



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.: CV-23-0070521500CL and DATE: November 1, 2023
CV-2300703754-00CL

NO. ON LIST: 2

TITLE OF PROCEEDING: IN THE MATTER OF VALIDUS POWER CORP. et al

And

MACQUARIE EQUIPMENT FINANCE LIMITED, Applicant
v.
VALIDUS POWER CORP.

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Applicant:

Name of Person Appearing	Name of Party	Contact Info
JENNIFER STAM	MONITOR	Jennifer.stam@nortonrosefulbright.com
JAMES RENIHAN	MONITOR	James.renihan@nortonrosefulbright.com

For Respondent:

Name of Person Appearing	Name of Party	Contact Info
CATHERINE FRANCIS	VALIDUS ENTITIES ET AL.	cfrancis@mindengross.com
SCOTT BOMHOF	MACQUARIE EQUIPMENT FINANCE LTD.	sbomhof@torys.com
JEREMY OPOLSKY	”	jopolsky@torys.com
MIKE NOEL	”	mnoel@torys.com

Other:

Name of Person Appearing	Name of Party	Contact Info
EDWARD PARK	DOJ for CRA	Edward.park@justice.gc.ca
JESSE MIGHTON	HUT 8 MINING CORP. / FAR NORTH	mightonJ@bennettjones.com

ENDORSEMENT OF JUSTICE OSBORNE:

The Motions

[1] KSV Restructuring Inc. brings motions in each of these two companion proceedings. I heard both of these motions yesterday, and this Endorsement applies to both motions in both proceedings.

- [2] KSV, as Court-appointed Monitor of the Validus Entities in the CCAA Proceeding, seeks an order:
- a. approving a SISP for the Validus Entities;
 - b. authorizing the Monitor to implement the SISP;
 - c. approving the Transaction Agreement between the Validus Entities by KSV as Monitor, and Kingston LP, and Macquarie Equipment Finance Ltd. (“Macquarie”) and Far North Power Corp. (“Far North”) as Assignee (Macquarie and Far North together referred to as the “Stalking Horse Bidder”), solely for the purpose of constituting the Stalking Horse Bid in the SISP;
 - d. authorizing the Monitor to enter into the Break Fee Agreement and approving the Break Fee and the Expense Reimbursement;
 - e. granting the Bid Protections Charge on the Property in favour of Macquarie as security for the Break Fee and the Expense Reimbursement;
 - f. approving the Unknown Contract Bar Process;
 - g. approving the Pre-Filing report of the Monitor dated August 23, 2023, the First Report dated September 1, 2023, and the Second Report dated October 19, 2023; and
 - h. extending the Stay Period to December 31, 2023.

[3] KSV, as court-appointed Receiver of the Validus Entities in the Receivership Proceeding seeks an order amending paragraph 23 of the Receivership Order to increase the Receiver’s borrowing limit under the Receiver’s Borrowing Charge by \$500,000 from \$1 million to \$1.5 million.

[4] Defined terms in this Endorsement have the meaning given to them in the motion materials, the Reports of the Monitor/Receiver or earlier Endorsements made in these proceedings, unless otherwise stated.

[5] All of the relief sought in both proceedings is unopposed by any party, except for the Validus Entities, who do not oppose approval of a SISP but oppose certain terms of this proposed SISP, and who oppose approval of the Stalking Horse Offer. The relief sought by the Monitor/Receiver is strongly supported by Macquarie, the largest secured creditor of the Validus Entities, and Hut 8 Mining Corp., now known as Far North Power Corp.

[6] The Validus Entities do not agree with the calculation of the quantum of the obligations owing to Macquarie. Since the proposed Stalking Horse Offer is essentially a credit bid by Macquarie based on the amounts owing to it, the Validus Entities oppose approval of that Stalking Horse Offer.

[7] In the alternative, and if the calculation is correct, the Validus Entities submit that the amount owing to Macquarie is unconscionable and violates the anti-deprivation rule.

[8] Finally, the Validus entities oppose, although the points were not pressed vigourously in argument, other terms of the SISP including the quantum of the break fee and the tight timing for the receipt of bids.

BACKGROUND, the MACQUARIE AGREEMENTS and the DEFAULTS

[9] A more detailed background to, and context for, these motions is set out in earlier Endorsements.

[10] The Validus Entities are a group of privately held companies that own and operate power generation plants located in North Bay, Kapuskasing, Iroquois Falls and Kingston, Ontario. They sell capacity and power to the Independent Electricity System Operator (“IESO”) as a participant in the IESO’s capacity auction market.

[11] Macquarie is the senior secured lender of the Validus Entities. In April, 2022, Iroquois Falls Power Corp. (“IFPC”), one of the Validus Entities, entered into a sale-leaseback transaction with Macquarie pursuant to several transaction agreements which work together and are all part of the relationship between Macquarie and the Validus Entities.

[12] Those transaction agreements include an Amended and Restated Lease Agreement (the “Lease Agreement”), an Amended and Restated Participation Agreement (the “Participation Agreement”) and certain guarantees and security provided by the Validus Entities (collectively the “Lease Transaction Documents”).

[13] In summary, and as part of that transaction, IFPC sold certain Leased Property to Macquarie pursuant to the Participation Agreement, and that Leased Property was then leased back to IFPC pursuant to a Lease Agreement. Macquarie was granted security for the amounts owing to it.

[14] The first ranking security held by Macquarie includes a pledge of the interests of the Validus Parent in certain of the power generation plants, general security and mortgages on substantially all real and personal property of the Validus Entities in respect of the four power plants except for turbines, plant and equipment that is owned by Macquarie and leased to IFPC under the Lease Agreement, and a pledge of various material agreements.

[15] As is further explained below, it is important to understand that the Macquarie transaction was a sale lease-back transaction, and not simply a loan.

[16] Macquarie calculates its claim as at September 22, 2023 to be \$57,218,822, to which amount it adds costs and overdue interest accruing after that date.

THE PROPOSED SISP, STALKING HORSE AGREEMENT and RELATED RELIEF

[17] A SISP was contemplated from virtually the outset of the CCAA Proceeding. The particulars and full terms of the proposed SISP are set out in the Second Report and I have not summarized all of them here unless they are contested or centrally relevant to the disposition of the motions.

[18] In summary, the SISP contemplates a relatively tight timeframe for the commencement of a marketing process by the Monitor, the receipt and evaluation of Bids and Qualified Bids, the conduct of an Auction (if any), followed by a motion for approval of the transaction reflected in the Successful Bid (whatever Bid that may be), which approval will likely include a reverse vesting order structure.

[19] A reverse vesting order structure is contemplated since the Validus Entities hold numerous permits and licences that allow them to operate in a highly regulated industry. The Stalking Horse Bidder requires such a structure to minimize uncertainty related to the transferability of those licences and permits in any commercially reasonable time frame. The Monitor anticipates that other bidders would require the same terms.

[20] It is also important to note that approval of any transaction, including but not limited to the transaction reflected in the Stalking Horse Offer, and approval of any reverse vesting order structure, is not being sought

today (and to be very clear, nor is it being granted). Rather, and as discussed below, approval of the Stalking Horse Offer is sought as just that: a stalking horse bid as a term of the proposed SISP to provide a “floor” or minimum initial bid only.

[21] The proposed SISP include some significant flexibility to give the Monitor the latitude and discretion to conduct the process in a manner that is likely to maximize recovery for stakeholders, but to do so pursuant to a process that is transparent, fair and efficient.

[22] For example, interested parties may submit Bids for individual assets or plants, and multiple Bids may be aggregated to form together a Qualified Bid, including in conjunction with the Stalking Horse Offer to form an Alternative Bid.

[23] In order to be considered a “Qualified Bid” under the SISP, a Bid must meet the criteria clearly set out in the SISP. Those criteria include a minimum aggregate consideration of \$60,228,822. That figure represents the sum of:

- a. the Macquarie Claim Amount referred to above of \$57,218,822 (as of September 22, 2023);
- b. the Priority Payments Closing amount of \$1.5 million;
- c. the Bid Protections of \$2.26 million; and
- d. a \$750,000 minimum overbid.

[24] In addition, Qualified Bids must also provide for the purchase of the interest of Macquarie in the Receiver’s Certificates which are projected to be approximately \$1.3 million - \$1.5 million plus fees and interest: see the Second Report of the Monitor, Cash Flow Forecast Appendix.

[25] The Stalking Horse Offer has been structured to be what is referred to colloquially as a “sign and close” transaction with the intention that Macquarie and Far North are not deemed to control IFPC for income tax purposes prior to the time that the applicable Stalking Horse Bidder actually acquires control at closing (if in fact that occurs).

[26] Macquarie and Far North has advised the Monitor that there is a risk that such deeming for income tax purposes would occur if the bid provided for a closing date that did not occur contemporaneously with the execution by the parties of the Transaction Agreement.

[27] Importantly, however, the Stalking Horse Offer is irrevocable subject to its Terms and Conditions. It contemplates a transaction pursuant to which Macquarie and Far North would acquire (in summary):

- a. the shares/units of Validus Parent held in the Validus Entities except for IFPC;
- b. newly issued shares of IFPC; and
- c. certain assets of Validus Parent that are not subject to the Macquarie Security, as fully described in the motion materials and the Second Report.

[28] The Stalking Horse Offer is effectively a credit bid. The consideration payable would be comprised of:

- a. payment by the Assignee of \$1.5 million in respect of certain estimated “priority payments” owing by Validus Parent in respect of unremitted employee source deductions (and an indemnity with a corresponding charge to secure those priority amounts);

- b. payment by the Assignee of an amount to be determined by the Monitor prior to closing in respect of administrative expenses;
- c. Macquarie releasing the Validus Entities from all outstanding obligations under the Lease Transaction Documents and security; and
- d. Macquarie transferring to IFPC the Leased Property (pursuant to a contemplated reverse vesting order structure).

[29] The Stalking Horse Offer also contemplates the opportunity for ongoing employment opportunities for employees of the Validus Entities as well as the assumption of all pre-and post-filing liabilities relating to Continuing Contracts and liabilities for municipal taxes.

[30] It contemplates an Outside Date of December 29, 2023. If it is Terminated (i.e., not selected as the Successful Bid or not approved by the Court, among other things), a break fee would be payable. Pursuant to the proposed Break Fee Agreement, the Monitor has agreed to a Break Fee of \$1.25 million plus an expense reimbursement of up to \$1 million (collectively, the (Bid Protections”) together with a Bid Protections Charge on the Property as security for the payment of the Bid Protections, which would be payable only out of the proceeds of sale on the closing of another Qualified Bid.

[31] As observed above, no party opposes the approval of a SISP. I am satisfied that the particular SISP proposed here should be approved.

[32] Courts have recognized that the broad, remedial nature of the CCAA, and the discretion in s.11 in particular, conferred the power to approve a SISP in respect of CCAA debtors and their property: *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169, 2009 CanLII 39492 (ONSC) (“*Nortel*”) at para. 36.

[33] This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See: *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

- a. the fairness, transparency and integrity of the proposed process;
- b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[34] The British Columbia Supreme Court recently surveyed the Canadian authorities relevant to consideration of stalking horse bids, including those referred to above, and expressed the relevant factors as follows (See: *Re Freshlocal Solutions Inc.*, 2022 BCSC 1616 at paras. 24-32):

- a. how did the stalking horse agreement arise?
- b. what are the stability benefits?
- c. does the timing support approval?
- d. who supports or objects to the stalking horse agreement?
- e. what is the true cost of the stalking horse agreement? and
- f. is there an alternative?

[35] In my view, these authorities are entirely consistent with one another and, while articulating the factors in a slightly different manner, each approaches the analysis in the same way and with the same objectives. The

slightly more detailed list of factors set out by Justice Fitzpatrick in *Freshlocal* are in my view all subsumed, or they should be, in the three factors set out by Justice Brown in *CCM*.

[36] Moreover, both of those authorities are also consistent with the approach of the Québec Superior Court which set out a list of non-exhaustive factors relevant to the approval of stalking horse bids in *Boutique Euphoria Inc. (Re)*, 2007 QCCS 7129 at para. 37 (as well as with the approach taken in *DCL Corporation, (Re)*, 2023 ONSC 3686 (CanLII), at para. 19).

[37] These analyses distill, essentially, to this question: taking into account the support for and opposition to the terms of the proposed SISP and stalking horse agreement, while recognizing whether and how those parties supporting or opposing it are economically affected by the outcome, will the proposed process (including its stalking horse bid component and all other material terms), if approved and approved at this time, likely result in the best recovery on the assets being sold pursuant to a fair and transparent process?

[38] These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

- a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- b. the interests of all parties;
- c. the efficacy and integrity of the process by which the party obtained offers; and
- d. whether the working out of the process was unfair.

[39] In *Nortel*, Morawetz, J. (now Chief Justice Morawetz) described several factors to be considered in a determination of whether to approve a proposed sales process, including:

- a. is a sale transaction warranted at this time?
- b. will it benefit the whole economic community?
- c. do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
- d. is there a better viable alternative?

[40] Subsequent to that decision, the *CCAA* was amended in 2009 to clarify the jurisdiction of this Court to authorize a sale of assets of the debtor outside a plan of arrangement according to the non-exhaustive list of factors set out in section 36 of the *CCAA*. The section 36 factors apply to approval of a sale rather than a sale process, but Chief Justice Morawetz' *Nortel* factors continue to apply post-2009 amendments: *Brainhunter Inc.*, 2009 62 CBR (5th) 41.

[41] Notwithstanding that the section 36 factors are not directly applicable to the relief sought on this motion, in my view they should be kept in mind since they will be considered when this Court is asked to approve a sale resulting from the very process now under consideration.

[42] The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Justice Penny of this Court, they can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as they establish a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).

[43] The challenge in this particular proceeding, as is often the case, is one of stability and time: the former is required and the latter is lacking.

[44] If recovery here is to be maximized, the business must be stabilized, and stabilized in a manner that is apparent to those inside such as employees, and to those outside the business such as potential bidders, future debt lenders or equity investors, and regulators.

[45] This means, among other things, that the preservation of value in the Validus Entities depends in large part on the ability of those entities or their successors to participate in the upcoming IESO capacity auction. The bid deadline for participating in the IESO capacity auction is November 29, 2023 (just over two weeks from now) and there are corresponding milestones to be met in advance of that bid deadline towards the achievement of which the Monitor, on behalf of the Validus Entities, is already working.

[46] It is therefore critical for the SISP (any SISP) to start as soon as possible to permit participation in the IESO's capacity auction and also continue the work streams that require the development of a comprehensive business plan for the Validus Entities more broadly. It follows that the timing is necessarily extremely limited.

[47] The SISP has been developed and will be conducted by the Court-appointed Monitor. To state the obvious, that Court Officer has, and I am certain will fulfil, the obligation to conduct that process in a fair and transparent manner.

[48] The proposed SISP contemplates and facilitates possible transactions with greater value than the Stalking Horse Offer if one is identified. The Monitor is of the view that the 35 day bid period is sufficient in the circumstances to allow interested parties to perform due diligence (there will be a virtual data room).

[49] I observe that the Monitor has been mindful of the sale process conducted by Ernst & Young Corporate Finance earlier this year (discussed in the Monitor's Reports and my earlier Endorsements in this proceeding), which did not yield any material unconditional offer for IFPC, and it is considered to be one of the two most valuable powerplants. In addition, the Validus Entities attempted without success to arrange alternative financing transactions at or about the time the Receivership Order was made (which they had opposed).

[50] Moreover, I am satisfied that the opportunity presented by the SISP is unlikely to take the market of potential bidders, (which is limited and highly sophisticated, given the nature of the business of the Validus Entities), by surprise. Hut 8 issued a press release on August 11, 2023 announcing the execution of the Transaction Support Agreement which effectively telegraphed to the market the very process for which approval is now being sought.

[51] I also note that the consideration contemplated by the Stalking Horse Offer exceeds materially the aggregate value that Validus Power Corp. paid when it acquired plants in 2021/2022, of approximately \$45 million.

[52] I am also satisfied that the inclusion in the SISP of the Stalking Horse Offer is appropriate in the particular circumstances of this proceeding. The Monitor considered one of the obvious questions; namely, whether a stalking horse bid was required at all or whether the process might be just as effective if those parties simply participated in the sales process by submitting whatever offer they might consider appropriate.

[53] I accept and agree with the recommendation of the Monitor that the Stalking Horse Offer provides an important degree of certainty to the employees of the Validus Entities and other stakeholders who may take some comfort that there is a possible going-concern solution for the business.

[54] As reflected in the Second Report, employees of the Validus Entities have communicated to the Monitor that they are encouraged by the steps taken to date in these proceedings and were further encouraged to learn that a stalking horse bid was being prepared and would likely be submitted by a prospective purchaser who is substantive and reputable. The Pre-Filing Report referenced the risk of significant employee resignations, and the

consequent effect on the continued operation of the Validus Entities and the preservation of their value. That risk is further mitigated by the Stalking Horse Offer.

[55] This is contrasted with the risks of conducting a SISP without a stalking horse, which risks include the absence of support from Macquarie as the senior secured creditor, the possible resignation of the employees and consequent shutdown of all plants, and the virtual certain detrimental, yet material, impact on value.

[56] As stated at the beginning of this Endorsement, the Validus Entities oppose certain terms of the Stalking Horse Offer.

[57] Leaving aside the issue raised by Macquarie as to what interests the Validus Entities are in fact advancing and for whose benefit, given that those Entities are currently being operated by the Receiver, I have considered the objections they have raised.

[58] First, as stated above and as was confirmed repeatedly in both written and oral submissions by the Receiver, the Monitor and the Stalking Horse Bidders (Macquarie and Far North), this Court is not being asked to approve today, and nor is it approving, the Stalking Horse Offer other than for the limited and exclusive purpose of having it serve as a stalking horse in the SISP.

[59] If, and only if, the Stalking Horse Offer is the Successful Bid in the SISP, further approval of the Court will be sought and required for the approval of such Successful Bid and the transaction contemplated thereby. This includes approval of its terms, the proposed reverse vesting order structure and the proposed tax treatment, including HST issues, and the inclusion or exclusion of assets.

[60] This Court has previously held that it is not in all cases necessary for the full terms of the stalking horse bid to be considered at the time of approval of an SISP: *Kingsett Mortgage Corporation et al v. Stateview Homes (Minu Towns) Inc., et al*, July 19, 2023, Ontario Superior Court of Justice (Commercial List) at paras. 7, 12 and 17; and *Fire & Flower Holdings Corp. et al*, 2023 ONSC 4048 (CanLII) at para. 23.

[61] I agree with that approach. That is not to say, however, that the terms of a stalking horse bid, including its overall economic value or the consideration payable if the transaction is approved, are irrelevant at the time of approval of a SISP. They are not. In my view, there is no purpose served by approving a stalking horse bid even if for the limited purpose of acting as such in a sales process, if it is clear from the outset that it would not be approved at the conclusion of the sales process even if no other bid, or no superior bid, were made. That sets up the process for failure and would likely result in a waste of time and financial resources all to the detriment of stakeholders and to the ultimate outcome achieved.

[62] To be clear, the value of the consideration to be paid in a stalking horse bid is a relevant consideration at the time of SISP approval. It is by no means determinative and is not the exclusive factor, but it is a relevant factor. This is particularly so, where, as here, the Stalking Horse Offer is a credit bid. That in turn means that the value of that credit (or really, debt) that is being bid, is a relevant consideration at the SISP approval stage.

[63] What all of this means is that the economically affected stakeholders, including in this case Macquarie who is the senior secured creditor and also the Stalking Horse Offer sponsor (with Far North), and also including the Court-appointed Officers (being the Receiver and the Monitor in making their recommendations to this Court), must go into the SISP process fully armed with the knowledge that even if the Stalking Horse Offer turns out to be the Successful Bid, there is a risk that it may not be approved by the Court. That determination is for another day, but the parties need to understand and recognize now the risk that a SISP with the Stalking Horse Offer has the possibility of not succeeding just as does a SISP without any stalking horse bid.

[64] I am satisfied that all parties understand this here; indeed, it is expressly recognized by the Receiver, the Monitor and the Stalking Horse Bidders as stated above. Appropriate parties will have the opportunity to oppose approval of the transaction contemplated by the Stalking Horse Offer, including the reverse vesting order structure, on the approval motion if it is the Successful Bid.

[65] Having considered all of the factors, I am satisfied that in the circumstances of this case, the SISP with the Stalking Horse Offer is the far preferable alternative to a SISP without a stalking horse.

The Objections Raised

[66] I have not set out in this Endorsement every particular of the objections raised by the Validus Entities, nor every particular of the points raised in answer to the objections by the Monitor and by Macquarie.

[67] In summary, the principal objections of the Validus Entities to approval of the Stalking Horse Offer, even for the limited purposes of the SISP as stated above, are three-fold:

- a. it overstates the quantum of the amounts owing to Macquarie which forms the basis of the credit bid, with the result that the consideration that must be offered by any alternative bidder to be deemed to be a Superior Bid is artificially inflated;
- b. in the alternative, if it does not overstate the quantum owing pursuant to the Lease Transaction Documents, that quantum is unconscionable and violates the anti-deprivation rule, with the result that the effect on the SISP and alternative bids is the same as above; and
- c. it contemplates a structure which should never be approved even if it is the Superior Bid since it would mean that the Validus Entities, through the Monitor, pay to Macquarie material amounts in respect of HST for remittance to the CRA, but the input tax credits generated by the HST payments are unavailable to offset outstanding HST liabilities to the CRA, all of which is to the detriment of the CRA and all other creditors of the Validus Entities.

[68] I am satisfied that the Stalking Horse Offer should be approved notwithstanding these objections, whether considered separately or in the aggregate.

The Quantum Owing to Macquarie

[69] First, I am satisfied that the amount owing to Macquarie is correct for the purposes of this motion, and accords with the Lease Transaction Documents and the calculation of that amount in the event of a default, as has occurred here.

[70] I draw significant comfort from the very strong support of the Court-appointed Monitor, having conducted its own extensive analysis and calculations, that the quantum is correct.

[71] In my view, much of the disagreement results from the issue foreshadowed at the outset of this Endorsement: the Lease Transaction Documents set out the terms not of a simple loan from Macquarie secured by equipment, but rather of a much more nuanced sale and lease-back transaction.

[72] The Validus Entities argue that the quantum that Macquarie says is outstanding and on which the credit bid is based materially exceeds the aggregate of all amounts advanced by Macquarie, net of repayments, as a result of double-counting of certain components of that quantum.

[73] I am satisfied for the purposes of this motion that it does not do so. Without question, the quantum sought by Macquarie is greater than the net amount advanced plus accrued interest. But that is not the end of the analysis

given the conceptual structure of the transaction in the first place and the application of the specific provisions of the Lease Transaction Agreements in particular.

[74] Counsel to the Monitor has provided an opinion that, subject to the standard assumptions and qualifications, the security granted by each of the Validus Entities to Macquarie is valid and enforceable.

[75] Pursuant to the terms of the Participation Agreement, the purchase price for the Leased Property was \$45 million plus \$5.85 million in HST. Of that \$45 million purchase price, the amount of \$9 million was agreed by the parties to be paid to IFPC upon it and other Validus Entities meeting a certain condition, failing which such amount was to be used to prepay rent under the Lease Agreement.

[76] Ultimately, the condition was not met, with the result that as contemplated by the parties and provided for in the Participation Agreement, that \$9 million was applied to pre-pay rent under the Lease Agreement.

[77] Pursuant to the Lease Agreement, IFPC agreed to make monthly rent payments to Macquarie in the amount of \$1.25 million (the “Base Rent”) plus HST during the 36 month base term of the Lease. IFPC also agreed to pay all other amounts and obligations it was required to pay under the Lease Transaction Documents.

[78] In the event of default, Macquarie had various contractual remedies provided, including the right to demand from IFPC liquidated damages in an amount equal to the sum of three components:

- a. any unpaid Base Rent in arrears;
- b. the Stipulated Loss Value (“SLV”) for the Leased Property; and
- c. interest on both of those amounts.

[79] The SLV is not a fixed value but rather, according to the terms of the Lease Transaction Documents, is determined as provided for in Schedule 3 to the Lease Agreement. Initially, the SLV was \$54 million, but was reduced with each rent payment made by IFPC. As provided for in the Lease Transaction Documents however, the relationship between the quantum of each rent payment, and the reduction in the-then amount of the SLV, is not linear (i.e., the two amounts do not reduce on a dollar for dollar basis at the same time).

[80] The amount of the SLV payable by IFPC in the event of a default was the SLV as of the date of written notice that Macquarie was exercising its remedies. Upon payment of these amounts, pursuant to section 13.1(f) of the Lease Agreement, IFPC would become the owner of the Leased Property.

[81] IFPC failed to make required payments under the Lease Agreement as due on each of May 31, 2023, June 7, 2023 and July 7, 2023. Pursuant to amendments made to the Lease Agreement on February 24, 2023, Macquarie provided IFPC a four-month “rent holiday” by amending the rent payment schedule (Schedule 3).

[82] As a result, IFPC was relieved of the obligation to pay rent from February through April, but was instead required to make a single, larger, rent payment in May (the “balloon payment”), followed by regular monthly payments in June and beyond. The total rent payable during that period was increased by \$1 million as is clear from a plain reading of the terms of the Lease Agreement.

[83] In other words, the parties agreed that a premium was to be paid for the rent holiday. In my view, therefore, it is not a fair characterization of the operation of the provisions of the relevant agreements to say that the aggregate rent payments due and owing exceed the sum of the original rent payments due monthly that were forgiven in exchange for the four-month rent holiday and the balloon payment thereafter. There has been no overstatement of rent arrears.

[84] Similarly, I am satisfied that there has not been a double-counting, as alleged by the Validus Entities, of \$8.5 million in the calculation of the SLV.

[85] The Lease Agreement specifies that the quantum of the SLV is determined upon reference to the “number of Base Rents paid ... at the relevant time”. The basis for the SLV is described above. I recognize that the operation of the Lease Transaction Documents results, given the default, in a contractual entitlement of Macquarie to collect both the rental arrears and an SLV that is not calculated in a manner that accounts for those rental payments. The Monitor is satisfied, however, that it is calculated exactly in accordance with the language of section 13.1(f) of the Lease Agreement.

[86] Finally, I am also satisfied that there has been no failure to credit the \$9 million in prepaid rent. Pursuant to the Lease Agreement, the Pre-Paid Rent is to be applied to the last payments of the Base Term. Macquarie submits, and the Monitor agrees, that the quantum sought gives credit for these payments when determining the quantum of the SLV.

[87] Macquarie gave notice that it was exercising its right to terminate the Lease Agreement on July 24, 2023. It demanded payment pursuant to section 13.1(f) of the Lease Agreement of \$55,598,575, comprised of:

- a. \$8.5 million of unpaid Base Rent;
- b. \$40.5 million in respect of the SLV;
- c. \$6,370,000 in respect of HST payable on the above amounts; and
- d. \$228,575 in respect of interest on the Base Rent.

[88] That quantum has increased, and continues to increase, as interest accrues (see paragraph 16 above).

[89] For all of these reasons, I am satisfied that the amount claimed is appropriate for the purposes of this motion and flows from the operation of the bargain made by the parties as reflected in the Lease Transaction Documents.

The Anti-Deprivation Rule

[90] Even if I am right in accepting the recommendation of the Monitor that the calculation is correct, the Validus Entities submit that such a calculation violates the anti-deprivation rule and would result in the unjust enrichment of Macquarie, to the detriment of other creditors and the Validus Entities.

[91] The anti-deprivation rule has its origins in the common law. It is intended to prohibit contracts that frustrate statutory insolvency schemes and was originally directed against fraudulent conduct.

[92] The Supreme Court of Canada considered the anti-deprivation rule in *Chandos Construction Ltd. v Deloitte Restructuring Inc.*, [2020] 3 S.C.R. 3, 2020 SCC 25 (“*Chandos*”), and shifted the focus from the nature of the conduct to the nature of the result, and rejected an intention-based test in favour of a result-based test.

[93] The Validus Entities argue that Macquarie invoked the SLV provision after issuing demands for repayment and serving a Notice pursuant to section 244 of the *BIA*, with the result that the anti-deprivation rule is engaged and should operate here to prohibit the operation of that contractual provision.

[94] The Supreme Court stated in *Chandos* that the rule renders void any provision in an agreement which provides that upon an insolvency (or bankruptcy), value is removed from the reach of the insolvent person’s creditors which would otherwise have been available to them, and places that value in the hands of others.

[95] In *Chandos*, that is exactly what happened. A general construction contractor entered into a construction subcontract which provided, in relevant part, that the subcontractor would pay the general contractor 10% of the subcontract price as a fee for the inconvenience or for monitoring the work in the event of a bankruptcy of the subcontractor.

[96] The fee was triggered and indeed was expressly conditional upon the event of bankruptcy. It was not payable otherwise in the event of a default or indeed in any circumstance absent a bankruptcy. It was a clear example of a provision that was triggered by an event of insolvency or bankruptcy. In fact, it could not have been clearer, as it stated that: “in the event that [subcontractor] commits any act of bankruptcy, [subcontractor] shall forfeit 10% of the subcontract price”.

[97] The present case is distinguishable. In my view, the anti-deprivation rule is not engaged in the circumstances of this case so as to prevent operation of the agreements according to their terms. The entitlements pursuant to the SLV provision (and the related provisions discussed above) did not arise as a result of the insolvency of the Validus Entities (and there has been no bankruptcy). They arose, as intended by the parties in making their bargain, on the default by the Validus Entities of their contractual obligation to make the rent payments when due.

[98] It is irrelevant whether those entities were insolvent, at the time of the defaults, or now when the amounts calculated by operation of the contractual provisions are being claimed. Those amounts did not arise, and were not triggered, by the insolvency. Macquarie would have been no less entitled to the amounts it is now claiming if the Validus Entities were not insolvent at all (then or now) but rather had simply breached the Lease Transaction Agreements in the absence of an insolvency.

[99] Moreover, Macquarie will not have been unjustly enriched if it is found to be entitled to the amounts it is claiming. The Validus Entities cannot meet the requirement of demonstrating that there was no juristic reason for the benefit and the loss, in circumstances where the Lease Transaction Documents, representing the bargain freely made by highly sophisticated parties engaged in an extremely complex transaction and represented by counsel throughout, specifically and expressly contemplated exactly this result.

[100] As observed by the Supreme Court, the anti-deprivation rule is based on the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. The Supreme Court concluded that Parliament intended to prohibit a debtor from contracting with creditors for a different distribution of the debtor’s assets in bankruptcy than that provided in the *BIA*. That is not what is happening here. In my view, it was neither the intent of the parties, nor the effect of the agreements, to circumvent the statutory regime that provides that all claims proved in a bankruptcy shall be paid rateably.

Unfairness Regarding HST Treatment

[101] With respect to the payment of HST, I am also satisfied that if an issue exists at all, it is an issue properly argued on the motion for approval of the transaction resulting from the Successful Bid, whether or not that is the Stalking Horse Offer.

[102] The Validus Entities submit, and in fairness to them submitted earlier on the motion to appoint a receiver, that they had concerns about the treatment of certain post-filing input tax credits (“ITCs”) which may otherwise serve to reduce the Purchase Price HST.

[103] First, counsel for the Canada Revenue Agency was present in Court on these motions and took no position on the issue. The CRA agrees that the issue is properly addressed at the time of the transaction approval motion, and moreover, the CRA is still in the process of completing its HST audit, with the result that it was not in a

position at the hearing to make any submissions with respect to what amounts were owing, what ITCs may be available, or to any other particulars of the HST issue.

[104] The Monitor/Receiver and Macquarie also submit that this issue is properly addressed on a transaction approval motion, since any Successful Bidder will be responsible for HST obligations arising on the transaction, and can and should take its own advice as to whether and the extent to which ITCs may be available to it, to subsequently set-off HST remittance obligations otherwise owing.

[105] Moreover, the Monitor has considered the proposed tax treatment under the Stalking Horse Offer, and is unaware as to whether any ITC applications were previously filed by the Validus Entities (largely due to the poor state of the books and records of the business, which has presented a continuing challenge for both the Receiver and the Monitor).

[106] Nonetheless, it is of the view that to the extent that IFPC is entitled to any ITCs in respect of HST on pre-filing base rent payments that were actually made by IFPC to Macquarie pursuant to the Lease Agreement, any such entitlements are Excluded Assets pursuant to the Transaction Agreement which would be vested, if the transaction is approved, in ResidualCo.

[107] In addition, the Monitor has concluded that any HST paid by IFPC in respect of the transaction contemplated by the Stalking Horse Offer is considered to be a post-filing payment of HST, and correspondingly, any ITCs generated as a result of such payment of HST cannot be set off against the pre-filing Purchase Price HST obligation in any event. Finally, any ITCs generated from the payment of HST on obligations of Validus Power Corp. during the receivership or CCAA period will continue to be assets of that entity or of ResidualCo, but also cannot be set off against the pre-filing Purchase Price HST.

[108] For all of those reasons, the Monitor is of the view that the treatment of any entitlements to ITCs under the transaction and within the course of these proceedings, is appropriately allocated. Even if it is not, the issue can be argued and determined as part of a sale approval motion.

[109] For all of these reasons, I am satisfied that the HST issues have been appropriately allocated to the extent they can be at present, and will in any event be the subject of the sale approval motion such that they need not be finally determined today. As stated above, and given the position of the CRA, they could not be determined today in any event.

Bid Protections

[110] The Break Fee Agreement includes a Break Fee of \$1.26 million and an Expense Reimbursement of up to \$1 million for reasonable out-of-pocket third-party expenses incurred by Macquarie.

[111] The Monitor has considered the range of acceptable bid protections in the context of stalking horse bids (see: Comparative Summary of Break Fees, Appendix 'J' to the Second Report). This Court has previously noted that bid protections within the range of 1.8% - 5% may be reasonable: *CCM*, at para. 13. Here, the maximum amount of the Bid Protections represent approximately 3.85% of the proposed consideration.

[112] The Monitor is of the view that the Bid Protections properly recognize the benefit being conveyed to the estate by the Stalking Horse Offer setting the floor for a sales process, as well as the time, effort and resources spent by the stalking horse buyer who may ultimately be outbid in the SISP.

[113] In the particular circumstances of this matter, I am prepared to accept the strong recommendations of the Monitor and Receiver, and approve the Bid Protections. I am doing so given my conclusions about the stability that the Stalking Horse Offer brings to the process which is particularly critical giving the upcoming IESO auction.

[114] That should not be taken as any statement as to the appropriateness generally of a break fee in the context of a credit bid, or at least a break fee that goes beyond the reasonable costs and expenses incurred in preparing a bid. It may be that a break fee over and above an expense reimbursement, which is effectively a premium, could be appropriate in some circumstances. However, the onus will be on the proposed stalking horse bidder seeking that break fee to demonstrate why it is appropriate in the circumstances and what additional value it brings to the particular situation, given that there is no new capital or funding being exposed or made available as part of the bid.

[115] In the circumstances here, and as I have concluded that the Bid Protections should be approved, I am also satisfied that the Bid Protections Charge, which I note is a condition of the Stalking Horse Offer, should be approved as this Court has done in other cases: see, for example, *In the Matter of LoyaltyOne Co.*, (March 20, 2023), Toronto, Superior Court of Justice (Commercial List), CV-23-0069601700CL.

[116] Although the Bid Protections Charge encumbers the Property, the Bid Protections themselves are payable only out of closing proceeds from a different successful transaction. The Monitor believes that such a charge is reasonable in the circumstances.

Unknown Contract Bar Process

[117] I am also satisfied that the Unknown Contract Bar Process should be approved. It is perhaps somewhat atypical, but I am satisfied that it is appropriate here. Part of the challenge faced by the Receiver and by the Monitor has been the fact that the books and records of the Validus Entities are incomplete and in disarray. The Monitor in particular has struggled to identify even material contracts to which the Validus Entities are parties, and therefore in some cases the counterparties are unknown.

[118] In other cases, the existence of a contractual arrangement and the identity of a counterparty may be known, but the material terms of the contractual arrangement are unknown or unclear. The Monitor has retained the services of a former senior officer of the Validus Entities to assist with its efforts in this regard.

[119] Courts have expressed concern in other cases, and properly so, regarding the notice to contractual counterparties as to the potential effects of a proposed reverse vesting order on the treatment of their contracts with the debtors: see, for example, *Re PaySlate Inc.* 2023 BCSC 608 at paras. 64, 71 and 75, where Justice Walker of the British Columbia Supreme Court declined to approve a proposed reverse vesting order transaction on the basis that, among other things, the debtor had not provided notice of the hearing for approval of the proposed transaction to counterparties in contracts that were proposed to be retained.

[120] In that case, the reverse vesting order transaction was subsequently approved, but only after notice had been given to those counterparties (2023 BCSC 977).

[121] The proposed Unknown Contract Bar Process here will provide for publication of the notice in both national and local publications. In addition, the Monitor is making best efforts to ensure that those known counterparties or possible counterparties are also advised. The Process contemplates that the Monitor will post on its website a list of known contracts, with the exception of employee agreements. Counterparties on that Known Contract List will receive notice of the anticipated reverse vesting order transaction, including notice as to how their contracts will be treated in the context of the Successful Bid.

[122] To identify whether there are any unknown excluded contracts or liabilities that would be affected by a reverse vesting order, the Monitor will post the notices as described above and require any contract counterparty to contact the Monitor by the Unknown Contract Bar Date to advise of the contract and provide an executed copy.

[123] The proposed Process does not bar any party from ultimately submitting unsecured claims, although those claims will be made in ResidualCo, if the anticipated reverse vesting order transaction (or any other reverse vesting order transaction) is approved, with the result that in my view it is very appropriate now that those contractual counterparties be given notice of what is afoot. The Monitor believes that the Proposed Unknown Contract Bar Process provides a fair and reasonable process to identify any unknown contract counterparties.

Activities of the Monitor

[124] The activities of the Monitor are set out in detail in the three reports: the Pre-Filing Report, the First Report and the Second Report. Approval of those activities is not opposed by any party and I am satisfied that the activities are both appropriate and consistent with the exercise of the mandate given to the Monitor pursuant to the Initial Order.

Stay Extension

[125] The stay of proceedings currently in effect expires on December 1, 2023. An extension is clearly appropriate to afford the Monitor sufficient time to conduct the proposed SISP. It makes good practical sense to seek that extension now, albeit approximately three weeks before the current stay expires, to avoid the expense incurred with bringing a separate motion for a stay extension in the very near future.

[126] I am satisfied that the Receiver and Monitor, respectively on behalf of the Validus Entities, have acted and continue to act in good faith and with due diligence.

Receiver's Borrowing Charge

[127] Concurrent with the stay extension, the Receiver seeks in the Receivership Proceeding the approval of an increase in the borrowing amount available pursuant to the Receiver's Borrowing Charge of \$500,000, from \$1 million to \$1.5 million. This, too, is unopposed.

[128] The revised cash flow forecast reflects that, provided that the increase in the Borrowing Charge is granted, the Validus Entities are projected to have sufficient liquidity to fund operations through the proposed stay extension period.

[129] The increase is approved.

Disposition

[130] For all of these reasons, the motions are granted. I have signed two orders, the first approving the increase in the Receiver's Borrowing Limit in the Receivership Proceeding, and the second approving the SISP, including the Stalking Horse Offer, approving the reports of the Monitor and the activities described therein, and extending the stay, all in the CCAA Proceeding.

[131] Both orders have immediate effect without the necessity of issuing and entering.

A handwritten signature in black ink that reads "Owen, J." The signature is written in a cursive, slightly slanted style.