

Court / Estate No.: 31-2688719

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION  
TO MAKE A PROPOSAL OF  
RGN BRITISH COLUMBIA XXIII LIMITED PARTNERSHIP**

**RESPONDING MOTION RECORD OF  
HOMER STREET OFFICE PROPERTIES INC.  
(Returnable December 14, 2020)**

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Limited Partnership

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## INDEX

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TAB 1

Court / Estate No.: 31-2688719

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION**  
**TO MAKE A PROPOSAL OF**  
**RGN BRITISH COLUMBIA XXIII LIMITED PARTNERSHIP**

**AFFIDAVIT OF ROSLIND MCQUEEN**  
**(Sworn December 13, 2020)**

**I, Roslind McQueen**, of the City of Vancouver, in the Province of British Columbia, **MAKE OATH AND SAY:**

1. I am a Leasing Executive with the Westbank Group, of which Homer Street Office Properties Inc. ("**Homer Street**"), a respondent to this proceeding, is a member. My responsibilities include overseeing leases for new build and existing properties in the Vancouver, Toronto, Calgary and Seattle markets. I was responsible for overseeing the lease between Homer Street and the debtor in this proceeding, RGN British Columbia XXIII Limited Partnership ("**RGN**"), which is the subject of RGN's motion to extend the stay of proceeding. As such, I have personal knowledge of the matters to which I herein depose, unless stated to be based on information and belief, in which case I state the source of the information and believe it to be true.

2. Before swearing this affidavit, I have reviewed the Affidavit of Joshua Nicosia sworn December 8, 2020 (the "**Nicosia Affidavit**") and the First Report to the Court of KSV Restructuring Inc. as Proposal Trustee for RGN dated December 9, 2020 (the "**Trustee's Report**").

### **The Lease**

3. Homer Street and RGN entered a lease agreement dated August 31, 2018 (the “Lease”) in respect of RGN’s intended tenancy of eight floors and a portion of the ground floor in a 25-story commercial building that is currently under construction located at 410 West Georgia Street in Vancouver, British Columbia. The building’s 25 floors have been erected. A picture of the completed structure is attached as **Exhibit “A.”** Homer Street is now in a position to commence the fit out of leased premises per tenant’s plans. RGN’s leased premises would include an access point through an office lobby that would be publicly accessible and visible inside the building at ground level, including a featured staircase from ground level to the second floor. A copy of the Lease is attached as Exhibit “D” to the Nicosia Affidavit.

4. The commercial terms of the Lease included the following:

- (a) RGN would not be required to pay rent until the “Commencement Date”, which date is at least nine months after the “Delivery Date”. The Delivery Date is defined as one of various events, none of which have yet occurred (Sections 4.4(a) and (b) and 5.2);
- (b) Homer Street was required to complete a substantial buildout of the interior premises leased by RGN in accordance with designs and specifications delivered by RGN (Section 1.1. “Landlord’s Project Work”; Section 4.4(a)(i); Schedule “D”, s. 3; Schedules “E” and “F”)

- (c) RGN's affiliate entity, Regus plc (the "**Indemnifier**"), agreed to indemnify Homer Street on five business days notice for any rent or other charges or amounts owing under the Lease by RGN up to a maximum liability of \$10,000,000, subject to a cap amount which reduces on a straight line basis over the term of the Lease (Sections 1.1(c) and 17.12; SCHEDULE "G", Section 2(a));
- (d) The bankruptcy or insolvency of the Indemnifier is an "Event of Default" under the Lease if within 10 business days of notice from Homer Street of the occurrence of the insolvency of the Indemnifier, RGN fails to post security equal to the Indemnifier's liability cap (Section 15.1(e)); and
- (e) Homer Street was permitted to terminate the Lease immediately and without further notice whenever an Event of Default occurred (Section 15.2(a)).

5. RGN has no obligation to pay any rent under the Lease until the Commencement Date and does not owe any money to Homer Street, apart from any liability that may flow from its default, described below.

6. Prior to the termination of the Lease, described below, Homer Street completed much of the base building work required as part of the "Landlord's Project Work" (as defined in the Lease). Just prior to termination, Homer Street was at the point where pursuant to the program for completion of the Landlord's Project Work, Homer Street was required to incur significant cost, approximately \$20 million, in providing the buildout of RGN's leased premises. This work has, and if the Lease remained effective

would continue to, require Homer Street to build out RGN's premises in accordance with RGN's specifications for its particular use on an ongoing basis and incur significant costs to do so.

7. The indemnity in favour of Homer Street is a crucial component of the Lease.

8. As described in paragraph 2.0(4) of the Trustee's Report, RGN is a special purpose entity that only exists for the purpose of acting as tenant under the Lease. It is my understanding that RGN does not presently generate income or hold any material assets of its own, outside of arrangements with its affiliates, including the Indemnifier.

9. The Lease contemplated Homer Street delivering a 'turnkey' premises for RGN, built out to RGN's design and specifications before RGN ever paid a penny of rent. This arrangement involved Homer Street spending significant capital on Landlord's Project Work for RGN. Homer Street required assurance that it would be indemnified should RGN fail to take occupancy, fail to pay rent at some date in the future or commit another breach of the Lease. In the absence of the indemnity, Homer Street would risk incurring a substantial loss caused by RGN without meaningful recourse.

### **Insolvency of the Indemnifier & Default Notices**

10. In September 2020, Homer Street learned that the Indemnifier was subject to insolvency proceedings in Luxembourg and the Bailiwick of Jersey. It is my understanding that, as described in paragraph 8 of the Trustee's Report, a trustee in bankruptcy was appointed in respect of the Indemnifier by the Luxembourg Court on October 9, 2020 following an application by the Indemnifier on September 10, 2020 in



Jersey confirming its insolvency and seeking an order of the Jersey court that it request the assistance of the Luxembourg court in making a order of bankruptcy against the Indemnifier and appoint a trustee in bankruptcy over the Indemnifier .

11. Immediately upon learning of the Indemnifier's insolvency proceeding in Jersey, I sent an email on September 24, 2020 to Wayne Berger of IWG plc, an affiliate of RGN and the Indemnifier, expressing my concern about the insolvency.

12. On September 28, 2020, I sent Mr. Berger an email attaching identical default notices from Homer Street's lawyers addressed to RGN's offices in Toronto and Carrolton, Texas. The notices were also delivered by courier to RGN's respective offices. The default notices are attached as Exhibit "I" to the Nicosia Affidavit.

13. The default notices advised that the Indemnifier's insolvency proceedings in Jersey and Luxembourg constituted an Event of Default under the Lease if security of \$10,000,000 in cash or by letter of credit was not posted with Homer Street, and failing which Homer Street may terminate the Lease without further notice all as provided in the Lease.

#### **Homer Street Terminates the Lease**

14. Following delivery the default notices, I and other representatives of Homer Street carried on discussions with RGN in an attempt arrive at a remedy of its default and preserve the Lease. However, as described in the Nicosia Affidavit, RGN was not able to provide a security deposit to give Homer Street the financial security that it

required to carry on with the Lease, which would involve further outlays of capital to build out RGN's custom premises.

15. Our discussions with RGN included a telephone call on October 2, 2020 attended by myself, my colleagues Ian Duke and Parvinder Hardwick, and representatives of RGN, including Mr. Berger and Mark Dixon. During that call, Mr. Dixon advised that RGN could not continue with the Lease and asked if Homer Street wished to take back the premises.

16. On November 19, 2020, Mr. Duke sent an email to Mr. Berger advising that Homer Street was terminating the Lease. The email enclosed termination letters from Homer Street's lawyer addressed to RGN's respective offices, setting out the basis of RGN's default and Homer Street's termination of the Lease. The email and termination letters are attached as Exhibits "K", "L" and "M" to the Nicosia Affidavit.

17. On November 26, 2020, counsel for RGN sent a letter to Homer Street's lawyers advising of this proceeding under the *Bankruptcy and Insolvency Act* and taking the position that the Lease termination was invalid. The letter from RGN's counsel is attached as Exhibit "N" to the Nicosia Affidavit. The letter was the first notice that Homer Street received of this proceeding, commenced November 13, 2020.

18. On December 4, 2020, I received an email from Mr. Berger, which is attached as Exhibit "O" to the Nicosia Affidavit. Among other things, the email says "We are still amenable to finding a resolution to your request for an alternative guarantor in replacement of Regus plc". This statement was false. RGN never made any attempts to find a replacement indemnitor. The only proposals that RGN made during our

discussions following the default involved the assignment by RGN of a sub-tenant contract to Homer Street in exchange for hiring RGN as manager of the premises. Such proposals were not attractive to Homer Street.

### **RGN Requests a Release of the Indemnifier**

19. Paragraph 13 of the Nicosia Affidavit states that “potential arrangements discussed” between Homer Street and RGN following the default notice “ranged from restructuring the guarantee to restructuring [RGN’s] underlying Lease”. In fact, RGN also proposed that the Lease be terminated consensually on the condition that the Indemnifier be released from liability under its indemnity.

20. RGN’s legal counsel, Lee Nicholson of Stikeman Elliott LLP, sent a letter dated November 26, 2020 to Homer Street’s lawyer, a true copy of which is attached as **Exhibit “B”** to this affidavit. Among other things, the letter says:

Given Landlord’s actions and desire to terminate the Lease, the Tenant would be willing consider a full and final surrender of the Lease upon execution of mutual releases in favour of the parties, including the Tenant, the Landlord and the Indemnitor.

21. Mr. Nicholson sent a further letter to Homer Street’s lawyer dated December 7, 2020, a true copy of which is attached as **Exhibit “C”** to this affidavit. Among other things, the email says:

It should be possible to develop a restructured replacement indemnity to replace the guarantee of Redox Plc., however, due to the various creditor protection

proceedings involving Regus affiliates, a full letter of credit replacement is not possible in the current circumstances. If the Landlord remains unwilling to discuss a proposal that involves the Tenant continuing with the project, we would also consider options on a surrender of the Lease.

**Homer Street Will Not Agree to RGN’s Proposal**

22. Section 5.0 of Trustee’s Report states that “the extension would provide the Partnership with a further opportunity to engage in negotiations with the Landlord and address the alleged default under the Partnership Lease.” Homer Street does not intend to have any further negotiations with RGN. Homer Street has already terminated the Lease. There is no proposal RGN could put to Homer Street to which Homer Street would agree.

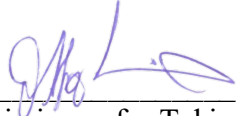
**SWORN VIRTUALLY BEFORE ME** in accordance with O. Reg. 431/20 at the City of Toronto, in the Province of Ontario for both the commissioner and at the City of Vancouver, in the province of British Columbia, for deponent, on December 13, 2020.

  
\_\_\_\_\_  
**ROSLIND MCQUEEN**

  
\_\_\_\_\_  
A Commissioner for taking Affidavits (or as may be)  
Jeffrey Levine, Barrister and Solicitor, LSO# 55582H

TAB A

This is Exhibit "A" referred to in the affidavit of  
ROSLIND MCQUEEN  
affirmed before me this 13<sup>th</sup> day of December, 2020.



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A Commissioner for Taking Affidavits

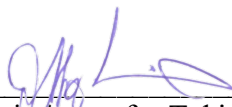
Jeffrey Levine, Barrister and Solicitor, LSO# 55582H



TAB B



This is Exhibit "B" referred to in the affidavit of  
ROSLIND MCQUEEN  
affirmed before me this 13<sup>th</sup> day of December, 2020.



---

A Commissioner for Taking Affidavits

Jeffrey Levine, Barrister and Solicitor, LSO# 55582H

Lee Nicholson  
Direct: (416) 869-5604  
leenicholson@stikeman.com

November 26, 2020

**By E-mail**

Kornfeld LLP  
1100 One Bentall Centre  
505 Burrard Street, Box 11  
Vancouver, B.C. V7X 1M5  
Attention: E. Neil Kornfeld, Q.C.

Dear Mr. Kornfeld:

**Re: Lease dated August 31, 2018 (the "Lease") between Homer Street Office Properties Inc. (the "Landlord") and RGN British Columbia XXIII Limited Partnership (the "Tenant") in respect of premises at 400 West Georgia Street, Vancouver, B.C. (the "Leased Premises")**

We are counsel to RGN British Columbia XXIII Limited Partnership (the "**Tenant**"). We write in response to a notice of default dated September 28, 2020 and notice of termination dated November 19, 2020 issued by the Landlord purporting to terminate the Lease in respect of the Leased Premises.

On November 13, 2020, the Tenant filed a Notice of Intention to Make a Proposal (the "**NOI**") under section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"). A copy of the certificate confirming the filing is enclosed. KSV Restructuring Inc. was appointed as proposal trustee in respect of the Tenant (the "**Proposal Trustee**"). Notice of the NOI filing was mailed to your client.

Pursuant to section 69 of the BIA, there is a stay of proceedings in respect of the Tenant prohibiting creditors, including the Landlord, from exercising any rights and remedies against the Tenant during the NOI proceedings. Section 65.1 of the BIA further provides that no person is entitled to terminate any agreement of the insolvent person by reason only that the insolvent person is insolvent or a NOI has been filed in respect of the insolvent person. Accordingly, the Landlord acted in violation of the stay of proceedings and the purported termination of the Lease is null and void in all respects.

The Tenant remains willing to continue the ongoing discussions between the parties to find a mutually acceptable resolution for the benefit of the Landlord and the Tenant as part of the NOI proceedings. Given Landlord's actions and desire to terminate the Lease, the Tenant would be willing consider a full and final surrender of the Lease upon execution of mutual releases in favour of the parties, including the Tenant, the Landlord and the Indemnitor. Please let us know within the next five (5) days if this is of interest to your client.

If the parties are unable to reach a resolution, the Tenant reserves all rights to continue its efforts to develop a proposal for the benefit of its stakeholders, which, may, among other things, disclaim or assign the Lease in accordance with the BIA.

Yours truly,

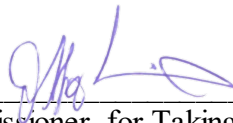
A handwritten signature in black ink, appearing to read "Lee Nicholson". The signature is written in a cursive style with a large initial "L" and "N".

Lee Nicholson

cc. A. Taylor, Stikeman Elliott LLP  
R. Kofman and M. Vininsky, KSV Restructuring Inc.  
S. Zweig, Bennett Jones LLP

TAB C

This is Exhibit "C" referred to in the affidavit of  
ROSLIND MCQUEEN  
affirmed before me this 13<sup>th</sup> day of December, 2020.



---

A Commissioner for Taking Affidavits

Jeffrey Levine, Barrister and Solicitor, LSO# 55582H

Lee Nicholson  
Direct: (416) 869-5604  
leenicholson@stikeman.com

December 7, 2020

**By E-mail**

Kornfeld LLP  
1100 One Bentall Centre  
505 Burrard Street, Box 11  
Vancouver, B.C. V7X 1M5

Attention: E. Neil Kornfeld, Q.C.

Dear Mr. Kornfeld:

**Re: Lease dated August 31, 2018 (the “Lease”) between Homer Street Office Properties Inc. (the “Landlord”) and RGN British Columbia XXIII Limited Partnership (the “Tenant”) in respect of premises at 400 West Georgia Street, Vancouver, B.C. (the “Leased Premises”)**

We are counsel to RGN British Columbia XXIII Limited Partnership. Capitalized terms not otherwise defined have the meaning set out in our letter dated November 26, 2020.

Further to our telephone conversation, we disagree with the Landlord’s position that the Lease was validly terminated following the filing of the NOI. We refer you to the decision of the Ontario Court of Appeal in *Crystalline Investments Ltd. v. Domgroup Ltd.* which sets out that upon filing of a NOI “the landlord’s rights against the insolvent tenant are suspended subject to the right to collect rent on a day-to-day basis following the date of the notice or proposal”. We also note that section 65.1(2) applies to cases where the debtor has failed to pay “rent, royalties... or other payments of a similar nature...” There have been numerous cases where the stay of proceedings provided in sections 65.1 and 69 of the BIA have been applied to prevent the termination of an agreement such as in this instance. For examples, please see *Nautical Data International Inc., (Re)* and *Cosgrove-Moore Bindery Services Ltd., (Re)*.

The decision in *Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd.* (“*Petcetera*”) referred to in our conversation is not applicable to this situation as it solely addressed instances of post-filing defaults and payments, which is not the case in this situation. In any event, *Petcetera* is not the law in Ontario and we refer you to the decision in *Emergency Door Service Inc., (Re)*.

The Tenant will vigorously contest any effort by the Landlord to seek a declaration that the Lease has been validly terminated from the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), which is overseeing the NOI proceedings.

As set out in our last letter, the Tenant wishes to continue the good faith discussions that were ongoing prior to the filing of the NOI and the purported termination of the Lease in order to develop a consensual resolution for the mutual benefit of the Tenant and the Landlord. It should be possible to develop a restructured replacement indemnity to replace the guarantee of Redox Plc., however, due to the various creditor protection proceedings involving Regus affiliates, a full letter of credit replacement is not possible in the current circumstances. If the Landlord remains unwilling to discuss a proposal that involves the Tenant continuing with the project, we would also consider options on a surrender of the Lease. Currently, we have concerns that the Landlord has taken advantage of the filing of Redox Plc to terminate the Lease and begin discussions with clients of the Tenant and its affiliates regarding their direct

occupation of the Leased Premises without the involvement of the Tenant. If the Landlord takes steps to interfere with pre-existing arrangements between the Tenant and its clients, the Tenant reserves all of its rights and claims against the Landlord with respect thereto.

Lastly, the Tenant will be bringing a motion to extend the time for it to file a proposal in the NOI proceedings for another 45 days. We have reserved time before the Court on Monday, December 14, 2020 at 2:15 p.m. to seek such an extension. We will serve you with our materials when they are available.

Yours truly,

A handwritten signature in black ink, appearing to read "L. Nicholson". The signature is written in a cursive, flowing style.

Lee Nicholson

cc. A. Taylor, *Stikeman Elliott LLP*  
R. Kofman and M. Vininsky, *KSV Restructuring Inc.*  
S. Zweig, *Bennett Jones LLP*

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE -  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**AFFIDAVIT OF ROSLIND MCQUEEN  
(Sworn December 13, 2020)**

**McMillan LLP**  
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Lawyers for Homer Street Office Properties Inc.



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