

CITATION NO.: Homedale-Eagle Corporation v. 253 Queen Street Inc., 2024 ONSC 6590
COURT FILE NO.: CV-24-84027
DATE: November 26, 2024

SUPERIOR COURT OF JUSTICE – ONTARIO

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED; AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C-43, AS AMENDED**

RE: Homedale-Eagle Corporation, Applicant

-and-

253 Queen Street Inc., Respondent

BEFORE: MacNeil J.

COUNSEL: *D. Preger and D. Seifer* – Lawyers for Rosen Goldberg Inc., Court-appointed
Receiver of 253 Queen Street Inc.

G. Phoenix – Lawyer for Homedale-Eagle Corporation

M. Spence and S. Hans – Lawyers for Sky Mortgage Corporation

C. Rempel and D. Ionis – Lawyers for 253 Queen Street Inc.

L. Tomasich and J. Cooke – Lawyers for 2830064 Ontario Inc., 2830068 Ontario
Inc., Mixed-Use Developments (Ontario) L.P., and Wasaga Developments and
Infrastructure 2021 L.P.

HEARD: November 13, 2024

REASONS FOR DECISION

Introduction

[1] The court-appointed receiver, Rosen Goldberg Inc. (“the Receiver”), makes this motion seeking an Approval and Vesting Order and an Administration Order concerning lands and premises, municipally located at 253 Queen Street East, Brampton (“the Property”), owned by 253 Queen Street Inc. (“the Debtor”).

[2] The Receiver requests the court to approve the sale of the Property to a numbered company (“the Purchaser”), pursuant to a signed Agreement of Purchase and Sale, dated August 15, 2024 (“the APS”) (“the Transaction”), and for related relief.

[3] The two secured creditors, Homedale-Eagle Corporation (“Homedale-Eagle”) and Sky Mortgage Corporation (“Sky Mortgage”) support the Transaction as proposed by the Receiver.

[4] The Transaction is opposed by the Debtor and some of its equity holders, 2830064 Ontario Inc., 2830068 Ontario Inc., Mixed-Use Developments (Ontario) L.P. (“Mixed-Use LP”), and Wasaga Developments and Infrastructure 2021 L.P. (“Wasaga LP”).

[5] 2830064 Ontario Inc. and 2830068 Ontario Inc. (“the TriDelta General Partners”) are general partners to Mixed-Use LP and Wasaga LP. The TriDelta General Partners were formerly controlled by Mohammad Mahdi Tajbakhsh (“Mr. Tajbakhsh”).

[6] Mr. Tajbakhsh is the sole officer and director of the Debtor.

[7] The TriDelta Fixed Income Fund and the TriDelta High Income Balanced Fund are limited partners of, and contributed capital to, Mixed-Use LP and Wasaga LP.

BACKGROUND

[8] The Debtor is the registered owner of the Property.

[9] The Debtor purchased the Property in May 2018 for \$15,150,000, with the intention to redevelop it and construct a multiphase mixed-use development consisting of three residential towers, office space and retail space.

[10] The funds to purchase and redevelop the Property primarily came from two mortgages: a first-ranking \$10 million vendor take-back mortgage in favour of Homedale-Eagle; and a second-ranking \$2 million charge held by Sky Mortgage.

[11] The remaining funds came from the purchase of special, non-voting shares in the Debtor by Mixed-Use LP and Wasaga LP (collectively “the Mixed-Use and Wasaga Partnerships”). The Mixed-Use and Wasaga Partnerships invested approximately \$9 million in shares of the Debtor; Mixed-Use LP owns 6,750,000 special shares, and Wasaga LP owns 2,250,000 special shares. The rights associated with the special shares are set out in the Articles of Amendment for the Debtor, dated April 25, 2018. The special shares provide an entitlement to receive dividends from the net proceeds, if any, flowing from the redevelopment and sale of the Property. The holders of the special shares are not entitled to vote or otherwise participate.

[12] For this motion, Sky Mortgage filed a copy of an executed commitment letter, dated April 5, 2022, respecting its loan to the Debtor for \$2,000,000 (“the Commitment Letter”). The joint and several guarantors of the loan commitment were Mr. Tajbakhsh (as personal guarantor) and Mixed-Use Development (Ontario) GP Inc. (as corporate guarantor). The Commitment Letter was accepted by the Debtor on April 7, 2022.

[13] Commercial tenants have been occupying the Property pursuant to various commercial lease agreements, carrying on business and paying rent to the Debtor.

[14] On September 29, 2023, the City of Brampton passed Zoning Bylaw 152-2023, which approved the Property for a mixed-use development with 1,001,043 buildable square feet consisting of three towers with heights of 33, 38 and 32 stories.

[15] By Order of Valente J., dated February 8, 2024, pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Receiver was appointed receiver and manager of the Property and the business carried on by the Debtor thereon and all proceeds thereof (“the Receivership Order”).

[16] In February 2024, as part of its regular monitoring of the Property, TriDelta discovered the Receivership Order. TriDelta filed a notice of appearance in the proceeding on March 22, 2024.

[17] By Notice of Motion dated June 14, 2024, the Receiver made a motion seeking, among other things, approval of its First Report, dated June 14, 2024 (“the First Report”), and of the Receiver’s proposed marketing and sale process with respect to the Property. The Debtor, 2830064 Ontario Inc., 2830068 Ontario Inc., Mixed-Use LP and Wasaga LP were served with the Receiver’s motion materials in this regard, including a copy of the unredacted broker proposals (which included opinions of value), and an appraisal that had been previously obtained by the Debtor.

[18] The Receiver’s motion was heard on June 27, 2024. None of the interested parties who received notice of the motion opposed the relief being sought therein. By Order of Hilliard J., made that day, the marketing and sale process described in the First Report was approved and the Receiver was authorized to engage CBRE Limited to list the Property for sale (“the Sale Process Order”). The approved marketing and sale process reads as follows:

Week 1-2 [2 weeks]	• New aerial photos to be taken and a drone to be flown for video; • Hard copy and electronic marketing package to be completed and approved within two weeks after signing of listing agreement; • Marketing materials to reflect current property specific information.
Week 3-7 [5 weeks]	• Creation of a data room with all necessary due diligence materials. Interested parties to be required to execute a confidentiality agreement to gain access to due diligence material; • Hard copy brochure to [be] mailed out to CBRE’s database of reputable developers and investors; • Electronic brochure to be sent out through individual email marketing campaign; • Media advertising in select publications; • With Receiver’s approval, signage to be placed at the Property; • Targeted phone campaign and face-to-face meetings with interested parties;

	• Drone video to be posted on CBRE's website and link to be provided in CBRE's email campaign.
Week 8-9 [2 weeks]	• Offer preparation and presentation to Receiver; • Negotiations; • Secure agreement of purchase and sale.
Week 9	• Commencement of due diligence (60-90 days).
Closing	• 30 days following waiver of due diligence conditions.

[19] The approved marketing and sale process directed that the listing would be “unpriced”.

[20] The preparation steps contemplated in weeks 1-2 of the marketing and sale process were undertaken by CBRE prior to the granting of the Sale Process Order. As a result, the marketing campaign was launched to the public on July 3, 2024.

[21] The marketing activities of CBRE included:

- (a) installing 8' X 8' signage at the Property on July 8, 2024;
- (b) advertising the opportunity in a “leading real estate development, municipal and planning publication” on July 15 and 17, 2024;
- (c) advertising the opportunity on LinkedIn and on CBRE's website;
- (d) featuring the opportunity on the CBRE Land Specialist team's monthly new listing report on July 15, 2024;
- (e) weekly individual electronic campaign blasts to the CBRE Land Specialist team's database of over 1,500 contacts, which generated 2,030 views and 199 “clicks”;
- (f) over 200 telephone calls with prospective parties during a phone campaign;
- (g) responding to requests from 22 people for further information and/or providing them access to CBRE's data room upon signing of confidentiality agreements; and
- (h) nine face-to-face meetings with interested parties.

[22] A total of three offers were submitted which ranged in price; each was conditional upon due diligence.

[23] The two highest bidders were invited to re-submit their bids and, on August 3, 2024, they both did so. One bidder, the Purchaser, re-submitted its offer for a reduced price but with conditions removed. The other bidder increased its price but the price was still lower than the Purchaser's re-submitted offer.

[24] After negotiations, the Receiver and the Purchaser entered into the APS on August 15, 2024, the terms of which include:

- (a) the Property is being sold on an “as is, where is” and “without recourse” basis, with no representations and warranties;
- (b) the sale is subject to court approval and the granting of an approval and vesting order;
- (c) a deposit was paid by the Purchaser to be credited as an adjustment against the purchase price on closing;
- (d) the balance of the purchase price will be paid in cash on closing; and,
- (e) the sale is set to close 35 business days following the granting of the approval and vesting order.

[25] The Receiver and the Purchaser subsequently agreed to extend the time for court approval of the proposed sale to November 30, 2024.

[26] In early August 2024, TriDelta was advised by the Receiver that an offer had been received on the Property that the Receiver was proposing to accept. The Receiver met with representatives of TriDelta on August 7, 2024, after offers had been submitted. At that meeting, TriDelta expressed its disappointment with a deal in the range that was being negotiated. Between August 9 and 13, 2024, counsel for TriDelta and counsel for the Receiver exchanged correspondence regarding TriDelta’s concerns. TriDelta requested that the sale process be extended, however, the Receiver did not agree to that request.

[27] The Receiver advises that, on August 14, 2024, it communicated with Mr. Tajbakhsh and advised him of the results of the sale process.

[28] On August 15, 2024, the Receiver spoke by telephone with representatives of TriDelta. Ian Hunt, Senior Vice President at CBRE, participated in the call. Mr. Hunt shared his view of market conditions and that further marketing of the Property would not result in a better outcome.

[29] On August 16, 2024, Mr. Tajbakhsh was provided with details of the offers that were submitted and a copy of the APS. By letter dated August 23, 2024, counsel for Mr. Tajbakhsh wrote to the Receiver’s counsel raising concerns about the sale process and price.

[30] Neither TriDelta nor Mr. Tajbakhsh submitted offers to purchase the Property during the sale process.

The Environmental Indemnity

[31] Around the time the Debtor purchased the Property, it entered into a full and final release and indemnity in respect of past environmental contamination on the Property (“the Environmental Indemnity”).

[32] The Environmental Indemnity was part of a settlement agreement originally executed in September 2009 and subsequently amended, involving Homedale-Eagle, United Technologies Corporation, Lear Corporation and Lear Corporation Canada Ltd. (collectively “UTC”) (“the Settlement Agreement”). UTC was a tenant of the Property when it was owned by Homedale-Eagle. Under the terms of the Settlement Agreement, the law firm Ritchie, Ketchison, Hart & Biggert LLP, acts as escrow agent in connection with UTC’s funding of the remediation and monitoring costs associated with the Property; sixty percent of the remediation costs are payable to the Debtor.

[33] The Receiver advises that a copy of the Settlement Agreement documents is in the public record as they were attached to the First Report, and they have been available for viewing on the Receiver’s website as part of the Property’s sale process.

THE LAW

[34] In *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA), the Ontario Court of Appeal affirmed the principles that govern the approval of sale agreements in a receivership context. By those principles, a court must consider the following:

- (a) did the receiver make a sufficient effort to obtain the best price and did it act providently?
- (b) did the receiver consider the interests of all parties?
- (c) the efficacy and integrity of the process by which offers were obtained; and
- (d) was there unfairness in the working out of the process?

[35] In *Soundair*, the Ontario Court of Appeal cautioned that a court “should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain.” The Court of Appeal cited the decision in *Crown Trust Co. et al. v. Rosenberg et al.*, 1986 CanLII 2760 (ON SC), 1986 CarswellOnt 235, at para. 77, wherein Anderson J. explained that it is only in an exceptional case where a court will intervene and not proceed in accordance with a receiver’s recommendation, if satisfied that it has acted prudently and not arbitrarily. Anderson J. further cautioned, at para. 84:

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[36] I address each of the *Soundair* factors in the context of this case later on below.

POSITION OF THE RECEIVER

[37] The Receiver submits that the principles established by *Soundair* have been satisfied, and recommends that the Transaction be approved and the requested Approval and Vesting Order be granted, for the following reasons:

- (a) the sale process was undertaken in accordance with the terms of the Sale Process Order;
- (b) the sale process was commercially reasonable and comprehensive, and it widely canvassed the market for prospective buyers;
- (c) the sale process was conducted in a manner that was fair to all who participated in it and maintained a level playing field for all interested parties;
- (d) neither TriDelta nor Mr. Tajbakhsh elected to submit offers during the sale process to protect their equity positions; and
- (e) the Transaction provides the greatest recovery available for the benefit of stakeholders in the circumstances.

[38] The Receiver obtained opinions confirming that the mortgages held by Homedale-Eagle and Sky Mortgage are valid and enforceable charges against the Property.

[39] TriDelta has not produced any legal agreement between the Mixed-Use and Wasaga Partnerships and the Debtor evidencing a requirement on the part of the Debtor to obtain the consent or approval of the Mixed-Use and Wasaga Partnerships to mortgage the Property. TriDelta has also not explained how Homedale-Eagle or Sky Mortgage should have known of such a requirement, if it exists.

[40] The court must look at the Receiver's conduct in light of the information it had when it made its decision to enter into the APS on August 15, 2024. Given the unfavourable market conditions and the few offers received by the Receiver, the Transaction was the best option available to the Receiver at the time. The Receiver made a sufficient effort to obtain the best price and closely adhered to the approved marketing and sale process. Accordingly, despite the concern regarding the sale price, the Transaction should be approved.

[41] Upon completion of the Transaction, the Receiver seeks authorization to distribute sufficient proceeds to satisfy the Homedale-Eagle and Sky Mortgage mortgages in full.

ISSUES

[42] The following issues are to be determined by this motion:

- (i) Should the court approve the Transaction and grant the requested Approval and Vesting Order?
- (ii) Should the court grant the requested Administration Order?

ANALYSIS

(i) *Should the court approve the Transaction and grant the requested Approval and Vesting Order?*

[43] The main reasons given by the opposing parties for why this court should not approve the Transaction are the following:

- (1) that the Receiver failed to have obtained a higher purchase price for the Property;
- (2) that the Receiver failed to have the Purchaser assume the Environmental Indemnity; and,
- (3) that the Receiver failed to recognize the beneficial interest in the Property as claimed by Mixed-Use LP and Wasaga LP.

[44] I now consider the *Soundair* principles that govern the approval of sale agreements in light of these three stated concerns.

(a) Did the Receiver make a sufficient effort to obtain the best price and did it act providently?

Position of the opposing parties

[45] The Debtor and the other opposing parties believe that the purchase price set out in the APS is too low. It is their position that the Receiver has rushed the sale process and so the proposed sale price for the Property is much lower than the Property's estimated value, which prejudices the Debtor and its shareholders.

[46] The Debtor submits that the sale process undertaken by the Receiver was not fair since the Receiver and its agent, CBRE, only used approximately half of the contemplated listing time to promote the Property which reduced the Property's exposure to the market. The APS was then signed less than six weeks later at a "dramatically depressed sale price". The depressed price alone is a sufficient enough reason for the court to decline to approve the Transaction. There were four brokerage proposals that estimated the Property's value much higher than the sale price set out in the APS. The Receiver did not consider the interests of the Debtor, its shareholders or its principal, Mr. Tajbakhsh, and is trying to sell the Property at a price that is well below market value so that the secured creditors can be paid.

Discussion

[47] Pursuant to the Sale Process Order, the Property was listed on an "as is, where is" basis, unpriced, and sought a cash offer. It appears to have been marketed over at least a 5-week period – July 3 to August 12 (the date CBRE's listing activity summary was created) – to inquire into current interest in the Property.

[48] The marketing and sale process used was similar to what the other brokerage proposals envisaged. Two of the proposals also intended an “unpriced” listing. Of the four proposals, two planned a 4-week marketing period, the third a 4-6 week marketing period, and the fourth, a 6-week one.

[49] While the timeline for accepting a bid and negotiating an offer was somewhat truncated due to the Receiver/CBRE’s accepting of offers as of July 30, 2024, I am satisfied that the marketing and sale process undertaken was in compliance with the intent and spirit of the Sale Process Order. According to the letter of that Order, if week 1 commenced June 30th, the marketing was to have continued until the end of week 7, being August 17th. To the extent the APS was signed on August 15th, this means that there were 2 days wherein the Receiver could no longer consider any further offers that may have been received. There is no evidence of any further offers being received other than the three identified bids, however.

[50] Through its agent, CBRE, the Receiver engaged in extensive marketing by both regular mail and electronic campaigns and by directly contacting potential bidders. CBRE’s process involved providing prospective purchasers with access to relevant data (with due diligence materials – including environmental, geotechnical and hydrogeological reports – being made available for interested parties who signed a confidentiality agreement), a time period to assess the bids received, negotiation with qualified bidders, time for performance of due diligence, final bid assessment, and court approval of the successful bid. The marketing process utilized by CBRE was very similar in nature to those proposed by the other brokerages who had bid for the opportunity to market the Property.

[51] Ultimately three parties submitted bids. The Receiver’s rejection of the lowest bid and its request that the other two bidders re-submit their bids, and the subsequent negotiation that was engaged in with the ultimate purchaser, shows the Receiver’s attempts to obtain the best price and act providently. Acting providently in this context included a consideration of the benefits of accepting an unconditional, cash offer in a timely manner that would reduce the ongoing expenses and accruing interest.

[52] The only evidence relied upon by the opposing parties to support their allegation that the APS purchase price is too low is the four valuations contained in the Receiver’s motion record. Such evidence is insufficient on its own to show that the sale was improvident. One of the valuations showed an anticipated value range that captures the APS price, while another’s low end is in the ballpark. I find the remaining two are not comparable: one of them stated that it was “not aware of any atypical soil or groundwater issues that could impact costing” and so did not appear to factor in any environmental contamination component, and also based its valuation on the options of a joint venture arrangement and a vendor take-back mortgage being available; and the other was based on a completed condominium project, a potential vendor take-back mortgage, and had anticipated a “better” performing 2024 condo market.

[53] Mr. Tajbakhsh’s evidence is that, in its online listing for the Property, CBRE stated the “price is negotiable” and he had never “seen such language in the context of an unpriced listing”. In answer to a written interrogatory posed by the Debtor, the Receiver responded that advertising that the price

is negotiable, in the context of an unpriced listing, was intended to stimulate interest. I find that this is an acceptable reason.

[54] Neither the Receiver nor its agent, CBRE, believes that additional marketing would result in a higher purchase price or a better offer. There is no evidence in the record to support that further exposure to the market would generate a higher price. There is also no evidence to support that marketing of the Property right up until August 17th (the last day of the 7th week) would have resulted in any different offer. This is not a situation where there was a substantially higher bid, or a new and higher bid, that was left on the table or ignored by the Receiver.

[55] The Debtor relies on *Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership*, 1995 CanLII 1882 (BC SC), in support of its argument that a depressed price is reason enough for the court to decline a proposed sale. I find that case to be distinguishable. In *On-Stream*, the Bank of Montreal had obtained default judgment against a limited partnership for failure to pay a debt secured by a debenture that had been assigned to the Bank. The Bank appointed a receiver-manager in respect of the assets of the limited partnership and to realize on the security of certain promissory notes. Litigation ensued between the parties concerning the authority of the general partner to pledge the promissory notes to the Bank, among other things. A trial was held three years later. Subsequent to that proceeding, the receiver-manager made a motion for directions. By the time that motion was heard, the face value of the notes exceeded the balance outstanding on the Bank's loan. While it had originally supported the sale, the receiver-manager no longer did so arguing that the contract had been frustrated, that the sale was no longer prudent, and that it originally agreed to sell the whole of the limited partnership's interest in the notes, and not just that of the bank, as it was now being requested to do. The court ultimately held that the contract had not been frustrated but it was imprudent and should not be approved. The suggested discount on the sale of the notes, 86 per cent, was too deep. The court found that, by its failure to seek a variation in the price to reflect the increasing value of the notes as time passed with the litigation unresolved, the receiver had not acted prudently. That is not this case. Here, Hilliard J. approved the marketing and sale process on June 27, 2024, the marketing of the Property commenced on July 3, 2024, and the APS was signed on August 15, 2024. There is no unaccounted-for time lag that has impacted on the value of the Property.

[56] In my view, none of the concerns expressed about the sale process being rushed or the sale price being too low support an improvident finding. The Property was marketed for 5 weeks, as contemplated by the Sale Process Order. It was listed on an "as is, where is" basis and sought a cash offer; both of which factors can serve to reduce a prospective purchase price. Unconditional offers also can result in reduced prices being offered by prospective purchasers. I am satisfied that the Property was listed for sale on the open market and the purchase price set out in the APS is the "best evidence" of fair market value: see *Lash v. Lash*, 2022 ONCA 361, at para. 42.

[57] I find that the Receiver made a sufficient effort to obtain the best price and that it has acted providently.

(b) Did the Receiver consider the interests of all parties?

[58] The Debtor contends that the Receiver's failure to have the Purchaser assume the Environmental Indemnity is unfair to the interests of the Debtor and its directors and officers. Apart

from this, Mixed-Use LP and Wasaga LP argue that the Receiver failed to recognize their beneficial interests in the Property. I deal with both of these issues separately.

Environmental Indemnity

Position of the Debtor

[59] First, the Environmental Indemnity. The Debtor submits that this is a crucial issue. The Debtor argues that it was made clear to the Receiver, early on in the process, that the associated release and indemnity obligations needed to be assumed by any prospective purchaser, just as the Debtor had assumed them from Homedale-Eagle (the previous owner who granted the vendor take-back mortgage) when it purchased the Property. There is a real risk of personal liability for corporate directors and officers in respect of claims arising from environmental contamination. The Debtor and Mr. Tajbakhsh expected that the release and indemnity obligations associated with the Environmental Indemnity would be assumed by any eventual purchaser of the Property. However, the APS provides that the Purchaser will indemnify only the Receiver for environmental contamination claims. This shows a clear disregard for the interests of the Debtor and its directors and officers in favour of the Receiver's interests. Given the failure of the Receiver to properly account for the Environmental Indemnity in the Transaction, it ought not to be approved.

Discussion

[60] I do not agree with the Debtor's position for the following three reasons.

[61] First, the Debtor and Mr. Tajbakhsh were informed of the Receiver's motion seeking the Sale Process Order. They did not oppose the motion, nor did they request that the terms of that order include provision that any prospective purchaser of the Property must assume the Environmental Indemnity.

[62] Second, there are provisions in the Settlement Agreement and related documents that account for what could happen in the event of a sale of the Property. Significantly, the Amended and Restated Settlement Agreement, dated May 2, 2018, wherein the Debtor assumed the burden of and receives the benefit of the original settlement agreement, including the Environmental Indemnity, does not require the assumption of same in the event of the sale of the Property. Rather the Amended and Restated Settlement Agreement contains the following relevant provisions:

13. If the Plaintiff's [Homedale's] Property is sold prior to completion of the Remedial Action Plan, or the obtaining of the filing of a RSC or RSC's over the entirety of the Plaintiff's Property, any Escrow Funds shall be returned forthwith to the Defendants [United Technologies Corporation, Lear Corporation and Lear Corporation Canada Ltd., collectively UTC] unless the new owner enters into an agreement whereby the new owner assumes the burden of and receives the benefit of this Agreement following completion of the sale. For record purposes, the provision has been satisfied as between Homedale, UTC and Developments [253 Queen Street Inc.] by virtue of execution of this Amended and Restated Settlement Agreement, and this provision shall apply to any future transfer or sale.

...

35. On the Effective Date, Homedale, as assignor, hereby assigns all of its right, title and interest in the Original Settlement Agreement and this Amended and Restated Settlement Agreement to Developments, as assignee, and Developments hereby assumes all of the rights, benefits, liabilities and obligations of the assignor set out herein. UTC hereby consents to the assignment.

[63] And, the Amended Escrow Agreement, also dated April 16, 2018, provides in paragraph 5(e):

The Escrow Agent may pay the Escrow Funds and any interest thereon, into Court for a determination by such Court as to the entitlement to the Escrow Funds and any interest thereon, at any time and the Escrow Agent shall thereupon be released from any obligation hereunder.

[64] Third, by virtue of Article 9 of the Commitment Letter, the Debtor assumed responsibility for the remediation of the Property. Article 9 reads:

9. Environmental Indemnity

The Borrower [253 Queen Street Inc.] represents and warrants that:

- i) Subsequent to the date the Borrower acquired title to the Property, no Hazardous Substances (hereinafter defined) have been or will not in the future be introduced to the Property or stored, processed, manufactured, handled or discharged in, on, under or from the Property;
- ii) Any contamination to the subsurface soil and groundwater at the date hereof and on the Funding Date has not increased subsequent to the date the Borrower acquired title to the Property;
- iii) To the best of its knowledge, there are no convictions (or prosecutions settled prior to conviction) or outstanding or threatened investigations, claims, work orders, notices, directives or other similar remedial actions against the Property or the Borrower in relation to the requirements of any environmental law.

The Borrower covenants, agrees and/or acknowledges, as the case may be, that it is responsible for remediation of any environmental damage to the Property and the removal of any Hazardous Substance from the Property and, without limiting the generality of the foregoing, it is responsible to satisfy and perform its obligations as set forth in the Settlement Agreement and the RAP and that it will indemnify [sic] the Lender [Sky Mortgage] for all costs, expenses, damages or liabilities (including, without limitation, legal fees) directly or indirectly arising out of or attributable to non-compliance by the Borrower with the provisions of the Settlement Agreement or the RAP or with any environmental laws or to the presence on, under or about the Property of any Hazardous Substance. The Borrower's liability and indemnity in this regard shall survive foreclosure upon the mortgage, and/or any other extinguishment of the obligations of the Borrower under the mortgage including repayment of the loan or an

assignment thereof approved by the Lender and any other exercise by the Lender of any remedies available to it against the Borrower. [Emphasis added.]

...

[65] Given this provision in the Commitment Letter, the Debtor's (and its guarantors) liability and indemnity for the Environmental Indemnity survives foreclosure on the Sky Mortgage mortgage. In my view, this disentitles the Debtor and Mr. Tajbakhsh from claiming that the Receiver ought to have ensured that the Purchaser assumed the Environmental Indemnity in any purchase of the Property. There was no law provided to me setting out an obligation on a receiver to obtain an assumption of liability from the prospective purchaser on behalf of a debtor.

Mixed-Use LP's claim of beneficial ownership of the Property

Position of Mixed-Use LP

[66] It is the position of 2830064 Ontario Inc., 2830068 Ontario Inc., Mixed-Use LP and Wasaga LP that the Receiver has no authority to sell the Property without consent from TriDelta as the general partner of Mixed-Use LP as beneficial owner. It is submitted that Mixed-Use LP has had a beneficial interest in the Property since it was purchased in May 2018, pursuant to a Declaration of Trust Agreement, dated November 14, 2017, signed between Mixed-Use and U Real Estate Group Inc. ("the 2017 Declaration of Trust"). TriDelta submits that, while it was aware of the 2017 Declaration of Trust as of December 2023, it only recently became aware of documents that support the beneficial interest claims of both Mixed-Use LP and Wasaga LP, when it received the responses to written interrogatories. Those documents are the Commitment Letter, and certain director's resolutions executed by Mr. Tajbakhsh, dated May 2, 2022, each of which purport to authorize the execution of documents relating to the Sky Mortgage mortgage for both Mixed-Use LP and Wasaga LP ("the Director Resolutions"). The Director Resolutions contain the following language:

WHEREAS:

A. Pursuant to an arrangement between 253 QUEEN STREET INC. ('253'), as borrower and Sky Mortgage Corporation (the 'Lender'), the Lender agreed to fund a mortgage loan in the principal amount of \$2,000,000.00 (the 'Loan') on the security, inter alia, of various guarantees provided by individuals and corporations, including the guarantee of the Corporation [Mixed-Use Developments (Ontario) GP Inc. / Wasaga Developments and Infrastructure G.P. Inc.].

B. The Corporation is the General Partner of [Mixed-Use LP / Wasaga LP] (the 'LP'), which has a direct or indirect beneficial interest in the property that is the subject matter of the mortgage or derives direct or indirect economic benefits from the making of loan and other financial accommodations provided to the borrower pursuant to the commitment letter dated April 5, 2022 (the 'Commitment Letter').

...

BE IT RESOLVED THAT:

1. The Corporation execute and deliver all documents and instruments as are required of it pursuant to the terms and conditions of the Commitment Letter, including inter alia, a Charge on the property municipally known as 253 Queen Street East, Brampton, Ontario, a Guarantee, Postponement of Claims and Indemnity, substantially in the form submitted herewith (hereinafter collectively referred to as the ‘Security’) in fulfillment of the obligations of the Corporation in connection therewith.

...

[67] Mixed-Use LP argues that the Receiver’s proposed terms of the sale fail to recognize that it holds an unencumbered beneficial ownership interest in the Property. The Receiver is not empowered to sell Mixed-Use LP’s beneficial interest since Mixed-Use LP is not part of the Receivership Order. A receiver is only entitled to exercise control in respect of the property of the debtor in respect of whose debt the receiver is appointed. This principle is reflected in s. 243(1) of the *Bankruptcy and Insolvency Act*. The Receivership Order does not include the Mixed-Use and Wasaga Partnerships as respondents and, therefore, does not purport to extend the Receiver’s power to include their property. It is well-established that a mortgagee is only entitled to sell what interest is subject to the mortgage and cannot sell third-party unmortgaged interests in the same land: *Blue Note Caribou Mines Inc., (Re)*, 2010 NBQB 91, at para. 60; and *1565397 Ontario Inc., (Re)*, 2009 CanLII 32257 (ON SC), at para. 68. As a result, the court cannot approve the Transaction.

[68] Mixed-Use LP further submits that, to the extent the Receiver purports to “vest out” its beneficial interest in the Property as part of the vesting order, such a vesting out would be inappropriate as the test established by the Ontario Court of Appeal in *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2018 ONCA 253, at paras. 110-111, is not met. Mixed-Use LP’s beneficial interest in the Property is clearly an ownership interest in the Property itself, rather than a monetary charge such as a mortgage. There is no evidence showing that the Mixed-Use and Wasaga Partnerships have consented to the vesting out of their interest. Since the Receiver was not appointed in respect of the property of the Mixed-Use and Wasaga Partnerships, the proposed vesting order cannot purport to sell their beneficial interest in the Property nor to extinguish it.

[69] Mixed-Use LP argues that, even apart from the 2017 Declaration of Trust, the fact that the Mixed-Use and Wasaga Partnerships paid the purchase price for the Property is sufficient to establish their beneficial interest. In this regard, it claims a purchase money resulting trust in the Property.

Discussion

[70] The 2017 Declaration of Trust is a written agreement made as of November 14, 2017, between Mixed-Use LP, as the Beneficiary, and U Real Estate Group Inc., as the Nominee. The relevant portions of the 2017 Declaration of Trust read as follows:

WHEREAS the Nominee confirms receipt of the sum of C\$250,000 (the ‘Investment Proceeds’) from the Beneficiary;

AND WHEREAS the Nominee will invest the Investment Proceeds to purchase, for and on behalf of the Beneficiary, a property located at 253 Queen Street East, Brampton, Ontario (the 'Property');

AND WHEREAS the Beneficiary has agreed to irrevocably authorize the Nominee to accept the Investment Proceeds and to make the investment in the Property, as the Nominee in its sole and unfettered discretion may determine to be in the best interests of the Beneficiary.

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises and other good and valuable consideration, the parties hereto covenant and agree as follows:

1. The recitals contained herein are accurate and complete.
2. The Beneficiary hereby authorizes and directs the Nominee to accept the Investment Proceeds delivered by the Beneficiary for the purposes of making the investment in the Property, and to do all things and execute all documents necessary to give effect to the foregoing in the sole discretion of the Nominee.
3. The Beneficiary does hereby indemnify and hold harmless the Nominee from any actions taken by the Nominee pursuant to the authority granted to it under this Agreement save and except for the gross negligence or wilful misconduct of the Nominee.
4. This Agreement shall enure to the benefit of and be binding upon each of the parties hereto and their respective successors and assigns.

...

[71] With respect to the Director Resolutions, it is contended that they confirm and reflect the fact that Mixed-Use LP and Wasaga LP were beneficial owners of the Property at the time of both the Homedale-Eagle and Sky Mortgage mortgages, by virtue of the language stating that the relevant partnership "has a direct or indirect beneficial interest" in the Property.

[72] Based on the record before me, I am not prepared to find that Mixed-Use LP (or Wasaga LP) is a beneficial owner of the Property.

[73] I address first the purported trust documents themselves. As the Ontario Court of Appeal held in *White v. Gicas*, 2014 ONCA 490, at para. 37:

For a trust to be validly created, it must be properly declared and constituted. Declaration of a trust requires certainty of intention, subject-matter, and objects. Constitution of a trust requires transfer of title to the trust property to the trustee. ...

[74] I find that the asserted trust has not been properly declared. The language used in the 2017 Declaration of Trust does not identify with certainty that Mixed-Use LP has, in fact, a beneficial

interest in the Property as opposed to an entitlement to derive economic benefits from the loan provided by Sky Mortgage. Further, it is not conclusive that U Real Estate Group Inc. actually invested the \$250,000 identified therein into the purchase of the Property.

[75] Additionally, I find that the asserted trust has not been properly constituted since title to the Property was never transferred to U Real Estate Group Inc., the trustee.

[76] In my view, the 2017 Declaration of Trust only establishes that U Real Estate Group Inc. holds the amount of \$250,000 in trust on behalf of Mixed-Use LP.

[77] Next, I address the purchase money resulting trust argument. In *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, at paras. 1 and 21, the Supreme Court of Canada described this type of trust as follows:

A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution.

[78] The Supreme Court of Canada further explained in *Nishi*, at para. 29, that in “the context of a purchase money resulting trust, the presumption is that the person who advanced purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price”.

[79] In *B&R Development Corp. v. Trail South Developments Inc.*, 2012 ABCA 351, appl'n for lv to appeal dismissed [2013] S.C.C.A. No. 34, the Alberta Court of Appeal held, at para. 60, that:

For the law to recognize a purchase money resulting trust, the appellants must establish that:

- (1) the trustee has title to the property;
- (2) the claimant supplied the whole or part of the purchase price when the property was being purchased from a third party and transferred to the name of the trustee;
and
- (3) the claimant acted throughout as the purchaser.

(*A.M.K. Investments Ltd. v. Kraus* (1996), 13 O.T.C. 254 (Ont. Bkcty.) at para 12, citing Prof. DWM Waters, *Law of Trusts in Canada*, 2nd ed (Toronto: Carswell, 1984) at 302 and 305.)

[80] The primary problem with Mixed-Use LP's argument that there was a purchase money resulting trust is that there is insufficient evidence that U Real Estate Group Inc., as trustee, has title to the Property. Rather, the registered owner of the Property is the Debtor only. Further, as noted

earlier, there is no evidence establishing that the identified \$250,000 was actually used to purchase the Property and not for other purposes.

[81] The Director Resolutions are insufficient evidence upon which to make findings of a purchase money resulting trust impacting the Property.

[82] In the result, I decline to find that Mixed-Use LP (or Wasaga LP) is a beneficial owner of the Property.

Conclusion

[83] Based on the foregoing, I find that none of the concerns raised by those who oppose the within motion are sufficient reasons for the court not to approve the Transaction being recommended by the Receiver. I am satisfied that the interests of all parties who would have an interest in the process were considered by the Receiver based on the information that was available to it, as of the date of signing the APS.

Mixed-Use LP's alternative arguments

[84] I have already declined to find a beneficial ownership interest in favour of Mixed-Use LP (or Wasaga LP). In the event I am wrong in this regard, I will consider the alternative arguments made on behalf of Mixed-Use LP.

[85] Mixed-Use LP makes the following alternative argument, in the event the court is inclined to approve the Transaction: that the court's order must recognize that the sale of the Property to the Purchaser is one of the registered interest only and that the beneficial interest and all related rights are preserved. In the further alternative, Mixed-Use LP submits that all of the sale proceeds must be delivered to it as beneficial owner of the Property: *New Solutions Financial Corporation v. 952339 Ontario Limited*, 2007 CanLII 183 (ON SC), at para. 22.

[86] With respect to these alternative arguments, I accept the Receiver's argument that ordering that the sale is one of the registered interest only and/or that all of the sale proceeds must be delivered to Mixed-Use LP as beneficial owner would be improper, since it would constitute a collateral attack on the Sale Process Order: see *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONCA 219, at paras. 35-36. The Order granted by Hilliard J. authorized the Receiver to market the Property without any limitations. The Mixed-Use and Wasaga Partnerships had the 2017 Declaration of Trust in hand at the time the Receiver's sale process motion was heard. They were aware of the motion and did not oppose the order being sought therein. Nor did they appeal the Sale Process Order after it was made. The doctrine of collateral attack prevents a party from undermining a prior order of the court which order has not been appealed, varied or set aside.

[87] I am also satisfied that Homedale-Eagle and Sky Mortgage were *bona fide* mortgagees whose registered mortgages trump any unregistered beneficial interest.

[88] Section 93(1) of the *Land Titles Act*, R.S.O. 1990, c. L.5, provides that a registered owner has the right to grant a mortgage over his or her land.

[89] Section 62 of the *Land Titles Act* addresses trusts and provides that any person dealing with an owner of land as a trustee has no duty to make inquiries as to the owner's power in respect of the land and the owner may deal with the land as if it was not described as a trustee. Subsections 62(1) and (2) read:

62 (1) A notice of an express, implied or constructive trust shall not be entered on the register or received for registration.

(2) Describing the owner of freehold or leasehold land or of a charge as a trustee, whether the beneficiary or object of the trust is or is not mentioned, shall be deemed not to be a notice of a trust within the meaning of this section, nor shall such description impose upon any person dealing with the owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise, but, subject to the registration of any caution or inhibition, the owner may deal with the land or charge as if such description had not been inserted. [Emphasis added.]

[90] The Divisional Court in *1168760 Ontario Inc. v. 6706037 Canada Inc.*, 2019 ONSC 4702, at paras. 60-62, discussed the purpose of s. 62(2), being to ensure certainty of title, as follows:

60 At this point it is important to remember the essential purpose of the land titles system – “to provide the public with security of title and facility of transfer...The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.” (*Lawrence v. Wright*, at para. 30 quoting from *Duranti v. Augier* at para. 41).

61 To facilitate this purpose, namely, certainty of title, the Legislature, through s. 62(2) of the LTA, has enacted a specific statutory provision regarding trusts. Under that provision, a purchaser who purchases a property that is registered as being held in trust has no duty to inquire as to power of the owner to deal with the property. Subject only to the registration of a caution or inhibition (which the beneficiaries did not do in this case), the registered owner may deal with the property as if the description “in trust” did not exist.

62 It would undermine the clear intention of the Legislature if we were to find that the certainty principle does not apply if a purchaser acquires knowledge of the mere fact that the owner holds the property in trust prior to the search of title. For example, a purchaser could submit an offer to a vendor and the vendor could sign the offer back indicating that they own the property “in trust”. According to the trial judge's reasoning, if the purchaser accepts the offer, he or she will be unable to rely upon s. 62(2) of the Act, since the information about the trust did not come from a title search. There is no principled reason why this should be the case. Further, it could encourage litigation focused entirely on establishing how the purchaser first learned that the property was held “in trust”—something that seems entirely tangential to the goals of the land titles system.

[91] In *DiMichele v. DiMichele*, 2014 ONCA 261, the Ontario Court of Appeal affirmed that s. 62(2) of the *Land Titles Act* is a “complete answer” to a beneficial interest argument. In that case, a group of investors who were involved with Antonio DiMichele in a real estate investment scheme that had failed, successfully sued him. In the course of that litigation, Antonio had agreed to a charge being placed on a property that had been left to him and his two brothers under his mother’s will as security for monies owing under any judgment obtained. Under the mother’s will, Antonio was named the estate trustee and the brothers were each given an equal share in the residue of the estate. The applicants brought an application against Antonio and his brothers to recover on the judgment and sought the sale of the property. Roberto DiMichele, the brother who had lived in the property both before and after his mother’s death, brought a counter-application disputing the applicants’ right to seek the sale of the property and asserting his entitlement to sole ownership of it. One of Roberto’s grounds for opposing the application to sell the property was his assertion that the creditors, by virtue of the property register (which they had before they entered into the mortgage), had notice of the fact that Antonio was holding the property in the capacity of a Trustee with a Will. Therefore, they had actual notice of the will and should not have simply accepted the mortgage as security for the property without first inquiring into whether Antonio could lawfully mortgage the property.

[92] At first instance, the trial judge in *DiMichele* concluded that the mortgage was valid but that, because the brothers’ beneficial interests in the property had vested by the time that Antonio granted the mortgage in 2008, Antonio could only have granted a mortgage against his interest in the property. The trial judge further found that because the 2002 action was against Antonio personally, and not in his capacity as the estate trustee, he could only give as security that which he owned in his personal capacity. Accordingly, the trial judge held that the mortgage was enforceable only against Antonio’s one-third interest in the property. On appeal, however, the Court of Appeal rejected Roberto’s argument. At paras. 67-70, the Ontario Court of Appeal confirmed that, even though the parcel register showed Antonio as owner but in the capacity of “TWW” (Trustee With a Will), s. 62(2) provides that an owner may deal with the land as if the description as a trustee had not been inserted, subject to the registration of any caution or inhibition. The Court of Appeal concluded that, since there was no registered caution or inhibition, there was no duty on the mortgagees to make any inquiry as to Antonio’s power as the registered owner to charge the property. There was no misapprehension that Antonio was the owner; the mortgage was not obtained or granted fraudulently and was not invalid. The Court commented that the respondents may have recourse against Antonio for what appeared to be a breach of his obligation as the estate trustee.

[93] Here, there was no registered caution or inhibition. There is also no evidence before me that notice of a valid trust in favour of Mixed-Use LP was given to Homedale-Eagle or Sky Mortgage before the making of the loans.

[94] Based on the holdings in *1168760 Ontario Inc.* and *DiMichele*, I find that Homedale-Eagle and Sky Mortgage, as mortgagees, were entitled to rely on the power of the Debtor to charge the Property.

[95] In signing the Commitment Letter, the Debtor represented and warranted to Sky Mortgage that it had the consent of any beneficial owners. Specifically, paragraph 10 reads:

10. Beneficial Owner – The Borrower represents and warrants to the Lender that if entity(ies) other than the Borrower are the Beneficial Owners of the Property, that such Beneficial Owners have consented to and authorized this transaction, have agreed to be bound thereby and that the Borrower has authority to execute all requisite loan documentation and within three (3) days of acceptance of this Commitment, the Borrower shall deliver to the Lender’s Solicitors a chart identifying the beneficial ownership of the Property or confirm in writing to the Lender that the Borrower holds title to the Property for its own account and as the beneficial owner thereof.

[96] Accordingly, to the extent that the Debtor did not, in fact, have the consent of any beneficial owners that may have been required, then any remedy would be as against the Debtor.

[97] The Ontario Court of Appeal in *DiMichele*, at paras. 107-109, further affirmed that a mortgage is valid as against the whole of the property, stating:

107 Under Ontario’s land titles system, the rights of a *bona fide* purchaser (which includes a mortgagee) for value who has registered its interest in the property trump any prior unregistered interests in the property: *719083 Ontario Limited v. 2174112 Ontario Inc.*, 2013 ONCA 11, 28 R.P.R. (5th) 1, at para. 12; *MacIsaac v. Salo*, 2013 ONCA 98, 114 O.R. (3d) 226, at para. 39.

108 In the present case, as I have already explained, the respondents were *bona fide* purchasers for value without notice. They registered their interest (the Mortgage) in the Property. Their interest would trump those with a prior unregistered interest in it. Therefore, even if the beneficiaries had an interest in the Property that pre-existed the granting of the Mortgage, that interest was unregistered and therefore was trumped by the registered Mortgage.

109 Accordingly, the Mortgage binds the entire Property.

[98] Finally, I note the decision in *Walshe v. Citizens Bank of Canada* (2003), 8 R.P.R. (4th) 273, 2003 CarswellOnt 922 (Ont. S.C.J.). In that case, two couples – one from Manitoba, the Walshes, and one from Ontario, the Crillys – purchased an investment condominium property in Ontario as 50 per cent co-owners. Since the Walshes were unable to attend the signing of the closing documents, the Crillys took title “in trust”. A trust agreement was executed but not registered on title. The Crillys subsequently re-mortgaged the property without the Walshes’ knowledge or consent. The same lawyer acted for the Crillys and the defendant bank on the transaction, but failed to indicate on the mortgage agreement that the couple were joint tenants “in trust”. The Walshes unsuccessfully applied for a declaration that their 50 per cent interest in the condominium was free and clear of the encumbrance to the defendant bank. The court held that the defendant bank was under no obligation to inquire into the particulars of the trust under which the Crillys held the property. The bank was entitled to, and did, rely on the Crillys’ assertions that there were no limitations affecting title to or interest in the property. The bank was entitled to security on the whole of the property, not just the Crillys’ 50 per cent interest. The court further held that, even if the bank’s lawyer had an obligation to inquire into the trust agreement on behalf of his client, he had no obligation to the *cestui que trust*, the Walshes, to inquire into the terms. He did not act for them and had no obligation to protect their interests. I find that the same reasoning applies to the case before me.

(c) Consideration of the efficacy and integrity of the process by which offers were obtained

[99] In my view, the criticisms voiced by the opposing parties about the marketing and sale process conducted by the Receiver do not affect its efficacy and integrity. There is no basis for a new court-supervised bidding process. Requiring a new sale process would undermine the integrity of the Receiver's process. As noted by McKinlay J.A., in agreement with Galligan J.A., in *Soundair*, at para. 72, it is "most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in dealing with receivers".

[100] Further, I am cognizant that the court is "not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.": *Crown Trust Co. v. Rosenberg*, at para 65.

[101] As discussed above, the marketing and sale processes proposed by the three other brokerages who bid on the opportunity to market the Property were very similar in nature to that which was ultimately used by the Receiver, by its agent, CBRE, including the estimated timing to complete the process. The Sale Process Order was complied with. The Receiver made the relevant documentation available for prospective purchasers to review for their due diligence purposes. The Property was being sold "as is, where is" and prospective purchasers were responsible to perform their own due diligence. An APS was signed for a purchase price that is fair and reasonable.

[102] I find that the process adopted by the Receiver in this case was an effective, efficient and honest one.

(d) Was there unfairness in the working out of process?

[103] The court has a responsibility to decide whether the working out of the process was fair: *Soundair*, at para. 49. However, in *Crown Trust*, Anderson J. cautioned, that when reviewing a receiver's proposal, the court should not become involved in making "business decisions". At paragraph 66, Anderson J. held:

In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

[104] The main objections raised by those opposing the Transaction's approval have been considered and substantially addressed above and so I will not repeat them.

[105] The Receiver was entitled to make its decision based on the information it had as of the date the APS was entered into. The Receiver was aware of the Settlement Agreement and the Amended and Restated Settlement Agreement, and had made them publicly available; they were not concealed. The Receiver owes its duty to all interested parties. Insisting on a prospective purchaser assuming a liability from one of the interested parties could negatively impact on the ability of the Receiver to

obtain the best offer for the sale of the Property. The Receiver is entitled to make a business decision based on what it believed would obtain the best offer for the Property.

[106] There is no certainty that if a new sale process was ordered that a higher or better offer would transpire or that a purchaser would agree to assume the Environmental Indemnity. What is certain is that the subject mortgages would continue to be in default and interest would continue to accrue, potentially reducing the level of equity in the Property ultimately available for the stakeholders.

[107] I find that no party has demonstrated unfairness on the part of the Receiver, in the working out of the marketing and sale process for the Property, sufficient to justify not accepting the Receiver's recommendations.

Conclusion

[108] For all of the foregoing reasons, I conclude that this case is not an exceptional one warranting the court to reject the Receiver's recommendation. I find that the principles established in *Soundair* have been satisfied, that the Transaction should be approved, and that the requested Approval and Vesting Order should be granted.

(ii) Should the court grant the requested Administration Order?

[109] By the requested Administration Order, the Receiver seeks: (i) approval of the Second Report of the Receiver, dated October 4, 2024, and the activities of the Receiver described therein; (ii) approval of the Receiver's interim Statement of Receipts and Disbursements for the period February 8, 2024 to September 30, 2024; (iii) authorization for the Receiver to redact from the Second Report served on the parties in the service list copies of CBRE's listing activity summary, the summary of offers submitted to the Receiver, and the APS; (iv) a sealing order for the unredacted version of the Second Report; and (v) authorization for the Receiver to distribute the sale proceeds in accordance with the Second Report.

[110] I find that the Receiver undertook its activities in furtherance of its duties and those activities were consistent with its powers as set out in the Receivership Order. The Receiver has acted reasonably and in the best interest of all of the stakeholders. The court has the inherent jurisdiction to approve such activities. The interim Statement of Receipts and Disbursements is a fair reflection of the funds that have passed through the Receiver's hands.

[111] The Receiver has requested a temporary sealing order that it submits is necessary to avoid suppressing realization if the Transaction is not approved and/or completed and the Property has to be marketed for sale again.

[112] In applying the test for a restriction on court openness as set out in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, I am satisfied that the Receiver has established that: (i) public disclosure of CBRE's listing activity summary, the summary of offers submitted to the Receiver, the APS, and the unredacted version of the Second Report, poses a serious risk of adversely impacting the future marketability of the Property, and a potential unfair advantage to potential bidders, in the event that the Transaction does not close; (ii) there is no reasonable alternative to a temporary sealing order of those parts of the Second Report that contain the asset value and pricing information; and

(iii) the benefits of maximizing recoveries for the creditors by sealing that information outweigh any negative effects on the open-court principle. Accordingly, the requested sealing order is granted.

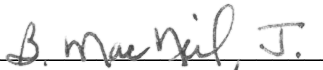
[113] In the result, I find that the requested Administration Order is appropriate and reasonable.

DISPOSITION

[114] For all of these reasons, the Receiver's motion is granted. Orders to go in the form of the Approval and Vesting Order and the Administration Order as submitted and signed.

COSTS

[115] The opposing parties requested that, if the Receiver's motion was granted, I endorse that the Debtor and 2830064 Ontario Inc., 2830068 Ontario Inc., Mixed-Use Developments (Ontario) L.P., and Wasaga Developments and Infrastructure 2021 L.P. reserve their rights with respect to the allocation of costs of the Receiver and the mortgagees as between them, if they wish. Accordingly, I so endorse.



MacNEIL J.

Released: November 26, 2024