the Receiver to complete the transaction contemplated thereby (the "**Aurora Transaction**"); and

   (b) upon execution and delivery of a certificate by the Receiver confirming the closing of the Aurora Transaction, vesting in the Aurora Purchaser[1] all rights, title and interest in the Purchased Assets (as defined in the Aurora APS) subject to certain encumbrances.

3. The second Order proposes the following substantive relief (the "**Ancillary Order**"):

   (a) approving the Receiver's Supplement to the Sixth Report dated January 11, 2023 (the "**Sixth Report Supplement**") and the actions and activities of the

[1] Or, if the Aurora Purchaser chooses, in the name of another person, entity, joint venture, partnership or corporation, subject to the terms and conditions of section 14.10 of the Aurora APS.

Receiver and its counsel described therein;

(b) authorizing and directing the Receiver to distribute monies from Go-To Eagle Valley to Imperio, HK United, Soil-Mat and HC Matcon (as each term is defined in, and for the reasons described in, the Sixth Report Supplement); and

(c) compelling Murray Maltz to produce the Unredacted Trust Ledgers (as defined below) to the Receiver.

4. This factum also provides a brief update regarding insurance-related matters, in light of the case conference on this subject that is scheduled for January 20, 2023.

5. Unless otherwise stated, all capitalized terms are defined in the Sixth Report Supplement.

PART II – THE FACTS

A. Background

6. Pursuant to an application by the Ontario Securities Commission (the "**OSC**") under ss. 126 and 129 of the *Securities Act* (Ontario) (the "**Securities Act**"), the Court made an Order on December 10, 2021 (the "**Receivership Order**") appointing KSV as the Receiver of the 17 pieces of real property described in the Receivership Order (the "**Real Property**") and all the other assets, undertakings and properties of each of the Receivership Respondents, including all the assets held in trust or required to be held in trust by or for any of the Receivership Respondents, or by their lawyers, agents and/or any other person, and all proceeds thereof (together with the Real Property, the "**Property**").[2]

[2] Receivership Order, at recitals, para. 3 and Schedule "A" thereto.

7. The Receivership Respondents were developers of nine, early-stage residential real estate projects in Ontario (the "**Projects**").[3] The Receivership Respondents' principal is Oscar Furtado ("**Mr. Furtado**").

8. Between 2016 and 2020, Mr. Furtado and the Receivership Respondents raised almost $80 million from Ontario investors for the Projects, the vast majority of which had not been repaid at the outset of this proceeding.[4]

9. Having regard to all the circumstances described in the OSC's application, the Court determined that it was in the best interests of the Projects' investors to appoint the Receiver.[5]

10. Mr. Furtado and the Receivership Respondents took steps to appeal the Receivership Order (the "**Appeal**"). They also brought a motion to stay the Receivership Order pending the Appeal (the "**Stay Motion**").[6] The Court of Appeal for Ontario dismissed both the Appeal and the Stay Motion.[7]

11. On June 27, 2022, Mr. Furtado and the Receivership Respondents filed an application with the Supreme Court of Canada ("**SCC**") seeking leave to appeal the Appeal's dismissal.[8] As of the date of this factum, no decision has been released by the SCC.

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[3] Sixth Report of the Receiver dated November 14, 2022 (the "**Sixth Report**"), section 2.0.

[4] Endorsement of The Honourable Mr. Justice Pattillo dated December 10, 2021 **[Receivership Endorsement]**, at para. 8.

[5] Receivership Endorsement, at para. 22.

[6] Sixth Report, section 1.0.

[7] Sixth Report, section 1.0.

[8] Sixth Report, section 1.0.

B. The Sale Process Generally and the Aurora Real Property Specifically

12. The Receivership Order grants the Receiver the authority to, *inter alia*, market the Property, sell the Property (with Court approval) and apply for vesting Orders.[9] The Receiver also obtained a further Order from the Court on February 9, 2022 (the "**Sale Process Order**") approving a sale process for the Property (the "**Sale Process**").[10]

13. To date, the Court has granted Orders: (i) approving the sale and vesting of seven of the nine groups of Property, all of which transactions have subsequently closed (the "**Completed Transactions**"); (ii) authorizing and directing the Receiver to distribute monies to certain mortgagees following closing of the Completed Transactions; (iii) authorizing and directing the Receiver, in the case of certain groups of Property, to distribute monies to proven unsecured creditors and investors; and (iv) approving the previous reports of the Receiver and the actions and activities of the Receiver and its counsel.

(i) The Aurora Real Property and the Aurora Assembly[11]

14. When the Receiver was last before the Court on November 23, 2022, it advised that it was continuing to market for sale the Aurora Real Property. The Receiver negotiated and executed the Aurora APS subsequent to the November 23, 2022 Court attendance.

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[9] Receivership Order, at paras. 4(j), 4(k) and 4(l).

[10] Sixth Report Supplement, section 2.0.

[11] Unless otherwise stated, all references in this section are to section 2.0 of the Sixth Report Supplement.

15. The Aurora Real Property (which is owned by one of the Receivership Respondents, Go-To Aurora Co.) and the adjacent properties (which are not owned by any of the Receivership Respondents) form an assembly (the "**Aurora Assembly**").

16. Go-To Aurora planned to develop the Aurora Real Property in coordination with the owners of the adjacent properties (the "**Other Parcels**"). The owners of the Other Parcels are 341868 Ontario Ltd., Kesbro Inc. and Gerry Brouwer (collectively, the "**Other Parcel Owners**"). The Receiver understands that Mr. Brouwer is the authorized signing authority for the Other Parcel Owners.

17. The Aurora Real Property totals 3.1 acres and contains a frontage of 237 feet along Aurora Road. A map reflecting the Aurora Real Property (in blue) and the Other Parcels (in yellow) is provided below:

(ii) Encumbrances and Allocation[12]

18. At the commencement of the receivership proceedings, Hillmount Capital Mortgage Holdings Inc. ("**Hillmount**") held a first mortgage (the "**Aurora Mortgage**") over the Aurora Assembly. Hillmount then assigned its interest in the Aurora Mortgage to the Aurora Purchaser, a company that the Receiver understands is owned or controlled by Mr. Brouwer. As a result, one of Mr. Brouwer's companies (i.e., the Aurora Purchaser) became the mortgagee over real property owned by: (i) Mr. Brouwer and two of his other companies (i.e., the Other Parcel Owners), in the case of the Other Parcels; and (ii) Go-To Aurora Co., in the case of the Aurora Real Property.

19. The Aurora Mortgage is the only mortgage registered on title against the Aurora Real Property.

20. The only lien on title to the Aurora Real Property was registered by Capital Build on January 28, 2022, for approximately $117,000. At the time of registration of the lien, no construction activity had occurred on the Aurora Real Property, and, in any event, the Receiver did not authorize any construction or development activity to occur. Accordingly, given that the Receiver was appointed on December 10, 2021 (and that the only invoice provided in support of the lien is dated November 1, 2021, which invoice is for the totality of the lien amount), the lien is statutorily out of time.[13]

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[12] Unless otherwise stated, all references in this section are to section 2.0 of the Sixth Report Supplement.

[13] The date of the contract in respect of Capital Build's engagement (March 14, 2017) places this lien under the old *Construction Lien Act* (Ontario), pursuant to which Capital Build had 45 days after the last day it supplied services to register its lien. Accordingly, even if Capital Build continued to supply services until the day of the Receiver's appointment of December 10, 2021, Capital Build would have had to register its lien by January 24, 2022, which it failed to do.

21. The Aurora Mortgage was originally registered by Hillmount Capital Inc. ("**Hillmount Capital**") against each of the real properties comprising the Aurora Assembly in the principal amount of $1.9 million on January 15, 2019. The registration was subsequently transferred from Hillmount Capital to Hillmount and amended to the principal amount of $2.125 million on February 9, 2021, before being transferred from Hillmount to the Aurora Purchaser on January 25, 2022 for approximately $2.2 million.

22. Pursuant to an agreement amongst Go-To Aurora Co., Mr. Furtado and the Other Parcel Owners dated January 15, 2019 (the "**Aurora Mortgage Agreement**"), the proceeds of the Aurora Mortgage were to be applied as follows:

    (a) $1.3 million to pay out and discharge the mortgage registered on title to the Aurora Real Property at the time (which mortgage had a principal amount of $1.3 million, all of which was outstanding) (the "**VTB Amount**");

    (b) an interest reserve of $205,400 to pay interest on the corresponding $1.3 million portion of the Aurora Mortgage over the initial two-year term (the "**Furtado Interest Amount**" and, together with the VTB Amount, the "**Furtado Portion**"); and

    (c) the balance to be "*applied to the obligations and liabilities of the Joint Venture [between Go-To Aurora and the Other Parcel Owners]*" (the "**JV Portion**").

23. The Aurora Mortgage Agreement states that repayment of the Furtado Portion (including, without limitation, "*any interest that may be due, from and after the maturity date of the [Aurora] Mortgage, on that portion of the principal amount of the mortgage equal to the VTB Amount and the Furtado Interest Amount*") is the sole responsibility of Go-To Aurora Co. and Mr. Furtado.[14]

24. Additionally, the Aurora Mortgage Agreement states that repayment of the JV Portion "*shall be the liability and responsibility of the Parties hereto [(being Go-To Aurora, Mr. Furtado and the Other Parcel Owners)] and shall be allocated among the Parties in accordance with the terms as set out in the Joint Venture Agreement.*"

(iii) Sale Process Results for the Aurora Real Property and the Aurora Assembly

25. Since the commencement of the receivership proceedings, the Receiver and Mr. Brouwer discussed the sale of the Aurora Assembly and the benefits of collaborating to sell the Aurora Assembly, which the Receiver believed provided the opportunity to maximize the value of the Aurora Real Property and the Other Parcels.

26. The Receiver and Mr. Brouwer agreed to enter into a cooperation agreement (the "**Cooperation Agreement**") such that offers would be solicited for the Aurora Real Property on both a stand-alone basis and as part of the Aurora Assembly. The Cooperation Agreement set out, *inter alia*, the following terms:

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[14] Each of Go-To Aurora Co., Mr. Furtado and Go-To Developments Holdings Inc. also provided a guarantee and indemnity to the Other Parcel Owners with respect to the Furtado Portion.

(a) Mr. Brouwer agreed to retain CBRE Limited ("**CBRE**") to market the Other Parcels jointly with the Aurora Real Property so that they could be offered for sale as an assembly;

(b) Mr. Brouwer agreed to a sell the Aurora Assembly if a minimum offer price were achieved (the "**Minimum Price**"); however, the Receiver would retain the option to sell the Aurora Real Property on its own if that maximized the value of the Aurora Real Property;

(c) Mr. Brouwer may make a bid for the Aurora Real Property. Accordingly, Mr. Brouwer would not be entitled to any information concerning the level of interest in, or offers received for, the Aurora Real Property on its own; and

(d) any sale of the Aurora Assembly is subject to an agreement between the Receiver and Mr. Brouwer as to the allocation of the sale proceeds between the Aurora Real Property and the Other Parcels.

27. Prior to the commencement of the Sale Process, an entity named Georgian Country Trails Inc. ("**Georgian**") submitted a conditional offer for the Aurora Assembly pursuant to a bid dated February 4, 2022. The offer did not allocate the purchase price amongst the properties in the Aurora Assembly and contained a 21-business day due diligence period. Georgian advised that it was unable to waive its due diligence condition by the February 18, 2022 deadline set out in the Court's endorsement dated February 9, 2022 (the "**February 9th Endorsement**").

28. For reasons discussed in the Third Report, including the conditionality of the offer and the limited due diligence that had been performed by Georgian at the time it submitted

its offer, the Receiver did not accept Georgian's offer and encouraged Georgian to participate in the Sale Process. No further offer was submitted by Georgian.

29. In marketing the Aurora Real Property in accordance with the Court-approved Sale Process, CBRE prepared an offering summary (the "**Aurora Offering Summary**"), which it distributed on March 3, 2022 to an extensive list of prospective purchasers, including local, national and international builders, developers and investors. The acquisition opportunity was also published in trade journals and on social media platforms, including LinkedIn. CBRE also directly contacted parties that it believed would be interested in the opportunity.

30. CBRE marketed the Aurora Real Property as both a commercial property and residential property on the Multiple Listing Service to attract both developers and residential buyers. The marketing materials invited potential purchasers to submit offers on the Aurora Assembly or the Aurora Real Property on a standalone basis.

31. Attached to the Aurora Offering Summary was the form of confidentiality agreement ("**CA**") that interested parties were required to sign to access a virtual data room (the "**VDR**"). The VDR included information provided to the Receiver by representatives of the Receivership Respondents. The VDR also included a form of asset purchase agreement ("**APS**"). The Receiver recommended that prospective purchasers submit offers in the form of the APS, together with a blacklined version of their offer against the form of template offer.

32. CBRE advised interested parties that the bid deadline was April 20, 2022. As discussed in the marketing report prepared by CBRE, which is appended to the Sixth Report Supplement, CBRE widely canvassed the market and received 20 signed CAs.

33. Only one offer was submitted at the bid deadline (April 20, 2022), which was from a party related to the Aurora Purchaser for a purchase price of $2.1 million. After consulting with CBRE, the Receiver decided to continue to market the property for sale, given that:

(a) as reflected in the Aurora Mortgage allocation calculations in Section 2.4 of the Sixth Report Supplement, the offer would not have resulted in recoveries to Go-To Aurora's unsecured creditors or investors;

(b) the Receiver considered the strategic value of the Aurora Real Property to the Other Parcel Owners and believed that these parties should attribute significant value to the Aurora Real Property as a sale to a third party could affect the opportunity to develop the Aurora Assembly; and

(c) the Receiver wanted the opportunity to continue to canvass the market for a better offer.

34. Following the bid deadline, the Aurora Real Property continued to be listed for sale with CBRE on an unpriced basis and the Receiver continued to engage with Mr. Brouwer regarding his interest in the Aurora Real Property.

35. In August 2022, a significant investor (the "**Investor**") in Go-To Aurora advised the Receiver that he was working with an undisclosed developer on an acquisition for the Aurora Real Property.

36. The Investor advised the Receiver that the developer requested Mr. Furtado's assistance to structure a transaction for the Aurora Real Property (the "**Proposed Investor Transaction**") based on Mr. Furtado's knowledge of the contemplated development for that property.

37. The February 9th Endorsement prohibits Mr. Furtado from engaging in any further sales or marketing efforts of the Real Property and requires him to direct any potential purchasers to the Receiver (and/or to CBRE). As a result, Mr. Furtado's counsel requested that the Receiver consent to Mr. Furtado providing assistance to try to facilitate a sale of the Aurora Real Property. The Receiver advised Mr. Furtado that it did not object to his participation in the Sale Process, subject to it being for the limited purpose of the Proposed Investor Transaction and that he disclose any financial interest he may have therein. Mr. Furtado's counsel advised that Mr. Furtado did not intend to have a financial interest in the Proposed Investor Transaction.

38. The Receiver understands that the Investor was also engaging with Mr. Brouwer regarding its potential acquisition of the Aurora Real Property; however, by November 2022, Mr. Brouwer's counsel advised that it did not expect to receive an acceptable offer from the Investor and/or the developer with which he was working. In addition, the Receiver did not receive offers from any other third parties through CBRE's marketing efforts.

39. As no offer had been received from the Investor by late November, the Receiver advised the Aurora Purchaser that the Receiver was prepared to consider an offer from it. The

discussions between the Receiver and Mr. Brouwer (through his counsel) resulted in the Receiver accepting the Aurora APS (subject to Court approval).

(iv) The Proposed Aurora Transaction[15]

40. A summary of the Aurora APS is as follows:

(a) Purchaser: The Aurora Purchaser., which is arm's length to the Receivership Respondents.

(b) Purchased Assets: All of the Receiver's and Go-To Aurora Co.'s right, title and interest in the Aurora Real Property and certain permits (if any exist) as specified in the Aurora APS.

(c) Purchase Price: The Purchase Price is $1.8 million. The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes. The Aurora APS provides that the Priority Payables,[16] which the Receiver estimated to be approximately $508,000, shall be satisfied by wire transfer to the Receiver on closing and that the remainder of the purchase price shall be credit bid by the Aurora Purchaser in satisfaction of part of the Aurora Mortgage.

(d) Deposit: As the Aurora Purchaser is the first mortgagee, a deposit is not required under the Aurora APS.

(e) Closing Date: The later of: (i) the first Business Day following the date that is ten days following the granting of the Aurora AVO; and (ii) the first Business Day following the date on which any appeals or motions to set aside or vary the Aurora AVO have been finally determined, or such other date as the Receiver and the Aurora Purchaser agree in writing.

(f) Material Conditions:

(i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of enjoining, preventing or restraining the completion of the Transaction or otherwise claiming that such completion is improper; and

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[15] Unless otherwise stated, all references in this section are to, and all capitalized terms in this section are defined in, sections 2.5 and 2.7 of the Sixth Report Supplement.

[16] This is defined as "all amounts owing (including all amounts accrued but not yet payable by Go-To Aurora Co. as of the Closing Date) which rank *pari passu* or in priority to the Mortgage Indebtedness including, without limitation the amounts secured by, or to be secured by, the Receivership Charge and which are allocable to the Specified Real Property".

(i) the Court shall have issued the Aurora AVO.

41. The Receiver's counsel has provided an opinion that, subject to the standard assumptions and qualifications contained therein, the real property security granted by Go-To Aurora Co. to the Aurora Purchaser, as registered on title to the Aurora Real Property, is valid and enforceable.

42. The Receiver is not aware of any other secured creditors or any other claims that rank, or may rank, in priority to the secured claim of the Aurora Purchaser (being the Aurora Mortgage), other than:

(a) property taxes, which will be satisfied on closing of the Aurora Transaction; and;

(b) the Receiver's Charge. In this regard, the Receiver will retain a reserve for its present and future fees and expenses, and those of its counsel. This amount is being funded under the Aurora APS as part of the Priority Payables amount.

43. The listing agreement with CBRE for the Aurora Property expired on October 4, 2022 and was not extended or renewed. No commission is payable to CBRE as a result of this transaction. CBRE is aware that no commission will be paid to it.

44. As the Aurora APS is structured as a credit bid (except for the Priority Payables amount), there will be no recoveries for Go-To Aurora's registered construction lien claimant (being Capital Build) or to Go-To Aurora's unsecured creditors or investors.

B. Go-To Eagle Valley and the Eagle Valley Construction Lien Holdback[17]

45. As discussed in the Fifth Report,[18] and in accordance with the Court's Ancillary Order dated August 12, 2022, the Receiver retained $916,196 (the "**Eagle Valley Construction Lien Holdback**"), which represents the maximum amount (inclusive of the statutory maximum for costs) of the construction liens that could possibly rank in priority to Imperio.

46. Imperio was the first mortgagee formerly registered against the Eagle Valley Real Property, after the vendor take-back mortgage in favour of Queen Properties was repaid. The Eagle Valley Construction Lien Holdback was retained by the Receiver to enable it to make Court-approved distributions to Queen Properties and Imperio, while reserving an amount to address a potential priority dispute as between Imperio, on the one hand, and HK United, HC Matcon and Soil-Mat (together with HK United and HC Matcon, the "**Lien Claimants**"),[19] on the other hand.

47. The Eagle Valley Construction Lien Holdback is comprised of the following:

	Potential Priority Amount ($000s)
HK United	432
HC Matcon	271
Soil-Mat	30
	733
Statutory maximum for costs (25%)	183
	916

[17] Unless otherwise stated, all references in this section are to section 3.0 of the Sixth Report Supplement.

[18] Fifth Report of the Receiver dated August 12, 2022 (the "**Fifth Report**").

[19] As noted in the Fifth Report, construction liens were also registered by Capital Build (which guaranteed, and postponed to, the Imperio mortgage, such that the totality of any such lien ranks behind Imperio's mortgage) and Peter's Excavating Inc. (which lien was statutorily out of time, and which did not file a claim in the Claims Procedure and is therefore barred from asserting a claim).

48. The Eagle Valley Construction Lien Holdback represents the only remaining material source of funds from the sale proceeds of the Eagle Valley Transaction. As noted in the Sixth Report, the aggregate amount recovered to date by Imperio in these proceedings in respect of its mortgage (approximately $2.139 million) is less than the indebtedness owing to Imperio (approximately $3.4 million). Accordingly, regardless of how the Eagle Valley Construction Lien Holdback is distributed between Imperio and the Lien Claimants, Go-To Eagle Valley's subordinate stakeholders (whether creditors or investors) are not expected to receive any monetary recoveries from the Eagle Valley Transaction.

49. The Receiver and its counsel reviewed the claims of the Lien Claimants and attempted to reach a consensus amongst the Lien Claimants and Imperio as to the distribution of the Eagle Valley Construction Lien Holdback based on the Receiver's understanding of their statutory priority entitlements. Pursuant to correspondence dated December 15, 2022 and December 19, 2022, the Receiver advised Imperio and the Lien Claimants, respectively, that the Receiver would recommend to Court the following distributions (the "**Recommended Lien Holdback Distributions**"):

(a) to HK United – $43,194.07, representing the 10% statutory holdback associated with HK United's $431,940.65 claim, as noted in the Fifth Report;

(b) to HC Matcon – $25,901.58, representing the amounts claimed as outstanding for the statutory holdback by HC Matcon in its proof of claim (being slightly less than 10% of its lien claim of $270,772.30, or $27,077.23);

(c) to Soil-Mat – between $3,024.43 and $30,244.34, being the range of 10% to 100% of the lien filed by Soil-Mat;[20] and

(d) to Imperio – the remaining balance of the Eagle Valley Construction Lien Holdback.

50. Copies of the extensive correspondence amongst counsel for the Receiver, the Lien Claimants and Imperio are provided in Appendix "G" to the Sixth Report Supplement. As noted therein, Imperio has advised the Receiver that, in its view, its mortgage ranks in priority to the Lien Claimants; however, it would support the Receiver's recommended distribution if the Lien Claimants do not object to the recommendation. As of the date of the Sixth Report Supplement, the Lien Claimants had not advised the Receiver of their formal position, but the Receiver understands that there have been communications between representatives of Imperio and the Lien Claimants.

51. If, upon the return of the Receiver's motion, there is: (i) opposition to the Recommended Lien Holdback Distributions; and (ii) Imperio and the Lien Claimants have not agreed on an alternative distribution, the Receiver is asking that a litigation timetable be established between Imperio and the Lien Claimants to adjudicate the dispute between them.

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[20] The range for Soil-Mat depends on whether its contract was with the owner directly (Go-To Eagle Valley) or with the construction manager (Capital Build). Soil-Mat's statement of claim pleads that Go-To Eagle Valley "*or*" Capital Build hired Soil-Mat. If the agreement is with the construction manager, and because the value of the improvements provided by the construction manager exceeded $302,443, the Receiver is of the view that this would entitle Soil-Mat to $30,244.34. If the agreement is with the owner directly, the Receiver is of the view that this would entitle Soil-Mat to $3,024.43. The Receiver requested that Soil-Mat provide any documentary support to the Receiver that Soil-Mat contracted with the construction manager instead of directly with the owner. Subsequent to the date of the Sixth Report Supplement, certain documentary support has been provided that could justify a distribution of $30,244.34 to Soil-Mat if the other Lien Claimants and Imperio agree.

C. Production Requests of Mr. Maltz[21]

52. As noted in the Sixth Report, the Receiver is reviewing the secured claim filed in the Claims Procedure by Adelaide Square Developments Inc. ("**ASD**") in the amount of $19.8 million. ASD's role in the transactions that led to Go-To Adelaide acquiring the Adelaide Real Property (the "**Adelaide Purchase**") is set out in detail in the OSC's application record that led to the Receiver's appointment.

53. Information provided to the Receiver by Mr. Raffaghello of Concorde Law, who acted as counsel for ASD in the Adelaide Purchase, includes:

(a) a direction regarding the disbursement of funds dated April 15, 2019 in connection with Go-To Adelaide's purchase of a portion of the Adelaide Real Property (the "**First Direction**"). Pursuant to the First Direction, the purchasers and their counsel were irrevocably authorized and directed to pay a $20,950,000 "*Assignment Fee due to Adelaide Square Developments Inc.*" to "*Concorde Law Professional Corporation, In Trust*"; and

(b) a second direction regarding funds dated April 2019 (the "**Second Direction**") and corresponding trust statement whereby ASD irrevocably authorized and directed Concorde Law to pay $22,100,000 to the parties listed on the Second Direction. This represents an increase of $1,150,000 from the First Direction, with the $1,150,000 difference being paid to Maltz PC, in trust (the "**Murray Maltz Trust Funds**"). The other recipients and the amounts paid to them on the Second Direction are consistent with the First Direction.

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[21] Unless otherwise stated, all references in this section are to section 4.0 of the Sixth Report Supplement.

54. Pursuant to a letter dated December 1, 2022, the Receiver required that Mr. Maltz provide the Receiver with all non-privileged Records (as defined in the Receivership Order) by December 9, 2022, including, without limitation, all accounting Records, evidencing who ultimately received the Murray Maltz Trust Funds. The Receiver also requested that Mr. Maltz advise of the role that the recipient played in the Adelaide Purchase and the reason the recipient was entitled to receive the Murray Maltz Trust Funds. This information was requested pursuant to paragraph 7 of the Receivership Order, which requires non-privileged Records to be delivered to the Receiver.

55. Mr. Maltz responded by providing his trust ledgers in connection with this matter (the "**Trust Ledgers**") on which the identity of his client(s) was redacted. Mr. Maltz also stated that "*[he] was advised that [his] client was receiving funds associated with brokering a transaction associated with 46 Charlotte Street,*" being one of the parcels included in the Adelaide Real Property. Mr. Maltz also provided certain additional limited information, and advised that he would provide a non-redacted version of the Trust Ledgers containing the identity of his client(s) (the "**Unredacted Trust Ledgers**") if he were provided with case law on the matter.

56. Subsequent communications were exchanged between the Receiver's counsel and Mr. Maltz's counsel, as discussed in and appended to the Sixth Report Supplement (including the Receiver's counsel providing the requested case law to Mr. Maltz's counsel). Mr. Maltz's counsel has advised the Receiver that:

(a) apart from the identity of Mr. Matlz's client, "*Mr. Maltz has no further information in connection with the transaction other than what he has*

previously advised and what was stated in [his counsel's] letter dated December 6, 2022;" and

(b) with respect to the identity of Mr. Maltz's client, "*Mr. Maltz is prepared for the Receiver to obtain either the necessary court order or clarification of paragraph 7 of [the Receivership Order] regarding your client's request. Mr. Maltz would certainly comply with a clearly worded order and take no position on the issue. Mr. Maltz has no desire to obstruct the Court-appointed Receiver in carrying out the receivership. He simply requires 100 percent comfort from a clearly worded Court Order that he must disclose the identity of his client so that he is protected against an action for breach of solicitor-client privilege or breach of confidentiality and protected against a complaint that he breached the Rules of Professional Conduct*."

D. Insurance Update[22]

57. During the last attendance on November 23, 2022, the Court declined at that time to schedule the lift stay motion requested by Lloyd's. As noted in the Sixth Report, the purpose of such a lift stay motion would be to permit Lloyd's to rescind insurance coverage against the Receivership Respondents due to alleged misrepresentations and incomplete disclosure made by Mr. Furtado (against whom coverage has already been rescinded). A 30-minute case conference has been scheduled for January 20, 2023. The Receiver believes the following information to be relevant for that conference:

[22] Unless otherwise stated, all references in this section are to section 5.0 of the Sixth Report Supplement.

(a) the Receiver has learned that Mr. Furtado commenced a notice of application on October 14, 2022, against Lloyd's, seeking that he be "*relieved from forfeiture with respect to his imperfect compliance with the Investment Management Insurance policy no. B0621PGOTO000218 issued by [Lloyd's],*" and that Lloyd's indemnify him thereunder for his "*Defence costs*" and "*Loss*" in connection with both this receivership proceeding and the OSC's enforcement proceeding (collectively, the "**Relief from Forfeiture Proceeding**");

(b) the Receiver has also learned that Lloyd's filed a notice of appearance in the Relief from Forfeiture Proceeding on October 21, 2022. As noted in the Sixth Report, Lloyd's did not respond to the Receiver's August 25th Letter regarding insurance matters until October 27, 2022. Lloyd's response and purported urgency referenced in its response of October 27, 2022 did not reveal the existence of the Relief from Forfeiture Proceeding; and

(c) after becoming aware of the above, the Receiver's counsel requested to be: (i) added to the service list in the Relief from Forfeiture Proceeding; and (ii) provided with whatever pleadings may have already been exchanged in that proceeding. This request was not accepted. Counsel in the Relief from Forfeiture Proceeding for Lloyd's and Mr. Furtado have advised that they consider that proceeding and its results to be "*a private matter as between Mr. Furtado and his insurer*."[23]

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[23] They have further advised that "*once the documents are filed they are part of the public domain, and your client is entitled to see them in the same way that any other member of the public is. We are therefore content to share the application materials after they are filed as a professional courtesy, to avoid you going to the hassle and expense of pulling the court file*."

58. Neither the Receiver nor its counsel has received any materials from Lloyd's, Mr. Furtado or their counsel in respect of the Relief from Forfeiture Proceeding or any further materials in respect of Lloyd's proposed motion in the receivership proceeding.

PART III – ISSUES AND THE LAW

59. The substantive issues on the Receiver's motion are the granting of the Aurora AVO and the Ancillary Order, inclusive of the proposed relief regarding distributions, productions and the approval of the Sixth Report Supplement.

PART IV – LAW AND ARGUMENT

60. In determining whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently and uniformly applied the principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*,[24] namely:

(a) *whether the receiver has made a sufficient effort to get the best price and has not acted improvidently*;

(b) *whether the interests of all parties have been considered*;

(c) *the efficacy and integrity of the process by which offers are obtained*; and

(d) *whether there has been unfairness in the working out of the process.*

61. The Receiver submits that the applicable *Soundair* principles have been satisfied in respect of the proposed Aurora Transaction and related relief. The "facts" section of this factum, together with the analysis in the Sixth Report Supplement and the

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[24] (1991), 4 O.R. (3d) 1 (C.A.) (CanLII: http://canlii.ca/t/1p78p) [*Soundair*].

appendices thereto, reflect the significant effort undertaken by the Receiver to maximize realizations, and to act fairly, efficiently and with integrity in considering the interests of all stakeholders, including, without limitation:

(a) the sale process undertaken by the Receiver that led to the Aurora Transaction was commercially reasonable, and was conducted in accordance with the Court-approved Sale Process;

(b) the Sale Process for the Aurora Real Property commenced in March 2022 and accordingly, the Aurora Real Property has been exposed to the market for a significant period of time;

(c) the Court has previously approved the seven Completed Transactions based on the conduct of, and results of, the Sale Process;

(d) CBRE has extensive experience selling development properties in and around the GTA, and widely canvassed the market for prospective purchasers. It is of the view that the Aurora Transaction is the best available in the circumstances;

(e) the Receiver understands that the Investor and Mr. Brouwer were not able to agree on an acceptable transaction over several months. The Receiver then negotiated with Mr. Brouwer/the Aurora Purchaser, which submitted the Aurora APS;

(f) the Aurora APS maximizes recoveries for this property in the circumstances;

(g) the Receiver is of the view that the purchase price is fair and reasonable based on: (1) the conduct of the Sale Process, which was carried out consistent with the terms approved by the Court for several months; (2) the lack of offers received; and (3) estimates of value that were provided to the Receiver by four

realtors that participated in its broker solicitation process;

(h) the Receiver does not believe that further time marketing the property will result in a superior transaction;

(i) the transaction is scheduled to close by January 31, 2023, assuming there are no appeals related to this relief; and

(j) the transaction is unconditional except for Court approval.[25]

62. The Receiver's rationale for its acceptance of the Aurora Transaction reflects sound business judgment. As such, the requested relief falls within "*the general principle that the court will be loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court.*"[26]

63. With respect to the Recommended Lien Holdback Distributions, they are based on section 78(2) of the *Construction Act*, which states:

> Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

64. The Eagle Valley Real Property was vacant land that had already been purchased prior to the existence of Imperio's mortgage or any advances thereunder. In addition, development of such land was the sole business of the applicable Receivership

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[25] Sixth Report Supplement, section 2.6.

[26] *Soundair*, at para. 16; *Morganite Canada Corp. v. Wolfhollow Properties Inc.* (2003), 47 CBR (4th) 89 (ONSC) (CanLII: http://canlii.ca/t/4qkp) at para. 7; *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 (CanLII: http://canlii.ca/t/hsp9r) at para. 43.

Respondents. It therefore appears to the Receiver (absent additional information) that the intention was for the mortgage to fund improvements. If Imperio and the Lien Claimants disagree with the Recommended Lien Holdback Distributions, and if they are unable to agree on an alternative distribution, it is appropriate for them to litigate the dispute between themselves, being the only stakeholders with a possible entitlement to these funds.

65. With respect to producing the Unredacted Trust Ledgers, Mr. Maltz is already required pursuant to paragraph 7 of the Receivership Order to provide all non-privileged Records to the Receiver, and the identity of his client(s) is not subject to solicitor-client privilege. The Receiver has provided case law to Mr. Maltz, including a recent case in which he was involved personally, confirming: (i) solicitor-client privilege "*applies only to communications*;" and (ii) the "*general rule*" that "*whenever a solicitor asserts that a communication is protected by the solicitor-and-client privilege, he cannot refuse to identify the client on whose behalf the privilege is asserted, because the identity of his client is not the subject of a professional confidence*."[27] There is no reason to depart from the general rule in this case, as there is not even a subject communication over which privilege can be asserted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED as of the date first written above.

Aird & Berlis LLP

AIRD & BERLIS LLP, lawyers for the Receiver

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[27] *Haroon v. Sheikh*, 2020 ONSC 1284 (CanLII: https://canlii.ca/t/j5rn6) at para. 42; *Greymac Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.) (CanLII: https://canlii.ca/t/g168p) at 338 [emphasis added].

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, (1991) 4 O.R. (3d) 1 (C.A.).

2. *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, (2003) 47 CBR (4th) 89 (ONSC).

3. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581.

4. *Haroon v. Sheikh*, 2020 ONSC 1284.

5. *Greymac Ontario (Securities Commission) v. Greymac Credit Corp. (1983), 41 O.R. (2d) 328 (Div. Ct.).*

SCHEDULE "B"
RELEVANT STATUTES

***Securities Act*, R.S.O. 1990, c. S.5**

Freeze direction
126 (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

(a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;

(b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or

(c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property.

Duration

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise.

Application

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction.

Exclusions

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states.

Certificate of pending litigation

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation.

Review by court

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate.

Grounds for continuance or other order

(5.1) An order may be made under subsection (5) if the court is satisfied that the order would

be reasonable and expedient in the circumstances, having due regard to the public interest and,

(a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or

(b) the regulation of capital markets in Ontario or another jurisdiction.

Notice

(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction.

Clarification or revocation

(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked.

Appointment of receiver, etc.

129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

Grounds

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law.

Application without notice

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days.

Motion to continue order

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate.

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority.

Directors' powers cease
(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. .

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 194, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion.

Limitation period
129.1 Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.

Directors and officers
129.2 For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

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

137(2) Sealing documents

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

***Construction Lien Act*, R.S.O. 1990, c. C.30**

Expiry of liens

31. (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. R.S.O. 1990, c. C.30, s. 31 (1).

Contractor's liens

(2) Subject to subsection (4), the lien of a contractor,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and

(ii) the date the contract is completed or abandoned; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date the contract is completed, and

(ii) the date the contract is abandoned. R.S.O. 1990, c. C.30, s. 31 (2).

Liens of other persons

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

(ii) the date on which the person last supplies services or materials to the improvement, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which the person last supplied services or materials to the improvement, and

(ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract. R.S.O. 1990, c. C.30, s. 31 (3).

Separate liens when ongoing supply

(4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, the person's lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that the person may have for the supply of services or materials after that date. R.S.O. 1990, c. C.30, s. 31 (4).

Declaration of last supply

(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,

(a) the date on which the person last supplied services or materials under that contract or subcontract; and

(b) that the person will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the person making the declaration. R.S.O. 1990, c. C.30, s. 31 (5).

What liens may be perfected

36. (1) A lien may not be perfected unless it is preserved. R.S.O. 1990, c. C.30, s. 36 (1).

Expiry of preserved lien

(2) A lien that has been preserved expires unless it is perfected prior to the end of the forty-five-day period next following the last day, under section 31, on which the lien could have been preserved. R.S.O. 1990, c. C.30, s. 36 (2).

How lien perfected

(3) A lien claimant perfects the lien claimant's preserved lien,

(a) where the lien attaches to the premises, when the lien claimant commences an action to enforce the lien and, except where an order to vacate the registration of the lien is made, the lien claimant registers a certificate of action in the prescribed form on the title of the premises; or

(b) where the lien does not attach to the premises, when the lien claimant commences an action to enforce the lien. R.S.O. 1990, c. C.30, s. 36 (3).

Rules re sheltering

(4) A preserved lien becomes perfected by sheltering under a lien perfected by another lien claimant in respect of the same improvement in accordance with the following rules:

1. The preserved lien of a lien claimant is perfected by sheltering under the perfected lien of

another lien claimant in respect of the same improvement where,

i. the lien of that other lien claimant was a subsisting perfected lien at the time when the lien of the lien claimant was preserved, or

ii. the lien of that other lien claimant is perfected in accordance with clause (3) (a) or (b) between the time when the lien of the lien claimant was preserved and the time that the lien of the lien claimant would have expired under subsection (2).

2. The validity of the perfection of a sheltered lien does not depend upon the validity, proper preservation or perfection of the lien under which it is sheltered.

3. A sheltered claim for lien is perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered.

4. Upon notice given by a defendant named in a statement of claim, any lien claimant whose lien is sheltered under that statement of claim shall provide the defendant with further particulars of the claim for lien or of any fact alleged in the claim for lien. R.S.O. 1990, c. C.30, s. 36 (4).

General lien

(5) Subject to subsection 44 (4) (apportionment), a preserved general lien that attaches to the premises shall be perfected against each premises to which the person having the lien desires the lien to continue to apply. R.S.O. 1990, c. C.30, s. 36 (5).

Where period of credit extended

(6) A person who has preserved a lien, but who has extended a period of credit for the payment of the amount to which the lien relates, may commence an action for the purpose of perfecting the lien even though the period of credit has not at the time expired. R.S.O. 1990, c. C.30, s. 36 (6).

***Construction Act*, R.S.O. 1990, c. C.30**

Priority over mortgages, etc.
78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5). R.S.O. 1990, c. C.30, s. 78 (8); 2017, c. 24, s. 70.

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983. R.S.O. 1990, c. C.30, s. 78 (9).

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit. R.S.O. 1990, c. C.30, s. 78 (10); 1997, c. 19, s. 30; 2017, c. 24, s. 53 (2), 70.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer. R.S.O. 1990, c. C.30, s. 78 (11).

ONTARIO SECURITIES COMMISSION Applicant	and	**GO-TO DEVELOPMENTS HOLDINGS INC. et al** Respondents	Court File No: CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF THE RECEIVER

(RETURNABLE JANUARY 20, 2023)

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