

2023 ONSC 832
Ontario Superior Court of Justice [Commercial List]

Rose-Isli Corp. v. Frame-Tech Structures Ltd.

2023 CarswellOnt 1532, 2023 ONSC 832, 2023 A.C.W.S. 469, 6 C.B.R. (7th) 129

**ROSE-ISLI CORP., 2631214 ONTARIO INC., SEASIDE CORPORATION, and
2735440 ONTARIO INC. (Applicants) and FRAME-TECH STRUCTURES LTD.,
MICHAEL J. SMITH, FRANK SERVELLO, CAPITAL BUILD CONSTRUCTION
MANAGEMENT CORP., and 2735447 ONTARIO INC. (Respondents)**

Kimmel J.

Heard: December 15, 2022; January 6, 26, 2023

Judgment: February 2, 2023

Docket: CV-22-00682959-00CL

Counsel: Jason Wadden, Carlos Sayao for Plaintiff, Applicant, Moving Party, Crown, Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation, 2735440 Ontario Inc.

Sharon Kour, Caitlin Fell, Shaun Parson for Receiver, Ernst & Young Inc.

Nathaniel Read-Ellis, Sean Pierce for Purchaser, Ora Acquisitions Inc.

Adam Wygodny for Purchasers of Unit No. 604

Cameron Neil for KNYMH lien claimant

Subject: Corporate and Commercial; Insolvency

MOTION by receiver for approval of sale and related relief; CROSS-MOTION by creditor to redeem mortgage.

Kimmel J.:

1 The court appointed receiver, Ernst & Young Inc., (the "Receiver") of 2735447 Ontario Inc. (the "Company") brings this motion for an approval and vesting order ("AVO") and an order for ancillary relief. This proceeding has a unique procedural history that has resulted in several court attendances and interim endorsements.

2 The circumstances are unusual because of the dealings between 2735440 Ontario Inc. ("273 Ontario") and the Receiver, as well as the different interests that 273 Ontario has in the Property (defined below). 273 Ontario is both a second mortgagee that wants to be paid and a joint venture participant in the Rosehill Project that was to be developed on the Property. The Receiver was appointed upon 273 Ontario's application under the oppression remedy, s. 248 of the Business Corporations Act, R.S.O. 1990, c. B-16.

3 This is the court's final decision on the Receiver's motion. It is also the final decision on 273 Ontario's cross-motion to redeem the Property or, in the alternative, for an order approving its credit bid in the court ordered sales process.¹

4 For the reasons that follow, the Receiver's motion is granted and the cross-motion is dismissed.

Prior Court Orders

5 Ernst & Young Inc. was appointed as the Receiver and manager over all the assets, undertakings and properties of the Company by order dated July 8, 2022 (the "Appointment Order"). This included the real property municipally described as 177, 185 and 197 Woodbridge Avenue, Vaughan, Ontario, and all proceeds thereof (the "Property"). These are the lands upon which the proposed "Rosehill Project" was to be constructed.

6 The Receiver's powers under paragraph 3 of the Appointment Order include:

(j) [T]o market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, and without limiting the generality of the foregoing, to take into account any offers to purchase the Lands or other assets of the Company that have been received and/or accepted to date as part of the sales process described in the Grossi Affidavit;

(k) [W]ith the approval of this Court, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business; provided, however, that in each such case notice under subsection 63(4) of the *Ontario Personal Property Security Act*, or section 31 of the *Ontario Mortgages Act*, as the case may be, shall not be required;

7 The Appointment Order contemplates that the Receiver may seek court approval to convey, transfer or sell the Property and seek vesting or other orders as may be needed to convey the Property to a purchaser free and clear of any liens, encumbrances or other instruments affecting it.

8 The prescribed responsibilities and powers of the Receiver under the Appointment Order are similar to those prescribed in insolvency situations when a receiver is appointed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. However, the Appointment Order was not predicated upon any finding that the Company was insolvent. It was made in the context of the within oppression remedy application commenced by 273 Ontario and others as a result of a breakdown in the relationship between the joint venture participants in the Rosehill Project.

9 While the Company has not been declared insolvent, the Receiver suggests that it may now be. In any event, that issue is not before the court.

10 When the Receiver was appointed, there appeared to be a consensus that the Property would be sold. While a credit bid from 273 Ontario was not ruled out, it declined to make a stalking horse bid.

11 The Receiver developed a sale and marketing process in consultation with, among others, 273 Ontario. Although not required in light of the powers granted to it under the Appointment Order, the Receiver sought, and was granted, an order approving its proposed sale and marketing process. No party opposed the requested order and it was granted on September 12, 2022 (the "Sale Process Order"). The Sale Process Order authorized and directed the Receiver to commence the Sale Process (described in the Receiver's First Report) for the purpose of soliciting interest in and opportunities for a sale of the Property.

12 The approved Sale Process was to proceed on an estimated timeline of 60 days and included the following: the retention of a listing broker, the establishment of a data room, the preparation of a confidential information memorandum, form of confidentiality agreement, teaser for prospective purchasers, the broker contacting potentially interested parties, a bid deadline of approximately 45-50 days for submissions by interested parties of a binding, irrevocable and unconditional asset purchase agreement (the "Binding APA") that was to comply with specified requirements (including a ten percent deposit, proof of financing and a closing date within five days of court approval, among other things) and the eventual selection of a successful bidder.

13 The Receiver had the authority to extend the Sale Process timeline, acting reasonably, with a view to securing a fair and reasonable bid for the Property. The Receiver also had the authority to extend the bid deadline or cancel the Sale Process.

14 Under the Sale Process, the successful bid and transaction would require court approval to transfer of the Property free and clear of all liens and claims, subject to any permitted encumbrances, pursuant to an approval and vesting order.

15 The Sale Process allowed that "[i]f the Receiver receives one or more Binding APAs, it may, in the Receiver's sole discretion, negotiate with such bidders with a view to improving the bids received."

16 The Sale Process required the Receiver to consider and review each Binding APA based on several factors, including:

Items such as the proposed purchase price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the counterparties to such transactions, the proposed transaction documents, other factors affecting the speed and certainty of the closing of the transaction, the value of the transaction, any related transaction costs, the likelihood and timing of consummating such transactions, and such other matters as the Receiver may determine.

17 The bid deadline was November 25, 2022.

The Motions

18 The procedural history is somewhat lengthy but provides important context. It was detailed in the court's January 18, 2023 endorsement and is repeated, with necessary additions and amendments, for ease of reference herein. Capitalized terms not defined herein shall have the meaning ascribed to them in the Receiver's Reports filed in connection with these motions: the Second Report filed December 11, 2022, the First Supplement to the Second Report filed December 19, 2022 ("Supplementary Report"), and the Second Supplement to the Second Report Filed January 25, 2023 ("Second Supplementary Report").

19 The Receiver seeks an AVO, *inter alia*:

a. approving the agreement of purchase and sale dated December 9, 2022 (the "APS") between the Receiver and ORA Acquisitions Inc. ("Ora" or the "Purchaser") for the purchase and sale of the assets, undertakings and properties of the Company (the "Purchased Assets"), including but not limited to the Property, and authorizing the Receiver to complete the transaction contemplated therein (the "Transaction");

b. vesting the Purchased Assets in the Purchaser upon the closing of the Transaction, free and clear of all security interests, liens and the like, whether secured or unsecured; and

c. ordering that immediately after the delivery of the Receiver's certificate confirming the closing of the Transaction, each of the Unit Purchaser Agreements (as defined hereinafter) shall be deemed to have been terminated by the Receiver and any rights or claims thereunder or relating thereto are not continuing obligations effective against the Property or binding on the Purchaser.

20 The Receiver is also asking the court to grant an ancillary order (the "Ancillary Order") for, *inter alia*, the approval of: (i) the Receiver's actions and activities and statement of receipts and disbursements described in its Second Report, (ii) the creation of appropriate reserves for the fees of the Receiver and its counsel, future anticipated receivership expenses and a reserve for Registered Lien Claims (defined hereinafter), (iii) proposed distributions that would satisfy the first mortgage charge in favour of Trez Capital Limited Partnership ("Trez")² and the Receiver's Borrowings Charge (as defined in the Appointment Order), and (iv) a limited sealing order in respect of certain identified confidential exhibits to the Receiver's Second Report dated December 11, 2022.

21 The Receiver's motion was originally returnable on December 22, 2022. It was adjourned to January 6, 2023 at the request of 273 Ontario. 273 Ontario, as a secured creditor of the Company, a joint venture participant and a bidder for the purchase of the Property, wanted the opportunity to make submissions on a more fulsome record regarding, among other things, the factors set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). *Soundair* sets out the legal framework for the court to determine whether to approve the APS and Transaction.

22 At the January 6, 2023 return date, 273 Ontario also brought its own cross-motion for an order permitting it to redeem the Property upon payment of the amounts found owing in priority to its second mortgage and asked the court to schedule a motion to disallow the Registered Lien Claims. Alternatively, 273 Ontario's cross-motion seeks an order approving its bid submitted on December 9, 2022 and supplemented on December 12, 2022 (the "Credit Bid").

23 During the January 6, 2023 hearing, the court raised a question about the aspect of the relief sought by the Receiver that would deem the condominium unit purchase agreements (the "Unit Purchaser Agreements") to be terminated upon the closing

of the Transaction. The Unit Purchaser Agreements were entered into by the Company prior to the receivership with purchasers of pre-sale residential and commercial condominium units (the "Unit Purchasers").

24 Specifically, the court asked for the authority upon which the Receiver asserted that the interests of the Unit Purchasers are not affected by the requested order. The Receiver said (for example, in paragraph 94 of its Second Report) that this was predicated upon these Unit Purchasers having no interest in (or any claim to) the Property. This was also the basis upon which the Receiver determined that the Unit Purchasers did not need to be served with the Receiver's motion. The Receiver argued that the legal rights of the Unit Purchasers are protected by its proposal that deposits paid pursuant to the Unit Purchaser Agreements, and held by the law firm Schneider Ruggiero Spencer Milburn LLP, will be returned if the Unit Purchaser Agreements are terminated after the closing of the Transaction.

25 At the court's request, further written submissions (reflecting inputs from both the Receiver and 273 Ontario) on this point were provided to the court on January 13, 2023.

26 By an endorsement dated January 18, 2023, the court reluctantly further adjourned the Receiver's motion and 273 Ontario's cross-motion, for, among others, the following reasons:

a. There may have been a misunderstanding between the Receiver and 273 Ontario about the importance and timeliness of the request by 273 Ontario for the Receiver to determine the validity of 273 Ontario's security and confirm the accepted amount of the 273 Ontario Loan and to determine the Registered Lien Claims. 273 Ontario considered both requests to be essential to its ability to exercise its right of redemption and/or make a Credit bid and to determine its essential conditions and structure. Once received, the prospect of an alternative transaction emerged (under the 273 Ontario Credit Bid or by virtue of the exercise of a right of redemption, if permitted) that does not terminate or disclaim the Unit Purchaser Agreements, albeit proposing to treat other stakeholders, such as the Registered Lien Claimants, less favourably than under the Transaction. The full implications of this have not been canvassed.

b. Thus far, 273 Ontario's position on the cross-motion had been that its Credit Bid (or terms of redemption) will not include sufficient cash to establish a reserve for the Registered Lien Claims pending their final adjudication or resolution. Under these circumstances, the court would like to be satisfied that both Registered Lien Claimants are on notice of that position and have been given the opportunity to address the court on that issue in light of the cross-motion.

c. While it may be reasonable to infer what the Registered Lien Claimants would prefer (to have a reserve established to protect their Registered Lien Claims until they have been determined), the court will not presume to know what the Unit Purchasers might say or what outcome they might prefer (particularly in light of the falling real estate market).

d. There is a strong argument in favour of the Receiver's position that the Unit Purchasers have no interest in the Property and no right to any remedy other than the return of their deposits. However, this is not an absolute or guaranteed outcome. Cases on this point indicate that prejudice to those purchasers can be a relevant consideration. Even if their legal rights are determined by the Unit Purchaser Agreements, there are stakeholders whose interests (which can extend beyond strict legal rights) may also be relevant when the court decides whether to allow 273 Ontario to redeem the Property or to grant the requested AVO and Ancillary Order.

e. Given that the termination of the Unit Purchaser Agreements is an explicit condition of the APS and sought as part of the AVO, and in the particular circumstances of this case, the Unit Purchasers should have been given notice of the Receiver's motion and the opportunity to respond to it. They may not oppose, or, their opposition may not be successful; however, they should be given the opportunity to be heard.

f. The court would also prefer to be fully informed about whether the Receiver has valid contractual grounds upon which to terminate the Unit Purchase Agreements that it relies upon.

g. Not every situation involving a deemed termination or approval of disclaimer of purchase agreements in pre-sale condominium projects in receivership will necessarily require notifying purchasers. Each case must be considered on its

own facts. As noted, the legal rights of these purchasers may be limited, even if their interests are not necessarily limited to their strict legal rights.

h. Prejudice (if it can be established) is also a relevant consideration. It is not just the prejudice to the Unit Purchasers, but also to the Registered Lien Claimants and to the Purchaser, that must be considered and balanced (along with the interests of the secured creditors and any other creditors that the court is typically concerned with on these types of approval motions).

i. The Receiver will need to determine the most efficient way to put the Unit Purchasers (and perhaps the Registered Lien Claimants) on notice of the next return date and to set out a process for their positions, if any, to be coherently and efficiently put before the court.

j. Pending the input of the Unit Purchasers, if any, the satisfaction of the condition of the APS that the Unit Purchaser Agreements be terminated or disclaimed remains uncertain.

27 In the court's January 18, 2023 endorsement, the court cautioned that the Unit Purchaser's positions would not be the only, or determinative, factor. It was noted that when the matter returned to court on January 26, 2023, the determination of the two remaining substantive issues: a) the purported exercise of 273 Ontario's right to redeem, and b) the approval of the APS, Transaction and proposed AVO, will involve, among other things, the court's consideration of the interests of, and prejudice to, all of the different stakeholders whose rights and interests are impacted differently by the different potential outcomes: see *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406, at para. 74; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at para. 47; *Royal Bank of Canada ; Ravelston Corp. Re.200524 C.B.R. (5th) 256 (Ont. C.A.)*, at para. 40.

28 The court foreshadowed in the January 18, 2023 endorsement that the ultimate consideration, involving the balancing of interests and alleged prejudices, may still favour approval of the APS, Transaction and AVO. That is in fact what has been decided.

Factual Background

29 Much of the factual background was reviewed in the court's January 18, 2023 endorsement. Relevant portions, not addressed elsewhere in this endorsement, are recapped below in this section for ease of reference.³

The Project, Existing Mortgages and Sales Efforts Around the Time of the Appointment Order and Sale Process Order

30 The Purchased Assets and the Property were part of the Rosehill Project, a joint venture between the applicants and the respondents for the development of a proposed six-story mixed use residential and commercial development. The Rosehill Project is anticipated to comprise of approximately 80 condominium units. The Company is the entity through which the joint venture was developing the Rosehill Project and is the registered owner of the Property. As at the date of the Appointment Order, 60 residential suites and one commercial unit had been pre-sold.

31 Trez (an arm's length third party lender) provided mortgage financing to the Company, secured by a first charge on the Property that initially went into default and then matured in August and September of 2022.

32 273 Ontario provided mortgage financing to the Company secured by a second charge on the Property.

33 Prior to the Appointment Order, the Company had begun marketing the Rosehill Project for sale. After the Appointment Order, the Receiver's efforts to re-engage with a pre-appointment prospective purchaser were unsuccessful.

34 Before the court approved the Sale Process, the Receiver and 273 Ontario discussed the possibility of 273 Ontario being a stalking horse bidder or assuming the Trez first mortgage loan. 273 Ontario did not pursue either option at that time. The Sale Process did not foreclose the possibility of 273 Ontario making a bid.

The Registered Lien Claims

35 The Receiver's First Report filed in connection with its motion to approve the Sale Process identified a construction lien registered by Capital Build on title to the Property for over \$2 million (the "Capital Build Lien"). When the Sale Process was approved, the Receiver had not completed an analysis to validate the work performed to support the Capital Build Lien or its priority.

36 In addition to the Capital Build Lien, another lien is registered on title to the Property by an architect (the "KNYMH Lien"). The KNYMH Lien and the Capital Build Lien comprise the "Registered Lien Claims" and "Registered Lien Claimants" as the case may be.

37 273 Ontario indicated to the Receiver that it challenged the legitimacy of the Registered Lien Claims and its priority over 273 Ontario's second mortgage. 273 Ontario wanted the Receiver to determine the validity of the Registered Lien Claims before it made its bid.

38 In October 2022, 273 Ontario made a specific request of the Receiver to review and determine the validity of the Registered Lien Claims. The Receiver reviewed the supporting documents for the Capital Build Lien and concluded that it was insufficient. The Receiver has advised that it intends to bring a motion for court approval to disallow that claim. The Receiver also reviewed the KNYMH Lien Claim, but allowed it. The Receiver understands that parties interested in the Registered Lien Claims may dispute the Receiver's determinations of their respective validity and priority. Moreover, it is expected that the court will eventually have to adjudicate their validity, amount and priority.

The 273 Security and Loan Amount

39 On October 14, 2022, counsel for 273 Ontario requested that the Receiver review 273 Ontario's security based on the supporting documentation 273 Ontario had provided. On or around November 15, 2022, counsel for 273 Ontario asked the Receiver to confirm whether 273 Ontario's security was valid and enforceable. On November 18, 2022, counsel for the Receiver confirmed with counsel for 273 Ontario that its security was valid and enforceable, and that the Receiver accepted \$6,389,204 as owing to 273 Ontario, assuming a payout as of December 31, 2022.

40 On November 21, 2022, counsel for 273 Ontario wrote to the Receiver objecting to that amount. 273 Ontario claimed that it was owed \$7,047,395.23, which included, among other things, interest to the July 16, 2023 maturity date of its loan (the "273 Ontario Loan").

The Bidding Process

a) The 273 Ontario Bid

41 The Receiver advised counsel for 273 Ontario that any Credit bid made by 273 Ontario must provide cash in the amount of the Registered Liens Claims. That cash was to be set aside until the final determination of the validity and priority of the Registered Lien Claims, or the settlement thereof.

42 273 Ontario had concerns about submitting a Binding APA containing a Credit bid by the bid deadline given that: a) the Registered Lien Claims, which 273 Ontario did not believe were legitimate, had not been determined and 273 Ontario was not certain it could raise sufficient financing to satisfy both the Trez mortgage as well as the Registered Lien Claimants; and b) there was a discrepancy between the calculations of the Receiver and 273 Ontario as to the amount outstanding of the 273 Ontario Loan and that could be applied to the Credit bid.

43 Counsel for 273 Ontario asked that the Receiver take no steps to "declare a winning bid or disregard [his] client's bid" until the hearing of a proposed motion to extend the bid deadline, proposed to be scheduled on November 29, 2022. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver had discretion to extend the November 25, 2022 bid deadline if necessary.

44 Regardless of what may, or may not, have transpired in the lead up to the November 25, 2022 bid deadline, counsel for the Receiver worked with counsel for 273 Ontario to attempt to address 273 Ontario's concerns thereafter. This included a suggestion that 273 Ontario submit a Credit bid which: (i) was conditional on the Registered Lien Claims being resolved to its satisfaction, and (ii) provided for a Credit bid of 273 Ontario's debt of not less than a specified amount. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver would consider any written offer made by 273 Ontario by the bid deadline, and that no motion was necessary to extend the bid deadline.

45 273 Ontario submitted a non-binding letter of intent on the bid deadline. Even though it did not satisfy the requirements for bids under the Sale Process (nor was it accompanied by a commitment for firm irrevocable financing or a deposit), the Receiver received and considered its terms and continued discussions with 273 Ontario thereafter.

46 By December 2, 2022, the amount in dispute between the Receiver's alleged amount owed under the 273 Ontario Loan, and 273 Ontario's alleged amount owed, was about \$700,000. The Receiver advised 273 Ontario that it would accept, for the sole purpose of 273 Ontario's Credit bid, 273 Ontario's claim that \$7,047,395.23 was owed under the 273 Ontario Loan.

b) Ora and other Bids

47 Ora and two other bidders submitted bids compliant with the requirements under the Sale Process on the bid deadline of November 25, 2022. The Receiver negotiated with Ora with respect to various terms of its bid. The result was that the Ora submitted an unconditional, all cash, Binding APA on December 7, 2022 (the "Ora Binding APA"), a requirement of which is that all Unit Purchaser Agreements and the unit deposits received thereunder be excluded from the Purchased Assets (as defined in the Ora Binding APA).

c) Request for Binding APA from 273 Ontario

48 After receiving the unconditional, executed Ora Binding APA on December 7, 2022, the Receiver asked 273 Ontario to submit a Binding APA with proof of financing and a deposit by December 9, 2022.

49 On Friday December 9, 2022, 273 Ontario submitted its Credit Bid. The bid was conditional on financing (but accompanied by a commitment letter) and was submitted with an unconditional Binding APA that the Receiver could accept.

d) The Receiver's Decision

50 The Receiver evaluated the Credit Bid and determined that it had significant risk around both the certainty of closing and 273 Ontario's ability to pay the cash component of the purchase price that was dependent on financing, which was itself contingent.

51 The Receiver thereafter decided to accept the Ora Binding APA, as it contained fewer conditions, carried less closing risk and had a greater certainty of recovery for creditors generally. The Receiver considers the Ora Binding APA to represent the best executable offer received in the Sale Process. The Receiver accepted the Ora Binding APA on December 10, 2022.⁴

52 On Monday, December 12, 2022, 273 Ontario supplemented its Credit Bid with financing commitments sufficient to pay certain priority payables, including the Trez Loan and the Receiver's Borrowing Charge, but not the Registered Lien Claims. Rather, the Credit Bid contains a closing condition that requires the Registered Lien Claims to be withdrawn or declared by the court to be invalid or dismissed. The Credit Bid does not require the termination or vesting out of the Unit Purchaser Agreements.

53 After accepting the Ora Binding APA, the Receiver received and considered some additional material and terms presented by 273 Ontario. The Receiver attempted to facilitate a settlement between Ora and 273 Ontario that involved 273 Ontario paying a break fee to Ora. There appeared to be a settlement but 273 subsequently advised that it was not prepared to proceed with that settlement in advance of the initial return date of the Receiver's motion on December 15, 2022. This led to the request by 273 Ontario for an adjournment so that it could bring its cross-motion and make further submissions in opposition to the Receiver's motion (that procedural history is discussed above).

The APS

54 The APS (comprised of the Ora Binding APA accepted by the Receiver) requires that title to the Property be vested in the Purchaser free and clear of the Unit Purchaser Agreements. As such, the proposed AVO vests out the Unit Purchaser Agreements.

55 The net sale proceeds under the APS are expected to repay the first mortgage in full, and, subject to the final determination of the Registered Lien Claims, part of the 273 Ontario mortgage.

56 Since the Property is to be transferred free and clear of all encumbrances and the Registered Lien Claims have not been finally determined, the Receiver seeks approval to hold back the following amounts comprising a proposed reserve for Registered Lien Claims (the "Reserve") until the Registered Lien Claims have been finally determined or resolved:

a. Until such time that the KNYMH Lien is resolved, the Receiver proposes to hold a cash reserve of \$259,211 from the net sale proceeds of the proposed Transaction, being the full amount of the KNYMH Lien, pending further order of the court.

b. Until such time as the validity and priority of the Capital Build Lien has been resolved, the Receiver proposes to hold a cash reserve of \$2,000,665 from the net sale proceeds of the proposed Transaction, being the full amount of the Capital Build Lien, pending further order of the court.

57 Ora has permitted its ten percent deposit to be held in a non-interest bearing account pending the court's determination of these motions. It has also kept liquid cash available so that it can close (with payment of its all cash purchase price) within five days of any court approval of the Transaction.

The Assignment of the Trez First Mortgage Position

58 Trez gave notice of default under its first mortgage in August 2022. The mortgage loan matured and became due and payable in September 2022. The net proceeds from the Transaction are projected to exceed the amounts owing to Trez. As noted above, the AVO contemplates paying out this first mortgage in full.

59 273 Ontario advised the court that, since the hearing on January 6, 2023, it continued to work with its financier, Toronto Capital Corp. ("Toronto Capital"), towards redeeming the Property. To that end, Toronto Capital and Trez entered into a Loan Sale Agreement (and ancillary agreements) whereby Trez assigned the first mortgage charge to Toronto Capital (the "Toronto Capital Assignment").

60 Pursuant to the Toronto Capital Assignment, Trez was paid out in full on the first mortgage and Toronto Capital became the first priority secured creditor. This transaction closed, and the security was transferred from Trez to Toronto Capital on the morning of January 26, 2023, just prior to the hearing.

61 Toronto Capital opposes the sale to Ora, among other things. As such, both the first-ranking (Toronto Capital) and second-ranking (273 Ontario) secured creditors now oppose the sale to Ora, and support either (i) the completion of the redemption of the Property by effecting a transfer of the Property to 273 Ontario; or (ii) the approval of the Credit Bid to effect a sale of the Property to 273 Ontario, both with the assumption of Toronto Capital's interest such that it is preserved.

62 273 Ontario has advised that it incurred financing fees of approximately \$235,000 to arrange for the Toronto Capital Assignment, plus legal costs. These expenses are in addition to the amounts it has already spent funding the receivership and these proceedings.

Issues to be Decided

63 The issues to be determined on the Receiver's motion and 273 Ontario's cross-motion were outlined in the January 18, 2023 endorsement to be as follows:

- a. Are there stakeholders who should have been served with the motions:
 - i. The Unit Purchasers?
 - ii. The Registered Lien Claimants?
- b. Does 273 Ontario have the right to redeem the Property?
- c. Should the Transaction and the APS be approved and the proposed AVO be granted?
- d. Should the Ancillary Order be granted?

Analysis

Preliminary Issues Regarding Service and Notice, and Updated Positions Regarding the Unit Purchasers and Registered Lien Claimants

64 The service issues were addressed in the January 18, 2023 endorsement. The Receiver's Second Supplement to the Second Report provided the following updates and information arising out of that endorsement:

- a. The Receiver made efforts to contact the Unit Purchasers and their counsel of record to notify them of the motions and provide them with the link to access the court materials by email and phone. They were invited to respond to the Receiver if they wished to put their positions before the court.
- b. Some Unit Purchasers contacted the Receiver and all who expressed a desire to attend the January 26, 2023 hearing were provided with the video link.
- c. A number of Unit Purchasers attended the hearing (approximately 30), and three requested and were given the opportunity to address the court.
- d. As at January 24, 2023, of the 62 residential and commercial Unit Purchasers contacted by the Receiver, 32 indicated that they would prefer their Unit Purchaser Agreements be terminated, 9 indicated they would prefer their Unit Purchaser Agreements be maintained, and 21 did not respond, or responded without indicating a preference.
- e. The Registered Lien Claimants are represented by counsel on the Service List and both were served prior to the motion dates on December 22, 2022 and January 6, 2023. Capital Build's Bankruptcy Trustee, and the Trustee's counsel, were also served with the motion materials. KNYMH's counsel attended the January 26, 2023 hearing.
- f. The Receiver does not rely on the contractual provisions of the Unit Purchaser Agreements to terminate those contracts. The Receiver relies on the powers granted to it under paragraph 3(c) of the Appointment Order "to manage, operate, and carry on the business of the Company, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Company", as well as the court's inherent jurisdiction as the basis for terminating the contracts and returning deposits to the Unit Purchasers.

65 At the January 26, 2023 hearing, some Unit Purchasers expressed the view that they would like to receive their deposits back and to have their Unit Purchaser Agreements terminated, having lost faith in the Rosehill Project coming to fruition. Others indicated that they would like to see the Rosehill Project built and to proceed with their purchase. One purchaser in particular (who also provided a statutory declaration) emphasized the attractive location, its proximity to amenities and services for seniors in the area and the enhancements to their unit to accommodate their particular needs. This purchaser expressed concerns about retirement plans and the detriment to purchasers and the community over the loss of the Rosehill Project.

66 In its submission to the court on January 26, 2023, 273 Ontario advised that if it is permitted to redeem or has its Credit Bid approved, it will provide the Unit Purchasers with 30 days to advise whether they wish to have their units put back into the pool of units to be sold by 273 Ontario going forward, and if such sales are achieved (without loss) then 273 Ontario will cancel their contracts without cost or penalty to them. 273 Ontario is prepared to have any court order approving the redemption or acceptance of its Credit Bid incorporate such a provision into the order.

67 273 Ontario also indicated that it is prepared to have any court order approving the redemption or acceptance of its Credit Bid contain the following mechanisms to preserve the rights of the Registered Lien Claimants pending the determination of their rights by the court as follows:

273 is prepared to bond off 10 percent of the respective amount of the Capital Build and KNYMH Liens. Alternatively, in the event the Court approves the 273 Credit Bid or permits 273 to redeem the Property, the resulting order can provide that KNYMH's and Capital Build's rights under the Liens are preserved in the Property to the extent they are found to be in priority to the 273 mortgage following the closing of the transaction.

68 Counsel for KNYMH indicated at the hearing that as long as its rights under s. 44(1) of the Construction Act, R.S.O. 1990, c. C.30 are preserved, and its lien is terminated on the basis of the payment of appropriate funds into court (the entire amount of the lien plus 25 percent for costs), or alternatively, its lien is preserved in the Property until such time as any process for the determination of the Registered Lien Claims has run its course, it takes no position on the motions.

Does 273 Ontario Have the Right to Redeem the Property and Should the Court Permit it to do so?

The Right to Redeem

69 273 Ontario argues that s. 2 of the Mortgages Act, R.S.O. 1990, c. M.40 guarantees a secured creditor's right to redeem. According to 273 Ontario, "[i]t permits the mortgagor or any 'encumbrancer', such as 273 [Ontario] as [a] secured creditor, to 'assign the mortgage debt and convey the mortgaged property' to any person."

70 Section 2(1) of the Mortgages Act entitles the mortgagor to require the mortgagee to assign the mortgage debt and convey the property as the mortgagor directs. The mortgagee is bound to assign and convey accordingly. Section 2(2) of the Act allows that right to be enforced by each encumbrancer. A requisition of an encumbrancer prevails over that of the mortgagor.

71 The right to redeem is a right of a debtor, upon payment of a debt, to recovery the property pledged to a creditor as security for payment of a debt: see *Wild Goose*, at para. 69.

72 In this case, 273 Ontario seeks to convey the Property to itself (and would have sought to assign the first mortgage debt to its financier, Toronto Capital, but that has now preemptively occurred).

73 Neither the Receiver nor Ora appear to disagree with 273 Ontario's theoretical right to redeem the Property as the second mortgagee. While this typically arises in foreclosure or court ordered sales (under, for example, r. 64 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194), 273 Ontario's request to redeem it is not opposed on the basis that no such right could ever arise in the context of a court ordered sale process in a receivership.

74 Rather, what the Receiver and Ora oppose is the timing of 273 Ontario's purported exercise of this right. They maintain that the court should not exercise its discretion to allow a creditor to exercise a right of redemption after a court-ordered Sale Process is in place and a bid has been accepted. Particularly in this case, a Sale Process that the creditor (273 Ontario) was consulted about and did not oppose when it was approved by the court.

Should 273 Ontario be Permitted to Redeem the Property?

75 The Receiver relies on *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, 200955 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) (Ont. S.C.) to argue that 273 Ontario should not be permitted to exercise its right of redemption at this stage in the proceedings.

76 In *B&M Handelman*, the court relied on the wording of the order authorizing the receiver to sell the subject property to preclude an automatic right to redeem. The court noted that in each case where the Receiver took steps to market the Property and to sell it in the ordinary course of business with the approval of the court, "it was exclusively authorized and empowered to do so, to the exclusion of all other persons including debtors and without interference from any other person": *B&M Handelman*, at para. 21. It was "[i]n the face of these provisions", that the court precluded an automatic right to redeem.⁵

77 The Receiver argues that the Appointment Order and Sale Process Order in this case should be read as containing similar language that precludes a right of redemption. I have not found similarly prescriptive language in the court orders in this case.

78 Of more direct concern in this case is the impact that allowing 273 Ontario to exercise its right of redemption would have on the integrity of the court approved Sales Process. The policy considerations that weighed heavily on the court in *B&M Handelman*, at para. 22 are of equal concern in this case:

A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

79 These policy considerations are discussed in many of the cases decided after the case that 273 Ontario relies upon most heavily, *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, 2004 B.C.L.R. (4th) 149. They do not appear to have factored in the court's decision in *Hester*, in which the court was unequivocal on the use of a redemption in a sales process:

[t]he integrity of the court process is not compromised by allowing a debtor or its trustee in bankruptcy to redeem the mortgaged property on the eve of an application to approve a sale of the property. Whenever there is a court-ordered sale process, it is always implicit that the conduct of the sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court.

80 The policy considerations inform the analysis in the cases decided after *Hester*, starting with *B&M Handelman*. Most recently, in *Wild Goose* at para. 74, the court noted that "[i]n a case in which a debtor seeks to redeem security after a sale has been negotiated by a receiver before a sale has been approved, consideration of the purchaser's interest and the efficacy and the integrity of the process by which an offer was obtained *may* favour approval of the sale" (emphasis added).

81 While the court in *Wild Goose*, at para. 78 distinguishes *Hester* on the basis that all the secured creditors were protected by the redemption in *Hester*, the decision on whether to allow a redemption in *Wild Goose* still appears to have turned on the integrity of the sales process. At para. 80 the court notes, "[i]n my view, protecting the integrity of the sales process contemplated by the sale solicitation order outweighs Wild Goose's claim that it should be entitled to redeem the petitioner's security in the circumstances of the case."

82 What emerges from these more recent cases is that the integrity of a court approved sale process is an important consideration. If a sale process is found to be sound, it should not be permitted to be interfered with by a later attempt to redeem. Further support for this approach can be found in the court's reasoning in *BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909, 27 C.B.R. (6th) 166, at para. 27: "[i]n this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process."

83 The court engages in a balancing analysis of the right to redeem against the impact on the integrity of the court approved receivership process: see *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at para.

41. The importance of the timing of the process in relation to the purported exercise of the right to redeem is emphasized at para. 36:

In [*B&M Handelman*], the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally.

The Balancing of Interests

84 The rights enunciated in *Hester* and relied upon by 273 Ontario must be balanced with the integrity of the court approved sale process. That in turn requires a consideration of whether that sale process was carried out in a procedurally fair manner, with a view towards achieving the best (and not an improvident) price, and with regard to the interests of all stakeholders. That consideration is part of the analysis that the court must engage in under the *Soundair* principles when deciding whether to approve the Transaction and grant an AVO, discussed in the next section of this endorsement.

85 The potential for prejudice to the different stakeholders is another consideration that is to be factored into the balancing exercise undertaken by the court in determining whether to permit the exercise of a right to redeem: see *Wild Goose*, at para. 74; *BCIMC*, at para. 47.

86 The stakeholder interests identified in this case include:

a. The interest of 273 Ontario, a joint venture and the fulcrum creditor, in acquiring the Property to try to preserve its debt and equity in the Rosehill Project (and avoid the losses that it will suffer if the Transaction is approved), as manifested by the relief sought in its cross-motion for the court's approval of its request to redeem or its Credit Bid.

b. The interest of the Receiver, in its capacity as the court appointed officer that sought the Sale Process Order and carried out the Sale Process, to protect the integrity of the court approved Sale Process.

c. The Purchaser is also invested in the integrity of the Sale Process, having participated in it in good faith. It also has a financial interest not only in the acquisition of the Property at the price agreed to under the Ora Binding APA, but in the lost opportunity costs by allowing its deposit to be held in a non-interest bearing account since November 25, 2022 and by maintaining sufficient liquidity to close the all-cash Transaction within five days of any court approval. While it engaged with the Receiver knowing that the Sale Process could be terminated by the Receiver, that never happened.

d. The priority interests of the first mortgagee (previously Trez and now Toronto Capital) and the Registered Lien Claimants are now protected under both the Ora Transaction and the redemption/Credit Bid scenario, so they have no prejudice to be considered. Any prejudice to Toronto Capital in respect of its plans to finance 273 Ontario has been created after the Receiver accepted the Ora Binding APA and is not a relevant consideration.

e. The Unit Purchasers whose Unit Purchase Agreements will be terminated (and deposits returned) under the proposed Transaction, if approved. They have now been given notice and have not come forward with a strong voice of opposition to the termination of those agreements by the court.⁶ Of those who have expressed a view, more prefer this than oppose it, and more still were silent on the point. The number and substance of the opposition is underwhelming, given how far away the Rosehill Project is from completion.⁷

f. Any other remaining unsecured creditors are unlikely to recover under either scenario and are not being directly impacted beyond the non-recovery of their debt.

87 The court recognizes that all stakeholder interests may not be equal: "[a]lthough the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors": *Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp.* 199912 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) (Ont. S.C.), at para. 6.

88 The other stakeholder interests in this case are either neutral or militate in favour of preserving the integrity of the Sale Process, which is what is stacked up against 273 Ontario's interests as a secured creditor and joint venture participant that will not fully recover its debt, investment or costs of the receivership if the Transaction is approved and is completed.

89 While the situation in this case is distinguishable from most of the decided cases in that it is a secured fulcrum creditor, rather than the debtor company in default, seeking to redeem, that does not diminish the importance of the integrity of the court approved Sale Process.

90 The normal course would be for the Credit Bid to be made at the outset of the Sale Process as the stalking horse bid. However, 273 Ontario was not willing or able to put forward a bid at the outset of the process. Asking the court to consider an improved Credit Bid (as of January 26, 2023) that may now be executable more than a month after the extended bid deadline under the Sale Process (and almost two months after the original bid deadline) undermines the integrity of the Sale Process.

91 Similarly, 273 Ontario only sought to redeem at the end of the court approved Sale Process that it was consulted on and participated in, after it became apparent that it was not able to make a competitive bid by the time of the extended bid deadline it was given of December 9, 2022. Allowing this right to be exercised at that late stage also undermines the Sale Process. If 273 Ontario had wanted to reserve its right to redeem to the end of the Sale Process, that is something that should have been expressly addressed at the time the Sale Process Order was made.

92 To be clear, it is not, as was suggested by 273 Ontario, the mere fact that the Receiver decided to accept the Ora Binding APA on December 10, 2023 that the court is looking at when considering whether the right to redeem is available. It is the fact that there was a court approved Sale Process that 273 Ontario was consulted about, did not oppose and participated in and only sought to override by a redemption when it was unable to make a competitive bid.

93 The existence of the APS (accepted Ora Binding APA) was always subject to court approval. If not approved, or if the court was not prepared to order the deemed termination of the Unit Purchase Agreements (with the result that the condition of the APS would have failed unless waived by both the Receiver and Ora) then 273 Ontario might have been permitted to step in with its redemption or Credit Bid. But that has not transpired.

94 The court has the jurisdiction to approve the deemed termination of the Unit Purchaser Agreements. The proposed treatment of the Unit Purchasers upon said termination is consistent with their contractual remedies for a breach of their agreements. No compelling reason has been presented not to approve this, if it is otherwise determined that the *Soundair* principles are satisfied (discussed in the next section).

95 The weighing of the interests (and prejudice) of all stakeholders is also an integral part of the consideration of the *Soundair* principles. If the Receiver is found to have carried out the court approved Sale Process in a manner consistent with the *Soundair* principles, the balance will favour protecting the integrity of the Sale Process over 273 Ontario's right of redemption.

Should the Transaction and APS be Approved and the Proposed AVO Granted?

96 The proposed sale to Ora must be demonstrated to meet the sale approval test from *Soundair*. To do so, the Receiver must demonstrate that:

- a. sufficient effort was made to obtain the best price and that the receiver has not acted improvidently;
- b. it has considered the interests of all stakeholders;
- c. the process under which offers were obtained and the sale agreement was arrived at was consistent with commercial efficacy and integrity; and
- d. there has not been any unfairness in the working out of the process.

a) *The Receiver's Efforts and Actions Were Provident*

97 According to the Court of Appeal in *Soundair*,

[W]hen a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

.....

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision.

98 The Receiver consulted with stakeholders, including 273 Ontario, in developing the Sale Process, which was followed. The confidential exhibits filed indicate a range of bid prices with differing conditions. Even the pre-Sale Process bid was conditional on due diligence and was withdrawn. Aside from that one withdrawn pre-Sale Process bid, the Ora Binding APA reflects a purchase price within the range of other all cash bids received and within the (low end of the) range of estimates of value from three independent brokers.

99 If there was a subsequent bid that demonstrates that Ora's price was improvidently low, that might be a relevant *ex post facto* consideration, but there is no comparable bid in this case. What we have is just a willingness on the part of 273 Ontario, a second mortgagee and investor who stands to lose a lot under the Ora Transaction to take on the risk and burden of the first mortgage, the Registered Lien Claims (to the extent they are ultimately determined to be valid and payable) and other expenses that will rank ahead of the second mortgage. 273 Ontario argues that its bid is almost 50 percent higher than the Ora Binding APA purchase price. However, that is not a reasonable comparison as the 273 Ontario Credit Bid is not a market bid that reflects any independent value assessment to which the court could compare the Ora bid. It is more appropriately characterized as the by-product of the value of the registered security on the Property.

100 Some of the other criticisms of 273 Ontario about the Receiver's conduct and actions are addressed under the third category of *Soundair* (process related) considerations, although there may be some overlap between the first and third categories.

101 For purposes of this first part of the analysis, the Ora Binding APA has not been demonstrated to be improvident.

b) *Consideration of Stakeholder Interests*

102 Under the second consideration, I agree with 273 Ontario that the court should be primarily concerned with the interests of creditors. It is secondarily concerned with the process considerations and the interests of other stakeholders: see *Soundair*, citing *Crown Trust Co. et al. v. Rosenberg et al.*, (1986), 60 O.R. (2d) 87 (H.C.).

103 The fact that the secured creditor (273 Ontario now effectively operating from the first and second secured positions) supports its own bid is not surprising or a particularly weighty factor. However, as was observed in the concurring opinion in the Court of Appeal's decision in *Soundair*,

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver.

104 The court understands that 273 Ontario stands to lose a great deal if the Transaction and the Ora Binding APA are approved. There can be no doubt that the interests of the creditors are an important consideration and that the opinion of the creditors as to which offer ought to be accepted is something to be taken into account. However, that should not be at the expense of the integrity of the Sale Process.

105 273 Ontario's desire to have the opportunity to make a Credit Bid was facilitated by the Receiver in the accommodations it afforded to 273 Ontario up to December 9, 2022. The Receiver went to great lengths to accommodate 273 Ontario, but 273 Ontario was not able to put together a firm unconditional bid by December 9, 2022, when it was told it had to.

106 At that time, the Receiver also had to consider the interests of Trez (the first priority secured creditor) and make a business judgment about whether to proceed with the Ora Binding APA or 273 Ontario's Credit Bid after it was received on December 9, 2022. That decision was made with regard to the factors that were outlined in the court approved Sale Process, including the relative closing and execution risks associated with each.

107 273 Ontario complains that the Receiver rushed to accept the Ora Binding APA on December 10, 2022 rather than continuing to engage with a view to receiving an unconditional Credit Bid from 273 Ontario, after it threatened to exercise its right to redeem the Property. However, by December 10, 2022, the Receiver was in the position of having to accept the Ora Binding APA or risk losing the Transaction. The Ora Binding APA was the only available closable deal at the time that had a certain outcome of full recovery for the first secured creditor, Trez. This is owing to the fact that 273 Ontario did not have firm financing to satisfy the first priority secured loan, whether by redemption or through a Credit Bid.

108 The Receiver, in its discretion, determined that there was a risk of losing the Ora Binding APA and that is what led to the decision to accept it after evaluating the two options available. The Receiver's judgment at the time, for which no grounds have been suggested as warranting a lack of deference, was that Ora could walk from the Transaction if the Receiver did not sign back the Ora Binding APA. The Receiver was worried about the terms and conditions of the Credit Bid and its conditional financing at the time.⁸ The Receiver's business judgment about the potential loss of the Ora Binding APA, weighed against the inability of 273 Ontario to come forward with a firm Credit Bid, is not something that the court should second guess.

109 As was observed in the earlier discussion about balancing stakeholder interests, in this case it largely comes down to a balancing of the integrity of the Sale Process against 273 Ontario's interests. The following passage from *Soundair* is instructive:

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported.

110 The integrity of the Sale Process is not just about the fact that the Ora Binding APA had been accepted, for reasons indicated earlier.

111 The record is clear that consideration was given to all stakeholders' interests. The Purchaser's interests were not given more or undue weight over the interests of secured creditors. If anything, it was the interests of Trez, the first secured lender at the time, that the Receiver was, justifiably, concerned about if the Transaction was lost. The second secured lender's interests were not disregarded, ignored or given unfair consideration; they just did not tip the balance in the ultimate decision by the Receiver to accept the Binding Ora APA.

112 Similarly, the interests of the Unit Purchasers, whose agreements the court is being asked to deem to have been terminated, were considered. It was determined that they were being treated in accordance with their contractual rights upon any breach or termination of the Unit Purchase Agreements by the Company. Although their contractual remedies upon termination are not being compromised (they are getting their deposits back as they would be entitled to on any breach), a minority of them, when given the opportunity, expressed disappointment that their expectation of purchasing a completed unit in the Rosehill Project will not be met. The majority appear to be content with the preservation of their contractual remedies upon termination or breach and the return of their deposits, a reasonable expectation that will be met if the Transaction is approved.

113 In the end, what is important is that all relevant stakeholder interests were considered and balanced by the Receiver, including those of 273 Ontario. I am satisfied that they were.

c) The Commercial Efficacy and Integrity of the Sale Process

114 273 Ontario has criticized the manner in which the Receiver reached out to some prospective bidders (and failed to follow-up directly with one of the known pre-Sale Process bidders), as well as the fact that an outdated draft non-reliance appraisal report was not in the data room. The Receiver has explained its actions with reference to these criticisms in a manner that satisfies the court. They do not diminish the integrity of the Sale Process that the Receiver followed.

115 273 Ontario also criticizes the Receiver for running a "fire sale" because it was mentioned in its materials for the Sale Process that the Rosehill Project had "fallen into receivership," thereby suggesting there was an insolvency situation. Having considered all the evidence about the implementation of the Sale Process, I do not consider this to be a fair characterization of the Receiver's conduct during the Sale Process. Nor was it improper for the fact that the Rosehill Project was in receivership to have been mentioned; the Receiver has to identify itself as such when engaging with prospective purchasers.

116 It has not been suggested that the court approved Sale Process itself lacked commercial efficacy or integrity. Nor has it been demonstrated that the Receiver failed to follow that process. I am satisfied that the process under which bids were obtained and the APS was arrived at was consistent with commercial efficacy and integrity.

d) No Unfairness in the Working out of the Process

117 The Receiver engaged with 273 Ontario and made efforts to take its interest in making a bid into account. Even after it missed the bid deadline, 273 Ontario's offer letter was received and considered and 273 Ontario was encouraged and given time to compile a bid.

118 Further, the Receiver treated 273 Ontario fairly in receiving and considering the bid it eventually made, which was not accompanied by proof of financing and was no accompanied by a Binding APA. Whereas the Receiver could have rejected this for non-compliance, it did not do so.

119 273 Ontario complains that it was "jammed" because of the Receiver's delay in confirming the validity, enforceability and amount owing under the 273 Ontario Loan and in dealing with the Registered Lien Claims, both of which 273 Ontario maintains impacted its ability to submit a Binding APA. The Receiver maintains that it responded in a timely manner to requests from 273 Ontario about these matters. It even eventually agreed to allow 273 Ontario's second mortgage claim to be valued at the full amount 273 Ontario submitted, and not at the lesser amount that the Receiver had valued it at for other purposes.

120 273 Ontario also complains that the Receiver first invited it to make its Credit Bid conditional upon the resolution of the Registered Lien Claims to 273 Ontario's satisfaction and then gave as one of its reasons for preferring the Ora Binding APA that 273 Ontario's Credit Bid was conditional upon the Registered Lien Claims being withdrawn or found to be invalid. The suggestion that a bid could be made conditional upon a satisfactory resolution of these claims does not mean that this condition would not be factored into the evaluation of the bid, it just meant that the requirement that the bid be unconditional for it to even be considered was being waived (as an accommodation to 273 Ontario, something that the Receiver did not have to do).

121 It is suggested that the Receiver should have started to validate 273 Ontario's mortgage security in July 2022, and that its delay until its final confirmation of the amount on December 3, 2022 was unreasonable. The Receiver has explained the normal course approach to validating a security. Moreover, the record demonstrates a timely response to 273 Ontario's request that it do so when made in October 2022, including allowance for a higher amount than what the Receiver considered appropriate for the purposes of the Credit Bid that it permitted 273 Ontario to make after the bid deadline had already passed.

122 Similar criticisms are made about the Receiver's failure to prioritize the evaluation of the Capital Build Lien (which 273 Ontario had maintained was fraudulent from the outset). Yet, when asked to prioritize this, the Receiver did so and made the decision to seek approval from the court to disallow it. The timing of 273 Ontario's requests for the security review (and

subsequent request for confirmation of the accepted amount of the 273 Loan) and for the determination of the Registered Lien Claims have been addressed earlier in this endorsement. 273 Ontario suggests that, because it was funding the receivership, its requests should have been given priority by the Receiver. The Receiver's duties are to the court and all stakeholders. But it did prioritize issues when they were raised by 273 Ontario, so these complaints are unfounded both legally and factually.

123 If 273 Ontario had wanted its mortgage security validated and the Registered Lien Claims dealt with before the bid deadline under the Sale Process, it could have asked that this be done at the time of the court's approval of the Sale Process Order. It did not do so. Now it suggests that the Receiver was remiss in not appreciating how important this was to 273 Ontario's participation in the Sale Process. I do not accept that to be a valid criticism of the Receiver.

124 At worst, there appears to have been a misunderstanding between the Receiver and 273 Ontario about whether the Receiver was working on evaluating 273 Ontario's security and the Registered Lien Claims prior to the specific requests from 273 Ontario that it do so commencing in October 2022. The Receiver addressed these points during the Sale Process when it was asked to do so in October 2022. The real issue is that 273 Ontario did not agree with, and was perhaps surprised by, the Receiver's assessments once received. The court does not accept the assertion by 273 Ontario that the Receiver did not address these matters in a timely and diligent manner. Even if 273 Ontario had thought, or hoped, they were being addressed earlier, that possible misunderstanding does not rise to the level of a failing on the Receiver's part.

125 273 Ontario argues that, but for the Receiver's artificial and aggressive deadlines, and its failure to address the two issues 273 Ontario requested it to take care of well before the bid deadline, the Toronto Capital funding commitment would have been provided to the Receiver before the bid deadline and its bid would not have suffered from the identified execution risks. I have difficulty with the position that this delay was the Receiver's fault. The deadlines were prescribed under the Sale Process. It is not lost on the court that 273 Ontario was engaged in a Sale Process that was primarily directed to prospective third-party purchasers. It declined to put in a stalking horse bid in advance of the Sale Process Order and then had to scramble when it decided to do so once the Sale Process was underway.

126 273 Ontario, at some point in the process, became concerned about the value of the bids that might materialize and began to work on its Credit Bid. 273 Ontario then found itself scrambling to find financing for a Credit Bid and was not able to do so even by the extended deadline of December 9, 2022. I am not persuaded that this was a function of any unfairness in the Sale Process that the Receiver followed, or its conduct in dealing with requests from 273 Ontario to review its security and determine the Registered Lien Claims.

127 273 Ontario then complains that after it submitted its Credit Bid, it was rejected out of hand without any further negotiation after the Receiver rushed to accept the Ora Binding APA. 273 Ontario complains that the Receiver did not contact it to invite it to remove conditions before accepting the Ora Binding APA. 273 Ontario suggests that this was done for Ora between November 25 and December 6. In fact, it was done for both Ora and 273 Ontario before the December 9, 2022 deadline. Suggestions were made in an effort to assist 273 Ontario in putting in its Credit Bid despite the challenges it was facing. 273 Ontario did not raise concerns about conditions on its financing with the Receiver before submitting its Credit Bid on December 9, 2022.

128 The Receiver extended an accommodation to 273 Ontario by allowing it to continue in the Sale Process after the November 25, 2022 Bid Deadline and to work forward from its offer letter to its Credit Bid on the same time line as it afforded to Ora to move forward from its initial Bid to the Binding Ora APA that was submitted on December 7, 2022, and then 273 Ontario was given two days after that to submit its Credit Bid. 273 Ontario was not treated unfairly in this process. Ora and 273 Ontario were both afforded opportunities to improve their bids after November 25, 2022 and were treated equitably during that period.

129 Events that occurred after the Ora Binding APS was accepted on December 10, 2022 are of marginal relevance, unless they shed light upon matters that were known or ought to have been known at the relevant time. In the category of marginal relevance would be the assignment of the Trez first priority mortgage to Toronto Capital that has alleviated some of the execution risk associated with the 273 Ontario Credit Bid that the Receiver had identified when it decided to accept the Ora Binding APA. The fact that almost two months later, 273 Ontario was able to get financing in place to take out the first secured mortgage does not

diminish the legitimacy of the Receiver's concerns about the relatively more significant execution risk associated with the Credit Bid when it was considering which bid was in the best interests of the stakeholders of the Company on December 10, 2022.

130 Lastly, I do not find there to have been anything unfair about the Receiver's efforts to facilitate a commercial resolution between 273 Ontario and Ora after the Ora Binding APA had been accepted and 273 Ontario was able to obtain financing. No one tried to hold 273 Ontario to that resolution, even though it agreed to it and later indicated that it had felt pressured to enter into it and was not prepared to follow through with it.

131 The fact that the terms and limitations on the 273 Credit Bid ultimately submitted were less favourable in the Receiver's assessment than other bids does not mean it was not properly considered. I find that 273 Ontario was treated fairly by the Receiver in the working out of the Sale Process.

e) Approval of the APS, Transaction and AVO

132 Accordingly, the *Soundair* principles having been satisfied, the APS and Transaction are approved and the AVO is granted.

Should the Ancillary Order be Granted?

133 Counsel for 273 Ontario suggested that the requested ancillary relief should be delayed, regardless of the outcome of the decision on the AVO because there are concerns about fees that 273 Ontario has not had time to address. However, the Receiver is not seeking approval of its fees under the Ancillary Order. The relief it is seeking is related to the AVO.

134 If the *Soundair* requirements are found to have been met and the Receiver's conduct in carrying out the Sale Process is not impugned, it should not be open to further challenge. The Receiver's actions and activities during the relevant period should be approved. The approval of the statement of receipts and disbursements is simply a recognition of what amounts were received and paid. It is not an approval of any amounts that may have been paid to the Receiver and its counsel. The Receiver will still be required to seek those approvals in the normal course with the appropriate fee affidavits.

135 In the meantime, establishing a reserve or holdback from the sale proceeds to satisfy the fees, in such amounts as may ultimately be approved, is a prudent and reasonable thing to do, particularly given the breakdown in the relationship between the Receiver and 273 Ontario.

136 The proposed distributions, to the first mortgagee and on account of the Receiver's Borrowing Charge (for amounts borrowed and previously approved) appear to be reasonable. If the new first mortgagee, Toronto Capital, does not want to be paid out then that can be addressed in the context of the Ancillary Order being settled. I will hold off in signing it for now, but if it does want to be paid out, I would approve that distribution.

137 Finally, the requested sealing order is appropriate.

138 The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.

139 The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

140 These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

141 Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

142 The Receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. At the appropriate time, the Receiver shall also seek an unsealing order.

Costs and Final Disposition

143 The Receiver's Motion for an AVO and Ancillary Order is granted on the terms indicated herein. 273 Ontario's cross-motion is dismissed.

144 There was not sufficient time booked at any of the hearings to address the issue of costs. The parties should exchange cost outlines and try to reach an agreement on costs. If they are unable to do so they are directed to arrange a scheduling appointment before me so that an efficient procedure can be established for the costs of these motions to be determined.

145 Before signing the proposed AVO and Ancillary Order, I wanted to give the parties the opportunity to consider if anything further needs to be changed in the forms that were originally submitted by the Receiver, given the passage of time and with the benefit of the court's endorsement. Updated forms of orders may be submitted to me for consideration (with blacklines to indicate changes made) by emailing them to my judicial assistant: lina.bunoza@ontario.ca

146 The court recognizes that this decision will have significant implications for 273 Ontario and the Rosehill Project. However, after permitting the adjournments to allow for a full airing of the multitude of issues raised on the merits, this is the outcome that has been reached. I am appreciative of the efforts and helpful submissions provided by all counsel.

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-22-00682959-00CL HEARING DATE: 26 JANUARY 2023
.....

NO. ON LIST: 3

TITLE OF PROCEEDING: ROSE-ISLI CORP. et al v. FRAME-TECH STRUCTURES LTD. et al

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
JASON WADDEN (counsel)	Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation, 2735440 Ontario Inc.	jwadden@tyrllp.com
CARLOS SAYAO (counsel)		csayao@tyrllp.com

For Other:

<i>Name of Person Appearing</i>	<i>Name of Party</i>	<i>Contact Info</i>
SHARON KOUR (<i>counsel</i>)	Ernst & Young Inc. (Receiver)	skour@reconllp.com
CAITLIN FELL (<i>counsel</i>)		cfell@reconllp.com
SHAUN PARSON (<i>counsel</i>)		sparson@reconllp.com
NATHANIEL READ-ELLIS (<i>counsel</i>)	Ora Acquisitions Inc. (Purchaser)	nreadellis@agbllp.com
SEAN PIERCE (<i>counsel</i>)		spierce@agbllp.com
ADAM WYGODNY (<i>counsel</i>)	Purchasers of Unit No. 604	awygodny@groiaco.com
CAMERON NEIL (<i>counsel</i>)	KNYMH lien claimant	neilc@simpsonwigle.com

In total there were approximately 38 observers and participants at the hearing, including the above named counsel and a number of individual purchasers. Three purchasers, *MARY RAPPULO*, *NICOLA LACANTORE*, and *VINCENZO PATERINO* addressed the court.

Motion granted; cross-motion dismissed.

Appendix

Footnotes

- 1 It was noted that, as a practical matter, the latest version of 273 Ontario's credit bid would form the basis for the implementation of the right of redemption if that relief were to be granted.
- 2 After the court's endorsement of January 18, 2023, and just prior to the re-attendance of the parties on January 26, 2023, the Trez first mortgage was paid out and assigned to Toronto Capital. Toronto Capital is now the first ranking creditor on the Project. Unlike Trez, it supports the position of 273 Ontario and the redemption right that 273 Ontario seeks to exercise. However, the court assumes that, if the AVO is granted and the Transaction with Ora is approved, Toronto Capital, now standing in the position of Trez, will want to receive the same proposed distributions that the Receiver had sought the court's approval to make to Trez to satisfy the first mortgage charge. That should be clarified before the final draft of the AVO is provided to the court to be signed.
- 3 Counsel for 273 Ontario pointed out at the January 26, 2023 hearing (and counsel for the Receiver did not disagree) certain inaccuracies contained in the court's January 18, 2023 endorsement regarding the timing of registration of the Registered Lien Claims which are corrected herein.
- 4 There was some discrepancy in the evidence about the date on which the Ora Binding APA was accepted, but it was confirmed during the January 26, 2023 hearing to have been accepted on December 10, 2022.
- 5 As a result of *B&M Handelman*, the court in *Wild Goose*, at para. 67 expressly reserved in the court order Wild Goose's right to redeem "that might otherwise be lost on the reasoning in [*B&M Handelman*,]."
- 6 The purpose of requiring that the Unit Purchasers be given notice of the relief sought was so that they were made aware and given the opportunity to make submissions about whether the court could or should make the requested order deeming the Unit Purchaser Agreements to have been terminated..
- 7 After the Unit Purchaser feedback was received and reported, 273 Ontario argued that only the interests of those who want to continue with their Unit Purchase Agreements should be considered. This was said to be logical because the court is being asked to allow the Receiver to break those agreements, whereas the Unit Purchasers in favour of that happening do not have a right themselves to break their agreements. That takes too narrow a view of the Unit Purchasers' interests. They all have an interest in what happens to their Unit Purchase Agreements as a consequence of the Transaction that the court is being asked to approve, even if they do not have the right to break, or specifically enforce, their agreements because of the terms of the Appointment Order.

- 8 273 Ontario suggested that the Receiver should have known, or could have asked and been told, that the financing would be waived by the lender, despite what the commitment letter said. If that was the case, that was something 273 Ontario could have conveyed to the Receiver, but did not do so.

2023 ONSC 4203
Ontario Superior Court of Justice

Ontario Securities Commission v. Bridging Finance Inc.

2023 CarswellOnt 11304, 2023 ONSC 4203

ONTARIO SECURITIES COMMISSION (Applicant) and BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND (Respondents)

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: July 17, 2023
Judgment: July 17, 2023
Docket: CV-21-6611458-0CL

Counsel: John L. Finnigan, Grant Moffat, Adam Driedger, for Receiver, PricewaterhouseCoopers Inc.
David Ullman, for Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas & 2190330 Ontario Ltd.
Robert Staley, Mike Shakra — Unitholder Representative Counsel

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Securities

Geoffrey B. Morawetz C.J. Ont. S.C.J.:

1 The Receiver brings this motion seeking the following orders:

(a) authorizing and directing the Receiver to enter into the AMI SPA and take such steps as are necessary to carry out the AMI Transaction and vesting all of the Receiver's right, title, and interest in the GFAC Shares held by Bridging in and to the Purchaser thereof on closing of the AMI Transaction free and clear of all encumbrances (the "Approval and Vesting Order");

(b) authorizing and directing the Receiver, on behalf of BIF, as the sole equity holder of Bottom Line, to enter into the Bottom Line APA and take such steps as are necessary to carry out the Bottom Line Transaction (the "Bottom Line Order");

(c) sealing from the public record until the closing of the AMI Transaction the unredacted copy of the AMI SPA, to be filed as Confidential Appendix "A" to the Seventeenth Report (the "AMI Sealing Order");

(d) sealing from the public record until closing of the Bottom Line Transaction the unredacted copy of the Bottom Line APA, to be filed as Confidential Appendix "B" to the Seventeenth Report; provided that Schedule 6.3(a) of the Bottom Line APA shall remain sealed until further order of the Court (the "Bottom Line Sealing Order" and together with the AMI Sealing Order, the "Sealing Orders"); and

(e) approving the Sixteenth Report of the Receiver dated April 25, 2023, the Supplement to the Sixteenth Report of the Receiver dated May 4, 2023, and the Seventeenth Report of the Receiver dated July 10, 2023, and the activities, decisions and conduct of the Receiver as set out therein.

2 The capitalized terms not expressly defined herein are defined, and have the meanings set forth, in the Seventeenth Report of the Receiver dated July 10, 2023 (the "Seventeenth Report").

3 There was no opposition to the requested relief. Unitholder Representative Counsel supported the position of the Receiver.

FACTS

4 The facts relevant to this motion are set more fully out at paragraphs 83 to 148 of the Seventeenth Report.

AMI Transaction

5 AtlantiCann Medical Inc. ("AMI") is a federally licensed cannabis producer based in Halifax, Nova Scotia. AMI is 100% owned by Growforce AC Holdings Inc. ("GFAC"), a privately held corporation. GFAC is a holding company that was incorporated for the sole purpose of holding the shares of AMI. The issued and outstanding shares of GFAC (collectively, the "GFAC Shares") are held as follows:

(a) 10.05% by Halef Group Holdings Limited;

(b) 0.5% by Tim Nolan; and

(c) 89.45% collectively by or on behalf of BIF, MMF, BIIF, and SMA 2 (collectively, the "Applicable Bridging Funds").

6 In addition to holding 89.45% of the shares of GFAC, Bridging is a secured creditor of AMI and GFAC. AMI and GFAC have each guaranteed the indebtedness of a Borrower to Bridging and Bridging continues to hold security over all of the assets of AMI and GFAC in respect of such guarantees.

7 There have been four unsuccessful separate marketing efforts conducted in respect of AMI and GFAC (and/or the interest of Bridging and MJar in AMI and GFAC).

8 In early 2023, GFAC and the Receiver received various inquiries regarding the opportunity to purchase the AMI business. 15103154 Canada Inc. (the "AMI Purchaser") submitted a LOI to AMI on March 21, 2023 to purchase 100% of the shares of AMI from GFAC. After preliminary negotiations with AMI and GFAC, the Purchaser submitted a revised LOI on April 27, 2023 and, following further negotiations, it was recommended by the special committee of the board of directors to the shareholders of GFAC and accepted following consultation with the Receiver.

9 On June 23, 2023, the Receiver (on behalf of Bridging), the Halef Group, and Tim Nolan and the Purchaser entered into a share purchase agreement (the "SPA") for the purchase of 100% of the GFAC Shares (the "AMI Transaction").

10 The SPA has been redacted to preserve the confidentiality of the Purchase Price payable by the Purchaser and other applicable monetary amounts or percentages that reveal the economic terms of the SPA. The Receiver seeks a sealing order in respect of the unredacted SPA, which is time limited to the period up to and including the Closing Date (after which it is contemplated that the unredacted SPA will no longer be sealed and will form part of the public record).

11 The SPA sets out the terms and conditions pursuant to which the Purchaser will acquire 100% of the GFAC Shares from the Vendors.

12 The Receiver is satisfied, in its business judgment, that the AMI Transaction represents the highest and best value in the circumstances for the GFAC Shares and is superior to any alternatives, including a liquidation of the assets of AMI. The Receiver consulted with Unitholder Representative Counsel on the AMI Transaction and potential alternatives. Unitholder Representative Counsel supports the AMI Transaction.

Bottom Line Transaction

13 Pittsburg Bottom Line, LLC ("Bottom Line") is a Borrower that provides railroad infrastructure services in the Southwestern and Midwestern United States. Bottom Line is an affiliate of Allied, another Bridging Borrower. BIF is the senior secured creditor and sole equity holder of each of Allied and Bottom Line. There have been two separate marketing efforts conducted by the Receiver in respect of Bottom Line. The first effort proved to be unsuccessful.

14 The deadline for submission of LOIs was February 28, 2023. The Receiver received multiple offers by the bid deadline. The Receiver ultimately identified Martinus North America, Inc. or an affiliate thereof (the "Martinus") as the successful bidder. Bottom Line and Martinus executed a nonbinding LOI on March 13, 2023 (the "Martinus LOI"), which contemplated the sale by Bottom Line of substantially all of its assets to Martinus (or an affiliate) subject to, among other things, completion of due diligence and negotiation of definitive documentation.

15 The Receiver is satisfied that the Bottom Line APA represents the highest and best offer for the Bottom Line assets and business at this time.

16 The assets being sold pursuant to the Bottom Line APA are the property of Bottom Line and not Bridging (and therefore do not constitute "Property" over which the Receiver has been appointed). In that regard, there are two key implications that impact the nature of the relief being sought by the Receiver:

- (a) first, the Court does not have jurisdiction to vest title to the Bottom Line assets in and to Martinus; and
- (b) second, the Appointment Orders do not require the Receiver to obtain Court approval prior to a wholly owned subsidiary of Bridging selling its own assets, which do not constitute Property. Paragraph 2(k) of the Appointment Orders only requires the Receiver to obtain Court approval prior to selling Property for an amount greater than \$250,000.

17 However, given that the Bottom Line assets are directly tied to the value of the equity interest in Bottom Line held by BIF and the loans made by BIF to Bottom Line (all of which constitute Property), the Receiver is seeking the Court approval to enter into and carry out the terms of the Bottom Line APA. The Receiver consulted with Unitholder Representative Counsel on the Bottom Line Transaction. Unitholder Representative Counsel supports the Bottom Line Transaction.

ISSUES

18 The issues on this motion are whether the Court should:

- (a) approve the AMI Transaction and grant the proposed Approval and Vesting Order;
- (b) authorize and direct the Receiver, on behalf of BIF, as the sole equity holder of Bottom Line, to enter into the Bottom Line APA and carry out the Bottom Line Transaction; and
- (c) grant the proposed Sealing Orders in respect of Confidential Appendices "A" and "B" to the Seventeenth Report.

Approval and Vesting Order for AMI Transaction

19 It is well established that where a Court is asked to approve a transaction and grant a sale approval and vesting order in the context of a receivership, the Court should consider the following principles delineated by the Court of Appeal for Ontario in Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ONCA) (collectively, the "Soundair Principles"):

- (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.

20 Absent clear evidence that a proposed sale is improvident or that there was unfairness in the process, a Court is to grant deference to the recommendation of the Receiver to sell a respondent's assets. Only in "exceptional circumstances" will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

21 Having reviewed the record and hearing submissions, I am satisfied that the Soundair Principles have been adhered to and that the Approval and Vesting Order should be granted for the following reasons:

(a) In my view, sufficient effort was made to obtain the best price. As noted above, four separate marketing processes were conducted. The consideration that will be received by Bridging under the AMI Transaction is superior to any other offers received as well as the liquidation value of AMI's assets. The Receiver is of the view that conducting a fresh marketing process for AMI would not be a productive use of Bridging's resources. Further, closing the AMI Transaction eliminates the risk that Bridging's investment in AMI, as well as its security position as a secured creditor of AMI, may deteriorate in value.

(b) Further, the interests of all parties have been served. The AMI Transaction represents the best possible outcome in the circumstances for all parties with an economic interest in AMI. The AMI Transaction also provides for the continuation of the AMI business, thus preserving jobs for a number of employees in Nova Scotia as well as value for customers, suppliers, and other parties with whom AMI transacts.

(c) In my view, the sale processes were run with integrity and there was no unfairness. The Receiver is satisfied, in its business judgment, that each sale process described above in respect of GFAC and AMI was conducted in a fair and transparent manner.

Approval Regarding Bottom Line Transaction

22 The Receiver seeks an order authorizing and directing the Receiver, on behalf of BIF, as the sole equity holder of Bottom Line, to enter into the Bottom Line APA and carry out the Bottom Line Transaction. On that basis, the Receiver has considered the application of the Soundair Principles to the Bottom Line Transaction.

23 I am satisfied that the Soundair Principles have been adhered to and therefore the Bottom Line Order should be granted for the following reasons:

(a) In my view, sufficient effort was made to obtain the best price. The Receiver is satisfied, in its business judgment, that the Bottom Line Transaction represents the highest and best value for the assets of Bottom Line in the circumstances. It will also eliminate the ongoing requirement of Bridging to fund the Bottom Line business. The consideration that will be received by Bridging under the Bottom Line Transaction is superior to the liquidation value of Bottom Line's assets. The Receiver is of the view that conducting a fresh marketing process for Bottom Line would not be a productive use of Bridging's resources.

(b) Further, the interests of all parties have been served. The Bottom Line Transaction maximizes value for all parties with an economic interest in Bottom Line.

(c) In my view, the sale processes were run with integrity and there was no unfairness. The Receiver is satisfied, in its business judgment, that each sale process described above in respect of Bottom Line was conducted in a fair and transparent manner.

(d) There are no exceptional circumstances that would lead this Court to proceed contrary to the recommendation of the Receiver. The Receiver consulted with Representative Counsel on the Bottom Line Transaction and potential alternatives. Representative Counsel supports the Bottom Line Transaction.

Sealing Orders

24 The Receiver seeks a sealing order in respect of Confidential Appendix "A" and Confidential Appendix "B" to the Seventeenth Report.

25 Confidential Appendix "A" contains the unredacted AMI SPA. The redacted version of the AMI SPA redacted the purchase price and other applicable monetary amounts or percentages that reveal the economic terms of the AMI Transaction (the "AMI Economic Terms"). The Receiver only seeks to seal the AMI Economic Terms until the closing of the AMI Transaction.

26 Confidential Appendix "B" contains the unredacted Bottom Line APA. The redacted version of the Bottom Line APA redacted the monetary components of the purchase price (the "Bottom Line Economic Terms"), the list of customer and/or supplier contracts to be assumed by Martinus contained at Schedule 1.5 thereto (the "Third Party Contracts"), and the names and salaries of the employees of Bottom Line to be assumed by Martinus contained at Schedule 6.3(a) thereto (the "Employee Information"). The Receiver only seeks to seal the Bottom Line Economic Terms and the Third Party Contracts until the closing of the Bottom Line Transaction. The Receiver seeks to seal the Employee Information until further order of the Court.

27 The applicable test for granting a sealing order, as set out by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 28, is that the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

28 The Receiver submits that the request for a sealing order in respect of the AMI Economic Terms, the Bottom Line Economic Terms, the Third Party Contracts, and the Employee Information satisfies the *Sherman Estate* test for the reasons set out below.

29 The key economic terms of a transaction are routinely sealed until closing on the basis that there is a broader public interest in maintaining the confidentiality of such information. See, for example, *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2023 ONSC 2579 at ; and *American General Life Insurance Company et al. v. Victoria Avenue North Holdings Inc. et al.*, 2023 ONSC 3322 at .

30 In the Receiver's view, disclosure of the AMI Economic Terms and the Bottom Line Economic Terms (together, the "Economic Terms") would prejudice recoveries for Bridging's stakeholders in the event that the applicable transactions do not close because the disclosure of such terms would effectively create a ceiling on the amount that a new purchaser would be prepared to pay for the applicable assets or shares.

31 The Receiver submits that there are no alternatives to sealing the Economic Terms. In terms of proportionality, given that the Sealing Orders in respect of the Economic Terms are time limited to the pre-closing period, the Receiver submits that the limitation on the open court principle is both minimal and justified. The broader public interest in maintaining the confidentiality of economic terms pre-closing and maximizing recoveries for the Bridging stakeholders outweighs the minimal limitation on the open court principle in these circumstances.

32 The Third Party Contracts are the contracts between Bottom Line and third parties that will be assumed by Martinus on closing. The redacted Schedule 1.5 in the Bottom Line APA, which contains the Third Party Contracts, sets out the name of each contract and the parties thereto. None of the parties involved in the Third Party Contracts are parties to this proceeding.

33 Disclosing the Third Party Contracts could facilitate efforts by Bottom Line's competitors to market goods or services to those customers or suppliers, to the detriment of Bottom Line. Similar to the Economic Terms, disclosure of the Third Party Contracts could therefore prejudice recoveries for Bridging's stakeholders in the event that the Bottom Line Transaction does not close.

34 Counsel to the Receiver submits that there are no alternatives to sealing the Third Party Contracts. In terms of proportionality, similar to the Economic Terms, given that the Sealing Order in respect of the Third Party Contracts is time limited to the pre-dash;closing period, the Receiver submits that the limitation on the open court principle is minimal in these circumstances and is outweighed by the broader public interest in maximizing recoveries for the Bridging stakeholders.

35 The Employee Information contains the specific names and salaries (or hourly wages) of each employee of Bottom Line that is to be assumed by Martinus on closing. None of the applicable employees are parties to this proceeding.

36 Employee names and salaries have been sealed in similar circumstances by the Court in this proceeding *Ontario Securities Commission v. Bridging Finance Inc*, 2021 ONSC 4347 [at paras 25ndash;27, as well as other cases that were also decided after the Supreme Court released its decision in *Sherman Estate* . (See: *Just Energy Group Inc. et al*, 2021 ONSC 7630 [at paras 26ndash;29; and *PricewaterhouseCoopers Inc. v. MJardin Group, Inc*, 2022 ONSC 3603 [at paras 13ndash;21.) The overarching principle from these cases is that there is an important public interest in protecting sensitive and personal compensation information of non-dash;party employees that justifies a sealing order in certain circumstances. See for example: *Canwest Global Communications Corp., Re*, [2009] OJ No 4286 (QL) at para 52; *Bridging*; *Just Energy* ; and *MJardin*.

37 The Receiver submits that the foregoing principles should apply equally to the Employee Information in this case. The Receiver is of the view that the named employees have a reasonable expectation that their names and salaries (or hourly wages for the non-dash;salaried employees) will be kept private, particularly in a proceeding that is entirely unrelated to their employment. Disclosure of the Employee Information may offend applicable privacy legislation or may otherwise give rise to claims against Bottom Line or Bridging by the employees.

38 The Receiver is of the view that no party will be prejudiced in sealing the Employee Information and the benefits of granting the sealing order outweigh any limited impact on the open court principle. There are no reasonable alternatives in the circumstances.

39 In the other cases referenced herein in which similar employee information was sealed, the applicable sealing order was to remain in effect pending further order of the Court. The Receiver similarly requests that the Employee Information remain sealed in this case until further order of the Court.

40 Having reviewed the submissions of the Receiver, and having considered the test set out in *Sherman Estate* , I am satisfied that, in these circumstances, it is appropriate to grant the sealing orders requested by the Receiver.

Approval of Reports and Activities

41 Finally, the Receiver requests approval of its Sixteenth Report, the Supplement to the Sixteenth Report and the Seventeenth Report.

42 The Receiver reports that no adverse comments have been received in respect of the reports.

43 I am satisfied that these Reports should be approved.

DISPOSITION

44 The motion is granted and the Orders reflecting the foregoing have been signed.