

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

**VECTOR FINANCIAL SERVICES LIMITED**

Applicant

- and -

**33 HAWARDEN CRESCENT INC. and 35 HAWARDEN CRESCENT INC.**

Respondents

**FACTUM OF THE COURT-APPOINTED RECEIVER**

<p><b>Date:</b> March 13, 2024</p>	<p><b>BLANEY MCMURTRY LLP</b> Barristers &amp; Solicitors 2 Queen Street East, Suite 1500 Toronto ON M5C 3G5</p> <p><b>Timothy R. Dunn</b> (LSO #34249I) Tel: (416) 597-4880 Email: <a href="mailto:tdunn@blaney.com">tdunn@blaney.com</a></p> <p><b>Alexandra Teodorescu</b> (LSO #63889D) Tel: (416) 596-4279 Email: <a href="mailto:ateodorescu@blaney.com">ateodorescu@blaney.com</a></p> <p>Lawyers for the Court-appointed Receiver, Pollard &amp; Associates Inc.</p>
<p><b>To:</b></p>	<p><b>The Service List</b></p>

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Court File No. CV-23-00704623-00CL

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**FACTUM OF THE RECEIVER  
(RE: APPROVAL OF TRANSACTION)**

**PART I – OVERVIEW**

1. This is a motion for an approval and vesting order brought by Pollard & Associates Inc., in its capacity as receiver (the “**Receiver**”) of 33 Hawarden Crescent Inc. (“**33 Hawarden Inc.**”) and 35 Hawarden Crescent Inc. (“**35 Hawarden Inc.**”) (collectively, the “**Companies**”) by Order of the Honourable Justice Cavanagh dated October 10, 2023 (the “**Appointment Order**”) made pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O 1990 c. C.43, as amended (the “**CJA**”).

2. The Appointment Order became effective at 5:00 p.m. on October 13, 2023, when the Companies failed to make an interim payment in the amount of \$174,103.75 (the “**Interim Payment**”) as required under the Appointment Order.

3. The Appointment Order appointed the Receiver, without security, over the lands and premises municipally known as 33 Hawarden Crescent, Toronto, Ontario (“**33 Hawarden**”) and 35 Hawarden Crescent, Toronto, Ontario (“**35 Hawarden**”) owned by the Companies (collectively, the “**Real Property**”).

4. The Receiver seeks an Order from the Court, among other things, authorizing and approving the sale transaction contemplated by the Agreement of Purchase and Sale dated February 6, 2024, (the “**APS**”) for the Real Property entered into by the Receiver, as vendor, and Gott Upper Canada Inc., as purchaser (the “**Purchaser**”).

5. In connection with the approval of the APS and the vesting of the Companies’ right, title and interest in the Real Property to the Purchaser, the Receiver is also seeking an Order sealing: (a) a summary prepared by the Receiver of all offers received for the Real Property, (b) the Appraisal of the Real Property prepared by Bona Fide Appraisal Inc. (“**Bona Fide**”) effective date November 23, 2023, and (c) the unredacted APS (collectively, the “**Confidential Appendices**”).

6. The Companies have brought a cross-motion to redeem the Applicant’s mortgage on or before March 25, 2024 (“**Cross Motion**”).

## **PART II – FACTS**

### **A. The Parties and the Real Property**

7. The relevant facts are as set out in the First Report of the Receiver, dated March 1, 2024 (the “**First Report**”) and the Supplementary Report of the Receiver dated March 11, 2024 (the “**Supplementary Report**”), which describe the Receiver’s activities and conduct of the sale

process. As may be applicable, capitalized terms not otherwise defined herein are defined in the First Report and the Supplementary Report.

8. The principal asset of the Companies is the Real Property, which is comprised of two parcels of land fronting on Spadina Road and Hawarden Crescent, Toronto. The Companies acquired the Real Property for the purposes of developing the land.<sup>1</sup>

9. Vector Financial Services Limited (“**Vector**”) agreed to advance to the Companies a loan in the original principal amount of \$8,000,000 with interest of 13% per annum to November 9, 2023, and 16% per annum thereafter. As security for the loan, the Companies granted to Vector, among other things, a first-ranking mortgage on title to the Real Property in the amount of \$8,000,000 registered on August 26, 2022 (the “**Vector Mortgage**”).<sup>2</sup>

10. In addition to the Vector Mortgage, the parcel registers for the Real Property indicate a charge in the original principal amount of \$1,020,000 registered in favour of Rupinder Bamra (“**Bamra**”) on February 23, 2023 (the “**Bamra Mortgage**”). The Bamra Mortgage is registered behind the Vector Mortgage in second position.<sup>3</sup>

## **B. Appointment of Receiver**

11. Vector brought an application to appoint the Receiver, which was heard on October 10, 2023. The Appointment Order deferred the appointment of the Receiver to allow the Companies an opportunity to redeem the Vector Mortgage.<sup>4</sup>

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<sup>1</sup> First Report of the Receiver dated March 1, 2024 (“**First Report**”), at paras. 8-10, Motion Record (Motion to Approve Sale), dated March 1, 2024 (“**Motion Record**”), Tab 2.

<sup>2</sup> First Report, at paras. 11-13, Motion Record, Tab 2.

<sup>3</sup> First Report, at para. 14, Motion Record, Tab 2.

<sup>4</sup> First Report, at paras. 1-3, Motion Record, Tab 2.

12. In particular, the Appointment Order provided that it would not come into effect until 5:00 p.m. on October 25, 2023, provided that the Companies make the Interim Payment by 5:00 p.m. on October 13, 2023 (“**Interim Payment Date**”).<sup>5</sup>

13. The Companies failed to make the Interim Payment by the Interim Payment Date and, therefore, the Appointment Order became effective as at October 13, 2023.<sup>6</sup>

### **C. Severance Applications**

14. On August 31, 2023, prior to the Appointment Order, the Companies’ planning consultant, Dales Consulting (“**Dales**”), filed with the Committee of Adjustment two applications to sever the Real Property (“**Severance Applications**”).<sup>7</sup>

15. The Receiver was advised that a public hearing was scheduled for November 29, 2023, to consider the Severance Applications. The Receiver engaged Dales to continue to bring forward the Severance Applications, to prepare the report for the Committee of Adjustments, to advise the Receiver of the status of the applications and attend at the hearing.<sup>8</sup>

16. Prior to the hearing date, the Receiver was advised that 9 letters of objection had been filed by residences within the neighbourhood. Various objections to the proposed severance were raised. In addition, Josh Matlow, Councillor for the ward, filed correspondence with the Committee of Adjustments to encourage the Companies to collaborate with the neighbours on the proposed severance.<sup>9</sup>

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<sup>5</sup> First Report, at para. 1 and Schedule “A”, Appointment Order, paras. 1-3, Motion Record, Tab 2 and Tab 2A.

<sup>6</sup> First Report, at para. 2, Motion Record, Tab 2.

<sup>7</sup> First Report, at para. 15, Motion Record, Tab 2.

<sup>8</sup> First Report, at para. 16, Motion Record, Tab 2.

<sup>9</sup> First Report, at para. 17.

17. On November 27, 2023, Pat F. Scanga, Manager, Development Engineering, advised the Committee of Adjustments that there was an existing storm sewer that traverses the rear of the Real Property and the Severance Applications did not properly identify how the proposed construction would impact the existing storm sewer. It was his recommendation that the Committee defer the Severance Applications to an unspecified future date.<sup>10</sup>

18. As a result of the various concerns raised, the Receiver determined, in consultation with Dales, that it was best to defer the hearing to allow for consultation with Development Engineering regarding the sewer easement and to meet with neighbours who expressed concerns with the proposal. The adjournment was granted by the Committee of Adjustments.<sup>11</sup>

#### **D. Termination of Litchen APS**

19. Prior to the Receiver's appointment, 35 Hawarden Inc. entered into an agreement of purchase and sale, dated September 13, 2023, to sell 35 Hawarden conditional upon the severance of the property for \$3,200,000 to Samantha Litchen ("**Litchen APS**").<sup>12</sup>

20. After reviewing the Litchen APS with counsel, Vector and Vector's counsel, the Receiver determined that, in the broader scope of the receivership, completion of the Litchen APS was not in the best interest of creditors because (a) it was conditional on severance approval and the timing of this approval was unknown; and (b) Vector did not support the release of its security to allow the Litchen APS to be completed.<sup>13</sup>

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<sup>10</sup> First Report, at para. 18 and Schedule "C", Motion Record, Tab 2 and 2C.

<sup>11</sup> First Report, at paras. 19-20, Motion Record, Tab 2.

<sup>12</sup> First Report, at para. 21 and Schedule "D", Motion Record, Tab 2 and 2D.

<sup>13</sup> First Report, at paras. 22-23, Motion Record, Tab 2.

21. On November 16, 2023, the Receiver terminated the Litchen APS.<sup>14</sup>

### **E. The Sales Process**

22. The Appointment Order authorizes the Receiver to market and sell the Real Property, including the authority to engage consultants, appraisers, agents and other individuals to assist with the sale process.<sup>15</sup>

23. The Receiver engaged Bona Fide to determine the market value of the Real Property in “as is” condition, as well as the value of the Real Property in “as if” condition assuming the Severance Applications were approved to allow for 2 detached dwellings and 5 townhouses.<sup>16</sup>

24. The appraisal prepared by Bona Fide outlines the current market value of the Real Property and the current market value with the assumption that the property has been severed into seven building lots as at November 25, 2023 (“**Appraisal**”).<sup>17</sup>

25. The Receiver determined that it was in the best interest of the creditors to commence a sales process prior to completion of the Severance Applications given the uncertainty as to timing and outcome of the Severance Applications.<sup>18</sup>

26. The Receiver reached out to Vector and Bamra to discuss the proposed approach to marketing the Real Property.<sup>19</sup> The Receiver discussed in detail its proposed approach to market

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<sup>14</sup> First Report, at para. 23 and Schedule “E,” Schedule “F” and Schedule “G,” Motion Record, Tab 2, 2E, 2F and 2G.

<sup>15</sup> First Report, Schedule “A”, Appointment Order, para. 5, Tab 2 and 2A.

<sup>16</sup> First Report, at paras. 31-32, Motion Record, Tab 2.

<sup>17</sup> First Report, at para. 32, Motion Record, Tab 2.

<sup>18</sup> First Report, at para. 47 Motion Record, Tab 2.

<sup>19</sup> First Report, at para. 50, Motion Record, Tab 2.



the Real Property with Vector and its counsel. In addition, the Receiver discussed with counsel for Bamra the listing of the Real Property on the Multiple Listing Service (“MLS”).<sup>20</sup>

27. The Receiver requested proposals for listing the property for sale from four agents with knowledge of the market and contacts with various developers. After review of the proposals from three of the agents (the fourth agent did not submit a proposal), the Receiver engaged the services of Marilena Di Marco and John Mancuso, sales representatives (collectively the “Agents”) of Home Life/Bayview Realty Inc. to assist the Receiver with a sale of the Real Property.<sup>21</sup>

28. The listing agreement with the Agents was executed by the Receiver on December 6, 2023. The terms of the listing agreement provided for 2.9% commission if the Agents are the sole agent involved, or 4% commission if another agent is involved in the sale, which would be allocated as 1.5% commission to the buyer agent and 2.5% commission to the Agents.<sup>22</sup>

29. The Agents prepared a brochure respecting the particulars of the Real Property and its development potential.<sup>23</sup>

30. The Agents placed on the Real Property three “For Sale” signs that conform with the City of Toronto by-laws.<sup>24</sup>

31. The Real Property was listed on MLS on December 8, 2023. The listing provided details of the Real Property including the brochure, proposed Severance Applications, the link to the City

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<sup>20</sup> First Report, at para. 51, Motion Record, Tab 2.

<sup>21</sup> First Report, at para. 52, Motion Record, Tab 2.

<sup>22</sup> First Report, at para. 53, Motion Record, Tab 2.

<sup>23</sup> First Report, at para. 55 and Schedule L, Motion Record, Tab 2.

<sup>24</sup> First Report, at para. 56, Motion Record, Tab 2.

of Toronto web pages in reference to the Severance Applications and a draft purchase and sale agreement.<sup>25</sup>

32. The Agents contacted over 200 residential developers of land in the GTA either my email or telephone in reference to the sale of the Real Property.<sup>26</sup>

33. The Receiver and the Agents corresponded with a number of prospective purchasers and shared information about the Real Property. In particular, 128 interested parties contacted the Agents requesting details about the property including the status of the Severance Applications.<sup>27</sup>

34. The Receiver and the Agents discussed the timing of the receipt of offers and determined that a tentative offer date of January 19, 2024, would be reasonable and that the Receiver would re-evaluate the timing as may be required. The Receiver and the Agents had discussions with a number of parties expressing interest prior to January 19, 2024, and the Receiver elected to extend the timing for receipt of offers to allow for additional time for the prospective purchasers to evaluate their offers and, if desired, to present an amended offer to the Receiver.<sup>28</sup>

#### **F. Outcome of the Sales Process**

35. The Receiver received seven (7) offers for the Real Property. The Receiver reviewed each of these offers in detail with its counsel and prepared a summary of offers (“**Offer Summary**”).<sup>29</sup>

36. The Receiver provided general details of the offers received to Vector, as the first ranking mortgage holder on title to the Real Property. The Receiver indicated that it was the Receiver’s

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<sup>25</sup> First Report, at para. 57, Motion Record, Tab 2.

<sup>26</sup> First Report, at para. 58, Motion Record, Tab 2.

<sup>27</sup> First Report, at para. 59, Motion Record, Tab 2.

<sup>28</sup> First Report, at para. 60, Motion Record, Tab 2.

<sup>29</sup> First Report, at para. 61 and Schedule “M”, Offer Summary, Motion Record, Tab 2 and 2M.

intention to request improved offers from the potential purchasers with respect to the amount offered for the Real Property and the timing of the closing date.<sup>30</sup>

37. The Receiver and the Agents continued to have discussions with the prospective purchasers and their agents and requested their best offer to be presented on February 5, 2024.<sup>31</sup>

47. The Receiver discussed with the prospective purchasers the possible reduction in the commission being paid to their agents and how the commission affected the overall purchase price.<sup>32</sup> Specifically, the Receiver discussed with the Agents the reduction in the commission and the Agents agreed that they would reduce their commission from 2.5% to 2%.<sup>33</sup>

48. Prior to February 5, 2024, a third offer was received by the Agents. The Receiver reviewed the offer, and the Agents advised the two potential purchasers that a third offer had been presented.<sup>34</sup>

49. The Receiver reviewed all of the offers presented on February 5, 2024. The potential purchasers presented their best offers to address the concerns of the Receiver, being the closing date, the commission being paid to the Agents, and the purchase price for the Real Property.<sup>35</sup>

50. The Receiver and counsel reviewed the terms of all of the offers presented and determined that the offer presented by the Purchaser best addressed the concerns of the Receiver. The Purchaser's offer provided for the commission to be paid directly by the Purchaser and that the closing date would be within five (5) days of the Receiver obtaining an Approval and Vesting

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<sup>30</sup> First Report, at para. 62, Motion Record, Tab 2.

<sup>31</sup> First Report, at para. 63, Motion Record, Tab 2.

<sup>32</sup> First Report, at para. 64, Motion Record, Tab 2.

<sup>33</sup> First Report, at para. 65, Motion Record, Tab 2.

<sup>34</sup> First Report, at para. 66, Motion Record, Tab 2.

<sup>35</sup> First Report, at para. 67, Motion Record, Tab 2.

Order. The APS represents the best executable offer received in the sales process given the purchase price, commission and closing date contemplated therein.<sup>36</sup>

51. Upon the Purchaser and the Receiver agreeing to final terms, the APS was executed and the first deposit in the amount of \$500,000 was paid to the Receiver. The Purchaser has provided to the Receiver the second deposit in the amount of \$500,000 in accordance with the terms of the APS. The Receiver and the Purchaser have agreed to amend the closing date from March 5, 2024 to March 26, 2024.<sup>37</sup>

52. The Purchaser is not affiliated with Vector and was not given any preferential treatment in the sale process. In particular, the Purchaser did not obtain any confidential information related to the Receiver's activities or other offers (including purchase price) in the sale process.<sup>38</sup>

#### **G. Redemption Attempt by the Companies**

53. The Companies have been attempting to obtain financing to repay the indebtedness due to Vector since June of 2023.<sup>39</sup>

54. The Cross Motion filed by the Companies is the first time that the Companies have demonstrated any evidence of refinancing to redeem the Vector Mortgage and the costs associated with the receivership proceeding.<sup>40</sup>

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<sup>36</sup> First Report, at para. 68, Motion Record, Tab 2.

<sup>37</sup> First Report, at para. 69, Motion Record, Tab 2.

<sup>38</sup> Affidavit of Jeffrey Gottesman, sworn March 12, 2024, paras. 5, 14.

<sup>39</sup> First Report, at para. 74, Motion Record, Tab 2.

<sup>40</sup> First Report, at para. 76, Motion Record, Tab 2.

55. The Companies have obtained refinancing proposals from two prospective lenders. The particulars of the proposals are as follows:

- a. \$7,150,000 from KPMAN Enterprises Inc. and 2106192 Ontario Inc. (“**KPMAN Financing**”) in exchange for a first-ranking mortgage to be registered against title to the Real Property; and
- b. \$2,000,000 from Doji Construction Services Inc. in exchange for a second ranking mortgage to be registered against title to the Real Property (“**Doji Financing**”).<sup>41</sup>

56. The commitment with respect to the KPMAN Financing is highly conditional. Specifically, the commitment letter includes, but is not limited to, the following conditions:

- a. Receipt of final appraisal confirming an “as is” current value of not less than \$11,725,000 satisfactory to the lender;
- b. Satisfactory environmental assessment and geotechnical reports;
- c. Completed forms from the Companies and the guarantors, including net worth statements, credit checks and background checks;
- d. Interview with Andrew Dale of Dales and receipt of a planning reliance letter regarding the current planning status, City of Toronto easement, tree preservation plans and overall justification to support the proposed development;
- e. Satisfactory receipt of the project preliminary budget;

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<sup>41</sup> Affidavit of Jason Allen John, sworn March 7, 2024 (“**John Affidavit**”), Exhibit “J” and Exhibit “K,” Motion Record (Borrowers’ Motion to Redeem), dated March 7, 2024 (“**Cross Motion Record**”), Tab 2J and 2K.

- f. Evidence that the Companies have sufficient cashflow to fund the development and successfully complete the severance within a reasonable time; and
  - g. Evidence of the Companies' cash equity in the property supported by documents satisfactory to the lender.<sup>42</sup>
57. There is no indication that these conditions have been satisfied or waived by the lenders under the KPMAN Financing.
58. Additionally, the commitment for the KPMAN Financing states that it was open for acceptance until February 28, 2024, after which time the commitment becomes void and may not be accepted without the further written consent of the mortgagee. Despite this deadline, the commitment was signed by the Companies on March 6, 2024, and there is no evidence that the KPMAN lenders consent to this late execution.<sup>43</sup>
59. With respect to the Doji Financing, the commitment provides an expiry date of March 1, 2024, unless extended by written agreement.<sup>44</sup> There is no evidence that the Doji Financing was advanced by the expiry date or that this date was extended in writing.
60. The Doji Financing is also conditional on the lender completing its due diligence investigation, which includes, but is not limited to:
- a. Obtaining proof that the property taxes have been paid to date;

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<sup>42</sup> John Affidavit, Exhibit "J," Cross Motion Record, Tab 2J, pg. 111.

<sup>43</sup> John Affidavit, Exhibit "J," Cross Motion Record, Tab 2J, pg. 116.

<sup>44</sup> John Affidavit, Exhibit "K," Cross Motion Record, Tab 2K, pg. 120.

- b. Obtaining a final “as is” current appraisal of the property and an “as if” approved appraisal based on the request for severance satisfactory to the lender;
  - c. Obtaining the current and previous 2 years financial statements for the Companies and the guarantor, bank statements, and balance and trial balance sheets for the most recent month end of the project (including a detailed list of costs to date);
  - d. Obtaining evidence of funded equity in the property by the Companies or the guarantor;
  - e. A statement of net worth from the Companies and the guarantor;
  - f. An organization chart showing legal ownership interests of the property amongst the borrower, each beneficial owner, all shareholders, unit holders, companies and trusts;
  - g. Current planning report to support the current status and feasibility of the project and timelines for development; and
  - h. A detailed preliminary development budget with a proforma profit statement for the project.<sup>45</sup>
61. There is no indication that these conditions have been satisfied or waived by the lender under the Doji Financing.

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<sup>45</sup> John Affidavit, Exhibit “K,” Cross Motion Record, Tab 2K, pg. 123.

62. After payments are made with respect to prepaid interest reserves, lender fees and broker fees under each of the KPMAN Financing and the Doji Financing, the funds available to redeem the Vector Mortgage will be \$8,439,875.<sup>46</sup>

63. The Companies estimate a shortfall from the KPMAN Financing and Doji Financing of \$883,932.65 (the “**Estimated Shortfall**”).<sup>47</sup> However, the amounts in the Estimated Shortfall are understated as follows:

	<b>Amounts listed by Companies in Statement of Receipts and Disbursements</b>	<b>Actual Amounts to date<sup>48</sup></b>
<b>Vector Indebtedness</b>	\$8,958,381.93	\$9,145,768.05
<b>Property Taxes</b>	\$27,033.47	\$64,030.99
<b>Receiver’s Certificates</b>	\$41,514.02	\$51,830.63
<b>Receiver’s Fees</b>	\$250,000	\$300,000
<b>Total</b>	<b>\$9,276,929.42</b>	<b>\$9,561,629.67</b>

64. The Companies’ Estimated Shortfall does not reflect the funds required for the proposed redemption date on or before March 25, 2024. It should be noted that the listed amounts do not include Vector’s legal fees, the 2% brokerage fee owing to the Agents, and HST on the Receiver’s fees.<sup>49</sup>

65. The Companies contemplate covering any shortfall by “a new investor who has agreed to invest the sum of \$900,000 provided the Companies obtain court permission to redeem the

<sup>46</sup> John Affidavit, Exhibit “L,” Cross Motion Record, Tab 2L, pg. 135.

<sup>47</sup> John Affidavit, Exhibit “K,” Cross Motion Record, Tab 2K, pg. 135.

<sup>48</sup> Supplementary Report of the Receiver, dated March 11, 2024 (“**Supplementary Report**”), paras. 13-17, Responding Motion Record (Borrowers’ Motion to Redeem), dated March 11, 2024 (“**Responding Motion Record**”), Tab 1.

<sup>49</sup> Supplementary Report, paras. 13, 16, Responding Motion Record, Tab 1.



mortgage.”<sup>50</sup> This new investor was identified in the supplemental materials of the Companies to be Mr. Al Lalani (“**Mr. Lalani**”) of the Lalani Group.<sup>51</sup>

66. The Companies have also indicated that its directors have “agreed to inject an additional investment of one million dollars to cover carrying costs of the Real Property and to extend such funds towards completion of the severance.”<sup>52</sup> No evidence has been provided to support the credit worthiness or financial capacity of the Companies’ directors to advance the funds required to cover any shortfall and future carrying costs if the Companies are successful on their Cross Motion.

### **PART III - ISSUES**

67. The issues in the Receiver’s motion and the Cross Motion are whether:

- (a) the APS should be approved and the Receiver be authorized to complete the transaction;
- (b) the Companies can redeem the Vector Mortgage;
- (c) the Receiver’s activities should be approved; and
- (d) the Confidential Appendices should be sealed.

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<sup>50</sup> John Affidavit, para. 34, Cross Motion Record, Tab 2, pg. 16.

<sup>51</sup> Affidavit of Jason Allen John, sworn March 11, 2024 (“**Responding John Affidavit**”), para. 27, Responding Motion Record (Receivers’ motion for approval), dated March 11, 2024 (“**Responding Record of the Companies**”), Tab 1, pg. 10.

<sup>52</sup> Responding John Affidavit, para. 29, Responding Record of the Companies, Tab 1, pg. 11.

## PART IV – LAW & ARGUMENT

### A. The APS Should Be Approved and AVO Should be Granted

68. It is well established that in determining whether to approve a transaction proposed by a receiver, the Court should consider the factors set out in *Royal Bank v Soundair Corp.*:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.<sup>53</sup>

#### *The Receiver undertook significant effort to obtain the best possible price*

69. The Receiver, with the assistance of the Agents, ran a robust sale process that was designed to obtain the highest price for the Real Property based on current market conditions. Following discussions about the proposed sale process between the Receiver, Vector and Bamra, the Real Property was listed on MLS on an unpriced basis to allow for the market to establish value.<sup>54</sup>

70. The Agents canvassed the market extensively by reaching out to over 200 residential developers and were contacted by 128 interested parties requesting details about the Real Property.

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<sup>53</sup> *Royal Bank v Soundair Corp.*, 1991 CanLII 2727 [*Soundair*].

<sup>54</sup> First Report, at paras. 47-57, Motion Record, Tab 2.

Interested parties, including the Companies, were provided with a reasonable timeframe (approximately two months) within which to consider the opportunity and make an offer.<sup>55</sup>

71. The Receiver received seven (7) offers for the Real Property. The Receiver negotiated terms with the prospective purchasers and also negotiated with the Agents to reduce their fee from 2.5% to 2% to maximize value for the Companies' creditors.<sup>56</sup>

72. The APS represents the highest and best offer for the Real Property in terms of proposed purchase price, agent commissions and closing date, and is not conditional except for obtaining Court approval.<sup>57</sup> The proposed purchase price set out in the APS is consistent with the range of estimates provided in the Appraisal.<sup>58</sup> The Receiver is of the view that the purchase price in the APS is fair and reasonable.

***The Receiver considered the interests of all stakeholders***

73. In addressing the interests of all parties, the interests of creditors are the primary consideration, though not the overriding one. The interests of the debtor and the interests of a prospective purchaser that has negotiated an agreement with the receiver may also carry weight.<sup>59</sup>

74. In conducting the sale process, the Receiver has considered the interests of all parties. The Receiver's primary intent was to maximize the chances of realization for the benefit of all creditors, with a view to minimizing closing risk and delay given the continuing accrual of interest and fees on the secured debt. In particular, the indebtedness owing by the Companies to Vector continues

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<sup>55</sup> First Report, at paras. 59-60, Motion Record, Tab 2.

<sup>56</sup> First Report, at paras. 61 and 65, Motion Record, Tab 2.

<sup>57</sup> First Report, at para. 68, Motion Record, Tab 2.

<sup>58</sup> First Report, Schedule "H," Motion Record, Tab 2H.

<sup>59</sup> [\*Royal Bank v Soundair Corp.\*](#), 1991 CanLII 2727.

to accrue *per diem* interest of \$3,142.19 plus default fees of \$31,300 per month. The Vector debt, therefore, continues to grow by more than \$125,000 monthly, exclusive of ongoing legal fees.<sup>60</sup>

75. The Receiver, in consultation with Dales, deferred the Committee of Adjustment hearing to deal with the Severance Applications given the advice from Development Engineering that more time was needed to address storm sewer issues, the objections filed by nine neighbouring residences and the request of Councillor Matlow for community consultation.<sup>61</sup>

76. Weighing the uncertainty associated with the Severance Applications as to timing and outcome against the mounting costs of the Vector debt, the Receiver determined it would be prudent to commence a sale process for the Real Property in December 2023.<sup>62</sup>

***Sales process was commercially reasonable, efficient and conducted with integrity***

77. The Receiver consulted with key stakeholders, including Vector and Bamra, on the sale process, and conducted it in a commercially reasonable manner.<sup>63</sup> The Receiver balanced the desires of the secured creditors for an expedited process against the need to ensure there was sufficient time for bidders to conduct due diligence and submit bids.

78. The Receiver engaged Agents after reviewing proposals from three agents with knowledge of the market and contacts with various developers. The Receiver and the Agents widely canvassed the market for prospective purchasers.<sup>64</sup>

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<sup>60</sup> First Report, para. 13, Motion Record, Tab 2.

<sup>61</sup> First Report, at paras. 15-16 and 19, Motion Record, Tab 2.

<sup>62</sup> First Report, at paras. 47-49, Motion Record, Tab 2.

<sup>63</sup> First Report, paras. 50-51, Motion Record, Tab 2.

<sup>64</sup> First Report, at paras. 52, 58-59, Motion Record, Tab 2.

79. All interested parties were given an opportunity to participate in the sale process. The Companies and their counsel had notice that the Real Property was listed on MLS.<sup>65</sup> The Companies did not participate in the sale process, even though they could have contacted the Receiver or the Agents to inquire about the bid deadline. The sale process was fair and transparent and allowed for sufficient exposure of the Real Property.

***There has been no unfairness in the working out of the process***

80. The sale process was robust and conducted with consultation of stakeholders and counsel. Further, the Receiver had direct involvement in negotiating the terms and conditions of the APS and believes that it is fair and reasonable in the circumstances.

81. In considering whether to approve the APS, the Court should not lose sight of two of the overarching policy considerations underpinning insolvency proceedings: urgency and commercial certainty. Delay fuels increased costs and breeds chaos and confusion, all of which risk adversely affecting the interests of parties with a stake in the sale process.<sup>66</sup>

82. Based on the *Soundair* principles and the above-noted policy considerations, it is the Receiver's view that the APS provides the best executable transaction with the least amount of risk and the highest degree of certainty as compared to the alternative trajectory of waiting for the Severance Applications to be approved.<sup>67</sup>

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<sup>65</sup> First Report, at paras. 75, Motion Record, Tab 2.

<sup>66</sup> [1705221 Alberta Ltd v. Three M Mortgages Inc.](#), 2021 ABCA 144, para. 48.

<sup>67</sup> First Report, at paras. 47-49, 68-69, Motion Record, Tab 2. See also Supplementary Report, paras. 18-19, Responding Motion Record, Tab 1.

83. The Receiver's recommendation should be granted deference and viewed as a matter of business judgment based on the information available to the Receiver at the time it agreed to accept the offer.<sup>68</sup> As the Court of Appeal stated in *Soundair*:

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 perception of receivers and in the perception of any others who might have occasion to deal with them...That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.<sup>69</sup>

84. There is no reason to reject the Receiver's recommendation. The Receiver's rationale for entering into the APS reflects sound business judgment and prudent consideration of the interests of all stakeholders.

#### **B. Companies Should Not Be Permitted To Redeem Vector Mortgage**

85. There is no automatic right of redemption in circumstances where a receiver is exclusively authorized and empowered to market and sell a debtor's property without interference from any other person, including the debtor, and has taken steps pursuant to the appointment order to do so.<sup>70</sup>

86. In determining whether the Companies should be granted leave to redeem, this Honourable Court must engage in a balancing analysis of the right to redeem against the impact on the integrity

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<sup>68</sup> [Royal Bank v Soundair Corp.](#), 1991 CanLII 2727.

<sup>69</sup> [Royal Bank v Soundair Corp.](#), 1991 CanLII 2727.

<sup>70</sup> [B&M Handelman Investments Limited et al. v. Mass Properties Inc.](#), 2009 CanLII 37930, at para. 22. See also [BDC v. Marlwood Golf & Country Club](#), 2015 ONSC 3909, para. 25.

of the receivership process.<sup>71</sup> The history of the proceedings and the potential for prejudice to the different stakeholders should also be considered.<sup>72</sup>

87. If a sales process has been carried out in a manner consistent with the principles set out in *Soundair*, a court should not permit a late attempt to redeem to interfere with the completion of the sales process.<sup>73</sup>

88. The importance of the timing and stage of the sale process in relation to the purported exercise of the right to redeem is critical. Courts have demonstrated a reluctance to allow a debtor to exercise its right of redemption when a receiver has run a sale process, has selected a purchaser and is moving to approve the purchase. The policy rationale for this is as follows:

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.<sup>74</sup>

89. It is well established that permitting debtors to redeem property during the sale approval motion would deter potential purchasers from placing bids in the first place, thereby threatening the effectiveness of the receivership process more generally.<sup>75</sup>

90. In this case, the Companies' attempt to redeem the Vector Mortgage at this late stage undermines the integrity of the sale process to the detriment of the stakeholders, including Vector

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<sup>71</sup> [\*Rose-Isli Corp. v. Frame-Tech Structures Ltd.\*](#), 2023 ONCA 548, at para. 9. See also [\*Rose-Isli Corp. v. Frame-Tech Structures Ltd.\*](#), 2023 ONSC 832, para. 83.

<sup>72</sup> [\*Rose-Isli Corp. v. Frame-Tech Structures Ltd.\*](#), 2023 ONSC 832, para. 85. [\*BCIMC Construction Fund Corporation at al v. The Clover on Yonge Inc.\*](#), 2020 ONSC 3659, para. 41 and 47.

<sup>73</sup> [\*Rose-Isli Corp. v. Frame-Tech Structures Ltd.\*](#), 2023 ONCA 548, at para. 9. See also [\*Rose-Isli Corp. v. Frame-Tech Structures Ltd.\*](#), 2023 ONSC 832, para. 83.

<sup>74</sup> [\*B&M Handelman Investments Limited et al. v. Mass Properties Inc.\*](#), 2009 CanLII 37930 (Ont. S.C.J.), at para. 22

<sup>75</sup> [\*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.\*](#), 2020 ONSC 1953 at para. 36

and the Purchaser. The Receiver spent considerable resources securing the APS, which it believes to be a fair and reasonable offer.

91. The Companies have been attempting to refinance for the past eight months. They were provided with an opportunity to redeem the Vector indebtedness as part of the Appointment Order, but failed to make the Interim Payment by the Interim Payment Date.<sup>76</sup> Further, the Companies did not participate in the sale process and only produced highly conditional financing one week before the Receiver's approval motion.

92. This is not a situation where the Companies have demonstrated that they have the ability to pay out the Vector debt immediately<sup>77</sup> or presented a vastly superior offer to that accepted by the Receiver.<sup>78</sup>

93. The opposite is true. The KPMAN Financing and the Doji Financing are far from firm, with due diligence potentially taking months to complete. On its face, the KPMAN Financing is non-compliant with the execution deadline and the Doji Financing is expired.<sup>79</sup>

94. Together, even if the KPMAN Financing and the Doji Financing did materialize, which is uncertain, there would still be a significant shortfall well above \$1 million. The Companies state that Mr. Lalani is prepared to provide an investment in the amount of \$900,000 and that he has "confirmed that funds are available in his lawyer, Jason Cherniak's trust account for the benefit of the Companies' redemption of this mortgage," although no evidence has been provided. The

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<sup>76</sup> First Report, at para. 1 and Schedule "A", Appointment Order, paras. 1-3, Motion Record, Tab 2 and Tab 2A. *BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909, para. 15.

<sup>77</sup> *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 19-20, 58.

<sup>78</sup> *Home Trust Company v. 2122775 Ontario Inc.*, 2014 ONSC 1039, para. 10.

<sup>79</sup> John Affidavit, Exhibit "J," Cross Motion Record, Tab 2J, pg. 116. John Affidavit, Exhibit "K," Cross Motion Record, Tab 2K, pg. 120.



Companies' directors also purported to have agreed to fund an additional \$1 million to cover costs towards completion of the Severance Applications.

95. The Companies have provided no evidence of the credit worthiness of Mr. Lalani or the Companies' directors. The Receiver is concerned that the financing proposed by the Companies does not provide certainty or bring finality to the receivership, as significant interest and costs continue to mount on a daily basis.<sup>80</sup>

96. Balanced against the transparent and commercially reasonable sale process undertaken by the Receiver, which satisfies the *Soundair* criteria, the Companies should not be permitted to redeem the Vector Mortgage in a last-minute attempt to subvert the sale.

### **C. The Receiver's Activities Should Be Approved**

97. The Receiver is seeking approval of its activities as set out in the First Report and the Supplementary Report, which describe the sale process cumulating in the APS and present the information necessary for the approval of that transaction.

98. When Courts approve the general activities of a receiver as described in a receiver's report, the Court is not required to make any findings of fact beyond expressing satisfaction with the general scope and direction of the receiver's activities as set out in the report before them.<sup>81</sup>

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<sup>80</sup> Supplementary Report, paras. 18-19, Responding Motion Record, Tab 1.

<sup>81</sup> [Hanfeng Evergreen Inc., \(Re\)](#), 2017 ONSC 7161 at [para 24](#).

99. In circumstances where the Court is considering whether to approve a sale process, the Court has held that the approval order also approves all findings necessary to lead to that sale approval.<sup>82</sup>

100. In this case, the Receiver's First Report and Supplementary Report contain the factual basis that the Court will rely on in determining whether to grant the requested Orders.

101. The APS cannot be found to have met the *Soundair* factors without a parallel finding that the Receiver's activities in carrying out the sale process were satisfactory. Based on the above, the Receiver submits that it is appropriate to approve the Receiver's activities set out in the First Report and the Supplementary Report.

#### **D. Confidential Appendices Should Be Sealed**

102. The Receiver seeks an order sealing the Confidential Appendices, pending the closing of the APS or further order of the Court. This Court has jurisdiction to make the sealing orders sought.<sup>83</sup> The relief sought meets the test as set out in *Sherman Estate v Donovan* and is appropriate in the circumstances.<sup>84</sup> The salutary effects of a sealing of the Confidential Appendices outweigh any deleterious effects that may occur.

103. The Receiver submits that, in the circumstances, it is necessary to seal the Confidential Appendices to prevent a real and substantial risk of harm to the Companies' commercial interests. The Confidential Appendices contain sensitive information related to the valuation and offers to purchase the Real Property. If such information was to be made public, any subsequent sale process

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<sup>82</sup> *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONSC 3989 at [para 2](#); *The Bank of Nova Scotia v. Lackey and Lackey*, 2021 ONSC 2628.

<sup>83</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43 at [s 137\(2\)](#) [CJA].

<sup>84</sup> *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman Estate*].

by the Receiver could be compromised to the detriment of the Companies' creditors who have an interest in ensuring the highest realizable value possible is received for the Real Property.

104. The Confidential Appendices are limited to commercially sensitive information such as appraisal information, a comparison of offers submitted in the sales process and the price in the APS. The requested sealing relief is the least restrictive means available, and, as such, complies with *Sierra Club*, *Sherman Estate* and the *CJA*.<sup>85</sup>

#### **PART V – ORDER SOUGHT**

105. Based on the foregoing, the Receiver respectfully requests that this Court grant the proposed form of Orders found at Tabs 3 and 5 of the Motion Record and dismiss the Companies' Cross Motion.

**ALL OF WHICH ARE HEREBY SUBMITTED ON THIS 13<sup>th</sup> DAY OF MARCH 2024 BY:**



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Tim Dunn / Alexandra Teodorescu

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<sup>85</sup> [\*Sierra Club of Canada v. Canada \(Minister of Finance\)\*](#), [2002] 2 SCR 522 at para 53; *Sherman Estate*, [para 38](#); *CJA*, at [s. 137\(2\)](#).

**SCHEDULE “A” – LIST OF AUTHORITIES**

1. [1705221 Alberta Ltd v. Three M Mortgages Inc.](#), 2021 ABCA 144
2. [BDC v. Marlwood Golf & Country Club](#), 2015 ONSC 3909
3. [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.](#), 2020 ONSC 1953
4. [B&M Handelman Investments Limited et al. v. Mass Properties Inc.](#), 2009 CanLII 37930
5. [Cosa Nova Fashions Ltd. v. The Midas Investment Corporation](#), 2021 ONSC 3989
6. [Hanfeng Evergreen Inc., \(Re\)](#), 2017 ONSC 7161
7. [Home Trust Company v. 2122775 Ontario Inc.](#), 2014 ONSC 1039
8. [Rose-Isli Corp. v. Frame-Tech Structures Ltd.](#), 2023 ONSC 832
9. [Rose-Isli Corp. v. Frame-Tech Structures Ltd.](#), 2023 ONCA 548
10. [Royal Bank v Soundair Corp.](#), [1991] OJ No 1137 (CA)
11. [Sherman Estate v Donovan](#), 2021 SCC 25
12. [Sierra Club of Canada v. Canada \(Minister of Finance\)](#), [2002] 2 SCR 522
13. [Royal Bank v Soundair Corp.](#), 1991 CanLII 2727
14. [The Bank of Nova Scotia v. Lackey and Lackey](#), 2021 ONSC 2628

**SCHEDULED “B” – STATUTORY PROVISIONS**

[Courts of Justice Act](#), R.S.O. 1990, c. C.43

Documents public

**137** (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

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

**VECTOR FINANCIAL SERVICES LIMITED**

Applicant

-and-

Court File No. CV-23-00704623-00CL  
**33 HARWARDEN CRESCENT INC., et al.**

Respondents

***ONTARIO***

**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF COURT-APPOINTED RECEIVER**

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