



This is the 3rd Affidavit
of Suzanne Volkow in this case
and was made on May 30, 2025

No. S-243389
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE RECEIVERSHIP OF
ECOASIS DEVELOPMENTS LLP AND OTHERS

BETWEEN:

SANOVEST HOLDINGS LTD.

PETITIONER

AND:

ECOASIS DEVELOPMENTS LLP, ECOASIS BEAR
MOUNTAIN DEVELOPMENTS LTD., ECOASIS RESORT
AND GOLF LLP, 0884185 B.C. LTD., 0884188 B.C. LTD.,
0884190 B.C. LTD., 0884194 B.C. LTD., BM 81/82 LANDS
LTD., BM 83 LANDS LTD., BM 84 LANDS LTD., BM
CAPELLA LANDS LTD., BM HIGHLANDS GOLF COURSE
LTD., BM HIGHLANDS LANDS LTD., BM MOUNTAIN GOLF
COURSE LTD., and BEAR MOUNTAIN ADVENTURES LTD.

RESPONDENTS

AFFIDAVIT

I, Suzanne Volkow, of 2900 – 550 Burrard Street, Vancouver, British Columbia, SWEAR
THAT:

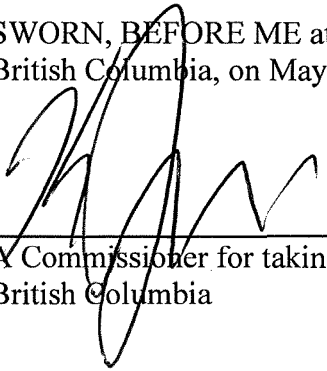
1. I am a paralegal in the law firm Fasken Martineau DuMoulin LLP, solicitors for the
Petitioner, Sanovest Holdings Ltd. (“**Sanovest**”), and as such have personal knowledge of the facts
hereinafter deposed to except where stated to be on information and belief, in which case I verily
believe them to be true.

2. Attached hereto as **Exhibit “A”** is a copy of the transcript taken of the proceedings in the
Supreme Court of British Columbia in Bankruptcy and Insolvency on September 10 to 12, 2024,

in respect of the hearing of the initial application brought by Sanovest seeking the appointment of a receiver and manager over certain of the assets, undertakings, and property of the Respondents.

3. Attached hereto as **Exhibit "B"** is a copy of email correspondence between counsel to 599315 B.C. Ltd. and Daniel Matthews and counsel to Sanovest, dated May 21, 2025 to May 27, 2025.

SWORN, BEFORE ME at Vancouver,
British Columbia, on May 30, 2025



A Commissioner for taking Affidavits for
British Columbia



SUZANNE VOLKOW

KIBBEN JACKSON
Barrister & Solicitor
Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
604 631 4786

This is Exhibit "A"
Referred to in the Affidavit of
SUZANNE VOLKOW
Sworn before me this 30 day of
May, 2025

A handwritten signature in black ink, consisting of stylized, overlapping loops and curves, positioned above a horizontal line.

A Commissioner for taking Affidavits
in British Columbia

A handwritten signature in black ink, consisting of a single, large, sweeping loop, positioned below the horizontal line.

No. S234048
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE JUSTICE WALKER)

Vancouver, BC
September 10, 2024

BETWEEN:

599315 B.C. Ltd. and Daniel Matthews

Petitioners

AND:

Ecoasis Bear Mountain Developments Ltd.,
Ecoasis Developments LLP, and
Ecoasis Resort and Golf LLP, Tian Kusumoto,
and Sanovest Holdings Ltd.

Respondents

No. S243389
Vancouver Registry

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE RECEIVERSHIP OF ECOASIS
DEVELOPMENTS LLP AND OTHERS**

BETWEEN:

Sanovest Holdings Ltd.

Petitioners

AND:

Ecoasis Developments LLP,
Ecoasis Bear Mountain Developments Ltd.,
Ecoasis Resort and golf LLP, 0884185 B.C. Ltd.,
0884188 B.C. Ltd., 0884190 B.C. Ltd., 0884194 B.C. Ltd.,
BM 81/82 Lands Ltd., BM 83 Lands Ltd., BM 84 Lands Ltd.,
BM Capella Lands Ltd., BM Highlands Golf Course Ltd.,
BM Highlands Lands Ltd., BM Mountain Golf Course Ltd.
and Bear Mountain Adventures Ltd.

Respondents

EXCERPT FROM PROCEEDINGS IN CHAMBERS
(Proceedings from 10:11 AM to 2:06 PM)

COPY

APPEARANCES

Counsel for Sanovest Holdings:

**A.I. Nathanson, KC
D. Byma
K. Jackson
L. Hiebert**

Counsel for 599315 B.C. Ltd.:

**C.A.B. Ferris, KC
G. Brandt
W.L. Roberts
C. Ohama-Darcus**

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(Proceedings from 10:11 AM to 10:11 AM)

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1
Discussion re housekeeping matters

September 10, 2024
Vancouver, BC

(EXCERPT FROM PROCEEDINGS)

(PROCEEDINGS COMMENCED) ([10:11:10 AM])

DISCUSSION RE HOUSEKEEPING MATTERS:

THE CLERK: In the matter of 599215 and BC Limited
versus Ecoasis Bear Mountain Developments in
action 234048 and Sanovest Holdings Limited versus
Ecoasis Developments LLP in action 243389,
Justice.

THE COURT: All right. Mr. Nathanson.

CNSL A. NATHANSON: Good morning.

Introductions. So together with me is
Mr. Jackson --

THE COURT: Mr. Jackson.

CNSL A. NATHANSON: -- Ms. Hiebert --

THE COURT: All right.

CNSL A. NATHANSON: -- and Mr. Byma.

THE COURT: Mr. Byma.

CNSL A. NATHANSON: And in action 048, we act for Tian
Kusumoto and Sanovest Holdings. And in the second
proceeding, the insolvency proceedings, 389, we
act for the petitioner, Sanovest Holdings.

THE COURT: Thank you.

CNSL A. NATHANSON: Thank you.

THE COURT: All right. Mr. Ferris?

CNSL C. FERRIS: Thank you, Justice. With me is -- is
Mr. Brandt, initial G --

THE COURT: Mr. Brandt.

CNSL C. FERRIS: -- Ohama-Darcus in the
[indiscernible], and, at the back --

THE COURT: Mr. Roberts.

CNSL C. FERRIS: -- Mr. Roberts. We act for
Mr. Matthews and his numbered company --

THE COURT: All right.

CNSL C. FERRIS: -- 591 [sic] and in both proceedings.

THE COURT: I see a number of people in the courtroom.

Is everyone -- are there enough tables for
everyone, or do I need to get another table put in
here somewhere?

CNSL A. NATHANSON: We're fine on the side of Ecoasis.

CNSL C. FERRIS: So are we.

THE COURT: Okay. Thank you.

2
Discussion re preliminary matters

1
2 **DISCUSSION RE PRELIMINARY MATTERS:**
3

4 CNSL A. NATHANSON: Justice Walker, just a few
5 preliminary matters -- I've spoken to my friend
6 Mr. Ferris about this -- just to enumerate them
7 and then go through them very quickly so we can
8 get on to the main event.

9 So there are orders by consent for the use of
10 evidence in one proceeding and the other --

11 Sorry, yes. Mr. Ferris asks and I would like
12 to know as well who would be attending remotely.

13 THE COURT: Okay. I think there may be someone from
14 the media attending, but let's just -- and, clerk,
15 do you know who's online?

16 THE CLERK: I do, Justice.

17 THE COURT: How many people are -- are attending
18 remotely?

19 THE CLERK: They are attending remotely.

20 THE COURT: How many people? How many -- how many
21 people?

22 THE CLERK: Three.

23 THE COURT: Three?

24 THE CLERK: Yeah.

25 THE COURT: Do you need --

26 CNSL A. NATHANSON: Sorry, may I have just a moment?

27 THE COURT: Yes, of course.

28 CNSL A. NATHANSON: Just [indiscernible]. Is it -- is
29 it -- I don't know if we could find out whether
30 it's just other counsel who are interested or
31 whether it's members of the public.

32 THE COURT: I can ask.

33 Those who are attending remotely, is anyone
34 counsel?

35 You are -- no? I knew -- I was told that one
36 member of the media may be -- may be signing in.

37 CNSL A. NATHANSON: That's fine, Justice. Thank you.
38 I appreciate that.

39 So -- so that -- that -- preliminary matters
40 are use of evidence orders, which are by consent
41 at the moment.

42 THE COURT: All right.

43 CNSL A. NATHANSON: There are applications by both
44 sides for sealing orders, which I don't expect
45 will be contentious as amongst counsel.

46 Ms. Hiebert and Mr. Brandt will deal with that.

47 THE COURT: Okay.

3
Discussion re preliminary matters

1 CNSL A. NATHANSON: There is a case plan conference
2 that has been --
3 THE COURT: Right.
4 CNSL A. NATHANSON: -- sat --
5 THE COURT: I saw that.
6 CNSL A. NATHANSON: -- before you this afternoon --
7 THE COURT: Yeah.
8 CNSL A. NATHANSON: -- at 3:00 PM. I think our counsel
9 here would prefer to do it at 3:30. We think that
10 there won't be a lot of substance to it.
11 And our plan is to let Mr. Peterson, who is
12 counsel for Tom Kusumoto in one of the
13 proceedings, know that.
14 THE COURT: Mr. Peterson's in Victoria?
15 CNSL A. NATHANSON: Yes, and I don't know what his
16 arrangements were, whether he's coming in person
17 or whether he --
18 THE COURT: Will you reach out to him?
19 CNSL A. NATHANSON: We will.
20 THE COURT: But if he wants to attend it by Teams, he
21 certainly can.
22 CNSL A. NATHANSON: Thank you. And we'll -- we'll let
23 him know. Mr. Byma will deal with that.
24 And then the last point, which I'll tell you
25 now, is -- I'll just tell you we've agreed on how
26 to deal with the two applications. And so
27 counsel's plan, subject to your direction, is as
28 follows.
29 After these preliminary matters, Mr. Jackson
30 will make the application for the appointment of
31 the receiver in the insolvency proceeding. My
32 friends will then combine their response to that
33 motion with their application for interim relief
34 under the oppression remedy.
35 THE COURT: And respond to the receivership.
36 CNSL A. NATHANSON: And -- and respond to the
37 receivership. That's right.
38 And then Mr. Jackson will reply.
39 I will respond to the oppression interim
40 relief motion.
41 And then my friends will have a last right of
42 reply in respect of their oppression motion.
43 I think we're reasonably comfortable that we
44 can get this done in the time that we have
45 available.
46 THE COURT: All right.
47 CNSL A. NATHANSON: It's already been adjourned.

4

Summation by the court

1 THE COURT: I can't -- I know. I appreciate everyone's
2 understanding. I couldn't -- I simply couldn't
3 appear.

4 CNSL A. NATHANSON: We -- we had adjournments before
5 your unfortunate accident, Justice.

6 THE COURT: Yeah.

7 CNSL A. NATHANSON: But there is commercial urgency, as
8 you see.

9 THE COURT: I see that.

10 CNSL A. NATHANSON: So we're going to work hard to get
11 this -- get this done.

12 THE COURT: Yeah, I can't sit on Friday. Right? I --
13 but if it has to -- I'll get some other date ASAP
14 if it has to -- doesn't finish by Thursday.

15 CNSL A. NATHANSON: Thank you. On -- on our side,
16 we're going to work hard to make sure it can be
17 done. And I think it can. And we know that
18 you've had some advanced review of the material.

19 THE COURT: I -- I have. And I want to put something
20 out to counsel. I don't know if you want me to
21 put it out now or you want to deal with the
22 consent orders first.

23 CNSL A. NATHANSON: No time like to present, Justice.

24

25 **SUMMATION BY THE COURT:**

26

27 THE COURT: Okay. Well, look, I haven't read every
28 single page. I -- I was -- and Mr. Matthews'
29 submissions came in -- were uploaded late
30 yesterday. I just only had a chance to skim it.

31 This is what I gleaned from what I read so
32 far. The parties are deadlocked. It's a
33 deadlock. And whether that has a meaning --
34 whether the BC *Business Corporations Act* applies
35 or not to bring a deadlock -- I know there's an
36 issue about oppression and standing.

37 Practically speaking, the deadlock -- it
38 appears that the business can't meet its payroll,
39 can't pay its debts, and they have the primary
40 secure lender -- the debts owed to the lender's in
41 default. The lender happens to be a partner of
42 the -- of the business.

43 And I appreciate that there's an allegation
44 that Sanovest is trying to leverage its position
45 as a credit -- secured pretty to somehow take
46 advantage of -- of the business, but -- and there
47 are also competing allegations of breach of

5

Summation by the court

1 fiduciary duty, oppressive conduct.

2 And I see now by getting the CPC file that
3 this action and others are set for trial in
4 January 2025.

5 And so I just wonder how much of the -- the
6 allegations concerning oppressive conduct, breach
7 of fiduciary duty, mall -- I'll call it *malafide*
8 conduct, tortuous conduct. I can decide on a
9 summary application. And, really, aren't they the
10 type of allegations that require the determination
11 at trial?

12 I also see that the parties appear to agree
13 that some form of officer needs to be appointed to
14 deal with the business and selling assets.

15 And -- and I wasn't clear if Mr. Matthews was
16 saying it needs to be a marketing agent or a
17 receiver with limited powers. From the NOA
18 response, I thought it was a receiver but with
19 limited powers. And so I -- my sense was that the
20 parties agree that something needs to be done, and
21 the question is, is it a receiver with broad
22 powers or some -- a receiver with more limited
23 powers?

24 And I see that Mr. Matthews also wants to
25 make -- enshrine his -- his ability to redeem in
26 the context.

27 So I thought, well, a receiver is the court's
28 officer. And if -- if I appoint a receiver in --
29 in the -- with the usual powers, the receiver has
30 to come back. The receiver has to engage an
31 analysis of the business and the assets and come
32 back with a recommendation to court.

33 And I don't know if the receiver is going to
34 say, look, Mr. Matthews is right. There's greater
35 value to sell these properties off piecemeal so
36 that you -- rather than on-block, because they'll
37 be greater -- there will be greater proceeds
38 realized as opposed to an unblocked sale where
39 someone might be buying something at an unfair
40 discount. Or on-block is the way to go.

41 And so if -- if I appoint a receiver with the
42 usual powers, it doesn't prejudice -- I -- I was
43 wondering how would it prejudice Mr. Matthews'
44 rights. Because he always has the ability to come
45 and contest what the receiver is saying and
46 recommending.

47 At the same time, if Mr. Matthews wants the

6

Summation by the court

1 ability to redeem, think about [indiscernible] and
2 how long that's going to take to get finally
3 worked up, approved, and the sales process to
4 take. That's month -- usually a number of months.

5 Well, if there's a right to redeem enshrined,
6 he's going to have that ability in the interim,
7 come back, arrange financing, redeem, and pay out
8 Sanovest.

9 And all of the issues that are -- that are
10 in -- in dispute between the parties still go to
11 trial.

12 If he can't redeem and the receiver comes and
13 recommends sales however -- on-block or limited --
14 and there's sale proceeds, they get paid and get
15 held in trust in an interest-bearing trust account
16 depending the determination of the trial so that
17 no one's prejudiced.

18 But if there's something truly unique about
19 these properties where someone says, look, it's --
20 it's unfair and prejudiced if this unique piece of
21 property is sold, monetizing it isn't appropriate.

22 And if -- then somebody needs to arrange
23 financing so the business can be run properly in
24 the interim, so the status quo's maintained
25 somehow.

26 And if there's financing to do that, the
27 question is should the court appoint someone to
28 run the business if this was a CCAA proceeding,
29 some kind of super monitor, somebody to run the
30 business so that no one's prejudiced, the issues
31 get on at trial -- which is not that far away --
32 and then the judge hearing the trial makes the
33 determination and everything at that point falls
34 into place based upon the finding. It just struck
35 me from what I was reading.

36 Now, I may have missed a lot, maybe a lot of
37 nuances and things. But it seems to me there was
38 a -- there may be a way to preserve the business,
39 protect everyone's assets, or have the receiver
40 come back and make appropriate recommendations
41 that still enshrines Mr. Matthews's right of
42 redemption.

43 And in the meantime, I hear from an
44 independent court's officer what the right thing
45 to do is.

46 That -- that's what struck me. And -- and --
47 and what I was thinking, that's sort of --

7

Summation by the court

1 everyone knows what I -- what I gleaned. And
2 maybe I'm way off base, but that's what I was
3 seeing when I read -- read the materials.

4 I appreciate, Mr. Ferris, I haven't had a
5 chance to read your client's written submissions
6 and need to.

7 CNSL A. NATHANSON: Thank you, Justice. I --

8 THE COURT: I don't know if that helps.

9 CNSL A. NATHANSON: I'm not -- that's helpful. I'm --
10 I'm not going to make any comment. I'll let
11 Mr. Ferris address that. But it is helpful to
12 know what you're thinking.

13 So I'll just deal with these things very
14 quickly. So the first thing is, because we have
15 two proceedings, counsel agree that any materials
16 filed in one will be evidence in the other and
17 vice versa.

18 THE COURT: Okay.

19 CNSL A. NATHANSON: We have two consent orders. They
20 have been vetted. I can hand them up.

21 THE COURT: Okay.

22 CNSL A. NATHANSON: Counsel have signed them. I
23 thought Ms. Hiebert -- sorry?

24 CNSL L. HIEBERT: I've given you both.

25 THE COURT: And -- and the oppression action, that's --
26 that's --

27 CNSL A. NATHANSON: The oppression --

28 THE COURT: -- 389?

29 CNSL A. NATHANSON: No.

30 THE COURT: No. 380 -- 048?

31 CNSL A. NATHANSON: Yeah.

32 THE COURT: And that's going to trial in January?

33 CNSL A. NATHANSON: Yes.

34 CNSL C. FERRIS: No. No, that's not correct.

35 THE COURT: It's not?

36 CNSL C. FERRIS: It's going to trial in January of
37 2026.

38 THE COURT: Oh, I thought it was 2025.

39 CNSL C. FERRIS: It was moved.

40 THE COURT: Oh, all right.

41 CNSL C. FERRIS: It was originally 2025, and -- and
42 that's what the case planning order is to address
43 is --

44 THE COURT: Oh, I see.

45 CNSL C. FERRIS: -- to set the schedule to lead us to
46 2026.

47 THE COURT: Oh, all right. Well, that may make a

8

Submissions re sealing order by Cnsl L. Hiebert

1 difference from what I just said.

2 CNSL A. NATHANSON: Well, you'll -- you'll hear from
3 Mr. Jackson. I mean, either way, it's -- it's
4 just over a year, so it's --

5 THE COURT: Yeah.

6 CNSL A. NATHANSON: -- still not a long period of time,
7 given everything you described. But I -- I won't
8 pre-argue here.

9 THE COURT: All right. Okay. That's fine. Everyone
10 agrees to these, so that's ...

11 CNSL C. FERRIS: Thank you.

12 CNSL A. NATHANSON: Yes, Justice.

13 THE COURT: Okay. Madam Clerk, you can hand these
14 back, then.

15 CNSL A. NATHANSON: Thank you, Justice.

16 THE COURT: Madam Clerk?

17 CNSL A. NATHANSON: Sorry.

18 THE COURT: Thank you.

19 CNSL A. NATHANSON: And you've got copies?

20 THE COURT: Yes.

21 CNSL A. NATHANSON: Thank you. We'll arrange to have
22 these entered.

23 THE COURT: Thank you.

24 CNSL A. NATHANSON: I've said what I need to say on the
25 CPC. If there's any difficulties with
26 Mr. Peterson, we'll advise you.

27 THE COURT: All right.

28 CNSL A. NATHANSON: Otherwise, 3:30.

29 And then Ms. Hiebert will bring submissions
30 on the sealing order.

31 THE COURT: Okay.

32 CNSL A. NATHANSON: Thank you.

33 THE COURT: That's something I have -- hang on,
34 Mr. Nathanson. I haven't -- I didn't read
35 anything about the sealing, so you're going to
36 have to --

37 CNSL L. HIEBERT: I -- yeah, I -- I wouldn't expect
38 that you have.

39

40 **SUBMISSIONS RE SEALING ORDER BY CNSL L. HIEBERT:**

41

42 CNSL L. HIEBERT:

43 So I'm going to hand up the notice of
44 application and the authorities -- Sanovest's
45 authorities for the sealing order.

46 But I'm -- and there are two applications
47 because there are two affidavits sworn at

9

Submissions re sealing order by Cnsl L. Hiebert

1 different times, and the applications got filed at
2 different times. But I'm going to speak to them
3 both concurrently because they are, effectively,
4 the same issue.

5 Both affidavits attach appraisal evidence.
6 And, as the court has already noted, the parties
7 don't agree on a lot, but they certainly agree
8 that there -- that there's going to be a sale
9 process here. It's -- they agree that it should
10 be conducted by a court officer.

11 THE COURT: Right.

12 CNSL L. HIEBERT: And -- and so, in our submission, we
13 want to protect the market for those assets. And
14 so the -- the sealing order that we are seeking
15 seals the appraisals -- or seals those two
16 affidavits attaching those appraisals. It's the
17 affidavit number 1 of Jennifer Bantog made
18 June 14th and the affidavit number 4 of Tian
19 Kusumoto made August 8th. You don't have copies
20 of those.

21 THE COURT: I don't. Okay.

22 CNSL L. HIEBERT: So I will hand up those. So this is
23 the June 14th affidavit.

24 THE COURT: This is the one filed in 048?

25 CNSL L. HIEBERT: These are both in the oppression
26 action, yeah, ending 048.

27 THE COURT: Okay.

28 CNSL L. HIEBERT: And so --

29 THE COURT: The first one is Ms. Bantog?

30 CNSL L. HIEBERT: Yes. That's the June 14th affidavit.

31 THE COURT: She works -- she's a legal assistant at
32 your firm. All right.

33 CNSL L. HIEBERT: She is, yes. And it attaches
34 correspondence from our firm to an appraiser and
35 then Exhibit B, the response. And, particularly,
36 if the court turns to page 10 of the exhibits.

37 THE COURT: Okay.

38 CNSL L. HIEBERT: At the bottom, the very -- basically
39 the last sentence at the bottom of that page has
40 comments regarding value. And -- and so the
41 appraisals -- we wanted -- we just want those
42 sealed so that there's no information in the
43 market that might impact the ultimate sale
44 process.

45 THE COURT: Right. And will you be dealing with this
46 evidence and the other evidence during the course
47 of submissions?

10

Submissions re sealing order by Cnsl L. Hiebert

1 CNSL L. HIEBERT: These affidavits are not being dealt
2 with in the course of -- of Mr. Jackson's
3 submissions on the receivership. I believe they
4 may be spoken to in the context of the oppression.

5 THE COURT: So then my question is how do we deal with
6 that in terms of submissions and -- and -- and the
7 open courtroom?

8 CNSL L. HIEBERT: Well, I think that we will -- we will
9 deal with it the way we've often done it in
10 insolvency proceedings where we refer to -- refer
11 to the pages but don't say --

12 THE COURT: Okay.

13 CNSL L. HIEBERT: -- in open court the information that
14 we're looking to have sealed.

15 THE COURT: All right.

16 CNSL L. HIEBERT: Because everyone will just refer the
17 court to the pages, and then everyone can read
18 the -- the relevant information. And those
19 parties who are able to have access to the
20 information will be able to -- to read the same
21 information. But we'll all be careful not to put
22 the figures and --

23 THE COURT: Right.

24 CNSL L. HIEBERT: -- the information into the record.

25 THE COURT: All right. And so then the other one is
26 from Tian Kusumoto?

27 CNSL L. HIEBERT: Yes.

28 THE COURT: He's the CFO?

29 CNSL L. HIEBERT: He is the -- he is the -- he is the
30 CFO of -- of one of the entities. He's -- he's
31 the directing mind of -- of Sanovest --

32 THE COURT: Okay.

33 CNSL L. HIEBERT: -- and one of the -- one of the
34 litigants here.

35 THE COURT: Okay.

36 CNSL L. HIEBERT: And the affidavit just attaches some
37 further appraisal evidence.

38 THE COURT: It's a different appraiser?

39 CNSL L. HIEBERT: Yes.

40 THE COURT: All right. Okay. And what does the order
41 say in terms of who has access and -- and whether
42 there's a Suntek [phonetic] clause in it?

43 CNSL L. HIEBERT: Yes, so the -- so the order -- do you
44 have a copy, Justice?

45 THE COURT: Of the ...?

46 CNSL L. HIEBERT: It will be attached to the notice of
47 application. The one filed August 15th will be

11

Submissions re sealing order by Cnsl L. Hiebert
Order

1 the one we'll look at.
2 THE COURT: Okay. Just give me one second. Okay.
3 I've got it.
4 CNSL L. HIEBERT: Or I can hand up the vetted copy --
5 THE COURT: No, that's all right.
6 CNSL L. HIEBERT: -- if that's easier.
7 THE COURT: I'll take a look at this.
8 CNSL L. HIEBERT: But -- so we're -- we're proposing
9 that the -- the access to the sealed items in the
10 court file be accessed subject to court order. My
11 friends already have copies of these affidavits,
12 so they don't need access to copies of the court
13 file.
14 THE COURT: So it's only these two -- only these two
15 documents, then?
16 CNSL L. HIEBERT: Only these two affidavits.
17 THE COURT: Everything else is -- is open to the
18 public?
19 CNSL L. HIEBERT: Yes.
20 And the proposed duration for these
21 affidavits, because they're appraisals tied to the
22 sale process, it will end on the earlier of a
23 certificate confirming that the sale -- the sale
24 of the property.
25 THE COURT: All right.
26 CNSL L. HIEBERT: This is similar language that has
27 been used in receivership proceedings. It's -- it
28 refers to just a certificate, not specifically
29 whether it's a receiver certificate because we
30 don't yet know what kind of -- what kind of
31 officer might be appointed.
32 THE COURT: Right.
33 CNSL L. HIEBERT: And it's -- but I think this -- this
34 gives the party the flexibility that, when the
35 property's been sold, a certificate be filed, and
36 then these materials can be unsealed.
37 THE COURT: Okay. All right. Everyone agree to this?
38 Oh, sorry, and access to -- to seal the
39 orders [indiscernible] upon access.
40 CNSL L. HIEBERT: It's -- access is subject to further
41 order of the court. But counsel for 599 and
42 Mr. Matthews already have copies, so they don't
43 need access to the court filed copies.
44 THE COURT: Okay. Does everyone agree to this?
45 CNSL A. NATHANSON: Yeah.
46 CNSL C. FERRIS: Yes, Justice.
47 THE COURT: Okay. Do you have the vetted orders, then?

12
Discussion re housekeeping matters
Order re affidavits

1 CNSL L. HIEBERT: Yes.

2 THE COURT: This is one ...

3 CNSL L. HIEBERT: It's one -- one order referring to
4 both affidavits.

5 THE COURT: Okay. So --

6 CNSL L. HIEBERT: We're going to file them in one
7 envelope.

8 THE COURT: I'll give you all these materials back, but
9 I'll keep the two affidavits.

10 CNSL L. HIEBERT: Certainly.

11 THE COURT: All right. Okay. Thank you.

12 THE CLERK: Justice, [indiscernible] two affidavits are
13 the agreements sealed, or is there another copy of
14 it? Those are the judge's copies?

15 CNSL L. HIEBERT: Those are the judge's copies.

16 THE CLERK: Oh.

17 CNSL L. HIEBERT: I have the -- I have the originals
18 for the registry.

19
20 **DISCUSSION RE HOUSEKEEPING MATTERS:**

21
22 THE COURT: Okay. Now, just other housekeeping
23 matters, I have two -- here. These are -- yeah, I
24 have written submissions of Sanovest on the
25 hearing of the petition and the defendants Tian
26 Kusumoto and -- regarding an interim relief.
27 They're bound up.

28 I have something I printed off, the written
29 argument of Mr. Matthews in 599, but is that a
30 fulsome document?

31 CNSL C. FERRIS: Yes.

32 THE COURT: Okay.

33 CNSL C. FERRIS: I have a written copy for you with a
34 book of authorities.

35 THE COURT: Oh, good. All right. I'll take that.

36 And let me just see. There's a joint --
37 there's a condensed record and joint book of
38 authorities. I take it --

39 CNSL L. HIEBERT: Those are --

40 CNSL C. FERRIS: Sorry.

41 CNSL L. HIEBERT: Those are for the -- for use on the
42 receivership application. We just -- because the
43 record is quite --

44 THE COURT: Yes.

45 CNSL L. HIEBERT: -- large, we thought that the
46 receivership has some focused documents that
47 are -- are relevant and cited in --

13

Discussion re housekeeping matters

1 THE COURT: Okay.
2 CNSL L. HIEBERT: -- our written argument.
3 THE COURT: Okay.
4 CNSL L. HIEBERT: There is an electronic version of the
5 condensed record in the FTS.
6 THE COURT: Oh, is there? Okay.
7 CNSL L. HIEBERT: And -- and we've provided the index
8 to our friends.
9 And then the book of authorities is a joint
10 book of authorities with the authorities cited in
11 our -- our petition and the response to petition.
12 They're --
13 THE COURT: Okay.
14 CNSL L. HIEBERT: The authorities, they don't include
15 the oppression --
16 THE COURT: Okay.
17 CNSL L. HIEBERT: -- law but just the receivership.
18 THE COURT: Okay. And the written submissions of
19 Sanovest, is that --
20 CNSL L. HIEBERT: Yes.
21 THE COURT: -- different than what was filed on
22 August 19th?
23 CNSL L. HIEBERT: Written submissions? Oh, there --
24 there will be two arguments.
25 THE COURT: Oh.
26 CNSL L. HIEBERT: There will be one -- there's --
27 THE COURT: I -- I have two. I have two. One --
28 one -- they're both filed August 19th. One is in
29 respect of the oppression proceeding, the other
30 one is in respect of the petition to the
31 receivership proceeding. I'm just wondering if
32 what you've handed up loose is the --
33 CNSL L. HIEBERT: Oh, then you -- then you already
34 had -- then you have -- yes, a loose copy,
35 that's -- you can ignore that one, because the --
36 the bound copy is -- will be the exact same.
37 THE COURT: All right. So it wasn't updated by -- for
38 any reason?
39 CNSL L. HIEBERT: It has not been updated, no.
40 THE COURT: Okay.
41 CNSL L. HIEBERT: No, it's the same.
42 THE COURT: So I'll just use this. Okay.
43 CNSL L. HIEBERT: I can take that back.
44 THE COURT: I'll just keep it here. Thank you. I may
45 have marked -- yes.
46 CNSL C. FERRIS: So, Justice, just a final housekeeping
47 item. Mr. Brandt is going to speak to a couple of

14

Submissions re sealing order by Cnsl G. Brandt

1 sealing orders that are.

2 THE COURT: Okay.

3
4 **SUBMISSIONS RE SEALING ORDER BY CNSL G. BRANDT:**

5
6 CNSL G. BRANDT: Thank you, Justice. And our materials
7 are in a -- our collective binder that includes
8 copies of the affidavits to be sealed along with
9 our notice of application, if I could hand that
10 up.

11 THE COURT: Yes, thank you.

12 CNSL G. BRANDT: Thank you, Justice. And just as my
13 friends had, there are two applications before the
14 court because there are affidavits to be sealed in
15 the two separate proceedings. The binder starts
16 with the proceeding 243389, which is the --

17 THE COURT: Insolvency.

18 CNSL G. BRANDT: -- receivership proceeding. Correct,
19 Justice. And we have the notice of application.
20 What we're seeking sealed here is a copy of
21 the affidavit number 2 of Mr. Matthews filed in
22 the receivership proceeding.

23 THE COURT: Okay.

24 CNSL G. BRANDT: And if I may, I'll -- I can just take
25 the court into paragraph 13 of the notice of
26 application, as given advice from the court that
27 you've read some of the background materials.

28 And --

29 THE COURT: Right.

30 CNSL G. BRANDT: -- there are essentially three areas
31 in this affidavit over which we're seeking the
32 sealing order.

33 The first relates to an arbitration involving
34 the hotel. As is set out in the notice of
35 application, the arbitration -- the arbitration
36 includes, among other things, a lease, and the
37 lease is subject to a confidentiality clause, and
38 Matthews' affidavit number 2 describes
39 communications regarding the hotel lease.

40 THE COURT: So is the arbitration underway now?

41 CNSL G. BRANDT: There's an arbitration underway now,
42 not involving -- so involving the partnership --

43 THE COURT: Yeah.

44 CNSL G. BRANDT: -- or, more precisely, the Resort
45 partnership.

46 THE COURT: Yes.

47 CNSL G. BRANDT: And parties who -- the Resort

15

Submissions re sealing order by Cnsl G. Brandt

1 partnership was in a commercial lease, an
2 operations agreement with. And that -- that --
3 those two agreements arose from the sale of a
4 hotel that was originally owned by the referred
5 partnership, subsequently sold out from the
6 partnership to -- we'll call it the hotel
7 operators. That is an arbitration that's going on
8 with the Resort partnership, essentially, as the
9 claimant. And there's claims and cross claims
10 there.

11 As I -- I've set out in the next section,
12 there are aspects of the hotel arbitration
13 proceeding that have become public because
14 there -- there was an initial decision and an
15 appeal and a challenge to that decision. And it's
16 an absurd -- materials have been filed. And to
17 the extent those materials are part of the public
18 record, they are not -- we don't seek a sealing
19 order over them.

20 But to the extent there are ongoing matters
21 in the arbitration that are not coming to the
22 public record in that manner, we are seeking a
23 sealing order, and that's what's set out here
24 in -- in Matthews' affidavit -- affidavit number 2
25 are aspects of the arbitration that are -- that
26 are subject to the arbitration --

27 THE COURT: So which paragraph?

28 CNSL G. BRANDT: -- confidentiality -- those paragraphs
29 are paragraphs 13 through 17 of Mr. Matthews'
30 affidavit number 2.

31 THE COURT: Okay. So you want the whole of this
32 affidavit --

33 CNSL G. BRANDT: We're seeking the whole of the
34 affidavit sealed. There's -- there's the third
35 area regarding negotiations of investors that's
36 set out at paragraph 19 of our application, and
37 those cover the whole affidavit. This
38 affidavit -- this affidavit was prepared with the
39 intention that a sealing order would be sought.

40 THE COURT: Well, there's a -- a reference to another
41 affidavit of Mr. Matthews. Are you seeking to
42 have that sealed? That's number 1. Or am I
43 looking at --

44 CNSL G. BRANDT: So affidavit number 1 is not -- we're
45 not seeking to have a sealing order for affidavit
46 number 1. That's filed.

47 So I -- I do have a vetted order here with

16

Submissions re sealing order by Cnsl G. Brandt

1 respect to the affidavit number 2 of Mr. Matthews.
2 THE COURT: So in terms of access, you want -- you want
3 just this affidavit sealed?

4 CNSL G. BRANDT: The affidavit's sealed pending further
5 order of the court. That's what we're seeking
6 here.

7 I need to sign the copy I just handed up. My
8 apologies.

9 THE COURT: Wouldn't it be appropriate to put some sort
10 of termination clause in there? I mean, it's --
11 the purpose of this is to -- is to protect it
12 during the course of the hearing of -- of the
13 insolvency proceeding or the oppression action.

14 CNSL G. BRANDT: Well, the difficulty -- and I -- I'll
15 come to further sealing orders where we are
16 seeking, you know, the order may be terminated
17 earlier. But because the issue here relates to
18 the confidentiality of arbitration, that doesn't
19 end, per se, even with the end of the arbitration
20 proceeding.

21 THE COURT: I see. Okay.

22 CNSL G. BRANDT: And similarly with the confidentiality
23 of the commercial hotel lease, that ...

24 THE COURT: Right. Okay. All right. Let me think
25 about that for a minute. Let's look at the next
26 one.

27 CNSL G. BRANDT: So if I can, then, just move into the
28 next tab here, which is the receivership -- sorry,
29 the oppression proceeding.

30 THE COURT: And that's tab 4?

31 CNSL G. BRANDT: That is ...

32 THE COURT: Tab --

33 CNSL G. BRANDT: It's tab 4 under the next big tab.

34 Correct.

35 And so here there are three affidavits for
36 which -- over which we're seeking a sealing order.
37 The first is the affidavit number 1 of Ms. Celiz,
38 who is a legal assistant. And that affidavit
39 attaches a response to the material that's in the
40 Bantog affidavit, which has just been sealed.

41 THE COURT: Okay. Just a moment. So I've got four.

42 And where is that affidavit?

43 CNSL G. BRANDT: At tab 5.

44 THE COURT: Oh, here. Oh, that's Jennifer Bantog's
45 affidavit.

46 CNSL G. BRANDT: That's right. Ms. Celiz's affidavit
47 is at tab 6.

17

Submissions re sealing order by Cnsl G. Brandt

1 THE COURT: Okay. So what's at tab 5 has just been
2 sealed?

3 CNSL G. BRANDT: Has just been sealed.

4 THE COURT: Okay.

5 CNSL G. BRANDT: And at tab 6 is -- is enclosing a
6 letter. And as you'll see, it's -- just over the
7 page at tab A, it's a response to the letter
8 that's attached to the Bantog affidavit.

9 THE COURT: All right.

10 CNSL G. BRANDT: So that's -- that's the basis there,
11 and we'll come in a moment to the conditions.

12 THE COURT: Yeah.

13 CNSL G. BRANDT: The affidavit -- the next is the
14 affidavit number 4 of Ms. Celiz, and that is
15 enclosing the full copy of appraisal report.
16 Mr. Matthews in an unfiled affidavit has referred
17 to certain excerpts of the appraisal, but the full
18 appraisal, so the court has it, is attached here.
19 And obviously Mr. Matthews was selective in this
20 first affidavit around that issue.

21 And then, finally, affidavit number 5 of
22 Mr. Matthews contains confidential communications
23 exchanged between Mr. Matthews and others, and
24 that --

25 THE COURT: Just a -- just a minute. That's at tab --
26 where is that at? I'm at tab 7. That's
27 Ms. Celiz's number 4. Tab 5 -- or tab 8 is the
28 sealing order.

29 CNSL G. BRANDT: Sorry, Justice. I may hand that up
30 separately.

31 THE COURT: All right. That's the original?

32 CNSL G. BRANDT: This is the original.

33 THE COURT: Okay. Do you have a copy?

34 CNSL G. BRANDT: I -- I do have a copy here, which I'll
35 pull that up, yes. Oh, it's actually blank.
36 Perhaps I can hand it up for now, and we'll bring
37 a copy.

38 THE COURT: Sure.

39 CNSL G. BRANDT: We'll need to ...

40 THE COURT: So if you're handing me the original -- so
41 I won't mark it up.

42 CNSL G. BRANDT: Well ...

43 THE COURT: Okay. This is --

44 CNSL G. BRANDT: So --

45 THE COURT: Yeah, this is Matthews number 5?

46 CNSL G. BRANDT: This is Matthews number 5.

47 THE COURT: Yeah.

18

Submissions re sealing order by Cnsl G. Brandt

1 CNSL G. BRANDT: And this -- this affidavit responds to
2 a primary affidavit of Mr. Kusumoto. And in
3 Mr. Kusumoto's version of the affidavit, he's
4 redacted the values to -- again, to preserve
5 confidentiality of negotiations with third
6 parties. This is a response to that. And our
7 approach has been to -- to not make public any of
8 that correspondence and taking a similar approach.

9 THE COURT: And so you want -- you say it should be
10 sealed because it contains information regarding
11 values?

12 CNSL G. BRANDT: Values and -- and negotiations with
13 third parties -- nature of negotiations with third
14 parties for sale of the assets that are subject
15 [indiscernible].

16 THE COURT: Anything in here that's without privilege,
17 can you -- without prejudice communication or
18 privileged that I shouldn't see?

19 CNSL G. BRANDT: No. No, there isn't, Justice.

20 THE COURT: Okay.

21 CNSL G. BRANDT: All right.

22 THE COURT: Okay. So let's look at the sealing order
23 for -- what -- what do you say, then, the
24 duration?

25 CNSL G. BRANDT: So the duration for -- let's go
26 through each of these.

27 THE COURT: All right.

28 CNSL G. BRANDT: So for Ms. Celiz's affidavit, the
29 duration here is until the filing of the
30 certificate.

31 THE COURT: All right.

32 CNSL G. BRANDT: Confirming sale for Ms. Celiz's
33 affidavit number 4, certificate of sale. And for
34 Mr. Matthews number 5, until further order of the
35 court because, again, the nature of the
36 confidential negotiations.

37 THE COURT: And that's confidential negotiations
38 between the parties?

39 CNSL G. BRANDT: Between --

40 THE COURT: Third --

41 CNSL G. BRANDT: -- third parties. With third parties
42 regarding the sale of partnership assets,
43 expressions of interest. And all this goes to
44 the -- the fact that these negotiations themselves
45 generally occurred under an expectation of
46 confidentiality or express confidentiality
47 agreements with third parties --

19

Submissions re sealing order by Cnsl G. Brandt
Order re sealing of affidavits

1 THE COURT: Oh, I see.

2 CNSL G. BRANDT: -- who -- who don't want to have and
3 wouldn't want to have the nature of their
4 negotiations with the partnership made public.

5 THE COURT: So that -- that's why it's different than
6 the other -- the other affidavits --

7 CNSL G. BRANDT: Than an appraisal.

8 THE COURT: -- with a filing of a certificate.

9 CNSL G. BRANDT: Exactly. I do have a -- a better
10 copy.

11 THE COURT: Sure.

12 CNSL G. BRANDT: And I do have a second copy for Madam
13 Clerk.

14 THE COURT: Okay. Thank you. Let me hear from
15 Ms. Hiebert again.

16 CNSL L. HIEBERT: We've no submissions on their sealing
17 orders.

18 THE COURT: Okay. I'm satisfied in the circumstances
19 that the order should be granted.

20 CNSL G. BRANDT: Thank you, Justice.

21 THE COURT: And I -- although you didn't take me to
22 your case authorities, Ms. Hiebert, I didn't look
23 at what was in there, I'm aware of those cases.

24 CNSL L. HIEBERT: Yeah. And I didn't think we needed
25 to -- to go --

26 THE COURT: Yeah.

27 CNSL L. HIEBERT: -- through the -- the authorities in
28 detail, the court being familiar with them and
29 [indiscernible].

30 THE COURT: Okay. So I've signed the -- signed the two
31 vetted orders.

32 Let me give you back this original affidavit
33 of Matthews number 5.

34 CNSL C. FERRIS: Thank you. And we'll -- we'll replace
35 that for you, Justice.

36 THE COURT: Right.

37 CNSL C. FERRIS: And with respect --

38 THE COURT: Can I give you the binder back, and then
39 you can just give me a set of affidavits that are
40 sealed so I don't --

41 CNSL C. FERRIS: We'll do that. We'll do that all at
42 once, Justice.

43 THE COURT: Yeah, all right. So I'll give the binder
44 back.

45 CNSL C. FERRIS: And you'll note there are blanks in
46 the record, the paper record that the court has --

47 THE COURT: Okay.

20

Submissions re receivership order by Cnsl K. Jackson

1 CNSL C. FERRIS: -- that they can simply insert it
2 into.

3 THE COURT: Oh, all right. So if we get them punched,
4 just tell me where to put that.

5 CNSL C. FERRIS: We'll do that. Thank you, Justice.

6 THE COURT: Okay. So, Mr. Jackson?

7

8

SUBMISSIONS RE RECEIVERSHIP ORDER BY CNSL K. JACKSON:

9

10 CNSL K. JACKSON: Yes. Me, Justice. As my colleague
11 mentioned, I'll be speaking to the application by
12 Sanovest for receivership order.

13 Before I begin, maybe I could just quickly
14 just tack on some comments to your observations at
15 the outset of the hearing, Justice.

16 Unsurprisingly, very commercial and practical
17 observations, ones which, frankly, I share.

18 I'll just, perhaps, supplement a few of the
19 comments there if you're taking notes on your
20 initial impressions, which I think are, for the
21 most part, correct.

22 You mentioned that there's an awful lot of
23 allegations and an awful lot of evidence around
24 *malafides*, you know, breaches of fiduciary
25 obligations, misappropriation of funds, all --
26 oppression, all of that. There is.

27 I have studiously stayed away from it
28 because, as far as I'm concerned in the context of
29 the applications before the court, it's
30 irrelevant. It need not be decided. The parties
31 are *ad idem* on one point, that there has to be
32 some sort of resolution to this process in the
33 form of a -- an order appointing a receiver for a
34 sale. I don't -- this court -- I think it would
35 be a very difficult task to ask of this court to
36 wade so far into that material to -- to determine
37 that there is some sort of *prima facie*
38 determination of oppression, which would justify
39 relief, which, otherwise, we agree is available
40 under section 39 of the [indiscernible] Act.

41 It doesn't mean that you're not going to hear
42 it. There's an application with the -- with the
43 evidence that's being relied upon brought by
44 Mr. Matthews and 599. And we'll probably use
45 those two interchangeably, which is responded to,
46 and, frankly, has to be responded to by
47 Mr. Kusumoto and Sanovest. It has to be.

21

Submissions re receivership order by Cnsl K. Jackson

1 But I don't think the court needs to
2 determine anything with respect to that evidence.
3 The only thing that really matters that, I
4 think, arises from that is it's very good evidence
5 of one thing: These parties do not get along,
6 they cannot agree on anything, and, quite frankly,
7 an adult needs to be put in charge of this.
8 That -- that's what it comes down to.
9 That's -- as far as I'm concerned, you can boil
10 all that evidence down to that because it's the --
11 it's evident in support of the very -- very relief
12 sought. That's --

13 THE COURT: So in terms of the oppression, the interim
14 relief application --

15 CNSSL K. JACKSON: Yeah.

16 THE COURT: -- in the oppression proceeding, I take it,
17 then, that there are -- the affidavits there
18 contain significant conflicts -- significant
19 conflicts --

20 CNSSL K. JACKSON: Indeed.

21 THE COURT: -- in the evidence.

22 CNSSL K. JACKSON: Right.

23 THE COURT: So whoever has -- is dealing with that, the
24 one question I had -- one of the questions I had
25 is, is it appropriate for me to even determine
26 them on a summary basis? And, if it is, how can I
27 do that given the nature of the conflict?

28 CNSSL K. JACKSON: I would -- it's a question I would
29 ask myself, Justice. I don't have an answer for
30 that. I don't think the court can determine
31 what -- it could. It could be asked to wade into
32 that. It may be asked to wade into that. I don't
33 think it needs to wade into that and make a
34 determination because it is an awful lot of
35 conflicting evidence.

36 I mean, fundamentally, each party thinks the
37 other is -- is guilty of various misdeeds and
38 misconduct.

39 It would take -- I don't know. I'm not a --
40 I'm not a true litigator, Justice. My impression
41 is it would take -- I'm surrounded by them, but I
42 am not one for good reason.

43 It would take, I think, an awful lot of
44 additional evidence, perhaps viva voce evidence,
45 everything else to be able to explore all of those
46 issues properly to make a determination. And you
47 don't need to, Justice, because it doesn't affect

22

Submissions re receivership order by Cnsl K. Jackson

1 the availability of relief. Period.

2 Both parties rely on -- on -- on jurisdiction
3 for the appointment of a receiver, which doesn't
4 require findings of fact in relation to those
5 allegations.

6 I say it -- it all amounts to, what I said,
7 one thing: They don't get along, they can't get
8 along, they have fundamental, intractable
9 disagreements, and that is supportive of a
10 receivership order being made. That's it.

11 And -- and -- and I think the reality is
12 there's an application before you which deals with
13 it. You're going to probably hear it. I think
14 you can. It's -- it won't impede your ability to
15 make an order to resolve this today -- or not
16 today but upon conclusion of the -- of the
17 hearing.

18 That's the first point.

19 On the oppression proceeding, which has a
20 trial -- we're now here in January 2026 -- that
21 may play out to trial, depending on how things
22 proceed. If a receivership order is issued --
23 complete receivership order, I should say, the
24 order sought by Sanovest -- if a complete
25 receivership order is issued, that proceeding
26 largely boils down to a question of damages.
27 There's some party liable for damages to another.

28 It doesn't -- it doesn't have the related
29 relief, which often arises in oppression
30 proceedings relating to replacements of directors
31 and -- and all the like because that will have
32 been addressed by a receivership order. It will
33 be damages.

34 Now, it's sometime in January 2026. Any
35 order for sale is going to take a long time.
36 There is, baked into Sanovest's receivership
37 application order, the concept that the
38 court-appointed receiver will return to court --

39 THE COURT: M'mm-hmm.

40 CNSL K. JACKSON: -- within a period of time not
41 specified to seek approval for a sale or an
42 investment solicitation process. There's an
43 automatic delay of some time, and I can't imagine
44 it's going to be days or weeks. It's probably
45 months before that receiver comes back and seeks
46 [indiscernible].

47 Then it has to carry out that assessment, and

23

Submissions re receivership order by Cnsl K. Jackson

1 then it has to come back, seek approval of any
2 sales, and it has to complete those sales.

3 If we're done that in 2025, that will be a
4 good accomplishment. But, irrespective, as
5 justice said earlier, those funds will be in a
6 trust account.

7 First of all, there's no dispute as to
8 Sanovest's indebtedness for the most part.
9 Matthews and 599 agree that Sanovest is owed at
10 least \$50 million -- \$50 million at least in
11 principal and some interest. They disagree as to
12 the total amount of interest. But the point is
13 there will not be a dispute about paying out from
14 sales the large -- the majority of the amount
15 owing to Sanovest, which is beneficial. It will
16 stop the burn at that point.

17 And if there is some dispute about
18 distribution of the additional funds to Sanovest
19 either as creditor or as its entitlement under the
20 partnership agreement for its partnership
21 interest, then those funds can be held up and tied
22 up in court pursuant to an order until all the
23 claims between the parties are resolved, if that's
24 necessary.

25 So it doesn't -- it's not a problem, in my
26 mind, that we have ongoing litigation. In fact, I
27 think we'll resolve a lot of that litigation if
28 there's a receivership order issued because it
29 takes away some of the -- some of the disputes.

30 And I'll say the other thing about that. In
31 my experience, once you have monetized assets,
32 focusing the parties' attention on settlement
33 becomes easier because they know what they're
34 fighting for.

35 That's the oppression proceeding, which you
36 commented on, Justice.

37 Third thing I'll mention in respect of your
38 initial comments deals with the allegation which
39 you identified. It comes from 599 and Matthews
40 that somehow -- and that's the important point --
41 somehow Sanovest is seeking to advantage itself
42 through this receivership. Yes, I think that is,
43 boiled down, the -- the basis for the opposition
44 to the receivership application.

45 There are multiple allegations of various
46 forms of mischief by -- by Sanovest, which are
47 denied, of course.

24

Submissions re receivership order by Cnsl K. Jackson

1 But -- and I'll come to this a bit more
2 shortly, but they really don't -- there's no real
3 tie from allegations of mischief to why that would
4 deny the -- the entitlement of Sanovest to the
5 relief, it seems.

6 The -- the reality is I can't -- I have a
7 difficult time -- when you said "somehow," I had
8 the exact same impression. How is this
9 advantaging Sanovest? It's a creditor, yes. It
10 wants to get repaid, yes. It's also a
11 partnership, and it has, actually, a greater
12 partnership stake and priority partnership stakes
13 in comparison to 599.

14 Putting the partnership into receivership,
15 selling the lands and the business affects
16 Sanovest as much as it does 599 or Matthews -- in
17 fact, disproportionately so. How is that
18 advantaging itself?

19 And so if they say, well, Sanovest wants to
20 buy the assets --

21 THE COURT: M'mm-hmm.

22 CNSL K. JACKSON: -- now, we have no indication that
23 that is true. I've not heard that. 599 wants to
24 buy the assets. Well, if it's going to do that,
25 it will be doing it in open court in a transparent
26 fashion with the market being thoroughly tested by
27 the court's officer. How is that advantaging
28 itself?

29 THE COURT: And, likewise, it would hurt Sanovest as
30 well; right?

31 CNSL K. JACKSON: Or 5 --

32 THE COURT: Sanovest --

33 CNSL K. JACKSON: -- 599.

34 THE COURT: Yeah.

35 CNSL K. JACKSON: Right.

36 THE COURT: Yeah, 599. Or if there's some -- some
37 effort by Sanovest to -- in the sales process to
38 use -- is credit -- credited somehow.

39 CNSL K. JACKSON: Right.

40 THE COURT: And there's an allegation of impropriety or
41 fraud with the party Sanovest that would have to
42 be considered in the sales process, and I'd have
43 to consider the advice of the court's officer.
44 Right?

45 CNSL K. JACKSON: Absolutely. And this is part of my
46 point. I mean, I don't -- I think if there was
47 some sort of nefarious scheme by -- by Sanovest

25

Submissions re receivership order by Cnsl K. Jackson

1 doing it in full light of the court in front of
2 the court's officer is not the way to carry that
3 out.

4 And that's my point. I have a difficult
5 time -- and I've had a difficult time -- trying
6 to -- to wade through the allegations of mischief
7 to try and figure out how any of them could
8 constitute mischief of a sort that would advantage
9 Sanovest by seeking a receivership order to put
10 someone in charge of these assets, to operate the
11 business, to run a transparent court-ordered
12 approved sale process at all.

13 And so -- so -- so that somehow advantages
14 itself is exactly my point. I have yet to figure
15 out that theory, and I cannot understand it.

16 I'll come to it a bit more because I address
17 a couple of the specific allegations.

18 And the last thing is your comment on
19 redemption.

20 THE COURT: M'mm-hmm.

21 CNSSL K. JACKSON: I will address this again first
22 but -- because there is this point.

23 First point is Mr. Matthews and 599, they
24 have no right of redemption. They don't have --
25 the equity of redemption lies with the -- the
26 borrower, the owner of the lands. Right?

27 THE COURT: Okay.

28 CNSSL K. JACKSON: It's not just the borrower. The
29 borrower, the nominees, the owners of the lands.

30 THE COURT: Who are -- I haven't drilled through the --

31 CNSSL K. JACKSON: Right.

32 THE COURT: -- entire ownership. So who owns the
33 lands, then?

34 CNSSL K. JACKSON: Well, there are legal owners and
35 beneficial owners.

36 THE COURT: Right.

37 CNSSL K. JACKSON: Importantly, the beneficial owners
38 are, for some of the lands, the respondent, which
39 is the top-level partnership, Ecoasis Developments
40 LLP, that limited partner.

41 THE COURT: Right.

42 CNSSL K. JACKSON: That is the one which has Sanovest
43 and 599 as limited partners. So -- so we called
44 that "Developments." It beneficially owns some of
45 the lands.

46 The other -- and then it also is the limited
47 partner of the other partnership, which is Ecoasis

26

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1 Resort and Golf LLP, which is one of the
2 respondents, and we call that "Resort." So Resort
3 owns some of the lands beneficially.

4 And then lands are legally owned by a number
5 of nominees, which are numbered companies
6 enumerated in -- as respondents here. We don't
7 need to go through them precisely, but it's
8 relevant except -- with one exception: Bear
9 Mountain Adventures Ltd., the last named
10 respondent.

11 THE COURT: Oh, yeah.

12 CNSL K. JACKSON: Bear Mountain Adventures, BMA, it had
13 one parcel of land transferred to it for a dollar.
14 And Sanovest's mortgage still attaches to it, and
15 so it's the legal and beneficial owner of one
16 parcel of land. And so the beneficial owners are
17 the two partnerships and BMA, and the legal owners
18 are the nominee numbered companies and BMA.

19 THE COURT: Who's the borrower, then? You say the
20 borrower has the --

21 CNSL K. JACKSON: The borrower is --

22 THE COURT: -- right of redemption. Who's the
23 borrower?

24 CNSL K. JACKSON: Right. And so the borrower's -- I
25 think it's actually -- the borrower is
26 Developments. And then its obligations --

27 THE COURT: And that's a -- that's a -- that's a
28 partnership?

29 CNSL K. JACKSON: Yes.

30 THE COURT: Okay.

31 CNSL K. JACKSON: Yes, yes, exactly.

32 Ms. Hiebert points out in the condensed
33 record --

34 THE COURT: Okay.

35 CNSL K. JACKSON: -- tab 6 --

36 THE COURT: Yeah.

37 CNSL K. JACKSON: -- would be helpful to ...

38 THE COURT: Yeah. Because if the partnership has the
39 right of redemption, then it's --

40 CNSL K. JACKSON: So --

41 THE COURT: -- it consists of Mr. Matthews' group and
42 Sanovest's group; right? Or if I --

43 CNSL K. JACKSON: I'm sorry, Justice. I missed the
44 question.

45 THE COURT: I just want to drill down on your point
46 that it's the borrower that has the right of
47 redemption? Is that what this --

27

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1 CNSL K. JACKSON: It's the --

2 THE COURT: If it's the partnership, the partners are
3 Mr. Matthews and his group and Sanovest and its
4 group?

5 CNSL K. JACKSON: Right. Right. Sanovest and 599.

6 But behind them, Mr. Kusumoto and -- and
7 Mr. Matthews. That's right.

8 THE COURT: So then the ability to redeem --

9 CNSL K. JACKSON: It comes from -- it's actually the
10 persons who have granted the security. And --
11 and -- and so it's the -- the partnership --

12 THE COURT: Yeah.

13 CNSL K. JACKSON: -- the partnerships who have granted
14 their beneficial interests, and it's the nominee
15 companies --

16 THE COURT: Oh.

17 CNSL K. JACKSON: -- the nominee companies --

18 THE COURT: All right.

19 CNSL K. JACKSON: -- who have the ability to redeem.
20 So -- and so ...

21 THE COURT: Are they deadlocked as well? In other
22 words, if Mr. Matthews was able to raise the funds
23 to redeem, would -- would that be blocked by --

24 CNSL K. JACKSON: It's -- it's -- one of the problems
25 is -- is that redemption becomes more difficult
26 because, of course, it has to be those parties who
27 are deadlocked.

28 THE COURT: Right. Right.

29 CNSL K. JACKSON: Right. That -- that was exactly
30 my --

31 THE COURT: Okay.

32 CNSL K. JACKSON: -- point, Justice. Yes.

33 And -- and, I mean, the -- the court will
34 have, you know, a fairly broad discretion in the
35 context of a receivership proceeding if
36 Mr. Matthews shows up with a cheque and says --

37 THE COURT: Right.

38 CNSL K. JACKSON: -- look, help me get through this
39 blockade.

40 And I'm not saying there's no pathway to do
41 that, but I want to be clear that there is no
42 right of redemption for that -- for Mr. Matthews
43 or 599.

44 THE COURT: Okay.

45 CNSL K. JACKSON: It exists with the very parties who
46 are deadlocked.

47 And your point is -- the second one, I would

28

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1 say, in any event -- and this may be a complete
2 answer to redemption -- is there's going to be
3 months and months and months before there's an
4 approval of the sale here --

5 THE COURT: Yeah.

6 CNSL K. JACKSON: -- by any measure. And redemption --
7 the right of redemption exists up to the approval
8 of sale. Sometimes beyond, but let's not worry
9 about that. Up to the point of approval of the
10 sale.

11 And so this idea that there needs time, there
12 will be time.

13 THE COURT: So the practical matter, then, is the sale
14 process unfolds, the -- the receiver comes forward
15 with offers, Mr. Matthews and his group can say,
16 well, we have a competing bid. We have a bid
17 that -- we have -- we -- we're going -- we can
18 either -- we want to redeem, judge.

19 Or the other route would be let's say they
20 can -- they can buy the properties less than the
21 cost of redemption, they can --

22 CNSL K. JACKSON: Certainly. And depending on --

23 THE COURT: -- tender a bid, then, that beats the
24 others and buys the assets.

25 CNSL K. JACKSON: Right. If -- if Mr. Matthews is able
26 to source funding --

27 THE COURT: Right.

28 CNSL K. JACKSON: -- now -- this is now, you know, some
29 time later --

30 THE COURT: Correct.

31 CNSL K. JACKSON: -- and some time down the road, it
32 could be -- then -- then that funding could be
33 used, yes, certainly as -- as a means by which to
34 fund an acquisition of -- of -- of the property or
35 some of the properties, yeah.

36 THE COURT: Right.

37 CNSL K. JACKSON: Or the business.

38 I suppose there's a world in which
39 Mr. Matthews and counsel shows up and says, well,
40 I don't have enough to buy the property, but I
41 have enough to redeem secured creditors -- redeem
42 the security and what's owed to the -- pay out the
43 secured creditors and what's owed to them.
44 Because of the deadlock, we have an inability to
45 do that, but you can cause your receiver to do it,
46 perhaps. It's the receiver. And I -- I expect
47 that there's a way in which that could happen.

29

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1 Quite frankly, what's -- what's my client
2 going to say if it's tendered a cheque for the
3 full amount?

4 THE COURT: Right.

5 CNSL K. JACKSON: But -- but my point is they don't
6 have a right automatically, and there's time to do
7 that. Not just --

8 THE COURT: Yeah.

9 CNSL K. JACKSON: -- you know, there will be time after
10 a receivership, which -- which the court's already
11 picked up on, so ...

12 THE COURT: Yeah.

13 CNSL K. JACKSON: Now, Justice, those -- those were
14 the -- sort of the -- the points I wanted to make
15 in response to your initial observations with
16 which I -- as I said earlier, I completely agree.

17 What I might do is just ...

18 THE COURT: All right. And just a couple more
19 questions.

20 CNSL K. JACKSON: Yes. Yes, of course.

21 THE COURT: So then receiver would step in and run the
22 business --

23 CNSL K. JACKSON: Indeed.

24 THE COURT: -- under your -- under your
25 [indiscernible]?

26 CNSL K. JACKSON: Right. And so there are one --
27 right. And so one of the -- one of the things
28 you've seen, having skimmed at least the response
29 or seen the response from 599 and Matthews, is you
30 don't need a receiver of the Resorts business and
31 assets.

32 And with that, we disagree. First of all,
33 it's subject to the security in favour of
34 Sanovest. It's captured by that security. That's
35 part of the security package. And, in fact,
36 that -- if -- if it needs to be bundled and sold
37 with the other assets or doesn't need to be,
38 that's something which shouldn't be predetermined.
39 That's up to the court's officer to recommend.

40 That's the first point.

41 The second point is that our client has
42 concerns with the way in which that business is
43 being operated. It's been expressed -- again, you
44 don't have to find it, but the parties disagree.
45 But there are allegations of -- of
46 misappropriation of funds from that business and
47 just general concerns with the way it's run in

30

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1 terms of the -- the dispute about the lease of the
2 hotel space, for the -- for the pro shop, and
3 things like that. Again, the issue is it -- it
4 has to be taken out of the hands of the parties
5 who have fundamental disagreements.

6 That's the second point.

7 The third point is this business is in
8 jeopardy. And this one may be the more important
9 of all things. This business has \$1.9 or so
10 million of aged AR, trade creditors. It has --
11 now, they -- they describe it differently because
12 they call some of it aged AR and some of it
13 cheques which we have issued but not released. I
14 suspect under your -- under an accounting program,
15 when you cut a cheque, it puts it into a different
16 column, even if the cheque hasn't been delivered
17 and cashed.

18 THE COURT: Right.

19 CNSL K. JACKSON: But, either way, the two add up to
20 about \$1.9 million.

21 This -- Mr. Matthews's own evidence, which
22 I'll take you through, is -- this is back in --
23 in -- is it May or June? First affidavit.

24 CNSL L. HIEBERT: May.

25 CNSL K. JACKSON: May. Mr. Matthews' initial evidence
26 was this partnership -- the -- the business,
27 the -- the partnerships are teetering on the
28 brink, effectively. There is a concern they won't
29 make payroll. There is all this AR. We need to
30 do something.

31 And, of course, for Sanovest, that's a
32 concern. That is obvious evidence of -- of
33 indebtedness and a need for controls and -- and
34 ensuring a stay to prevent creditors from taking
35 action.

36 That evidence changed once, I think,
37 Mr. Matthews realized that perhaps that wasn't the
38 most advantageous evidence to -- to put in in
39 relation to a receivership application.

40 Mr. -- in -- in -- in June, Mr. Matthews
41 said, well, it's not as bad as that. We're going
42 to be fine. Over the course of the next four
43 months, we're going to be able to pay down -- or
44 two months, we're going to be able to pay down --
45 four months, we're going to be able to pay down
46 our AR by \$780,000. We're heading into the golf
47 season. It's -- it's going to be good.

31

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1 And what was -- we found out very recently is
2 that hasn't happened. There has been,
3 effectively, no paydown whatsoever of the
4 indebtedness, the AR. It's almost identical to
5 what it was in May.

6 And, worst of all, we're heading out of the
7 golf season into the lean year -- lean months
8 of -- of a golf operation.

9 And so from the perspective of Sanovest as a
10 secured creditor and, frankly -- this is not to be
11 lost -- with respect to the other stakeholders,
12 having a receiver put in place, having a
13 receivership order with a stay of proceedings to
14 prevent creditors from taking action, these -- all
15 these creditors with AR -- with AP, I should say,
16 is essential. And it will ensure that there is
17 funding to the extent necessary to make payroll,
18 to keep the lights on, and to keep the business
19 operating while the sale is carried out. And
20 that -- there is likely going to be need -- a need
21 for some borrowings.

22 The -- the bank accounts -- it's in evidence
23 that, currently, the bank accounts are either
24 overdrawn or have several thousand dollars.
25 That -- that's how close it is with issued cheques
26 in the hundreds of thousands that aren't delivered
27 and AR of another \$1.2 or 3 million on top of
28 that.

29 That business needs a receiver to operate it;
30 a receivership order to enable -- I mean to borrow
31 funds, to -- to -- to fund it; and it needs a stay
32 of proceeding.

33 THE COURT: And where would the money come from?

34 CNSSL K. JACKSON: So -- so -- so, seriously, one --
35 one -- one of the allegations by 599 is -- well,
36 it's -- it's -- it's part of the difficulty with
37 the -- with the response. On one hand, they say
38 Sanovest would not fund. They have been refusing
39 to fund and advance additional funds under their
40 loan.

41 Well, at times, that has been true. There
42 have been requests, and there has been no funding.
43 But, of course, the loan is in default. There's
44 no obligation to fund. Quite frankly, if you're
45 Sanovest and you're concerned with the way that
46 the business is being operated, the way your funds
47 are being used, you're entitled to say no to that.

32

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1 Now, the other thing 599 says is that
2 Sanovest is seeking to advantage itself -- or
3 entrench itself is the word they use -- as a
4 secured lender by advancing funds in a
5 receivership. It's seeking to enhance it's status
6 as secured lender by advancing funds.

7 First of all, which is it?

8 But, second of all, somebody needs to advance
9 funds to the receiver. Sanovest has indicated it
10 will -- it is prepared to do so in the context of
11 a receivership. It will advance funds.

12 Does it have to be Sanovest? No. The
13 receiver would be expected to find the best priced
14 money available on the market. There's no doubt
15 people will be happy to loan against these lands
16 and maybe at a better rate than Sanovest. I'd be
17 surprised, but that's for the receiver to
18 determine.

19 But the point is there is funding available.
20 Sanovest is prepared to make the funding available
21 because, of course, it's not so foolish as to
22 think that it could initiate a receivership
23 without funding.

24 But it doesn't have to be Sanovest, and it's
25 not contrary to 599's suspicions seeking to
26 advantage itself or somehow entrench itself as a
27 secured creditor by adding to its debt, despite
28 the fact that 599 earlier asked it to do so.

29 So there is funding available if -- and --
30 and from Sanovest if no one else.

31 THE COURT: And so another question, then, is are there
32 secured creditors behind Sanovest?

33 CNSSL K. JACKSON: There are -- there are not secured
34 creditors behind. There's HSBC ahead of
35 Sanovest --

36 THE COURT: Okay.

37 CNSSL K. JACKSON: -- on some of the lands. Right? Not
38 all of the lands. And so when -- when -- when
39 the -- when the -- when the partnership acquired
40 these lands -- it was in 2013 -- they were
41 acquired -- you may recall that Bear Mountain
42 CCAA, one of the earlier accredited driven CCAs
43 where HSBC was a secured creditor -- had a -- by
44 you -- HSBC standards, worldwide, had significant
45 exposure to -- to this development.

46 And when it sold, it took some cash -- not as
47 much as it wanted in cash, and so it has a

33

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1 participation agreement where, on the sale of
2 lands in the future, it gets a certain percentage
3 of the -- of the proceeds of sale.

4 That -- that obligation is secured by
5 mortgages of certain of the lands. And so there
6 are certain lands with --

7 THE COURT: What -- what I was worried -- well,
8 thinking about and also concerned about is in the
9 middle of this protract -- this very fractious
10 dispute between the parties, is there or are there
11 other creditors who would initiate bankruptcy
12 proceedings under the BIA and -- and, you know, in
13 addition to bankrupt -- some -- some proceeding
14 that would effectively take it out of the hands of
15 the parties in any event?

16 CNSL K. JACKSON: Right. Well, I don't see HSBC doing
17 that. I think their -- their obligations arise on
18 sales, and so I think they're -- they're not the
19 bigger concern.

20 I think the bigger concern, Justice, is the
21 City of Langford has a \$1.8 million claim, which
22 it's advancing --

23 THE COURT: Okay.

24 CNSL K. JACKSON: -- against the -- the partnership.
25 And -- and there are, as I said, you know,
26 \$2 million of -- of unsecured creditors out
27 there --

28 THE COURT: Right.

29 CNSL K. JACKSON: -- who are unpaid. And all it really
30 takes is one of those with a more significant
31 claim to start taking action. Even
32 [indiscernible], there are -- there are actions in
33 terms of seizing assets --

34 THE COURT: Right.

35 CNSL K. JACKSON: -- if they get to judgment. We
36 haven't seen it happen yet, but, of course,
37 that's -- you know, we're holding our breath at
38 least on the -- on the Sanovest end.

39 Excuse me.

40 That's true. There are -- there are also --
41 there are secured creditors: more -- equipment
42 lessors, vehicles, and the like. Sorry, there's
43 also the golf course -- the golf cart -- I'm
44 missing one. There's another significant claim
45 that was advanced by ...

46 THE COURT: In any event --

47 CNSL K. JACKSON: In any event, Justice --

34

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1 THE COURT: -- your point is that --

2 CNSL K. JACKSON: -- there -- that's what --

3 THE COURT: -- my concern is not unfounded in the sense
4 that what you're saying is -- in your submission
5 is that a receivership brings about a stay that
6 would otherwise let some third party creditor, who
7 is owed money, take a course of action that
8 would -- would take this out of the hands of the
9 parties in any event.

10 CNSL K. JACKSON: Right. Right. And we've already
11 seen -- as I said, we've already seen litigation
12 initiated, you know, for a significant amount of
13 money. And -- and, you know, in the context of
14 the debt compared to Sanovest, it's not
15 significant, but it wouldn't be the first time
16 that a smaller, unsecured creditor has tipped a
17 company into -- into a receivership as a result.

18 THE COURT: So I know you're going to get into this in
19 a significant way, but --

20 CNSL K. JACKSON: Yeah.

21 THE COURT: -- tell me, what is the issue, then, with
22 the more limited receivership order? I take it,
23 as a receivership order, the question is, is it a
24 broad one, or is it --

25 CNSL K. JACKSON: Right.

26 THE COURT: -- limited with the power to sell specific
27 assets? And I wasn't certain because I didn't
28 have opportunity read all the submissions how that
29 would be formulated.

30 CNSL K. JACKSON: Right. Well -- well, there are a
31 number of problems with it. And so maybe just to
32 do that, then, what I could do is --

33 THE COURT: Just the --

34 CNSL K. JACKSON: -- quickly --

35 THE COURT: Just the -- the big overview so I can
36 then --

37 CNSL K. JACKSON: Right.

38 THE COURT: Or -- or you can deal with it later.

39 CNSL K. JACKSON: Well, no. No. I mean, look, one of
40 the fundamental dis -- disagreements between the
41 parties is the -- the means by which and the
42 manner in which the lands or the assets should be
43 monetized. Right?

44 THE COURT: Right.

45 CNSL K. JACKSON: Sanovest is of the view that there
46 should be an unblock sale. Sell it all, get the
47 best price for all because it's better to have it

35

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1 sold as a whole than in pieces.

2 THE COURT: Right.

3 CNSL K. JACKSON: Mr. Matthews and 599 disagree. Their
4 view is, we think we can come up with this way of
5 slicing and dicing and rearranging and subdividing
6 and packaging the parcels to be able to sell
7 land -- only some of them, though -- and get just
8 enough money to pay out Sanovest and have a bit of
9 working capital. That's what they think is the
10 right way to go.

11 The parties disagree. Period.

12 Here's the thing. We're not here to tell you
13 that Sanovest is absolutely right.

14 THE COURT: It would -- that would -- that was -- I was
15 going to go to that next.

16 CNSL K. JACKSON: Right.

17 THE COURT: Ultimately, the receiver could come down on
18 the side of San -- Mr. Matthews initially and say,
19 look, rather than trying to sell it all unblock, I
20 think the more appropriate -- given the market
21 conditions and the nature of these assets --

22 CNSL K. JACKSON: Right.

23 THE COURT: -- it's preferable to try and sell them at
24 certain stages or in certain smaller blocks.

25 CNSL K. JACKSON: Right. Right. And -- and -- and if
26 that's the receiver's conclusion --

27 THE COURT: Yeah.

28 CNSL K. JACKSON: -- Sanovest -- the reason -- seeking
29 a receiver, it knows the consequences of seeking a
30 receiver. It's giving the -- it's not seeking to
31 tie the receiver's hands in any regard is -- apart
32 from the fact that, at the behest of 599, it is --
33 it is mandated to come back to court to seek a
34 sale -- an investment solicitation process order,
35 which it would do anyways.

36 But, sure, we're not -- Sanovest is not
37 seeking to -- to bind the receiver to proceed in
38 one particular way or another. That's the
39 difference.

40 599 and Matthews are asking this court to
41 make a determination that this -- this -- is the
42 best way to monetize the assets for the
43 partnership.

44 Well, there's a disagreement on that. There
45 is insufficient evidence for this court to
46 conclude that. And the court shouldn't conclude
47 that but leave it to its officers to report.

36

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1 And it may well be the conclusion of the
2 court's officer, but it may not be.

3 And they're asking this court on what we say
4 is insufficient evidence of the value of these
5 lands.

6 And -- and -- and here's the other part of
7 this. What does it do to the remaining lands?
8 That will leave behind a remaining parcels of land
9 where there's no comment at what -- what happens
10 if you sell these chunks of land to developers who
11 begin to develop and -- and take away some of the
12 density and the zoning and leaving these lands
13 behind? And -- and there's no evidence at all
14 about what the impact is apart from Mr. Kusumoto
15 says, I have a concern about that.

16 And it needs to be investigated in a much
17 more thorough manner by a court's officer. That's
18 our point. That -- those the primary concerns.

19 Now, we can get into other issues with it
20 because the order they're seeking actually compels
21 subdivision. It compels subdivision despite the
22 fact that Sanovest's mortgage precludes that
23 without its consent.

24 HSBC has a mortgage. It's not named or on
25 notice of this order. And they don't even name in
26 their proceeding the legal owners of the lands.
27 The actual numbered companies that are the legal
28 owners whose lands are to be subdivided aren't
29 even named. How do they show up at a land title
30 office with that in hand and say, this is how it's
31 going to be done?

32 So there are -- there's any number of reasons
33 it's unworkable.

34 But the most reason -- the -- the most -- the
35 primary reason it's unworkable is it presupposes
36 that their way of -- of having the lands sold is
37 the correct way, and that's not something that
38 this court should be determining on this
39 application is what we say with this evidence.

40 THE COURT: And -- and it would -- and they have --
41 Mr. Matthews, just like Sanovest, would have the
42 opportunity at a later date to come and contest
43 the receiver's recommendations.

44 CNSL K. JACKSON: So there's two things that -- that,
45 you know, I would take as a given in any
46 receivership.

47 One, every stakeholder will have the ear of

37

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1 the receiver. Now, in this case, the two
2 fundamentally, you know, most important
3 stakeholders are Mr. Matthews and Mr. Kusumoto.
4 Each one --

5 THE COURT: And --

6 CNSL K. JACKSON: There's no receiver in the land
7 that's going to -- to decide how to monetize the
8 assets of this partnership without speaking with
9 the two of them.

10 THE COURT: Well, there's also obligations owed by
11 them.

12 CNSL K. JACKSON: Precisely. To both of them. And --
13 and -- and so they're going to have as much input
14 as they want into the formulation of the plan for
15 the sale process by the receiver.

16 Of course, they will -- they have the benefit
17 of counsel. They can get their own financial
18 advisors, if they want. Whatever -- there's going
19 to be that process.

20 And as I said earlier, it's not going to be
21 days or weeks. It's going to be months to get
22 that process hammered out with the evidence this
23 court needs to be satisfied that this is the right
24 way to proceed, first point.

25 And -- and the second thing is exactly what
26 you said, Justice. Even if they say, well, we
27 gave them all these ideas and evidence that we
28 said this is the way to proceed and the receiver
29 shows up and comes up with a plan that we don't
30 agree with it, there's still someone they have to
31 get on there, the receiver, and that's -- that's
32 this court, Justice. They still have the
33 opportunity to say, somehow, this court's officer
34 has made a mistake in its conclusion.

35 And so there's -- there's any number of
36 safeguards in that regard.

37 The concern is -- is prejudging the way in
38 which it's to be done and tying the hands of the
39 court's officer to proceed in one manner. That's
40 the concern.

41 And -- and so one of the -- one of the
42 benefits of the comprehensive, complete
43 receivership order sought by Sanovest is it does
44 no such thing. It does no such thing.

45 I'll -- I'll -- while we're on it, I'm -- and
46 I recognize the time, and maybe I'll make one or
47 two --

38

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1 THE COURT: Sure.

2 CNSL K. JACKSON: -- points before the break, if the
3 court is so inclined -- is my friends call it a
4 marketing agent, which is an unknown concept to
5 me. I mean, I know what it is just by the words,
6 but -- but it's not something which there's
7 jurisdiction under any of the authorities in which
8 they rely to do this.

9 Now, it's a receiver. I think if you put it
10 to them, they will say, yes, it's a receiver.
11 We're just cloaking it with a different name.
12 Fine.

13 There is no funding mechanism in the context
14 of that process that they envisage. There's going
15 to be subdivision, which I don't think is
16 necessarily an inexpensive process. You're going
17 to need consultants. You're going to need to
18 bring -- to go to the City. You're -- you're
19 going to have to get approvals to get all of that
20 done. You're going to have to pay the court's
21 officer. There's no funding mechanism built into
22 this at all. At all.

23 And so, you know, it's going to take months.
24 There's no indication -- there's no evidence --
25 this is one of the problems. Again, they're
26 asking the court to say, this is the right way to
27 go. There's no evidence of how long it will take
28 to do the subdivision. Our client says it's got
29 to be six months anyways. So it's going to be
30 months and months and months without funding.

31 THE COURT: Yeah.

32 CNSL K. JACKSON: We don't know how that works.
33 There's -- in -- in their written submission in
34 response, there's an indication that, well, the --
35 that's -- the marketing agent will come back and
36 seek interim financing. We're going to have a
37 fight all over again if that's what they seek to
38 do because it's going to be without notice of HSBC
39 so far on -- on notice to, presumably, our client,
40 where we can say, how does this benefit us? You
41 can't get it over our objection. We consent to
42 the funding ahead of us on a receivership -- a
43 full-blown receivership -- but not in this.

44 But even -- in any event, as we sit here
45 today, this -- it's -- it's half-baked. It
46 doesn't actually have a funding process baked into
47 the order that they're seeking, this receivership

39

Submissions re receivership order by Cnsl K. Jackson

1 order -- the limited receivership order.

2 And it's going to take months and months and
3 months, and there are carrying costs that are not
4 going to be insignificant to get the subdivision.
5 No indication of what those might be. No
6 indication of funding for them.

7 All solved by a complete receivership.

8 THE COURT: And I take it, under the -- the modified
9 receivership proposal that -- that Mr. Matthews
10 wants ordered, the receiver runs the business in
11 any event? In other words, he's out? Or no?

12 CNSL K. JACKSON: No, I don't think so.

13 THE COURT: Okay.

14 CNSL K. JACKSON: I think Mr. Matthews wants to hold
15 onto his -- his -- his golf course operation
16 and -- and has. And the -- and one of the -- one
17 of the difficulties with carving out the resort is
18 if there's going to be borrowing, it's going to be
19 against lands. No one's borrowing against golf
20 carts and -- and a golf business. No one's
21 lending against that.

22 The lands -- some of those lands are
23 beneficially owned by the resort. Someone needs
24 to be actually able to manage/operate the resort
25 and actually sign off, technically, on -- on -- on
26 lending to the -- the development -- the
27 partnership writ large based on security against
28 the lands.

29 THE COURT: All right. Well, we'll take the morning
30 break. One of the things I don't have a handle on
31 is the nature of the various businesses that --

32 CNSL K. JACKSON: Right.

33 THE COURT: -- are --

34 CNSL K. JACKSON: I -- I jumped way ahead, Justice.

35 THE COURT: No, but I --

36 CNSL K. JACKSON: I'll back up a bit.

37 THE COURT: No, I appreciate it. I -- thank you for
38 the overview.

39 CNSL K. JACKSON: Very good.

40 THE COURT: Okay. We'll take the morning break, then.
41 Thank you.

42 THE CLERK: Order in chambers. Chambers are adjourned
43 for morning recess.

44
45 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)

46 ([11:21:26 AM])

47 (PROCEEDINGS RECONVENED) ([11:44:18 AM])

40

Submissions re receivership order by Cnsl K. Jackson
Discussion re housekeeping matters

DISCUSSION RE HOUSEKEEPING MATTERS:

THE COURT: Yes.

CNSL G. BRANDT: By way of house --

THE CLERK: We are on the record, Justice.

THE COURT: Thanks.

Yeah, go ahead. Start over.

CNSL G. BRANDT: Justice, just by way of housekeeping,
I'd like to hand up the --

THE COURT: Okay.

CNSL G. BRANDT: -- copies of the affidavits that have
been the subject of the sealing order.

THE COURT: Okay.

CNSL G. BRANDT: And I'm going to hand up two --
there's two affidavits here that have their tab
numbers written on them in stickies.

THE COURT: Okay.

CNSL G. BRANDT: And there are blanks in the volumes of
the record.

And then, secondly, I have volume 9 of the
application record, which includes the two
affidavits -- number 1 and 4 -- of Ms. Celiz,
which were sealed, as -- as -- well as an
unsealed -- non-sealed affidavit of Ms. Celiz.

THE COURT: From Ms. who?

CNSL G. BRANDT: And that's volume 9.

THE COURT: Okay.

CNSL G. BRANDT: Those are the legal assistant
affidavits.

THE COURT: Oh, I see. Okay. All right. Very good.

CNSL G. BRANDT: Thank you, Justice.

THE COURT: Thank you.

Mr. Jackson.

**SUBMISSIONS RE RECEIVERSHIP ORDER BY CNSL K. JACKSON
continuing:**

CNSL K. JACKSON: Yes. Thank you, Justice.

What I might do, just to finish off the point
around the application and order sought by 599, if
I could just ask you on the -- on the joint app --
the condensed application --

THE COURT: Yeah.

CNSL K. JACKSON: -- record tab 3. If I could ask you
just to turn to that. It's -- it's the notice of
application by 599 and Mr. Matthews.

41

Submissions re receivership order by Cnsl K. Jackson

1 THE COURT: All right.

2 CNSL K. JACKSON: That gives you a high level at the
3 beginning, of course, of the orders sought by
4 them.

5 And I just wanted to finish this off --

6 THE COURT: I'm going to -- oh, I see -- I see what you
7 did. They're asking me to order them subdivided.
8 All right.

9 CNSL K. JACKSON: Sorry, Justice? I missed that.

10 THE COURT: They're asking me to order them be
11 subdivided.

12 CNSL K. JACKSON: Well, yes. And so, I mean -- and if
13 you look -- if you look at page 12 at the top --
14 you won't see it on the first page, but the second
15 page, you'll see the page numbers at the top.

16 THE COURT: Yes.

17 CNSL K. JACKSON: Page 12 is the actual form of order
18 that was appended.

19 THE COURT: Okay.

20 CNSL K. JACKSON: And just -- it's -- it's -- it's --
21 part of the difficulty, I'm not sure how this is
22 carried out, but it -- it reflects exactly what it
23 says there, that the lands and premises as follows
24 be, you know, sub 1 subdivided and bundled; sub 2
25 subdivided and bundled; sub 3, these ones be
26 bundled.

27 It doesn't really say how, just that they are
28 to be -- I -- I'm not -- I don't think that order
29 itself would be sufficient to accomplish that. It
30 doesn't say that anybody is supposed to do that.

31 And so it's a bit -- and -- and if you look
32 at the written submissions from 599 and Matthews,
33 they say, well, we're not actually seeking an
34 order that they be subdivided and bundled, but
35 I -- I don't know how else to read that.

36 And it doesn't -- it says -- well, this -- I
37 think what they say is, well, the -- the marketing
38 agent/receiver can do that. I suppose if that was
39 what they were directed to do, they could seek
40 necessary orders or consent from various parties
41 and carry that out.

42 But that's not what the order they're seeking
43 does. Seems to me they're asking the court to
44 simply order that, whatever, and then I -- I -- I
45 guess somehow it would be carried out.

46 What I pointed out last was there's no
47 funding mechanism for any of this built into their

42

Submissions re receivership order by Cnsl K. Jackson

1 order at present. That includes the draft order
2 that's attached as a schedule, but I think that
3 would be a problematic order for them to obtain in
4 the circumstances.

5 But paired up with that, there's this idea
6 that a marketing agent -- I'm going to keep saying
7 "receiver" because it's just -- I've, through
8 that, just called it a receiver. They haven't
9 identified who this is to be. It's an unnamed
10 person or institution or firm is to be appointed
11 as a marketing agent. They haven't named anyone.

12 I don't know how you can make an order
13 without a person actually being appointed. We --
14 we -- we -- you know, we've put forward Alvarez &
15 Marsal. We have had sent them active materials,
16 and they're -- you know, they -- they --
17 they've -- they've included all that. We don't
18 have that from 599 and Matthews. So I don't know
19 how you can order that.

20 It may be -- it's occurred to me -- or us, I
21 suppose, when we've spoken about it on our side
22 here -- that I'm not sure you'd find someone
23 enthralled with the idea of taking on that role,
24 having no funding and -- and having to try and
25 carry out, perhaps, if that's the intention -- to
26 carry out the subdivision, incur whatever costs
27 there are for that, go through a sale process.

28 It's just it's not there. It -- it -- when I
29 said earlier that it's a half-baked order, it
30 doesn't seem to have been thought through in that
31 regard, and I think it puts the -- puts the court
32 in an impossible position to suggest that the
33 order could possibly be made.

34 And then, since I have it, Justice, at page 3
35 of the order -- sorry, the application -- my
36 apologies, the application. So what they're
37 seeking, in fact, are two different orders: one
38 is the -- the subdivision order with a marketing
39 agent appointment, two is an order authorizing the
40 distribution of any proceeds from the sale of one
41 or more of the parcels as follows.

42 Now, this -- this is -- I mean, we've asked.
43 Our friends have not provided a draft of what that
44 order is, so we don't know exactly what it looks
45 like. But we have pretty good information from
46 what the proposed process high -- high level is.

47 In their materials, 599 and -- and Matthews

43

Submissions re receivership order by Cnsl K. Jackson

1 refer to their application as being a funding
2 application or an application for a funding order.
3 I think what they intend to say is that this
4 order, if granted, will enable us to monetize some
5 of the assets and create value and sufficient
6 funds to pay out Sanovest and carry on the
7 business because it's going to provide funding for
8 the -- for the business.

9 Well, you have my concerns with the order
10 that carries -- it gets you to any realizations.

11 But here -- here -- and, again, one of the
12 problems, of course, is we don't know what -- the
13 actual amount to be generated from the sale.
14 They'll say it could be \$90 million. Maybe. But
15 that's not -- there's no -- not sufficient
16 evidence to drive that

17 The order distributing the proceeds is -- is
18 even more problematic because the second thing it
19 wants -- the first:

20
21 2(a), a reserve to satisfy any tax -- tax
22 obligation of Ecoasis Bear Mountain
23 Developments --

24
25 That's the top partnership, which is defined at
26 "the company,"

27
28 -- the partnership --

29
30 Which is later defined as "Developments," so same
31 one, I think,

32
33 -- Ecoasis Resort and Golf --

34
35 Which is the resort partnership,

36
37 -- and their respective partners, which
38 includes Sanovest and 599 arising from the
39 sales.

40
41 What taxes? There's no evidence whatsoever as to
42 what that might be. It could be a dollar, it
43 could be every single dollar because we don't know
44 what the tax obligations are.

45 One thing I do know is that there's going to
46 be a significant cap gains hit at six -- at
47 two-thirds of whatever the -- the capital gains is

44

Submissions re receivership order by Cnsl K. Jackson

1 from the -- from the -- from the cost of those
2 lands. But we don't know what it is.

3 So it's kind -- and there's no process baked
4 in anywhere or indicated or in the evidence as to
5 how that's to be determined or what it might even
6 be. It's just any tax obligation arising from the
7 sale.

8 And then, next:

9
10 Of the balance --

11
12 I suppose it should say "if any,"

13
14 -- of the net sale proceeds, 85% goes to
15 repay the amount owing to Sanovest and 15% is
16 retained by the company --

17
18 Which is defined as "Developments,"

19
20 -- for ongoing operating expenses, the
21 partnership --

22
23 Which is also Developments,

24
25 -- and the Resort partnership.

26
27 Well, here -- here -- here's the problem with
28 that. Under the agreement -- under the loan
29 agreement, every dollar has to go to Sanovest for
30 the sale. There's no contemplation of -- of an 85
31 percent/15 percent split. There's no obligation
32 on the part of Sanovest to give a discharge in
33 those circumstances. If the loan is in default,
34 it can say, every single penny comes to me.

35 So it's seeking to rewrite the very agreement
36 that the partnership, as borrower, has with
37 Sanovest on a distribution. And Sanovest says,
38 no, thank you. That's not acceptable.

39 And then there's an optimistic:

40
41 Following repayment of the Sanovest loan in
42 full, the residue 50/50 --

43
44 Which sounds nice to a point, but that's not
45 exactly how the waterfall works -- I'll come to it
46 later -- in terms of how the partners share any --
47 any -- any relation proceeds or -- or relations

45

Submissions re receivership order by Cnsl K. Jackson

1 from the monetization of the asset of the
2 partnership.

3 Right. Sorry. That's a good point too.
4 Ms. Hiebert reminds me, 85 percent of the amount
5 owing to Sanovest is a disputed amount. There's
6 no mechanism anywhere for that resolution of that
7 in the distribution order here or in the limited
8 receivership order that's being sought.

9 So 85 percent of what? They're paying 85
10 percent to what? Towards what until they're paid
11 in full? It's not -- there's no process to have
12 that determined whatsoever in -- in -- in the
13 contemplation of 599 and Matthews.

14 I'll point out also the distribution order
15 conflicts with the limited receivership order in
16 draft because the limited receivership order does
17 provide for a charge in favour of the marketing
18 agent/receiver ahead of all other distributions of
19 prior claims. And so it's missing -- it seems to
20 be missing a whole other category of -- of -- of
21 payments that have to be made in this waterfall.

22 So it's contrary the contractual entitlement
23 of Sanovest. It's -- it's internally inconsistent
24 as between the two orders. It doesn't have any
25 indication about how tax obligations or amounts
26 owing to Sanovest are to be determined.

27 I said before it's half-baked, Justice. I --
28 I want to lean into that. This isn't thought
29 through in terms of how properly this can work.

30 Justice, that's all I intend to say for now
31 about the -- the orders that are being sought by
32 599 and Matthews.

33 What I might do is come back a little bit
34 [indiscernible] my submissions a little bit more
35 strictly according to the way they're laid out in
36 our written submissions. In doing so, I now
37 happily jumped through a lot of the overview. It
38 may be -- come to some of the facts that may still
39 be a little elusive in terms of how things have
40 gone so far, which -- if you have those written
41 submissions.

42 THE COURT: I do.

43 CNSL K. JACKSON: I want to make sure you have the
44 right ones, Justice. I think --

45 THE COURT: August 19th, 2024.

46 CNSL K. JACKSON: Right. Yeah, the oppression ones are
47 much bigger.

46

Submissions re receivership order by Cnsl K. Jackson

1 THE COURT: Yeah, it's the --
2 CNSL K. JACKSON: Ours are smaller.
3 THE COURT: Regarding the hearing on the petition.
4 CNSL K. JACKSON: Right. Very good. Thank you. So --
5 THE COURT: And you are going to walk me through or
6 explain at some point how this structure -- how --
7 how the ...
8 CNSL K. JACKSON: Right.
9 THE COURT: ... all the assets are set up.
10 CNSL K. JACKSON: That's what I was going to do.
11 THE COURT: Because I -- I -- I haven't drilled down
12 into that.
13 CNSL K. JACKSON: I'm going to be doing that, yes, at
14 this part here, at -- at page 4.
15 THE COURT: Okay.
16 CNSL K. JACKSON: And so -- so, again, I don't know if
17 an org chart is necessary. It's -- actually, at
18 the top level, the partnership is -- we call it
19 "Developments." "Developments partnership."
20 And Developments is the top-level partner,
21 the partnership units of which are owned equally
22 by Sanovest and 599.
23 THE COURT: If I do ask you for an org chart, you can
24 get one?
25 CNSL K. JACKSON: We can do that over lunch .
26 THE COURT: All right. Tomorrow.
27 CNSL K. JACKSON: Certainly. It won't be able -- it
28 will not be difficult.
29 THE COURT: All right.
30 CNSL K. JACKSON: Now, Development.
31 THE COURT: By Sanovest and 599.
32 CNSL K. JACKSON: 599.
33 THE COURT: Right.
34 CNSL K. JACKSON: Developments, as the top partnership,
35 is the sole limited partner of -- I guess we call
36 it a subsidiary partnership, which is Resorts.
37 Resorts.
38 THE COURT: Sure.
39 CNSL K. JACKSON: My friends think I'm wrong about
40 this. Ms. Hiebert's going to make sure I'm right.
41 THE COURT: Okay.
42 CNSL K. JACKSON: Right. Sorry. My friends -- so
43 limited liability partner.
44 The -- the -- there's one unit issued to the
45 manager of the partnership, which is -- which is
46 Ecoasis -- EMDB -- Ecoasis Mountain ...
47 UNIDENTIFIED SPEAKER: Bear Mountain.

47

Submissions re receivership order by Cnsl K. Jackson

1 CNSL K. JACKSON: Bear Mountain Developments.

2 Ecoasis -- EBMD. It is -- there's one unit. So
3 it's 49.5 percent Sanovest, 49.5 percent --

4 THE COURT: That's off Developments?

5 CNSL K. JACKSON: 599 with Developments and -- and then
6 1 percent for EM -- Ecoasis -- BMD -- EBMD.

7 And at the Resorts level, it's Developments
8 for 99 percent for -- or 99.5 -- and then one unit
9 issued to EBMD.

10 Now, I didn't bother mentioning it, because
11 the one is the notional unit, which is issued for
12 these lease circumstances, but it's -- it exists.

13 THE COURT: All right.

14 CNSL K. JACKSON: They don't get a return on it. If
15 they do, it's \$100 or something.

16 THE COURT: That's -- EBMD is the managing partner?

17 CNSL K. JACKSON: Yes.

18 THE COURT: Okay.

19 CNSL K. JACKSON: Yes. It's a manager.

20 CNSL C. FERRIS: I'll just add that it's the
21 corporation in the chain. So EMD -- BD is a
22 corporation, not a partnership.

23 CNSL K. JACKSON: Okay. All right. I see. Apparently
24 this is important for oppression.

25 THE COURT: All right. So I think an org chart would
26 be in order.

27 CNSL K. JACKSON: Sure. Certainly. Not a problem.

28 I think there's a reason that my friend
29 was -- was quick to point out there is a
30 corporation somewhere in here.

31 THE COURT: Okay. All right.

32 CNSL K. JACKSON: Right? It will be something that my
33 friend and -- and Mr. Nathanson will be -- will be
34 speaking to more. From -- for my purposes and, I
35 think, for the purposes of the receivership, it's
36 entirely irrelevant.

37 THE COURT: Okay.

38 CNSL K. JACKSON: So Developments owns what we call
39 the -- the project lands. And so at its core,
40 this entire enterprise is about developing the
41 lands that were acquired. So Developments is the
42 owner of the project. And there's a number of
43 parcels of the project lands.

44 Resorts is the -- is the beneficial owner --
45 I should say beneficial owner in both cases -- of
46 the golf course and tennis facilities. So it --
47 sorry. And -- and, as a result of the way things

48

Submissions re receivership order by Cnsl K. Jackson

1 have turned out and the way it's been structured,
2 it also owns some -- a smaller number -- of
3 parcels that are for development. So we say the
4 project lands, the development lands, are owned
5 largely by Developments and somewhat by -- in --
6 in a smaller portion by Resorts. A little bit.

7 Ms. Hiebert found that 24 of the parcels are
8 owned by Developments and two by Resorts.
9 Beneficial. Beneficially. I keep saying owned,
10 but beneficially.

11 And then there's that one parcel of land that
12 was transferred to Bear Mountain -- BMA, Bear
13 Mountain Adventures, that one parcel of land that
14 was transferred to it for a dollar.

15 So those are the -- and then all of the lands
16 except for the ones that were transferred to
17 BMA -- all of the lands are owned through nominee
18 numbered companies.

19 THE COURT: Okay.

20 CNSL K. JACKSON: We will get you an org chart to
21 show --

22 THE COURT: Yeah.

23 CNSL K. JACKSON: -- a little bit of that detail.

24 But the point is the -- the two partners, 599
25 and Sanovest, the top partners, have their
26 partnership interest in Developments, which, in
27 turn, has a partnership interest in Resorts. They
28 own the lands, the two partnerships, through
29 nominees.

30 THE COURT: And it's all situated in Langford?

31 CNSL K. JACKSON: It's all in Langford. That's right.

32 The district of Langford. And it's --

33 UNIDENTIFIED SPEAKER: It's not all in Langford.

34 CNSL K. JACKSON: It's not?

35 THE COURT: What's that?

36 UNIDENTIFIED SPEAKER: It's not all --

37 CNSL K. JACKSON: So it's not all in Langford. How
38 much is in Langford? Ms. Hiebert is an absolute
39 fact monster here, so I'll ask her.

40 We'll find -- there's another --

41 UNIDENTIFIED SPEAKER: There's a neighbouring district
42 of Highlands.

43 CNSL K. JACKSON: Oh, there you go. Some portion of
44 Highlands.

45 THE COURT: And there -- there was a hotel somewhere,
46 but that's not in the mix?

47 CNSL K. JACKSON: Well, the hotel was sold --

49

Submissions re receivership order by Cnsl K. Jackson

1 THE COURT: Right. That's --

2 CNSL K. JACKSON: -- years ago. And so the hotel is
3 now owned by another party. It had the -- the --
4 the arrangement originally was that -- that
5 Resorts, the operator of the golf course, would
6 lease some facilities from the hotel, which were
7 traditionally owned collectively -- some of the
8 facilities for the pro shop, for cart storage and
9 charging, and things like that.

10 That lease expired in July. It wasn't
11 renewed. There's disagreement -- surprise --
12 between the two partners as to whether it should
13 have been renewed, and the hotel says, doesn't
14 matter what you wanted; I wouldn't have renewed it
15 if Mr. Matthews was running this, but I would if
16 the receiver was.

17 You know, that's one of the exact problems
18 that's now -- Mr. Matthews will say, it's okay.
19 We've taken care of it. We've got a pro shop
20 facility that seems to be working just fine.

21 And Mr. Kusumoto will say, no, it's a hallway
22 with a bunch of, you know, clothes on clothing
23 racks in a hallway and no access to showers or
24 what -- I think it's another dispute. And someone
25 has to sort out if it should be a new lease or it
26 could just stay where it is.

27 THE COURT: Right. It's not -- how many acres are --
28 are -- are ...

29 CNSL K. JACKSON: Total acres, I think, are 740 is what
30 I recall.

31 THE COURT: And it's all bare land except for the golf
32 course and -- and this shop, this --

33 CNSL K. JACKSON: Leaving out the hotel. Anything that
34 is -- certain -- it's been sold over time.

35 And, in fact, one of the things -- if you
36 want to just jump ahead a little bit to -- in --
37 in -- in the submissions --

38 Right. And so if you look at paragraph 25 on
39 page 8.

40 THE COURT: All right.

41 CNSL K. JACKSON: So this -- this -- this goes back to
42 when the lands were acquired. So the partnerships
43 acquired the project lands and the golf course
44 lands and tennis facilities and 156-room hotel --
45 that's the one that was since sold -- in 2013.

46 Turning to paragraph 27, that talks about the
47 transfer from one of the nominees -- not a

50

Submissions re receivership order by Cnsl K. Jackson

1 numbered co but BM Mountain Golf Course Ltd. of
2 the BMA lands to BMA for \$1. Those are sought to
3 be included in the receivership order. They are
4 still under the Sanovest mortgage, and they rely
5 on Sanovest funding to pay property taxes -- or at
6 least the enterprise funding to pay property
7 taxes.

8 THE COURT: So 28, when it says Bear Mountain, which
9 Bear Mountain?

10 CNSL K. JACKSON: So Bear Mountain --

11 THE COURT: What's that?

12 CNSL K. JACKSON: -- is what we call the overall
13 development.

14 THE COURT: Oh, I see.

15 CNSL K. JACKSON: The whole development area.

16 THE COURT: Okay.

17 CNSL K. JACKSON: Yeah. And so that's big -- it's the
18 big development that was the dream of Len Barry
19 back originally when it was first owned by -- by
20 him to develop a great big golf course and
21 residential and commercial development called Bear
22 Mountain over on the island largely in Langford.
23 It now has about 1,400 residential units.

24 THE COURT: Okay.

25 CNSL K. JACKSON: 3,000 residents. It's expected to
26 grow to 3,000 residential units -- 8,000
27 residents -- in the next 10 years.

28 Over the page .

29 THE COURT: So some of that's -- not all of that's
30 owned by the -- by the partnership?

31 CNSL K. JACKSON: No. In fact, all of the things --
32 all of those residential units -- housing units
33 have now sold.

34 THE COURT: Right.

35 CNSL K. JACKSON: They monetized some of the lands by
36 developing and selling over time.

37 THE COURT: So what we're dealing with is the 29 --
38 that 740 acres?

39 CNSL K. JACKSON: Right. Right. And 200 of that is
40 the development lands, the project lands. The
41 rest is the golf courses and the tennis
42 facilities.

43 THE COURT: Okay. All right. I see. That answers my
44 question. Thank you.

45 CNSL C. FERRIS: Justice, as opposed to me standing up
46 on multiple occasions just to let you know that a
47 lot of these facts are -- are -- we think are --

51

Submissions re receivership order by Cnsl K. Jackson

1 are not totally -- in total -- that's -- we --
2 like, the last fact, we don't agree with that.

3 THE COURT: Okay. All right.

4 CNSL C. FERRIS: Just so you know.

5 THE COURT: Okay. Thank you.

6 CNSL K. JACKSON: We'll figure out maybe where the --
7 where the divide is here at some point.

8 THE COURT: All right.

9 CNSL K. JACKSON: We can deal with it in reply if we
10 need to.

11 THE COURT: Okay. All right. That helps -- gives me
12 an overview.

13 CNSL K. JACKSON: Right. Right.

14 Okay. So -- so -- so backing up ...

15 THE COURT: Where do you want to go to now?

16 CNSL K. JACKSON: Right. So back to page 4, paragraph
17 15 -- or paragraph 14. So the first thing I want
18 to point out -- now, on this application, there's
19 a -- some facts which are -- cannot be disputed.
20 Sanovest's loan is in default. There's --
21 it's been in default for a while. Payments
22 haven't been made. It's the end of paragraph 14.
23 No payments since July of 2023. Over a year. And
24 it came due in May of 2024.

25 THE COURT: Okay.

26 CNSL K. JACKSON: But there's no doubt it's in default.
27 That's -- it -- how much might be owing under it,
28 well, our client will say 64 million plus. 599
29 will say, well, at least \$50 million in principal
30 plus some interest. But we also know that 599
31 will say, okay, let's not forget that interest is
32 accruing at \$5 million a year on this. So 5
33 million bucks a year.

34 The partnerships are managed by EBMD. That's
35 paragraph 15. That's one that owns limited units
36 in the -- in the partnerships, and Matthews is the
37 CEO of that company. And he will admit that the
38 companies -- the borrower and the -- and the --
39 and the nominee -- were all guarantors, are unable
40 to pay the amounts owing to Sanovest unless the
41 property is sold.

42 Now, back in May, here's what Mr. Matthews
43 said about the partnerships. They were managing
44 cash -- this is over the page -- on a daily basis,
45 prioritizing only the most urgent of payments.

46 By the way, the -- the evidence cites are all
47 footnoted.

52

Submissions re receivership order by Cnsl K. Jackson

1 THE COURT: Yes.

2 CNSL K. JACKSON: Since September 2023, the accounting
3 team has been in possession of a stack of signed
4 and unsigned vendor cheques that cannot go out
5 given operating shortfall. And he's concerned
6 that:

7
8 We will not be able to pay our staff, keep
9 the lights on, and maintain our golf courses
10 and member services while also meeting our
11 obligations to vendors and others.

12
13 And so in May, again, Mr. Matthews' evidence was
14 that the partnership's financial position would
15 deteriorate further when property taxes came due
16 in July 2024. And the existing financial strain
17 has:

18
19 -- already impacted our operations, our
20 reputation, goodwill, our trust and
21 credibility, and our staff morale.

22
23 Just a footnote on that, the property taxes did
24 not get paid. They didn't get paid, and penalties
25 were incurred at two points already, totalling
26 10 percent of the total taxes in July and
27 September.

28 THE COURT: Sorry, how much?

29 CNSL K. JACKSON: The total amount of taxes was 1 --
30 what's the total taxes? It's later on in here. 1
31 point ... \$1.6 million in taxes and two 5 percent
32 penalties were incurred on that amount. So 160K
33 were incurred.

34 THE COURT: So that's on top of what you say is --

35 CNSL K. JACKSON: Indeed.

36 THE COURT: -- the penalties?

37 CNSL K. JACKSON: Yes.

38 So in June -- I mentioned this earlier --
39 Mr. Matthews revisited his evidence from May,
40 saying that it wasn't as dire as all that; the
41 financial position would improve, including paying
42 down accounts by approximately \$780,000.

43 But that didn't come to bear. The
44 evidence -- this is paragraph 18 -- from August
45 2024 shows that any reductions were minimal, and,
46 in most cases, it increased.

47 So partnerships -- this is actually -- maybe

53

Submissions re receivership order by Cnsl K. Jackson

1 I'll take you very quickly to this. So this is --
2 just going to hand this up rather than having to
3 flip back and forth, Justice.

4 THE COURT: All right.

5 CNSL K. JACKSON: Oh, sorry. Here we are. Here we
6 are.

7 So this is -- it's Exhibit R to
8 Mr. Kusumoto's affidavit -- his third affidavit.
9 This just shows you what it is at August 6th,
10 2024. So -- so you see unreleased cheques, aged
11 accounts payable. This is the state of the --
12 of -- of the partnerships in August 2024.

13 So Resort and Golf, which is the Resorts
14 partnership, has unreleased cheques of \$575,000
15 and aged accounts payable of just about 900. So
16 we're talking about, what, just under 1.5. \$1.45
17 million of unpaid -- unpaid AR.

18 Now, Developments had \$78,000 of unreleased
19 cheques and \$400,000 of -- of aged accounts, so
20 about 500,000. So we're talking about 1.9 to
21 \$2 million of -- of trade payables that were --
22 that are outstanding in August of 2024.

23 Compare that to May, and the number was
24 \$2 million of total aged and unreleased cheques
25 according to Mr. Matthews.

26 In other words, it has improved -- maybe -- a
27 few tens of thousands of dollars. Not \$780,000,
28 as Mr. Matthews deposed would be the case.

29 If -- if you want to compare that just to
30 what Mr. Matthews said, it's at tab 13 of the
31 condensed record where -- where he says, at the
32 time, the two combined had about 2.5 -- 2.05 --
33 \$2.05 million in unreleased cheques and aged
34 payables. In other words, improvement is minimal,
35 if -- if anything. Not \$780,000.

36 But we also go on to note here staff
37 retention bonuses -- these were unpaid in May --
38 were still unpaid. The for both, unpaid in May,
39 still unpaid. Interest continues to incur.

40 THE COURT: Sorry, what's the?

41 CNSL K. JACKSON: Employee -- employer health tax.

42 THE COURT: Right. Right you are. Employer health
43 taxes.

44 CNSL K. JACKSON: PST, unpaid in May, still unpaid.
45 GST is unknown. WCB, due May 20th, still unpaid.
46 Property taxes I mentioned already; late penalty.
47 This is in August; second one was in early

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Submissions re receivership order by Cnsl K. Jackson

1 September. And the City of Langford, 1.9. All
2 still unpaid.

3 That is the current state. And so while
4 Mr. Matthews got very optimistic in June about
5 what would happen hasn't come to bear. This --
6 this partnership -- the Resorts partnership is in
7 dire financial straits.

8 Justice, page 6, what I'm going to do is I'm
9 going to skip over -- actually, sorry, I'm not.
10 Paragraph 19. I mentioned before and I'll say
11 again, the partnership's financial difficulties
12 and the dispute really arise because they failed
13 to develop the project lands in a timely manner.
14 You'll have different rationales or reasons or
15 explanations as to why, each pointing a finger at
16 the other, but that's the heart of the problem.

17 Here's an important point. Mr. Matthews has
18 said that he's open to various alternatives in
19 relation to the sale of the partnership assets
20 that would include an unblock sale if carried out
21 in an orderly and prudent manner. And that -- the
22 reference is -- is -- is --

23 THE COURT: That's in his affidavit?

24 CNSL K. JACKSON: It's at the affidavit -- that's at
25 footnote 16 here, affidavit number 3 of
26 Mr. Matthews' -- it's in a letter from
27 Mr. Matthews.

28 THE COURT: Do you mind just showing me that?

29 CNSL K. JACKSON: Yes. Tab 14.

30 THE COURT: Of the condensed record?

31 CNSL K. JACKSON: Yes, sorry.

32 THE COURT: Okay.

33 CNSL K. JACKSON: Exhibit OO.

34 THE COURT: Okay.

35 CNSL K. JACKSON: So it's a letter from -- from counsel
36 for 599 and Mr. Matthews to counsel for --

37 THE COURT: Tab 16?

38 CNSL K. JACKSON: Tab, sorry, 14.

39 THE COURT: 14. Thanks.

40 CNSL K. JACKSON: You should have OO.

41 THE COURT: Yeah. Just ...

42 CNSL K. JACKSON: Page 314.

43 THE COURT: Oh, here it is. Page 3 -- sorry, starts at
44 312?

45 CNSL K. JACKSON: It does, yes.

46 THE COURT: Okay.

47 CNSL K. JACKSON: And 314 --

55

Submissions re receivership order by Cnsl K. Jackson

1 THE COURT: All right.

2 CNSL K. JACKSON: -- is page 3 of the letter from
3 Lawsons --

4 THE COURT: Right.

5 CNSL K. JACKSON: -- to Fasken. At (c), halfway down
6 the page --

7 THE COURT: Right.

8 CNSL K. JACKSON: -- financing alternatives.

9 THE COURT: So (b) is supporting an unblock listing and
10 sales processes?

11 CNSL K. JACKSON: Right:

12
13 Any of the following options, if carried out
14 in an orderly and prudent matter:

15
16 (b), an unblock listing of sales process for
17 substantially all the partnerships and land
18 assets.

19
20 That was April 2024. Something's changed. The
21 whole point of a receivership is, of course,
22 orderly and prudent, rational process for the
23 sale, unblock, if necessary. But that's the
24 point. They're open to it, as they should be. If
25 the court's officer thinks that that's the -- and
26 the court agrees that's the right way to proceed,
27 so be it.

28 So -- so -- so something's changed, but that
29 was certainly something Mr. Matthews was open to
30 in April of 2024.

31 Right. I should say that too. So
32 Ms. Hiebert points out too that this is at tab 17
33 of the same condensed book. This is Mr. Matthews'
34 own affidavit now sworn June of this year. And so
35 if you have tab 17 of the condensed book, page 9.

36 THE COURT: All right.

37 CNSL K. JACKSON: So what Mr. Matthews says there is --

38 THE COURT: Which paragraph?

39 CNSL K. JACKSON: Paragraph 14.

40 THE COURT: Okay. Yeah. All right.

41 CNSL K. JACKSON: So he says -- Mr. -- Mr. Kusumoto
42 states:

43
44 It is unclear what basis Mr. Matthews used to
45 choose and select lands instead of other
46 options like an unblock sale, the individual
47 sale of different parcels, or other solutions

56

Submissions re receivership order by Cnsl K. Jackson

1 to the partnerships' liquidity problems.

2
3 And then Mr. Matthews says:

4
5 I am not opposed to an unblock sale and have
6 supported the potential for an unblock sale
7 for many years now. An unblock land sale was
8 also one of several options I presented to
9 Sanovest and Tian --

10
11 That's Mr. Kusumoto,

12
13 -- in April 2024.

14
15 That's the letter I just took you to.

16 And so apparently he's not that offended by
17 the concept. That's the only point I take from
18 that part of the submissions.

19 We talked about relative prejudice and the
20 interest of the parties. It appears that that's
21 not something which Mr. Matthews hasn't
22 contemplated as a potentially reasonable
23 alternative to the outcome.

24 Justice, I'm just flipping through to try and
25 high-grade this so I don't take up more time than
26 allotted to me. I am going to have to go a bit
27 into the afternoon, but I'll try and make sure I
28 don't take up too much time.

29 I'm going to -- I'm going to skip ahead,
30 Justice, about the project lands and a bit --
31 we're touching again a little bit on the -- the
32 order that's being sought with respect to the
33 subdivision and sale at page 9 of the submissions,
34 paragraph -- beginning at paragraph 30 where --
35 this is from Mr. Clarke's affidavit. He's the --
36 he's the CFO of -- of the partnerships. So he --
37 he says -- or at least that's the evidence that's
38 reflected at paragraph 30:

39
40 Development of the project lands will
41 require, among other things, the subdivision
42 of existing parcels, municipality approvals
43 for density and zoning, and the significant
44 financial investment.

45
46 Paragraph 31:
47

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Submissions re receivership order by Cnsl K. Jackson

1 Matthews asserts that, as of 2024, the total
2 appraised value of the partnership's assets
3 exceeds --
4

5 And you'll see the number there. I think that's
6 in -- I think that's actually in evidence that's
7 open, but I don't want to -- I'll be slightly
8 careful about that:
9

10 -- excluding certain properties and the value
11 of the resort partnership's golf and tennis
12 assets.
13

14 The appraisal was not -- when this was filed, by
15 the way -- these submissions were filed hadn't
16 been disclosed. It is now in evidence. I think
17 it's in the recent affidavit that --

18 CNSL L. HIEBERT: Affidavit 4.

19 CNSL K. JACKSON: Affidavit 4 of Mr. Matthews. Oh,
20 sorry, the assistant affidavit.

21 The whole point of this is we don't know what
22 the value is. It's an appraisal. The
23 appraisal -- it's -- there are concerns with the
24 appraisal in terms of what -- what it relies upon.
25 It -- it at one point talks about absorption of
26 the process over 27 years and then says it can be
27 accomplished in 12. It doesn't talk about, you
28 know, a number of different issues that we have
29 concerns with .

30 But the point is, it's an appraisal, and we
31 don't know what the actual value is. If it's
32 significant, that's good. But it doesn't help in
33 terms of the relief sought by -- I guess specific
34 limited relief sought by 599.

35 It also doesn't talk about the impact of
36 value on selling only the select lands versus the
37 other lands. What about the other lands? It
38 doesn't -- doesn't have any commentary about that
39 concern. It doesn't have any evidence about the
40 time or the cost associated with the proposed
41 subdivision and sale process, which is one of my
42 points. The court is being asked to make a
43 decision that that is the right way to proceed
44 without sufficient evidence.

45 30 -- 32, Developments partnership has an
46 interest in a number of pieces of litigation
47 against third parties, against present and former

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Submissions re receivership order by Cnsl K. Jackson

1 directors, and against the partners themselves,
2 including alleged diversion of funds and
3 properties, which includes those lands transferred
4 to Bear Mountain Adventures and funds used by
5 Mr. Matthews and Tom Kusumoto. And to be clear,
6 Tom Kusumoto is Tian Kusumoto's late father.
7 UNIDENTIFIED SPEAKER: He's not deceased.
8 CNSL K. JACKSON: Is he deceased? No. I have that
9 wrong. How did I get that --
10 UNIDENTIFIED SPEAKER: He's sitting in the courtroom.
11 CNSL K. JACKSON: Numerous of his ties are greatly
12 exaggerated.
13 UNIDENTIFIED SPEAKER: Praise the lord.
14 CNSL K. JACKSON: I thought -- miracle.
15 UNIDENTIFIED SPEAKER: That's right.
16 CNSL K. JACKSON: There's a fact I agree I got wrong.
17 THE COURT: I take it he is in the courtroom.
18 CNSL K. JACKSON: He is. He left, but he is -- no, I
19 thought there was something else, actually. I'm
20 sorry. I have to apologize.
21 THE COURT: I'm being shown that he's just walked back
22 in the courtroom.
23 UNIDENTIFIED SPEAKER: Exactly.
24 CNSL K. JACKSON: Hale. In any -- apologies.
25 Anyways, there is -- there is -- there is
26 a -- the -- the -- Tian Kusumoto took over from
27 Tom Kusumoto as -- as the principal and management
28 of -- of Sanovest, and -- and the partnership has
29 claims against Mr. Matthews and Mr. Kusumoto with
30 respect to diversion of funds -- Tom Kusumoto.
31 One of the points we make is this. Those --
32 those chosen -- actually, that litigation, that's
33 not being funded. There are significant amounts
34 owing to counsel on at least one of the
35 proceedings in arbitration.
36 THE COURT: Sorry. There's that -- which action is
37 not -- that's the [indiscernible] -- which number
38 that?
39 CNSL K. JACKSON: The --
40 THE COURT: Is that part of the CPC this afternoon?
41 Mr. Nathanson --
42 CNSL K. JACKSON: That one is part of the CPC this
43 afternoon.
44 THE COURT: All right.
45 CNSL K. JACKSON: Yes.
46 UNIDENTIFIED SPEAKER: That -- that action?
47 CNSL K. JACKSON: That one is not, sorry. The

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Submissions re receivership order by Cnsl K. Jackson

1 oppression one is this afternoon. That's out of
2 my bailiwick. I'll have to defer to the
3 counsel -- the real litigators -- on that one.

4 THE COURT: So that -- that's a -- that's an action by
5 the Development against the third parties?

6 CNSL K. JACKSON: M'mm-hmm.

7 THE COURT: And one against former -- oh, against
8 present and former directors.

9 CNSL K. JACKSON: Right. There -- there -- there are
10 other -- those are some of the claims that exist,
11 yes --

12 THE COURT: Okay.

13 CNSL K. JACKSON: -- by Developments.

14 THE COURT: Okay.

15 CNSL K. JACKSON: The point is someone's going to have
16 to fund those. Someone's going to have to
17 consider whether to pursue.

18 CNSL C. FERRIS: I'm -- I'm not --

19 THE COURT: Yeah.

20 CNSL C. FERRIS: -- [indiscernible].

21 CNSL K. JACKSON: And so this is all part and parcel
22 of -- without funding, there's no ability to
23 defend proceedings, which -- of which there are
24 some. There's no ability to pursue proceedings.
25 That's the point. There are any number of
26 proceedings.

27 THE COURT: I understand. All right.

28 CNSL C. FERRIS: The -- the -- there's no funding of
29 the proceedings between the parties. Right?
30 The -- there's been no response filed by the
31 partnership. Those are -- the proceedings that
32 are going to be the subject of the case planning
33 conference this afternoon are between the various
34 principals and -- and the companies. That's not
35 anything that -- that is being funded or requires
36 funding by the company.

37 THE COURT: Okay.

38 CNSL K. JACKSON: Right. There -- but -- right. This
39 is about third-party proceedings -- against third
40 parties.

41 THE COURT: Okay. Just give me -- there -- there are
42 lawsuits that involve the principals of -- of the
43 partnership that are facing -- that are joined
44 issue. They're parties?

45 CNSL K. JACKSON: Yes. Yes.

46 THE COURT: Further -- further display of the deadlock;
47 right? If they're -- is that the point?

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Submissions re receivership order by Cnsl K. Jackson

1 CNSL K. JACKSON: Right. Right. This is -- this is --
2 that's -- there's -- there were three proceedings
3 that were joined that were all related to
4 allegations of wrongdoing among the -- among the
5 principals or the partners.

6 THE COURT: I see.

7 CNSL K. JACKSON: Right.

8 THE COURT: All right. Okay.

9 CNSL K. JACKSON: The partnerships -- and I could have
10 done this sooner because I was trying to find
11 where I had it in reference -- in the evidence.
12 But this is at paragraph 34. This is what I said
13 earlier about who owns which units in the
14 partnerships.

15 THE COURT: Oh, yeah. All right.

16 CNSL K. JACKSON: There's nothing here to take you
17 through. You've already been told that.

18 THE COURT: All right.

19 CNSL K. JACKSON: Paragraph 36, from 2013 to 2021, Tom
20 Kusumoto -- the healthy and present Tom
21 Kusumoto -- was a director of EBMD, and June 2021,
22 he resigned as a director of EBMD and Tian
23 Kusumoto became a director and CFO of EBMD.

24 One point, Matthews has said that
25 Mr. Kusumoto -- Tian Kusumoto -- holds the chief
26 financial officer position in name only, saying
27 this title was not intended to reflect the role of
28 an organization's working CFO.

29 THE COURT: Why does that matter?

30 CNSL K. JACKSON: I think it has more to do with the
31 oppression proceeding --

32 THE COURT: Oh, okay.

33 CNSL K. JACKSON: -- saying he had full access and
34 control, and I think there will be a dispute about
35 that. Irrelevant in the receivership application,
36 in my view. But -- but in his role as president
37 and CEO of EBMD, Mr. Matthews has exercised the
38 overall management and control.

39 Allocation of net -- this is paragraph 38 --
40 net income and distributable cash. So after you
41 pay out your debts, the partnership distributes
42 the net income and distributable cash *pari passu*
43 to the two partners up to \$15 million and then
44 partners holding class C units up to 30 million.
45 So after 15, the next goes \$30 million to the
46 class C units.

47 The only holder of class C units is Sanovest.

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Submissions re receivership order by Cnsl K. Jackson

1 So when I said earlier that it had a
2 disproportionate equity, if you will, interest in
3 the partnership, that's where that comes from.
4 After the first \$15 million, it takes the next 30.
5 So it's impacted first before 599 on anything that
6 occurs.

7 And then, after that, a notional amount goes
8 to EBMD up to \$100, and then the rest gets split
9 *pro rata* between 599 and Sanovest -- Sanovest.

10 So paragraph 40, the partnership generates
11 some revenues in the golf course and tennis
12 operations, but, historically, primary source of
13 funding has been loans from Sanovest.

14 The loan agreement was first entered in 2013,
15 amended in 2016 and 2022, including to increase
16 the amount available under the agreement
17 [indiscernible] facility and to extend the
18 repayment date.

19 And the loans used -- the loans made under
20 the agreement were used to fund obligations
21 related to the development of the project lands,
22 to pay property taxes on the project lands and the
23 BMA lands, and to fund a shortfall from
24 operations.

25 The borrower is Developments, the top-level
26 partnership. Resorts partnership is -- Resorts is
27 a guarantor, as are the nominees that own the
28 land. They all guaranteed it, provided security
29 by way of GSAs and mortgages and beneficial
30 charges.

31 So all -- well, paragraph 44, putting it
32 altogether, all of the partnership's assets,
33 including all real and personal property and
34 undertakings as well as the BMA lands, are secured
35 in favour of Sanovest. So everything that we're
36 seeking to have a receiver appointed over are
37 secured in favour of Sanovest.

38 45, the loan agreement provides that, during
39 the term of the loan -- so -- so they could -- as
40 is normal in a development project, the lender
41 agrees that if you pay me the amount -- the net
42 proceeds of sale, that you can get -- you're
43 entitled to a discharge of our mortgage.

44 That doesn't exist when the loan's in
45 default or after the term of the loan. That loan
46 is expired. It's become due. There's no
47 entitlement to discharge. At this point, Sanovest

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Submissions re receivership order by Cnsl K. Jackson

1 is entitled to rely on full payment -- or require
2 a full payment.

3 46, it also provides that the project lands
4 can only be subdivided or stratified with
5 Sanovest's prior written consent, which can be
6 withheld at Sanovest's sole discretion.

7 And there's my point at paragraph 47 that --
8 the fact that the 599 parties don't dispute that
9 at least \$50 million is owing. Sanovest claims
10 it's closer now to 64.5 million, but they made
11 demand in May for approximately \$62.3 million.

12 The partnership disputes -- I'm going to --
13 I'm going to go quickly over this part, Justice,
14 because you -- you -- you nailed it, I think, on
15 this one. There's a raft of allegations going
16 back and forth. You -- you've named several of
17 them, and it goes on. And there's going to be a
18 lot of discussion, I suspect, about that when we
19 come to the hearing about the oppression
20 application or the application within the
21 oppression proceedings. So I'm going to skip
22 over, for the most part, about that.

23 But let's just say that they aren't resolved.
24 There's no expectation that they can be resolved
25 in any time quickly, and it's going to take an
26 awful lot of time and money to do that.

27 Meanwhile, you have, effectively, a
28 floundering enterprise with no ability to revive
29 it, no ability to sell, no ability to fund while
30 those things play out, which doesn't seem to be a
31 particularly practical resolution in the
32 circumstances.

33 There's allegations that self --
34 self-interested transactions that Mr. Kusumoto's
35 advanced regarding payments to Mr. Matthews and
36 transfers of assets to Mr. Matthews personally or
37 to Tom Kusumoto -- that is, Mr. Kusumoto's
38 father -- where no shareholder approval was sought
39 or obtained. Again, there's an awful lot of
40 evidence around that, which I think is also
41 relevant other than the fact that it's an existing
42 issue that the parties have as between themselves.

43 It's -- I will say with that that those
44 allegations were at least verified by the former
45 CFO, Mr. Clarke. And -- and he says that he'd
46 learned of the transactions after the fact and
47 tried to record them as best he could in the

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Submissions re receivership order by Cnsl K. Jackson

1 company's ledgers. So at least there's some
2 back-up for that.

3 But, again, I'm not asking you to make a
4 determination in relation to that.

5 THE COURT: So then you turn to the current state of
6 the business.

7 CNSL K. JACKSON: Right. So I've already touched on a
8 lot of this --

9 THE COURT: Yeah.

10 CNSL K. JACKSON: -- as I'm trying -- as I say, I'm
11 trying to high-grade this a little bit, Justice.

12 THE COURT: Yeah.

13 CNSL K. JACKSON: And so --

14 THE COURT: When you say they've breached other
15 negative reporting covenants under the
16 agreement -- okay.

17 CNSL K. JACKSON: Sorry, Justice?

18 THE COURT: I'm just looking at -- there's a breach of
19 other negative reporting covenants, you said,
20 under the agreements.

21 CNSL K. JACKSON: There's breach -- well, I mean,
22 there's breaches of reporting covenants, which
23 have been going on for some time. There is
24 statutory obligations: financial statements not
25 having been provided since December 31st of 2018,
26 so we're talking, you know, five years of
27 financial statements; class draft financial
28 statements back to 2020; the books are not kept up
29 to date; the accountants don't know how much GST
30 or PST or employment taxes are due.

31 Again, there will be an allegation that this
32 is all Mr. Kusumoto's and not Mr. Matthews's
33 fault. Sure. That's all I'll say, Justice.

34 I don't -- I don't -- I don't think we
35 need -- no, unless something comes up that makes
36 me feel compelled to respond, you know, to it in
37 reply, I'm not going to go into too much detail.

38 THE COURT: But your point at 59 is that it's
39 insolvent.

40 CNSL K. JACKSON: 59 is that they are insolvent. I
41 mean, they are. There's no doubt about it.

42 They -- they -- they can't pay Sanovest. They
43 have \$2 million of aged payables. They owe --
44 that obviously includes approximately \$540,000 for
45 accounting and legal services provided --

46 THE COURT: Yeah.

47 CNSL K. JACKSON: -- since 2022. And some of those

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Submissions re receivership order by Cnsl K. Jackson

1 professionals have said they'll discontinue
2 services unless paid.

3 There's no dispute about the -- the fact
4 that that's -- and that's not disputed.

5 Paragraph 60, they defaulted on a \$300,000
6 payment to Langford, which resulted in an action
7 being commenced against Developments seeking
8 judgment of about \$1.8 million. It affected two
9 other actions involving claims of 1.5 and
10 \$2.1 million. It goes on and on and on and on.

11 And so, I mean, I -- it can't seriously be
12 disputed that they're insolvent. That's --
13 that's -- that's practically a given at this
14 point.

15 THE COURT: I think when you start at 66 -- we'll have
16 to come back at 2:00. But just before we break,
17 can you tell -- what -- what's the interest rate
18 charge that Sanovest wants to charge under the --

19 CNSL K. JACKSON: 8 percent. 8 percent.

20 THE COURT: 8 percent, yes.

21 CNSL K. JACKSON: Compounded quarterly.

22 THE COURT: Okay. And, Mr. Ferris, I have one question
23 for you. I don't know if it's properly put to you
24 or other counsel.

25 Is your client's position that I -- I should
26 and I can determine the allegations in the
27 oppression action on -- on the summary
28 application?

29 CNSL C. FERRIS: Our -- our -- our position is that
30 it's essentially an injection test, and so you
31 would look at it in the same manner as that.

32 THE COURT: Okay. But at the end of the day, the
33 relief your client's seeking in the -- on the
34 oppression is for the interim relief, the -- an
35 order concerning subdivision, the appointing of
36 some sort of receiver with limited powers?

37 CNSL C. FERRIS: Essentially you have a company that
38 has -- at least by appraised value -- an excess of
39 200 -- very large --

40 THE COURT: Yeah.

41 CNSL C. FERRIS: And -- and -- and it -- and a debt
42 which is a very small percentage of that overall
43 value and a client who has been trying to sell
44 assets to pay the debt for over two years and had
45 been stymied by Mr. Kusumoto.

46 THE COURT: Okay.

47 CNSL C. FERRIS: And so our position is, essentially,

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1 that you should do what's required, not take
2 control away and essentially give the victory in
3 the oppression -- of the oppressive actions as
4 part of an interim application.

5 THE COURT: Okay. Then something I'd like everyone to
6 think about, and that is I -- I don't know that
7 it's so much as a victory, but if the company --
8 if the parties are deadlocked and these are --
9 these allegations that engaged the oppression
10 action and these other actions I'm learning about
11 are something that's going to trial and the
12 parties recognize that assets need to be sold to
13 fund the business and the obligations of -- of a
14 receiver are owed to all of the stakeholders and
15 having been taken to Mr. Matthews' evidence that
16 he's not opposed to an unblock sale, I am -- I'm
17 going to obviously have to hear from
18 Mr. Matthews -- why not appoint a court's officer
19 to look at the whole of the matter? Particularly
20 in view of these allegations where each side's
21 alleging the other one is engaged in self-dealing,
22 self-interest, abuse of -- abuse -- breach of
23 fiduciary duty, all sorts of things?

24 CNSSL C. FERRIS: So -- so the simple answer is it's the
25 scope of what the person can do.

26 THE COURT: Yeah.

27 CNSSL C. FERRIS: We don't oppose. We've been trying to
28 sell --

29 THE COURT: Yeah.

30 CNSSL C. FERRIS: -- for two years. Been stymied. The
31 point is that there is a continuing dilution of
32 my -- of my client's interest every day that that
33 loan is outstanding.

34 THE COURT: Right.

35 CNSSL C. FERRIS: It's about \$13,000 a day. And so
36 we're looking for the quickest, most efficient
37 process to get that loan paid off.

38 And then if there needs to be a different
39 relief brought in where the parties are -- are --
40 are on more equal footing so -- so they -- this
41 process can't be -- my -- my friend can't suggest
42 that, receiver, you know what you should do? You
43 should build out this project for the next 10
44 years and while the clock ticks against my client.

45 The -- that's what we're trying to prevent.

46 THE COURT: Okay. So if -- but if I -- if there's an
47 independent court's officer that looks at this and

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Submissions re receivership order by Cnsl K. Jackson

1 is mindful of the -- of the burn rate and the need
2 to get funds in to pay off Sanovest, I would --
3 I -- I'm -- I'm going to have to hear from you on
4 what the impediment of that is while, on the other
5 hand, I'll being asked to issue an order that
6 reflects subdivision where -- I mean, it requires
7 an outlay of expenditure, municipal approvals, and
8 the like that would take a long period of time.

9 CNSL C. FERRIS: So we don't agree with that. And
10 so --

11 THE COURT: Oh, I see. Okay. All right.

12 And I just wondered if everyone -- seems to
13 me all parties recognize there's financial
14 distress. The operation is deadlocked. And I
15 wonder what -- and -- and parties reserve their
16 rights to -- to oppose any relief or course of
17 action recommended by the receiver. But the
18 receiver, at the end of the day, is the
19 independent court's officer, who owes duty do all
20 of the parties. I -- I wonder if there's not
21 some --

22 CNSL C. FERRIS: So in the first line in our argument,
23 if you read it, is a question is the scope of that
24 receiver's powers.

25 THE COURT: Yeah.

26 CNSL C. FERRIS: Not that -- whether or not there
27 should be a receiver.

28 THE COURT: Yeah, in a -- I -- I read it.

29 CNSL C. FERRIS: And -- and so that's -- that's what
30 the -- the submission is -- is about.

31 THE COURT: Yeah.

32 CNSL C. FERRIS: And the problem -- you know, my -- we
33 can't get funding because Mr. Kusumoto won't agree
34 to sell the assets, so no third-party funder will
35 provide it.

36 THE COURT: Right.

37 CNSL C. FERRIS: And so we're -- we're in this circle.

38 But the question is -- is -- is really let's
39 get this paid off efficiently and quickly and --
40 and -- and -- and pay them off to the extent
41 that's required.

42 THE COURT: Right.

43 CNSL C. FERRIS: And not sort of take over the
44 operations and go to a big expensive process,
45 which Sanovest then funds again for years on, and
46 it keeps clicking against my client.

47 You know, a receiver to manage is way more

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Submissions re receivership order by Cnsl K. Jackson

1 expensive than a receiver to sell.

2 THE COURT: I see.

3 CNSL C. FERRIS: And so that's what we've tried to do.

4 We've tried to be efficient, we've tried to be --

5 to do what's required, not what's putting

6 Mr. Kusumoto in a preferred position.

7 THE COURT: I see. Well, although the receiver, if --

8 if -- a receiver with full powers is appointed may

9 not recommend that. It may.

10 CNSL C. FERRIS: If you -- a receiver with full powers

11 is recommended today to take over the operations,

12 that clock starts ticking immediately.

13 THE COURT: I see. And -- okay. Very good. That

14 helps. Thank you very much.

15 THE CLERK: Order in chambers. Chambers are adjourned

16 for the noon recess.

17
18 **(EXCERPT ENDS) ([12:37:42 PM])**

19 **(PROCEEDINGS ADJOURNED) ([3:19:04 PM])**

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No. S234048
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE JUSTICE WALKER)

Vancouver, BC
September 10, 2024

BETWEEN:

599315 B.C. LTD. and DANIEL MATTHEWS

Petitioners

AND:

ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS DEVELOPMENTS LLP, and
ECOASIS RESORT AND GOLF LLP, TIAN KUSUMOTO, and
SANOVEST HOLDINGS LTD.

Respondents

No. S243389
Vancouver Registry

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE RECEIVERSHIP OF ECOASIS
DEVELOPMENTS LLP AND OTHERS**

BETWEEN:

SANOVEST HOLDINGS LTD.

Petitioners

AND:

ECOASIS DEVELOPMENTS LLP,
ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS RESORT AND GOLF LLP, 0884185 B.C. LTD.,
0884188 B.C. LTD., 0884190 B.C. LTD., 0884194 B.C. LTD.,
BM 81/82 LANDS LTD., BM 83 LANDS LTD., BM 84 LANDS LTD.,
BM CAPELLA LANDS LTD., BM HIGHLANDS GOLF COURSE LTD.,
BM HIGHLANDS LANDS LTD., BM MOUNTAIN GOLF COURSE LTD.
and BEAR MOUNTAIN ADVENTURES LTD.

Respondents

EXCERPT FROM PROCEEDINGS IN CHAMBERS
(Proceedings from 2:06 PM to 3:19 PM)

COPY

APPEARANCES**Counsel for Sanovest Holdings:****A.I. Nathanson, KC
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EXCERPT FROM PROCEEDINGS IN CHAMBERS
SEPTEMBER 10, 2024
(Proceedings from 2:06 PM to 3:19 PM)

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EXHIBITS

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No exhibits marked.

1
Submissions by Cnsl K. Jackson

September 10, 2024
Vancouver, BC

(EXCERPT FROM PROCEEDINGS)

(PROCEEDINGS COMMENCED AT 10:11 AM)

(EXCERPT BEGINS AT 2:06 PM)

THE COURT: Mr. Jackson.

CNSL K. JACKSON: Thank you. Justice, two of our -- three of our colleagues, I think, are out in the hall trying to negotiate the order that you might issue this afternoon, so they may -- I'm sure they'll make their way back in.

THE COURT: All right.

CNSL K. JACKSON: But that's why you see a couple fewer bodies.

I have two things for you, Justice. One is, as we've described it, a nonintuitive org chart that Ms. Hiebert managed to find and get.

THE COURT: Oh, good.

CNSL K. JACKSON: And also a list of the nominee entities. Those are the ones that own -- legal owners of the real property --

THE COURT: Perfect.

CNSL K. JACKSON: -- and guarantors of the indebtedness of the partnership to Sanovest. The second one, the nominee entities, is just a handy list, because it's in the materials, but that just enumerates it in one place for your ease of reference.

On the org chart, yeah, it's -- you'll see Sanovest and 599 on the far left and right. Each own 50 percent of the actual shares of EBMD, Ecoasis Bear Mountain Developments. That's the manager company. And then you'll see there their partnership unit interests in Ecoasis Developments LLP.

THE COURT: Okay.

CNSL K. JACKSON: Along with the 0.5 percent interest of EBMD, and then below all of that is the resort partnership and the relative interests being held by the development's partnership and EBMD.

THE COURT: And the managing partner is?

CNSL K. JACKSON: EBMD. That's the one that's the -- that's the one that manages the company that manages the partnerships, the business.

2

Submissions by Cnsl K. Jackson

1 CNSL C. FERRIS: Just to be completely accurate, it's
2 the general partner in a limited partnership.
3 CNSL K. JACKSON: Sorry, I missed your question. Yes,
4 that's not the managing partner; the general
5 partner.

6 THE COURT: It's the general partner.

7 CNSL K. JACKSON: It also manages the operations, but
8 it is the general partner too.

9 THE COURT: General partner in what partnership,
10 Mr. Ferris?

11 CNSL C. FERRIS: I've said it correctly.

12 CNSL K. JACKSON: It's an LLP, which I was corrected
13 on earlier. So when he says GP --

14 THE COURT: It's an LLP?

15 CNSL K. JACKSON: It's an LLP, right, and so it's --

16 THE COURT: But it's also the managing partner.

17 CNSL K. JACKSON: It's the managing partner.

18 CNSL C. FERRIS: It's the managing partner.

19 CNSL K. JACKSON: Within, yes.

20 THE COURT: Of?

21 CNSL K. JACKSON: Of the operations end of the LLP.

22 THE COURT: All right. Okay.

23 CNSL K. JACKSON: So Justice, I left off -- I think
24 we've sort of -- I'm going to -- I'll try to
25 be -- I'm trying to be less than an hour here.
26 We started at 66. That's sort of where I left
27 off about the equivocal evidence as to the
28 partnership's financial state.

29 This goes to something I'll come back to
30 again. Mr. Ferris gave us a little bit of a
31 preview of the response, which will help me to be
32 able to focus submissions a little bit in my
33 submissions, and this is relevant to, you know,
34 why a receiver needs to be appointed over the
35 whole enterprise, including resort's partnership
36 and its business.

37 And it goes back to something we've harked
38 on a little bit here, but there's some pinpoint
39 sites around the evidence at paragraph 66 about
40 the partnerships' financial distress. And his
41 evidence back in May, I recall, was that resort
42 partnership's revenues -- this is at 66 -- were
43 insufficient to support expenses, with operating
44 expenses, including property taxes, of more than
45 \$200,000 per month. Payments at that time were
46 being deferred in the amount of \$2 million. I
47 think I was saying they had accrued accounts

3
Submissions by Cnsl K. Jackson

1 receivable. They had accrued accounts payable,
2 of course -- I'm sure you understood what I
3 meant --
4 THE COURT: I did.
5 CNSL K. JACKSON: -- of \$2 million.
6 THE COURT: I figured it out. When I first --
7 CNSL K. JACKSON: Very good. Why am I harping on all
8 this money coming to them.
9 THE COURT: Yeah, that's right. I thought it was --
10 CNSL K. JACKSON: It's --
11 THE COURT: -- aged AR that was going to be written
12 off.
13 CNSL K. JACKSON: Yeah, no.
14 THE COURT: It's the converse.
15 CNSL K. JACKSON: Yes, and thank you. I'm glad that
16 was clear to you, but I apologize for that
17 confusion. That's a mistake I make occasionally.
18 And then last, in September 2023, the
19 partnership's been holding signed cheques due to
20 the shortfall, in the status quo is not
21 sustainable.
22 THE COURT: Right.
23 CNSL K. JACKSON: At the time he also swore that the
24 partnership's reputation and goodwill have
25 already been affected and its viability was at
26 risk.
27 THE COURT: All right.
28 CNSL K. JACKSON: Now, one of the things that 599 says
29 now is, you know, receivership over everything is
30 bad for the value and for the assets of the
31 business. Well, first of all, let's not forget
32 that they're seeking a receivership too, just not
33 a complete receivership.
34 Second of all, there's plenty of evidence
35 about the partnership dispute and the financially
36 strained circumstances of the partnership in the
37 media already. There's an affidavit of Irene Lee
38 in the materials which has a whole bunch of --
39 some of the press around this already.
40 THE COURT: So where do I find that?
41 CNSL K. JACKSON: That is at --
42 THE COURT: Condensed book?
43 CNSL K. JACKSON: I'm just going to find that for you.
44 Tab 10 of the condensed book.
45 THE COURT: All right.
46 CNSL K. JACKSON: And not all the -- so of course, in
47 the larger volumes you'll find the full amount,

4
Submissions by Cnsl K. Jackson

1 but there are articles here from various
2 publications: *Business in Vancouver, Vancouver*
3 *Island Free Daily, Victoria Times Columnist, Chek*
4 *News, Victoria News*, all through, and some of
5 them have been reproduced and attached as some of
6 the exhibits. And they're from as far back --
7 the first one, at tab B -- from 2022 about
8 lawsuits being filed against Bear Mountain, and
9 it already mentions Sanovest and 599.

10 And 2023, at Exhibit C, *Business in*
11 *Vancouver*, talking about the developer claiming
12 the partner blocking sales. In other words, this
13 dispute has been aired. At D, City of Langford
14 suing Bear Mountain.

15 This dispute -- the partnership's financial
16 circumstances, it has been aired in public
17 extensively, so the idea that a receivership is
18 somehow going to change things, while in some
19 cases that might be true, in this case that would
20 be very hard to hold up as being a concern.

21 And just to put a fine point on that, I'm
22 going to take you, Justice, to tab 17 of the
23 joint record -- sorry, the condensed record, and
24 it's page 10, paragraph 16. So one of the things
25 in response to concerns about values and
26 reliability of appraisal raised by Sanovest,
27 Matthews and 599, at paragraph 16, say, well,
28 here's a true copy of -- this is five lines
29 down -- four lines down -- of a Bear Mountain
30 valuation and marketing proposal prepared by
31 Colliers dated 2023, talking about how it's going
32 to maximize value by proceeding with sales at
33 this time and such.

34 Well, if you look at that, it's tab E, which
35 is one of the -- the first tab you'll see -- the
36 only tab, I think, in it. If you turn to
37 page 118.

38 THE COURT: One-eight-zero?

39 CNSL K. JACKSON: One-one-eight.

40 THE COURT: Oh, one-one-right.

41 CNSL K. JACKSON: Yes. And so it's a very small --

42 THE COURT: Yeah, I see it.

43 CNSL K. JACKSON: Right at the top. It says "Possible
44 Marketing Approaches."

45 THE COURT: Yeah, okay. Let me just get to 118.

46 CNSL K. JACKSON: 118. Close to the end, but you'll
47 see small -- yeah.

5
Submissions by Cnsl K. Jackson

1 THE COURT: Okay. I've got it.
2 CNSL K. JACKSON: Right. "Possible Marketing
3 Approaches."

4
5 *En bloc* sale of all sites.
6

7 This is the second line down. Now, this is the
8 valuation that had been put forward by --
9 marketing approach put forward by Mr. Matthews.

10 THE COURT: And just -- Colliers was retained by
11 Mr. Matthews --

12 CNSL K. JACKSON: Yes.

13 THE COURT: -- or by the partnership?

14 CNSL K. JACKSON: Well, let's see what he says. I
15 want to be sure before I say that unequivocally.
16 he says:

17
18 ... prepared by Colliers, delivered to the
19 partnership.
20

21 THE COURT: Okay.

22 CNSL K. JACKSON: So I assume it would have been
23 obtained by the partnership. Prepared for
24 Ecoasis Developments LLP.

25 THE COURT: Okay. There are different options
26 being -- different approaches, three.

27 CNSL K. JACKSON: There are. There are. But one of
28 the things it does say, *en bloc* sale of all
29 sites.

30 THE COURT: Right.

31 CNSL K. JACKSON: The second part down on 118:

32
33 There is meaningful skittishness within the
34 development community of acquiring and
35 owning a single component or components of
36 Bear Mountain, given its perception of
37 conflict within the Ecoasis ownership group
38 and how a single development might be
39 affected. Rational logic would suggest that
40 outright ownership of a development site
41 within the Bear Mountain community should
42 not be concerning to a developer, as it
43 would have nothing to do with Ecoasis.
44 Reality, though, suggests that successful
45 development requires cooperation, and most
46 purchasers would stay away from potentially
47 being affected by Ecoasis ownership

6
Submissions by Cnsl K. Jackson

1 conflicts.

2
3 In other words, you know, going to have a tough
4 time selling pieces of this and not the whole,
5 says Colliers, the person engaging that
6 partnership, and this is the evidence put forward
7 by Mr. Matthews.

8 THE COURT: And when was this prepared? November?

9 CNSSL K. JACKSON: 2023. It was from -- I think --
10 I'll just give you the exact date. November
11 2023.

12 THE COURT: All right.

13 CNSSL K. JACKSON: Sorry, just to complete this, I've
14 been asked by my colleagues to continuing reading
15 that page at 118:

16
17 This could be alleviated if the sites at
18 Bear Mountain are offered before sale in
19 their entirety, as this would eliminate the
20 market's concerns with respect to Ecoasis
21 being able to execute on a sale.

22
23 Ms. Hiebert thinks I need to finish my point
24 earlier, being that a receivership -- this goes
25 back to my point. A receivership -- you know,
26 there's already market skittishness. That's a
27 concern, so let's be fair that a receivership is
28 not going to be the problem here for attaining
29 value for the lands.

30 THE COURT: Yeah.

31 CNSSL K. JACKSON: And *en bloc* seems to be better,
32 according to Colliers too.

33 THE COURT: They're saying getting the internal
34 disputes out of the picture is important.

35 CNSSL K. JACKSON: Right. Who would want to buy into
36 this, is kind of the point I think they're making
37 as politely as they can.

38 I'm going to go over -- skip over some of
39 the further parts of my written submissions,
40 Justice. You have them, of course, and you've
41 read them, I believe.

42 But one thing I did want to go back to,
43 because this concerns the current status of the
44 finances. I didn't take you to the evidence
45 exact, but you heard in the paragraph immediately
46 preceding 66 that there was \$2 million owing as
47 of May, that it was going to get paid down --

7
Submissions by Cnsl K. Jackson

1 this is paragraph 69 -- it was going to get paid
2 down by \$780,000. That's at paragraph 69. So an
3 immediate payroll crisis, says Matthews, has been
4 avoided:

5
6 ... and I expect operations will be
7 sustained at least through the summer and
8 into the early fall.

9
10 But that's as far as it goes. And in that time,
11 he says it's going to pay down creditors from
12 2 million by \$780,000.

13 I handed up a piece of paper to you that
14 showed what the current outstanding cheques and
15 AP are, but now that I have you with the
16 condensed record, at tab 18, Exhibit O.

17 THE COURT: All right.

18 CNSL K. JACKSON: This is the bank balances of
19 Developments and Resorts at August 1st, 2024.
20 So --

21 THE COURT: Right.

22 CNSL K. JACKSON: So we know from the earlier document
23 that shows the amount of outstanding cheques and
24 the amount of accounts payable, well -- and that
25 was all on August 6th. Five days before that, if
26 you look at the top line of this, it's a bit
27 small print, but Ecoasis Developments has just
28 over \$3,000 in its bank account -- in that bank
29 account, and at the very bottom, it seems to
30 have -- no, it doesn't, sorry. Just over \$3,000.

31 It also has a MasterCard, at the very
32 bottom, with just under \$7,000 owing on it.

33 THE COURT: Where do I see that?

34 CNSL K. JACKSON: Very bottom. Look at the left line,
35 "business MC."

36 THE COURT: Oh, business MC, right. Right, okay.

37 CNSL K. JACKSON: So a Canadian balance owing on a
38 MasterCard of just under 7,000 against cash of
39 3,000.

40 And then if you look -- okay. And that
41 doesn't even account for -- just numbered 51,
42 which is Exhibit R, which you can flip to it if
43 you want to go back and forth between them.

44 THE COURT: Right.

45 CNSL K. JACKSON: So Development has unreleased
46 cheques still of 78,000 and payables of 575,000
47 against an account which is negative when you net

8

Submissions by Cnsl K. Jackson

1 them between the MasterCard and the bank account
2 as of August 2024. That's Developments.

3 Now, for the resort, Resorts, if you go back
4 to tab O -- or Exhibit O -- you'll see a business
5 account with 22,000 -- just over \$22,000 of cash
6 in one account for Resorts, a small amount in
7 another account below that.

8 THE COURT: Right.

9 CNSSL K. JACKSON: A US account about halfway down of
10 just over \$2,000.

11 THE COURT: Oh, yeah. Okay.

12 CNSSL K. JACKSON: So about \$25,000 in total. There's
13 a MasterCard which has a balance of over \$20,000
14 for Resorts. That's the second from the bottom.

15 THE COURT: M'mm-hmm.

16 CNSSL K. JACKSON: Business MC. So putting those
17 together, there's maybe 5,000, \$4,000 free cash.

18 Flipping back to Exhibit R, there's
19 unreleased cheques of \$575,000 for Resorts, and
20 there's accounts payable of \$900,000 for Resorts
21 with this much money in the bank account, when
22 Mr. Matthews' evidence was that things were going
23 to be fine through the summer and we'd pay things
24 down by 780,000.

25 That goes to my point. One of the things
26 I'll say -- I'll come to a little bit more --
27 I'll say right now this -- I understand when 599
28 says, if you put a receiver in that's going to
29 manage the business, there's going to be
30 incremental cost, I accept that as true. But
31 sometimes you need to put a receiver-manager in
32 to manage a business.

33 When does that occur? Well, in a couple of
34 obvious situations. One, where the business is
35 not being run well or there's concerns about the
36 business not being run well. That's been
37 expressed by Mr. Kusumoto. It's been contested
38 by Mr. Matthews, but there's a concern, and
39 perhaps, the evidence shows, that it's running
40 pretty lean, and that's a concern.

41 But the second reason is if this is going to
42 continue to operate without harming
43 stakeholders -- and I mean stakeholders including
44 Sanovest -- that business is part of its
45 collateral. If it ends up in trouble because
46 another creditor takes steps or because it, in
47 fact, starts bouncing cheques or someone sues,

9
Submissions by Cnsl K. Jackson

1 that's bad for Sanovest, for its collateral,
2 which it bargained to get. It's also bad for
3 third parties who continue to do business with
4 them -- with the partnership.

5 And so you put a receiver-manager in to look
6 after the business, to safeguard it and to
7 ensure, in part, that the collateral isn't
8 prejudiced, isn't devalued, and to ensure that
9 third parties aren't prejudiced. In other words,
10 we can take comfort that, where the receiver is
11 appointed over a business, that accounts will get
12 paid, post filing accounts will get paid. There
13 will be a stay, and all ongoing supply, which is
14 mandated, will ensure that those suppliers get
15 paid and payroll gets paid.

16 We can't say that now. We can't say that
17 with confidence now, given the evidence that's
18 before the court as recently as August. And so
19 there is an incremental cost, but it's necessary.

20 And I will say this. This isn't a pulp
21 mill. This is a golf course with a pro shop.
22 Generally speaking, these are light touches by
23 receivers in terms of management. They have
24 existing personnel who know how to run the golf
25 course. They can retain them. In fact, if
26 Mr. Matthews is the right person to run the golf
27 course, and this seems very important to him,
28 well, he can be retained, if the receiver is
29 satisfied that he's the right person for it.

30 In other words, you can minimize costs by
31 just keeping the existing infrastructure and
32 management in place. They basically look after
33 accounts payable. They look after cheques going
34 out. They ensure that everyone's getting paid,
35 and if there's a need for funding, they can get
36 funding.

37 So Justice, what I'd like to do, if I may,
38 is just turn to the legal basis portion of the
39 submissions, which start at page 21, and some of
40 this I'm also going to go through fairly quickly,
41 because --

42 THE COURT: So even if -- so just to go back to your
43 last point.

44 CNSL K. JACKSON: Yes.

45 THE COURT: So if even Sanovest objected, if the
46 receiver came along and said, look, the most
47 business-effective thing to do is to retain

10
Submissions by Cnsl K. Jackson

1 Mr. Matthews in his capacity.

2 CNSL K. JACKSON: Yes.

3 THE COURT: Because he has the greatest knowledge of
4 the day-to-day operations, that's the receiver's
5 recommendation.

6 CNSL K. JACKSON: That may be the best thing to do,
7 and -- like, even if Mr. Kusumoto doesn't agree
8 with it, and given his evidence, he probably
9 doesn't, that's not determinative, of course, and
10 this goes to another point that I think I was
11 going to come to later, but I think there's a bit
12 of a misapprehension as to the receiver's --
13 having heard from my friend earlier and getting a
14 little preview of the response, there's a bit of
15 a misapprehension there.

16 If our client says, hey, receiver, we want
17 you to develop 20 vertical stories, the receiver
18 is not bound to do that. It's not -- it's not
19 Sanovest's agent. It's not Sanovest's guy. The
20 receiver does what it thinks is best.

21 I will say this. I'd be absolutely
22 flabbergasted and floored if the receiver decided
23 to take, you know, land that had basically been
24 bare land or some servicing and somehow come up
25 with a plan to develop it over 20 years. I have
26 never seen that.

27 THE COURT: I suppose a concern for Mr. Matthews might
28 be, since Sanovest is prepared to fund this
29 aspect of the receivership and not the other one,
30 is that Sanovest, if it got unhappy with the
31 receiver's recommendations, could pull the plug
32 on financing. So I'd have to make sure that
33 there's a sufficient fund charged for the
34 receiver.

35 I mean, I'm trying to --

36 CNSL K. JACKSON: Yeah. No, I mean --

37 THE COURT: -- read into what Mr. Ferris's client's
38 concern is. Is that -- I'm kind thinking how can
39 the receiver be the agent of Sanovest and be told
40 what to do.

41 CNSL K. JACKSON: Right. It can't.

42 THE COURT: He's the court's officer.

43 CNSL K. JACKSON: Right.

44 THE COURT: But the receiver owes obligations to all
45 stakeholders. The law is very clear on that. So
46 how could Sanovest have some sway over the
47 receiver? Well, it would be through funding. So

11
Submissions by Cnsl K. Jackson

1 I thought, well, is that what the concern is?
2 Sanovest would say, well, we're really unhappy
3 and we want to cut off the fund something.
4 CNSL K. JACKSON: Yeah, it's a fair question. I don't
5 think that was exactly my friend's point.
6 THE COURT: No, it wasn't.
7 CNSL K. JACKSON: But it's one that he might have
8 raised.
9 THE COURT: But that's what I --
10 CNSL K. JACKSON: -- and which -- and so we should
11 address it.
12 I mean, I think we see that more in a CCAA
13 where the, you know, existing secured will put
14 cash flows and restrictions on the financing,
15 because they're the only source of the financing.
16 THE COURT: Right.
17 CNSL K. JACKSON: You know, financing, they could do
18 it under a borrowing certificate here. Here's
19 my -- the safeguard in all of this is I don't see
20 this receiver -- any receiver -- being bound to
21 any party, and the reason is this. These lands
22 have value sufficient to pay for the receiver's
23 costs.
24 THE COURT: I see.
25 CNSL K. JACKSON: Many times over. And so if they
26 think that Sanovest or some other party that's
27 prepared to lend, including, perhaps, 599, is
28 trying to tie in restrictions on use of funds and
29 what the receiver is going to do, I suspect that
30 receiver would be going straight to the market
31 and saying, thanks, but no thanks; I'm happy to
32 go get it from -- and name your ten parties that
33 are happy to cut a cheque against lands that have
34 significant value.
35 THE COURT: Right. Okay.
36 CNSL K. JACKSON: Right.
37 THE COURT: So there's sufficient -- there's
38 sufficient value there to cover the receiver's
39 costs so that it doesn't have to be worried about
40 Sanovest cut off financing.
41 CNSL K. JACKSON: No, and in fact, Mr. Matthews would
42 say the same thing. He says in his evidence, I
43 don't doubt there's any problem getting financing
44 against these lands in the event of a
45 receivership. That's paraphrasing, but that's
46 what he says.
47 THE COURT: Okay. All right.

12

Submissions by Cnsl K. Jackson

1 CNSL K. JACKSON: And so I don't think -- I mean, it's
2 a fair question. I think, if the circumstances
3 were different and this thing had only one source
4 of financing --

5 THE COURT: Yeah.

6 CNSL K. JACKSON: -- you might say, ah-ha, I've seen
7 this before; you're going to tie them up in knots
8 and make them do what you want. But that can't
9 happen here.

10 THE COURT: Yeah, okay.

11 CNSL K. JACKSON: Which also includes how the
12 partnership is run by the receiver, and if the
13 receiver decides, this is the most efficient and
14 best way to do it, is to maintain, effectively,
15 the status quo, so be it. So be it. And, you
16 know, certainly our client -- you know, it's
17 bought into the concept of a receivership and
18 handing everything over to the receiver.

19 THE COURT: Right.

20 CNSL K. JACKSON: You'll see the order -- you know, if
21 we get to it -- is very much around standard
22 model order, in fact adding in a provision to
23 ensure that SISP is approved by the court to
24 allay concerns in that regard too.

25 THE COURT: Okay. All right. So you were --

26 CNSL K. JACKSON: I was going to go to the legal
27 basis, and I think --

28 THE COURT: What page is that?

29 CNSL K. JACKSON: That's at page 21.

30 THE COURT: Okay.

31 CNSL K. JACKSON: Although I'm going to probably skip
32 through some of this, because I know that in
33 their response 599 says that a receiver --
34 appointment of receiver is not justified, which
35 I'd say I don't know how you can say that, given
36 what they're seeking. I think they've come past
37 that, and I think now, having heard this in the
38 beginning, it's a question of what receivership
39 order you should issue.

40 THE COURT: Yeah.

41 CNSL K. JACKSON: I'm going to skip through the
42 authority of the court to grant a receivership
43 order. Whether one should be made, it should.
44 I'm going to skip through the *Maple Trade*
45 factors for now.

46 THE COURT: Okay.

47 CNSL K. JACKSON: Because I will touch upon them in a

13
Submissions by Cnsl K. Jackson

1 bit. I want to touch on a couple of cases,
2 though, before I dive in a little bit to the
3 facts of this one, which is start at
4 paragraph 86.

5 THE COURT: Okay.

6 CNSL K. JACKSON: Which is the decision in *CMI*
7 *Roadbuilding* at -- it's in the joint book of
8 receivership authorities, the smaller one.

9 THE COURT: Oh, yeah, okay.

10 CNSL K. JACKSON: I think we handed it up.

11 THE COURT: Just give me a minute to get it.

12 CNSL K. JACKSON: It would be tab 8, and it's the very
13 last page of tab 8, so almost easier to flip to
14 tab 9 and go backwards. Or second-to-last page,
15 I guess.

16 THE COURT: Justice Macintosh.

17 CNSL K. JACKSON: Right. Right. So in this one --
18 this case -- I mean, I know it because I was
19 involved -- the secured creditor who supplied
20 equipment to the debtors said, hey, you know, you
21 haven't paid for it. You've got a security
22 interest, and we want a receiver appointed. And
23 they said, this thing's -- this thing you gave
24 us, it's an asphalt machine. You sold us a bill
25 of goods. It's a lemon. It doesn't work. It
26 never got -- it never got commissioned. We don't
27 owe you what you say you owe us. All of that was
28 accepted.

29 But what they -- what Justice Macintosh said
30 is, well, okay. There's a lot of disputes around
31 that, but -- a bit like what the court said this
32 morning -- was that can all come out in the wash,
33 can't it? And so what he says, if you look at
34 the last line at the bottom of page 11 -- or
35 second-to-last:

36
37 I accept CMI's submissions that the facts at
38 bar bear many similarities to those in *Ward*
39 *Western* where a receiver was appointed. Of
40 further note from *Ward Western*, the Court of
41 Appeal at paras. 68-87 --

42
43 And that case is in here if Justice wants to turn
44 to it, but I don't need to myself.

45
46 -- addressed the point that a receiver can
47 be appointed even where the facts of the

14
Submissions by Cnsl K. Jackson

1 case are actively disputed in conflicting
2 evidence, provided the evidence establishes
3 the basis for the appointment consistent
4 with the tests found in cases such as *Maple*
5 *Trade Finance*. That is the situation before
6 me.

7
8 And so it's a bit what I said early on. There's
9 going to be a lot of conflicting evidence, and
10 you can sift through all of that and decide
11 whether, under *Maple Trade*, the receivership
12 appointment on the terms sought is appropriate,
13 ignoring the conflicts in evidence on immaterial
14 issues.

15 The other case I'm going to go through in a
16 little bit more detail is *Pandion*, which is
17 tab 15. And so this is an application. This was
18 a mess of a mining enterprise where the secured
19 creditor, Pandion, sought to approve a receiver.
20 The mining debtor -- mining company debtor is
21 Otso, O-t-s-o, and there were lawsuits among
22 Otso, its majority shareholder, Pandion and
23 another party, Lionsbridge. It was quagmire.

24 At paragraph 4 of the decision, the court
25 notes that:

26
27 The petitioners ("Pandion") collectively
28 constitute Otso's only secured creditor.
29 There is a dispute as to how much Pandion is
30 owed.

31
32 Like this case.

33
34 It may be in the vicinity of US\$26 million
35 or exceed US\$95 million. Whatever the
36 amount owing, there is no dispute that Otso
37 is in default and is not in a position to
38 pay.

39
40 Then it goes on to describe some of the
41 litigation:

42
43 Otso's majority shareholder ... maintains
44 that it was induced by fraudulent
45 misrepresentations and other wrongful
46 conduct on the part of Pandion and
47 Lionsbridge into investing US\$27 million ...

15
Submissions by Cnsl K. Jackson

1
2 It's advanced claims and actions recently
3 commenced in Connecticut and in this Court.

4 Paragraph 6:

5
6 Otso is insolvent because it is at present
7 unable to pay its debts as they come due.
8 Otso's financial predicament is compounded
9 by the following:

10 The value of the mine is uncertain.

11
12 Well, probably have more certainty in lands in BC
13 than a mine, but you never know what value is.

14
15 The amount owing to Pandion is uncertain.

16
17 We have a dispute on that. And (c):

18
19 Brunswick is suing Pandion and Lionsbridge,
20 and there may be claims by or against Otso
21 arising from or in connection with this
22 litigation.

23
24 Lots of potential and existing litigation.

25 Paragraph 12 the court notes that Otso, the
26 debtor, doesn't oppose the application, but says
27 the appointment of a receiver should include
28 certain terms. Brunswick itself completely
29 opposes the application.

30 Background, paragraph 15. 2,500 pages of
31 evidence. Counsel, in their submissions, went
32 into considerable detail with a view to
33 explaining why their respective clients actions
34 were reasonable and those of their adversaries
35 were careless and wrongful. Each side accuses
36 the other of bad faith.

37
38 There are material conflicts in the
39 evidence. Faced with extensive affidavit
40 evidence untested by cross-examination, and
41 having heard just three days of argument in
42 chambers ... I am not in a position to
43 resolve the conflicts. However, to provide
44 context for this decision, it is important
45 that I outline three important disputes.

46
47 And he goes on. I don't need to go into these.

16
Submissions by Cnsl K. Jackson

1 They're not relevant for this. But issues
2 concerning the mine's prospects, number one.
3 Over the page, dispute as to the amount owing to
4 Pandion. Page 10, Brunswick's claims against
5 Pandion and Lionsbridge, which have already been
6 commenced, he notes at paragraph 31.

7 So some initial discussion around interim
8 receivership or receivership.

9 Page 15 I'll pick up next, Justice.

10
11 Is it just or convenient that a receiver of
12 Otso be appointed?
13

14 And so the court goes through *Textron*, of course
15 another one of the seminal cases in *Maple Trade*.
16 Paragraph 55:
17

18 The following considerations favour the
19 appointment of a receiver in this case.
20

21 56:
22

23 A continuing expenditure of funds is
24 necessary to preserve the value of the mine.
25 Otherwise, it is a wasting asset. Otso does
26 not have the funds required even to keep the
27 mine in "care and maintenance" mode. It has
28 been unable to find a lender in the context
29 of the CCAA proceeding. Brunswick is
30 unwilling to inject further equity. Pandion
31 is willing to fund the necessary expenditure
32 in the context of a receivership, but not
33 otherwise.
34

35 Not dissimilar at all from this case.
36

37 Appointment of a receiver will facilitate
38 preservation and the orderly marketing of
39 the mine for the benefit of all of Otso's
40 creditors, and perhaps even its
41 shareholders. Pandion is the party --
42

43 And again, every hope here that there is return
44 for equity and it's not insignificant.
45

46 -- with the greatest economic stake. It has
47 first call on the assets, it is not clear

17
Submissions by Cnsl K. Jackson

1 that there is sufficient value that it will
2 be paid in full, and the value of its
3 security is deteriorating. It is the
4 fulcrum creditor. Moreover, Pandion has
5 contracted for the right to appoint a
6 receiver.

7
8 58:

9
10 There are only two ways out of the present
11 predicament. If the amount owing to Pandion
12 is resolved in Otso's favour so that Pandion
13 can be paid out, it is conceivable that
14 Brunswick may come up with the necessary
15 funds or another equity investor may be
16 found. Otherwise, the mine must be sold.
17 Either way, the appointment of a receiver
18 will facilitate matters by stabilizing the
19 situation. It will prevent the assertion of
20 lawsuits against Otso without leave of the
21 court. The likely alternative is a free for
22 all of litigation and a wasting asset.

23 A court-appointed receiver is objective
24 and neutral, characteristics of particular
25 importance in a case involving competing
26 claims and factual disputes. The receiver
27 may seek assistance from the court. In the
28 context of a receivership, the court may
29 give directions for the resolution of
30 contentious issues.

31
32 That will arise in this case. There are going to
33 be occasions when that arises in this case, and
34 this is a good forum in which to have those
35 disputes resolved quickly.

36 So some of the things the court -- the court
37 ultimately makes the whole receivership order,
38 but it comments on some of the very specific
39 issues. And so page 18, the first thing they
40 talk about is what do we do about the choses in
41 action. And so there are claims, I said, by the
42 partnership against various third parties, and
43 the model order includes choses in action, the
44 court notes.

45 Paragraph 68:

46
47 Choses in action belonging to Otso should be

18

Submissions by Cnsl K. Jackson

1 realized for the benefit of Otso and its
2 creditors. The receiver should be afforded
3 an opportunity to investigate and report on
4 any choses in action it might discern. If
5 the receiver chooses to pursue a claim on
6 Otso's behalf, the model order permits it to
7 do so. As an independent officer of the
8 court, the receiver can be trusted to take
9 such steps. However, it is easy to imagine
10 that Pandion might choose not to fund
11 pursuit of a chose in action that other
12 interested parties might wish to pursue, and
13 that the receiver might be impaired in its
14 ability to pursue such claims.

15 It will be a term of the order that, if
16 the receiver chooses not to pursue a chose
17 in action that an interested party believes
18 should be pursued, that party will be
19 afforded a reasonable opportunity to seek
20 the court's direction. The court might
21 allow the interested party to pursue the
22 claim in Otso's name, on appropriate terms
23 such as ... in the context of a --
24

25 Section 38 order in a bankruptcy. No concerns
26 with something like that in this case, if there's
27 a concern that the receiver might not pursue
28 choses in action.

29 But the first -- the *prima facie*, the
30 starting point, is the receiver pursues or
31 considers and determines whether to pursue choses
32 in action, and if not, then there's every
33 opportunity to come back to the court and have
34 that resolved.

35 Sub (c), which is -- it's the -- (c) is one
36 of the issues that they wanted to talk about,
37 resolution of the amounts owing to Pandion. Oh,
38 I'm sorry, I've skipped over (b), claims against
39 Otso, which is claims against the debtor company.

40 This order that we're proposing is just like
41 the model order. It stays claims against the
42 debtor without the receiver's consent or leave of
43 the court. And so one of the creditors says, we
44 may wish to apply to lift the stay of actions
45 against Otso, perhaps in the context of one of
46 its actions against Pandion and Lionsbridge.

47 And 72:

19
Submissions by Cnsl K. Jackson

1
2 The stay afforded under clause 8 of the
3 model order is one of the advantages of the
4 receivership. It contemplates further
5 applications to court, as may be necessary.
6 No further provision is necessary.
7

8 And so, again, in this case there are multiple
9 proceedings involving the debtors. Those will
10 proceed with leave -- with consent or with leave.

11 Resolution of the amount owing, of course,
12 that's something that will have to be determined.
13 This is a ready forum for that determination.

14 And so this -- that case has an uncanny
15 similarity to the facts of this case, and the
16 court effectively landed where we suggest this
17 court should land. The full receivership is
18 appropriate, and if issues arise in relation to
19 it because some party is aggrieved or thinks that
20 the receiver should be doing something it's not
21 doing or there's litigation that needs to
22 proceed, that can easily be resolved, and
23 happily, given the way that the insolvency courts
24 operate, it can be done quickly.

25 So back to the written submissions, Justice.
26 So we say, as I've said before, and I'll say it
27 again, the complete receivership order is, we
28 say, the appropriate way to proceed, for all the
29 reasons we've been saying.

30 The partial receivership order, the
31 distribution order --

32 THE COURT: Which page are you at?

33 CNLS K. JACKSON: Oh, sorry. Paragraph 88 on page 24
34 Justice.

35 THE COURT: Okay. Right.

36 CNLS K. JACKSON: And so, just to take paragraph 88
37 and expand it, it's a partial order. It doesn't
38 go far enough. It doesn't resolve -- even if it
39 was appropriate -- even if there was evidence
40 this court could be satisfied that this was the
41 right way to proceed on these lands, what about
42 the rest of the problems? What about the rest of
43 the collateral? What about the rest of the
44 disputes? What about the deadlock? What about
45 the other third parties, employees, suppliers,
46 everyone else that's left dealing with the
47 fallout with respect to the remainder of the

20

Submissions by Cnsl K. Jackson

1 partnership enterprise?

2 One thing I'll point out, at paragraph 94 --
3 this is a point which I'd sort of made before,
4 but I didn't complete the thought -- the
5 partnerships are in a dire financial position.
6 It calls into question the partnerships' ability
7 to maintain, secure and insure the property.
8 They have no money to do any of that. One of
9 Mr. -- when it was pointed out that the golf
10 course didn't do as well this summer, as was
11 expected, one of the rationale -- one of the
12 reasons for it was, well, we had a failure of a
13 pump, I believe, which caused flooding. I think
14 it was a pump. I can't remember what it was, but
15 some piece of equipment, significant piece of
16 equipment which caused damage to two of the
17 holes.

18 This is a classic example of what happens
19 when companies run thin, businesses run thin, and
20 we can't be satisfied they have the funds to
21 ensure they don't?

22 THE COURT: Where does that appear? Just so I have --

23 CNSL K. JACKSON: That is right, and so -- again, I'll
24 move -- I'll get Ms. Hiebert to --

25 THE COURT: Just give me a note of where it is.

26 CNSL K. JACKSON: No, I will. Ms. Hiebert will have
27 that, I'm sure, in two seconds, but I'll carry on
28 and come back to it when she does, because the
29 encyclopedia here is at work.

30 And so one of the other things, property
31 taxes, they weren't paid. 10 percent penalty
32 incurred, the second one by September 2nd, which
33 has now passed, and property taxes, remember, get
34 adjusted daily, so that every day of the sale
35 continues to actually increase property tax
36 exposure for any sale on an adjustment basis.

37 So for the evidence of Mr. Matthews -- oh,
38 this is, sorry, Mr. Larocque, which is the
39 general manager of Resorts. So Mr. Larocque's
40 affidavit at tab 24, complete record --

41 CNSL L. HIEBERT: Sorry, that affidavit was delivered
42 after the condensed record was finalized. It's
43 in volume 8.

44 CNSL K. JACKSON: Volume 8, tab 24.

45 THE COURT: Okay. Right.

46 CNSL K. JACKSON: And so it's at -- Mr. Larocque goes
47 through about why he says -- it's -- he doesn't

21
Submissions by Cnsl K. Jackson

1 disagree that revenues were down and the
2 operations weren't as successful as hope. And so
3 if you look at --

4 CNSL C. FERRIS: That's not the evidence. That is not
5 the evidence.

6 CNSL G. BRANDT: That's an unfair reading of the
7 affidavit.

8 CNSL K. JACKSON: Okay. At paragraph 5:

9
10 Each month I do a mid month check on green
11 fee/cart revenues. This is done so I can
12 ensure our team has sufficient time in a
13 given month to respond should we see an
14 anomaly in revenues. With my mid-month
15 check in July 2024, I noticed that revenues
16 were not tracking relative to last year.

17
18 CNSL C. FERRIS: Yeah, so you have to read
19 paragraph 10 where he goes to the end of July.

20 THE COURT: All right. Go ahead.

21 CNSL K. JACKSON: Should I start there, Justice?

22 THE COURT: Just do 5 --

23 CNSL K. JACKSON: Keep going at paragraph 4? Or
24 paragraph 5?

25 THE COURT: Yeah, read paragraph 5, and then you can
26 take me to 10.

27 CNSL K. JACKSON: Thank you.

28
29 With my mid-month check in July 2024 I
30 noticed that revenues were not tracking
31 relative to last year. I'm in regular
32 contact with general managers from other
33 regional facilities who also reported drops
34 in golf bookings for July 2024. The
35 consensus among general managers was that
36 June 2024 was a strong month for the golf
37 business, but a combination of intense heat,
38 economic concerns and summer vacations
39 contributing to an unexpected downturn for
40 July 2024.

41
42 Paragraph 6:

43
44 Another factor unique to our operations at
45 Bear Mountain was a critical water pump
46 breakage on our valley course. The valley
47 pump and invariable frequency drive were

22

Submissions by Cnsl K. Jackson

1 installed at Bear Mountain in 2008. The VFD
2 regulates the water pressures when the pumps
3 turn on to slowly increase water pressure
4 safely within the system. It failed on
5 July 25th this year resulting in a loss of
6 water to holes number 6 through 15 on our
7 valley course.
8

9 At the very end, we can go through, but the last
10 sentence:

11
12 Unfortunately, this pump breakage and the
13 need to divert water resources meant the
14 turf on both courses was not in optimal
15 shape.
16

17 And so that -- that, of course, is a concern
18 about ability to maintain the operations -- the
19 equipment on the operations.

20 Paragraph 10, I'll read that for my friend:

21
22 As well, our year-to-date revenues to July
23 of 2024 -- July 31st, 2024 remain above our
24 revenues for the same period between
25 January 1 and July 31, 2023. Further
26 revenues for green fees/carts, our most
27 important daily revenue stream, are
28 currently at their highest for the period
29 January 1 to July 31, 2024, as compared to
30 all years back to 2016.
31

32 Sure. But not anywhere near what Mr. Matthews
33 said they were going to be, because, of course,
34 the accounts payable didn't change in any
35 material fashion. So better than previous years,
36 not great, and I say a concern with maintenance
37 of equipment.

38 But more to the point in all of that, great,
39 the best year since 2016, sustainable, on
40 Mr. Matthews' evidence, into the early fall. We
41 are still in summer, but not for long, and at
42 that point any financial improvements have to be
43 done. That would be the implication of
44 Mr. Matthews' evidence.

45 So what are we going to do about keeping the
46 lights on?

47 THE COURT: You just said a moment ago that, eastbound

23

Submissions by Cnsl K. Jackson

1 with those better revenues, they still -- they
2 can't meet payroll. They can't --

3 CNSL K. JACKSON: Well, you saw --

4 THE COURT: They can't pay -- they're still
5 withholding cheques.

6 CNSL K. JACKSON: They're still withholding cheques.
7 They still have \$200 million in payables, and
8 they have collectively, between the two
9 partnerships, \$20,000 in the bank, give or take.
10 I haven't got my math exactly right, but nothing.
11 Nothing. That's the most current evidence on the
12 status of that, and Mr. Matthews himself says, we
13 can do this until the early fall. I don't think
14 we should wait any longer.

15 So then we can go through -- so *Maple Trade*
16 factors. I decided what I would do is I would
17 just go in sort of a comparison of the two
18 options with some of the trade factors.

19 THE COURT: Let me just put this away.

20 CNSL K. JACKSON: Yes, sorry. I don't think I'll
21 refer to the -- thank you. And I'm at page 26,
22 Justice. So what I thought I'd do is, as I say,
23 go through the *Maple Trade* factors with a bit of
24 a comparison of what's being suggested by the
25 parties.

26 So starting at paragraph 99(a), irreparable
27 harm. He described the approach proposed under
28 the partial receivership order as uncertain,
29 piecemeal, incomplete, requires time. 599
30 doesn't take into account all of the
31 partnership's liabilities, including prior
32 ranking mortgages on some of the select lands.
33 No evidence for how a sale of the select lands
34 will impact on the other lands, the other assets
35 at all.

36 And second point under this, number 2,
37 there's no stay of proceedings for the Resorts,
38 no funding for operations. There's irreparable
39 harm as a risk, which I think has to be taken as
40 a given, given that -- the aged AP. There's no
41 stay. There's risk of irreparable harm when
42 other creditors take enforcement proceedings.

43 Whereas, number 3, the complete receivership
44 order, deals with all this. I has funding. It
45 has a stay, and it leaves open the possibility of
46 monetization of sales in any way that makes the
47 most sense according to the court's officer, with

24

Submissions by Cnsl K. Jackson

1 input from stakeholders and on application to the
2 court.

3 (B), the risk to the securityholder and need
4 to protect or safeguard assets. It's agreed the
5 assets have significant value, but there's no
6 liquidity. There's no funds to safeguard the
7 property during the process, including from
8 enforcement steps.

9 With \$20,000 in the bank, what about
10 insurance? Complete receivership order deals
11 with that. There's funding to ensure that the
12 assets are safeguarded. There's insurance that
13 everything is involved in a controlled process so
14 there's no risk to the securityholder.

15 The nature of the property. Parties agree
16 that the property has significant development
17 potential. Complete receivership order allows
18 for a comprehensive approach and solution to
19 monetize the lands. And this is the point I made
20 at the outset. The partial receivership order
21 precludes that. It presupposes that
22 Mr. Matthews' views reflect the best way to
23 monetize the lands. It doesn't allow for a
24 comprehensive solution. It allows for no input.
25 It allows for no discretion on the part of the
26 court's officer.

27 Also the partial receivership order only
28 focusses on the select lands, so that means the
29 remaining collateral, including the business,
30 languishes, risks duplicative proceedings, which
31 can distract, which will tie up resources,
32 unnecessarily exposes Sanovest and other
33 stakeholders to the risk that the select lands
34 aren't of sufficient value to pay out the
35 Sanovest debt, or it can't be realized in a
36 timely manner.

37 Waste of the debtors' assets, (d). We come
38 back to a theme. There's no funds available to
39 the partnerships, including for maintenance and
40 insurance. Partial receivership order does
41 nothing to deal with that; complete receivership
42 order does. Of course, value of the other lands.

43 Preservation and protection pending judicial
44 resolution. So a complete receivership order
45 ensures preservation and protection of assets,
46 facilitating funding for expenses and operating
47 costs and the receivership process itself. We

25

Submissions by Cnsl K. Jackson

1 know the partnerships don't generate sufficient
2 revenue to meet obligations as they come due, so
3 assets are jeopardized. A partial receivership
4 order would seek to protect portions of the
5 property, but leaving the balance vulnerable.
6 599 has offered no evidence as to how long -- and
7 this is important -- has offered no evidence as
8 to how long the proposed subdivision and sale of
9 the select lands may take.

10 There's no mechanism to meet the
11 obligations, not only to carry out that, but
12 prior to the time that that is completed and the
13 sale actually ensues.

14 Moreover, they have a distribution, which is
15 contrary to contractual entitlements, but
16 contemplate as reserve for tax obligations with
17 no idea what those actually are or how they'd be
18 calculated.

19 Balance of convenience. I don't have to go
20 too much more into this. I've said it a few
21 times. Complete receivership order leaves open
22 all the options. There is -- there is no
23 prejudice to 599 from a complete receivership
24 order, because everything that they want to do is
25 available within the context of a complete
26 receivership.

27 Mr. Matthews want to retain control over his
28 golf course. The receiver, if that's the right
29 thing to do, will ensure that he's retained to
30 manage. Mr. Matthews thinks that certain lands
31 should be subdivided, parcelled, bundled and
32 sold. If that's the right thing to do, that's
33 what will happen. And everything will be funded
34 without concern in that regard during that
35 process without fear of third parties, without
36 concerns about wastage.

37 (G), the right to a receiver under the
38 documentation. It is undisputed that Sanovest
39 has the right to appoint a receiver and manager
40 under the GSAs and the mortgages. It secures
41 all -- all of the partnerships' lands are secured
42 in favour of Sanovest and so -- and the business
43 of the resort.

44 Enforcement rights of the securityholder;
45 that's (h). I mean, that's what would happen if
46 Sanovest appointed a receiver by instrument. I
47 don't think we have to worry about that being the

26

Submissions by Cnsl K. Jackson

1 case. I'm not sure that we could take it as a
2 given that wouldn't be successful.

3 Extraordinary relief. Extraordinary relief
4 that should be granted cautiously, accepted,
5 other than those caveats which are in the
6 materials about the fact that when it's
7 contemplated under negotiated agreements, the
8 relief is less extraordinary.

9 And the need for a court-appointed for the
10 receiver to carry out its duties, we need that in
11 this case. This is going to be contentious.
12 There's going to be disputes. There's going to
13 be the immediate for the receiver to have an
14 order to protect it, to rely upon it, to come
15 back to court under.

16 (M), I'm just going to skip down, Justice.
17 Length of time the receiver may be in place.

18 THE COURT: Right.

19 CNSL K. JACKSON: We don't know. 599, in its
20 materials, for reasons I can't comprehend, seems
21 to think that its process is going to be a fast
22 one. I have difficulty with that, and here's
23 why. They cannot sell the lands. They cannot
24 begin to sell the lands until they're subdivided.
25 There is no evidence about how long it takes to
26 subdivide -- assuming they have funding, assuming
27 they could even get subdivision, which is, by no
28 means, a certainty -- which is by no means a
29 certainty -- they have to go through the
30 subdivision process. Mr. Kusumoto says he thinks
31 that's six months, at least, before you can even
32 begin to sell the lands.

33 So we're six months in. Then you have to go
34 back to the court with a sale process that gets
35 approved, and then you initiate your sale
36 process.

37 Under the complete receivership order, there
38 is a world in which the receiver comes to court
39 in a period of time, whatever it is -- several
40 weeks or a couple months -- and comes back and
41 says, here's the sale process I wish to initiate
42 starting in a week. We don't have to go through
43 subdivision.

44 If that happens it's going to be a much
45 faster sale in a complete receivership process.
46 It's possible the receiver comes back and says,
47 we agree with Mr. Matthews it should be

27

Submissions by Cnsl K. Jackson

1 subdivided. Well, then we have the exact same
2 length of time. So it's either faster or the
3 same in a complete receivership. It's going to
4 take time to sell. No one has any idea, but I
5 can't see how a complete receivership has any
6 risk of being longer than a partial receivership
7 reliant upon subdivision.

8 I should say also we don't have -- we don't
9 have a person named to be appointed under the
10 partial receivership order. I don't -- how can
11 that -- when is that going to happen? And is
12 anybody prepared to take that on? It's a
13 complete gap. Apart from the funding gap,
14 there's a complete gap in how this partial
15 receivership order is to be carried out. So I
16 guess there's some inherent delay baked into that
17 too.

18 Costs to the parties. This is at sub (n) on
19 page 30. I'm not going to go into that too much.
20 There's always a cost to a receivership. There's
21 two forms of receivership: One has some more
22 lands and one has less. One has managing a golf
23 course. For all the reasons I've said, there are
24 incremental costs, but there are occasions when
25 that is absolutely necessary to safeguard the
26 collateral, to safeguard third parties and to
27 ensure operations and funding during the
28 receivership. That's where it comes.

29 So I do accept there will be some
30 incrementally greater cost. Well, actually,
31 sorry, I don't know that, because I don't know
32 what subdivision costs. None of us do. But that
33 involves usually consultants, engineers,
34 applications. I don't know what it adds. None
35 of us do. So it's entirely feasible that the
36 full receivership, without a subdivision, turns
37 out to be cheaper, rather than foisting that upon
38 a court's officer.

39 And likelihood of maximizing return, that's
40 for the receiver to comment upon down the road,
41 because we don't have sufficient evidence to know
42 which one is going to bear -- which process will
43 be better, but we do know that optionality exists
44 under a complete receivership order, that the
45 court can be informed upon by its receiver.

46 So I'll let the rest sit there, Justice. I
47 think I made most of my points, and some of them

28

Submissions by Cnsl K. Jackson

1 several times. You have my point on the delay
2 and the time, because I want to think a little
3 bit about what my friend said. There was, what
4 about the cost? I've addressed that. What about
5 the ongoing delay? I get that. There is delay,
6 but it can't be worse.

7 And the other thing is this. There's still
8 this concept of redemption, that if Mr. Matthews
9 can come up with a way of addressing this, the
10 financing, then there's a way to deal with that
11 within this proceeding, irrespective of what
12 order issues, especially if it's a complete
13 receivership order, it can deal with it entirely,
14 rather than only part. In fact, it would be
15 harder for him, I think, to redeem in the context
16 of a partial receivership or to seek to get an
17 order that allows him to redeem.

18 And if there are sales -- if the sales don't
19 proceed *en bloc* and there are piecemeal sales,
20 and it looks -- and Sanovest gets paid out at
21 some point, receivership orders can be
22 terminated. That's a point which seems to be
23 lost on my friends, is that this seem -- they
24 take it as if it's sort of a final order. It's a
25 fluid proceeding. It's realtime, just to prey
26 upon a phrase which is used altogether too often,
27 but it's true. There is the opportunity for
28 parties to come back and seek to vary, seek to
29 have disputes resolved, seek to figure out how
30 litigation will proceed, if it's to proceed, and
31 if appropriate, terminate a receivership, which
32 happens from time to time.

33 I will be surprised if we see a situation
34 here, but it's open to the court to order that
35 and direct that, if there are circumstances that
36 merit that. And so it's not as if Mr. Matthews
37 is having his opportunity to deal with this
38 problem taken away.

39 THE COURT: Under the full receivership order, is it
40 contemplated that counsel would be appointed for
41 the receiver?

42 CNSL K. JACKSON: I should have mentioned that,
43 Justice, and actually, that is one of the things,
44 I think -- so Alvarez and Marsal has engaged
45 Blakes, Peter Rubin, in the event that they are
46 appointed. The court will be familiar with
47 Mr. Rubin. I think that's not a bad thing,

29

Submissions by Cnsl K. Jackson

1 particularly where there is going to be a need,
2 in fairly, you know, short order, to consider
3 some of the litigation that the partnerships are
4 involved in and what should be happening with
5 those, and I can't think of many counsel in the
6 city better suited for that.

7 THE COURT: Do you know if under the partial
8 receivership order, appointment of counsel for
9 this court officer is contemplated? And if you
10 don't know, I'll leave it to your friends.

11 CNSL K. JACKSON: Well, I can tell you what the
12 order -- the order -- the full order that's
13 attached to the notice of application doesn't
14 actually authorize -- what it provides --

15 THE COURT: The one you took me to before?

16 CNSL K. JACKSON: Right.

17 THE COURT: It deals with subdivision and
18 distribution.

19 CNSL K. JACKSON: It has a whole bunch of -- well, it
20 has a number of powers. So it's the model order
21 cribbed way down. And so if you look at --

22 THE COURT: Yeah. This is their order?

23 CNSL K. JACKSON: Yes, this is at tab 3 --

24 THE COURT: Where is that?

25 CNSL K. JACKSON: -- of the condensed book.

26 THE COURT: Okay, just a minute.

27 CNSL K. JACKSON: Yes.

28 THE COURT: It fell apart.

29 CNSL K. JACKSON: Oh, sorry.

30 THE COURT: All right.

31 CNSL K. JACKSON: So it does -- it does contemplate,
32 at 2(b), that the receiver can engage any number
33 of people, including counsel. So sorry, I jumped
34 ahead.

35 THE COURT: Okay. All right.

36 CNSL K. JACKSON: 2(b), you'll see second line down,
37 the reference to counsel.

38 THE COURT: All right.

39 CNSL K. JACKSON: So whoever the receiver is under
40 that order could engage counsel, and there is,
41 at --

42 THE COURT: But they call it a marketing agent under
43 that order.

44 CNSL K. JACKSON: Pardon me? Well --

45 THE COURT: It's called -- I thought --

46 CNSL K. JACKSON: Well, they call it a marketing --
47 I'm struggling with the term. I think my friends

30

Submissions by Cnsl K. Jackson

1 concede it's a receiver cloaked with a different
2 name. Am I right about that?

3 CNSL C. FERRIS: Yes, and we've discussed it, and it's
4 just simply to maintain -- for the market to
5 maintain not having the name "receivership"
6 associated with the project.

7 CNSL K. JACKSON: The press listening in should --
8 will know. Yeah, it's a receiver. And so
9 their -- so it's a model receivership order pared
10 way down. It does contemplate engagement of
11 counsel, and it does have -- this is at
12 paragraph 10, the initial language about security
13 for the marketing agent. So instead of
14 receiver's charge, security for the payment of
15 the fees and those of the counsel.

16 I did point out that one of the problems
17 with that is twofold. It's inconsistent with the
18 distribution order, which doesn't contemplate any
19 distribution to the marketing agent or its
20 counsel. It's first to taxes, then to the
21 parties.

22 It also isn't on notice to HSBC, who has a
23 charge on some of the lands. I will say our
24 draft order presently doesn't reference HSBC, but
25 it will say, when I come to it, that the charges
26 under that would be subordinate to HSBC's charge.

27 THE COURT: Your charges. You mean your client's
28 charges?

29 CNSL K. JACKSON: The proposed receiver's charge and
30 receiver's borrowings charge. The court-ordered
31 charges, they would be ahead of everything,
32 including Sanovest debt, but it would be
33 subordinate to HSBC's mortgages.

34 THE COURT: Okay.

35 CNSL K. JACKSON: Thank you, Justice. I don't have
36 anything else. I'm slightly over the hour I
37 proposed.

38 THE COURT: That's fine.

39 CNSL K. JACKSON: Nothing further.

40 THE COURT: So what is the intention now, then? We
41 have to -- we're starting the CPC at 3:30.

42 CNSL C. FERRIS: Well, we can do one of two things,
43 Justice. We can start and then we can break in
44 15 minutes --

45 THE COURT: Sure.

46 CNSL C. FERRIS: -- and do the CPC.

47 THE COURT: Sure.

31

Submissions by Cnsl W. Roberts

1 CNSL C. FERRIS: Or --

2 THE COURT: You can give me an overview, then.

3 CNSL C. FERRIS: Okay. Well, then, there's a surprise
4 for you.

5 THE COURT: Okay.

6 CNSL C. FERRIS: Because we've changed up the batting
7 order, and Mr. Roberts is going to give you an
8 overview of the response to the receivership.

9 THE COURT: Okay.

10 CNSL C. FERRIS: And then I'll come -- I'll come back
11 probably tomorrow morning.

12 THE COURT: Okay.

13 CNSL W. ROBERTS: Thank you, Justice. I think I'm
14 going to be relatively quick.

15 THE COURT: All right.

16 CNSL W. ROBERTS: I'm not sure if I'm 3:15 quick,
17 but --

18 THE COURT: All right. Just an overview would be
19 helpful.

20 CNSL W. ROBERTS: I'm just going to give you an
21 overview, and really only because, as Mr. Jackson
22 mostly went through receivership issues, we
23 thought, just while they were top of mind for
24 you, we'd address some receivership issues.

25 And so I'm going to start with our client
26 supports a resolution. That's why they came out
27 with their motion. They support a resolution
28 that preserves value/minimizes prejudice, because
29 those are flip sides of the same coin.

30 THE COURT: M'mm-hmm.

31 CNSL W. ROBERTS: That repays the Sanovest debt, and I
32 asterisk that, because we're going to come back
33 repeatedly to the distinction between Sanovest as
34 lender and partner.

35 THE COURT: Right.

36 CNSL W. ROBERTS: So prioritize repaying that debt,
37 the secured lender should be paid. We want to
38 preserve claims, and in particular you're going
39 to hear from Mr. Grant about an arbitration
40 that's commencing next week where -- I think I'm
41 right in saying this -- liability has been
42 determined, and they're moving into damages and
43 some material claim, meaning it's now. It's next
44 week.

45 THE COURT: Is that -- you're going to have to tell me
46 how that has an impact on the receivership
47 element.

32

Submissions by Cnsl W. Roberts

1 CNSL W. ROBERTS: Oh, I will.

2 THE COURT: Okay.

3 CNSL W. ROBERTS: But that whatever resolution is
4 being talked about today needs to take into
5 account the fact that there's an arbitration
6 starting next week.

7 THE COURT: Okay.

8 CNSL W. ROBERTS: We want a resolution that provides
9 for what I'm going to call short-term and
10 medium-term funding, and by short-term I mean the
11 payables that you've been hearing about.

12 THE COURT: M'mm-hmm.

13 CNSL W. ROBERTS: Medium-term the continuing
14 operations.

15 THE COURT: Right.

16 CNSL W. ROBERTS: Longer-term is paying out Sanovest,
17 but we have short and medium-term. And again,
18 you'll hear from Mr. Grant, but we say the reason
19 why these payables have mounted and why we have
20 these short and medium-term problems are because
21 Mr. Kusumoto refuses to allow any sales to occur,
22 and we want to bring a resolution within a
23 reasonable period of time, not something that's a
24 ten-year build-out.

25 And so our funding application, the one
26 you've seen, was our imperfect attempt to reach
27 those goals.

28 THE COURT: Funding application?

29 CNSL W. ROBERTS: The application you saw from us with
30 a limited receivership, which we've called a
31 funding application.

32 THE COURT: You call it -- okay. Because I don't
33 recall. You have to show me where the funding
34 aspect of it is.

35 CNSL W. ROBERTS: Funding for the company.

36 THE COURT: Oh, I see. Okay.

37 CNSL W. ROBERTS: So the idea was sell off some
38 identified parcels, generate enough money to fund
39 operations and pay out Sanovest. That was the
40 plan. And we don't come here to tell you it was
41 perfect at all, but it was an attempt to achieve
42 these goals and do the thing that Sanovest said
43 it wanted done. Sanovest made a demand and said,
44 if you don't pay me my money, I'm going to
45 commence proceedings and appoint a receiver, and
46 so we issued this motion, petition, seeking a
47 vehicle to get Sanovest its money.

33

Submissions by Cnsl W. Roberts

1 So we don't say it's perfect, but rather
2 than have Sanovest say to us, well, here will
3 fatal flaws in it, you should say to us, here are
4 the ways you can work. I have a problem with X
5 or Y. I have a problem with the subdivision
6 idea; I don't think you've picked the right
7 parcels.

8 THE COURT: Yeah.

9 CNLSL W. ROBERTS: Fine. We're happy to talk about
10 those. But you have in front of you a petition,
11 an application from us to approve that limited
12 receivership.

13 We say that the Sanovest full receivership
14 application is not the reasonable middle ground
15 that they're saying. We say instead it's a blunt
16 instrument, and what we've tried to do is address
17 specific problems that need to be fixed and
18 brought a petition to address those, not saying
19 that the receivership, our limited receivership,
20 can't in the future transition or pivot or do
21 something else.

22 But rather than -- if all you have is a
23 hammer, the world are nails. Rather than just
24 say, we should have a blanket receivership that
25 is going to run for years and years and cost many
26 millions of dollars, let's start by addressing
27 the specific problems. Let's address those
28 problems, and as the receiver moves forward, when
29 the receiver decides we should do something
30 differently, the receiver can come tell this
31 court and then move. So we always said, start
32 narrow. Start with a limited-purpose
33 receivership to address the specific problems
34 that we all agree on and then, as things change,
35 maybe the receiver gets discharged. Maybe they
36 move on. Maybe they expand, but those are things
37 we can deal with in the future.

38 We say that the blunt instrument of a full,
39 non-nuanced receivership does create prejudice,
40 not just in the community of purchasers; we have
41 a larger community. We have members of the golf
42 course and we have -- and I'm sorry, the
43 number -- how many residents? 3,000 residents in
44 that community. They've been through a
45 receivership once already. If we do another full
46 receivership, that's two times. That's going to
47 cause prejudice long-term to the membership and

34

Submissions by Cnsl W. Roberts

1 to the viability operations.

2 So if we can -- and I'll just do it this
3 way. If we can mitigate the prejudice, why would
4 we not choose to mitigate or minimize? Why would
5 we not have two paths, choose the one that, at
6 least at first glance, minimizes. If it so
7 happens that we have to pivot and do something
8 else, we'll do it. But we should start by
9 choosing the one that minimizes.

10 We say there are going to be significant and
11 unnecessary costs in a full receivership. This
12 receivership order simply says, receiver, you
13 shall take over all operations.

14 THE COURT: M'mm-hmm.

15 CNSL W. ROBERTS: The only evidence you have in front
16 of you that there's a problem with operations is
17 from somebody who has no involvement with
18 operations, Tian Kusumoto. Tian Kusumoto is the
19 CFO of this company, and he's relying on Dan
20 Matthews' evidence about finances. Mr. Kusumoto
21 has completely abdicated any responsibility for
22 his role as CFO. He has no concept of what's
23 going wrong or right within operations, and so we
24 shouldn't start from the point that we should
25 have a full receiver over all operations.

26 We also risk -- and I'm just going to say
27 it -- unintended consequences. If you just put a
28 blanket receivership over everything, who knows
29 how that's going to play out, as opposed to
30 building blocks to see so we can control the
31 outcomes.

32 That being said, you've heard it, there are
33 a lot of points of agreement here. We agree
34 these parties are at loggerheads. We agree there
35 should be a court officer appointed. Two points:
36 One, I look at my friend when I say this. He's
37 disingenuous when he tells you he doesn't know
38 who our proposed receiver is, because we've
39 talked about it many times.

40 CNSL K. JACKSON: I genuinely don't, Justice.

41 THE COURT: Sorry.

42 CNSL K. JACKSON: Last time you told me that was not
43 happening.

44 THE COURT: I think you want to remember that you're
45 talking to me.

46 CNSL W. ROBERTS: It's BDO. I had thought our consent
47 was filed. If not, we'll file it first thing in

35

Submissions by Cnsl W. Roberts

1 the morning. We have a consent from BDO to act
2 as receiver. The title -- and you'll see that we
3 call them a marketing agent -- that's only a
4 prejudice mitigation exercise, no more than that.
5 THE COURT: You're going to have to show me where I
6 can actually appoint someone called a mark --
7 with the nomenclature --
8 CNSSL W. ROBERTS: Agreed.
9 THE COURT: -- marketing agent.
10 CNSSL W. ROBERTS: And we say that we agree it's a
11 receiver. It's under the receivership power, and
12 we were changing the title, and if we can't
13 convince you that you can do it, so be it, but
14 we're going to make the pitch.
15 THE COURT: In essence, what you're really saying
16 is -- if I can summarize it -- what you've put
17 before me, you acknowledge may not be perfect.
18 CNSSL W. ROBERTS: Yes.
19 THE COURT: But you want to avoid what you think are
20 runaway costs from a full receivership and come
21 in with sort of a selected, staged approach,
22 allowing the receiver to be able to come to the
23 court and say, it's not working; we need to do
24 something else; I need full powers, et cetera,
25 to -- is that --
26 CNSSL W. ROBERTS: I can give you an example. If they
27 go in -- the receiver goes in and says, you know
28 what, there's no CFO there, we need that, and
29 they can either fix that problem or come to you
30 and expand it, yes, but we should start narrow
31 and move out.
32 THE COURT: I get -- I'm alive to the points you're
33 making, but how does that work, though, in this
34 high-conflict partnership now --
35 CNSSL W. ROBERTS: Oh, because --
36 THE COURT: -- where you've got these parties accusing
37 each other of *mala fide* conduct, misuse of funds.
38 CNSSL W. ROBERTS: Yes.
39 THE COURT: I think there's a complaint -- I read
40 somewhere about Mr. Matthews and what he's being
41 paid and somebody blocking things. I mean, it's
42 just -- it's just this -- it's a complete --
43 CNSSL W. ROBERTS: I have two answers --
44 THE COURT: -- morass of evidence if people --
45 CNSSL W. ROBERTS: Agree. And I agree with this point,
46 and you asked the question earlier, which is, are
47 you going to be called on today to make any

36

Submissions by Cnsl W. Roberts

1 findings about bad conduct? And no. And as
2 Mr. Ferris said, it goes into the analysis, but
3 you're not going to be able to sort that out on
4 this application.

5 The practical answer is Mr. Kusumoto isn't
6 in the office. Mr. Matthews is there running it,
7 and Mr. Kusumoto isn't. But if the court officer
8 goes in and decides that there's a problem to be
9 addressed, they can come to you and have it
10 addressed.

11 THE COURT: You see, if this were a CCAA and a monitor
12 was put in, and they came back and told me there
13 was significant problems with the debtor and
14 counting --

15 CNSL W. ROBERTS: Yeah, you could expand those powers.

16 THE COURT: I think they become a super monitor at
17 that point.

18 CNSL W. ROBERTS: That's right.

19 THE COURT: And they would take it and run it.

20 CNSL W. ROBERTS: Yes.

21 THE COURT: It would be incremental.

22 CNSL W. ROBERTS: Yes.

23 THE COURT: But I guess my concern is, when I looked
24 at your materials, as briefly as I did, what
25 you're proposing to me in terms of a staged
26 approach didn't leap out at me as --

27 CNSL W. ROBERTS: Well, then, we just did a bad job
28 pitching it to you.

29 THE COURT: Okay. Well, you haven't had time to pitch
30 it yet, but it's -- when I think, well, if the
31 order requires me to make an order about
32 subdivision, well, how does that --

33 CNSL W. ROBERTS: And we'll address that.

34 THE COURT: How does that affect the staged approach?

35 CNSL W. ROBERTS: So I'll -- again, I'll say two
36 things.

37 THE COURT: Yeah, all right.

38 CNSL W. ROBERTS: One, we'll address that for you, but
39 also, we don't tell you that that's the only
40 approach. We say it should be staged.

41 THE COURT: Okay.

42 CNSL W. ROBERTS: It should start with selling enough
43 lands to pay off Sanovest. That should be goal
44 number one. That's what Sanovest says is their
45 number one goal. That's what we say is our
46 number one goal: Sell enough lands to pay off
47 Sanovest. And if -- we put forward these three

37

Submissions by Cnsl W. Roberts

1 parcels. If it's not those, or if it should be
2 done in a different manner, then so be it. Let
3 it be a different manner. But it shouldn't
4 change the underlying goal, which is only do that
5 which is necessary to get those short-term,
6 mid-term goals -- problems addressed.

7 THE COURT: Well, all right. But then -- two things,
8 then. In view of the conflict between the
9 parties, is it appropriate to leave Mr. Matthews
10 running the business, as opposed to the receiver
11 going in, looking at it and then determining
12 whether or not it's appropriate for Mr. Matthews
13 to remain in the business?

14 CNSL W. ROBERTS: What if I put it the other way?

15 THE COURT: All right.

16 CNSL W. ROBERTS: Which is Mr. Matthews is running the
17 business today.

18 THE COURT: Yeah.

19 CNSL W. ROBERTS: And if the court officer looks and
20 says he shouldn't be, then he can come to you --
21 the court officer can come to you and say so.

22 THE COURT: Okay. Then that -- I'm glad -- that's a
23 good point you've raised, because then it takes
24 me to look at it this way. What I hear you
25 saying is, look, it might get to the point of a
26 full receivership.

27 CNSL W. ROBERTS: Yes.

28 THE COURT: It might. So --

29 CNSL W. ROBERTS: And we say hopefully not, but yeah.

30 THE COURT: But instead of staged multiple
31 applications -- they may occur in any event --
32 what if a full receivership order is granted, but
33 it includes one that specifically says to the
34 receiver, before you do anything else, you must
35 go in and you must determine, firstly, what
36 properties should be sold to pay off Sanovest;
37 and secondly, determine whether -- look at the
38 operations of the company and determine whether
39 Mr. Matthews is appropriate to run it and then
40 come back to the court and report.

41 CNSL W. ROBERTS: Yes.

42 THE COURT: And then -- and then he gives you what
43 you -- it lets the receiver know that they can
44 say to the court at that point, I've got the
45 authority if I need it. I need to get permission
46 from the court.

47 CNSL W. ROBERTS: What I think you're saying is at

38

Submissions by Cnsl W. Roberts

1 some point the court officer comes back to you
2 and says, here's what I've found.

3 THE COURT: Yeah.

4 CNSL W. ROBERTS: And here's what I think should
5 happen. What we say to you is they shouldn't --
6 we shouldn't put the stigma of receiver on them
7 to do that, because if we can -- if we can avoid
8 a stigma, why don't we? So if you could achieve
9 that goal by having what we propose is our
10 limited-purpose receiver go and do those same
11 things and give you that reporting, we say that
12 mitigates, as much as you can in these
13 circumstances.

14 THE COURT: But don't you already have the stigma if I
15 appoint a limited receiver in any event?

16 CNSL W. ROBERTS: Maybe. But if we can do something
17 that might mitigate, why wouldn't we? Why
18 wouldn't Sanovest support something that might
19 mitigate prejudice and preserve value?

20 THE COURT: All right. Interesting.

21 CNSL W. ROBERTS: And so I note the time.

22 THE COURT: Yeah, all right.

23 CNSL W. ROBERTS: I don't know if you want to break
24 and --

25 THE COURT: We should.

26 CNSL W. ROBERTS: Okay.

27 CNSL K. JACKSON: Justice.

28 THE COURT: Yes.

29 CNSL K. JACKSON: I think some of us, me particularly,
30 will not be helpful for the CPC. If I may be
31 excused.

32 THE COURT: All right. Because I'm not sure who's who
33 in what actions. I know it's Mr. Nathanson.

34 CNSL A. NATHANSON: Mr. Byma is going to deal with the
35 case planning conference, but I will stay to
36 assist, and I'm not sure who from my friends'
37 team.

38 CNSL C. FERRIS: Ms. Ohama-Darcus is going to handle
39 it.

40 THE COURT: All right. But until last night when the
41 CPC files were brought, I didn't even know about
42 these other actions.

43 CNSL C. FERRIS: It was a condition of the adjournment
44 of the trial that we have a CPC to set hard
45 deadlines so we can actually make the new trial
46 date.

47 THE COURT: Okay.

39
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1 CNSL C. FERRIS: And so that's why it's important to
2 proceed with it.
3 THE COURT: So it's the oppression action is part of
4 the CPC and other lawsuits as well; right?
5 CNSL C. FERRIS: There's three lawsuits.
6 THE COURT: Okay. And I take it what I'm going to
7 hear in the CPC doesn't bear on the insolvency
8 matter?
9 CNSL W. ROBERTS: It's not our two fights.
10 CNSL K. JACKSON: No.
11 CNSL W. ROBERTS: We've put ourself in a box, and that
12 box is leaving.
13 CNSL K. JACKSON: As I said, I studiously ignored all
14 of that, Justice.
15 THE COURT: All right. Okay, very good, then. I'll
16 wait for Madam Clerk to get me when everyone is
17 really. Thank you, and we'll come back, then, at
18 10 o'clock tomorrow.
19 THE CLERK: Order in chambers. This chambers is stood
20 down.
21

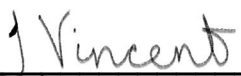
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31 That the proceedings were transcribed by me
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33 the same is a true and correct and complete
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37 IN WITNESS WHEREOF, I have hereunto
38 subscribed my name on this day, the 20th of
39 September, 2024.
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No. S234048
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE JUSTICE WALKER)

Vancouver, BC
September 11, 2024

BETWEEN:
599315 B.C. LTD. and DANIEL MATTHEWS

Petitioners

AND:
ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS DEVELOPMENTS LLP, and
ECOASIS RESORT AND GOLF LLP, TIAN KUSUMOTO, and
SANOVEST HOLDINGS LTD.

Respondents

No. S243389
Vancouver Registry

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE RECEIVERSHIP OF ECOASIS
DEVELOPMENTS LLP AND OTHERS**

BETWEEN:
SANOVEST HOLDINGS LTD.

Petitioners

AND:
ECOASIS DEVELOPMENTS LLP,
ECOASIS BEAR MOUNTAIN DEVELOPMENTS LTD.,
ECOASIS RESORT AND GOLF LLP, 0884185 B.C. LTD.,
0884188 B.C. LTD., 0884190 B.C. LTD., 0884194 B.C. LTD.,
BM 81/82 LANDS LTD., BM 83 LANDS LTD., BM 84 LANDS LTD.,
BM CAPELLA LANDS LTD., BM HIGHLANDS GOLF COURSE LTD.,
BM HIGHLANDS LANDS LTD., BM MOUNTAIN GOLF COURSE LTD.
and BEAR MOUNTAIN ADVENTURES LTD.

Respondents

PROCEEDINGS IN CHAMBERS

COPY

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G. Brandt
W.L. Roberts
C. Ohama-Darcus**

**PROCEEDINGS IN CHAMBERS
SEPTEMBER 11, 2024**

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EXHIBITS

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No exhibits marked.

1
Submissions by Cnsl W. Roberts

September 11, 2024
Vancouver, BC

(PROCEEDINGS COMMENCED AT 10:17 AM)

THE COURT: Sorry for the late start. There was another matter. If you want to come back at quarter to 2 o'clock, I can make it up to you that way.

THE CLERK: Justice, in the matter of Sanovest Holdings Limited versus Ecoasis Developments LLP, Justice.

CNSL W. ROBERTS: Good morning, Justice.

THE COURT: Yes, Mr. Roberts.

CNSL W. ROBERTS: Just a quick bit of housekeeping.

THE COURT: Yes.

CNSL W. ROBERTS: Two things. One, I somewhat facetiously called my friends disingenuous yesterday. He and I have discussed it and have come to an accord as to why he honestly believed the thing he said, and I honestly believe the thing I said.

THE COURT: All right.

CNSL W. ROBERTS: And I think we should leave it at that.

THE COURT: All right. Very good.

CNSL W. ROBERTS: I had thought these materials had been filed. I'll just pass you a copy. It's just the consents from BDO to act as either receiver or marketing agent or whatever, but as contemplated by our materials, what we call the funding application.

THE COURT: And do they have counsel lined up?

CNSL W. ROBERTS: They do not yet have counsel lined up, but obviously will if this goes ahead.

THE COURT: So I was thinking about your opening yesterday.

CNSL W. ROBERTS: Yes, okay.

THE COURT: And it just occurred to me -- these things occurred to me right off the top. It would be helpful if I actually saw a form of order that, in light of --

CNSL W. ROBERTS: Understood.

THE COURT: -- what you said yesterday, I could actually look at to see what it is that is being proposed, because it's different than what's in the -- in your client's NOA, given what you said

2
Submissions by Cnsl W. Roberts

1 yesterday.
2 Then I was wondering about my jurisdiction
3 under the *BIA* to actually order some form of
4 limited receivership, no matter what the
5 nomenclature is.
6 CNSL W. ROBERTS: Right. Right.
7 THE COURT: And then I was thinking, well, if I go the
8 other way that you propose, this staged
9 approach --
10 CNSL W. ROBERTS: Yes.
11 THE COURT: -- wouldn't it make sense to put in a
12 provision that gives the receiver liberty to
13 apply for further directions to --
14 CNSL W. ROBERTS: Agreed.
15 THE COURT: -- expand the scope of powers on some very
16 short notice.
17 CNSL W. ROBERTS: Agreed. Yeah.
18 THE COURT: So it sort of -- it's a reverse of what
19 Mr. Jackson's client is seeking, but it
20 effectively does the same thing. Receiver
21 basically is told, the first thing you do is go
22 in and assess what needs to be monetized to meet
23 payroll and meet the accounts payables, and then
24 to operate the business and to pay off Sanovest,
25 and then also to consider what -- who should be
26 operating the business, including Mr. Matthews,
27 and come back to court within a defined
28 timeframe, and you've also got the right to seek
29 broader powers necessary.
30 CNSL W. ROBERTS: Yes.
31 THE COURT: I mean, that's --
32 CNSL W. ROBERTS: So you've just read out what I was
33 going to say over the next ten minutes.
34 THE COURT: Okay.
35 CNSL W. ROBERTS: But I'm going to put to you a slight
36 change of wording.
37 THE COURT: All right.
38 CNSL W. ROBERTS: Which is, for the receiver to decide
39 if it should take over operations. And so my
40 first ten minutes were going to be, after having
41 worked on, after having listened to Mr. Jackson
42 yesterday and heard your comments, we worked on
43 this last night and are going to, over the
44 next -- over today, pitch to you the concept of
45 this -- let's call it interim -- and I don't use
46 that in a capital-I way; I just mean an interim
47 appointment of a court officer -- to go and

3
Submissions by Cnsl W. Roberts

1 investigate and report back on both operations
2 and the sales program, but we don't have the
3 receiver take possession and control. They just
4 need to go in and have sufficient powers to get
5 access to information, and then come back to you
6 and make a report and say, here's what should
7 happen next, and I think we would give them some
8 priorities on, you know, what happens next so
9 that we can achieve the goals of repaying
10 Sanovest, make a decision about whether
11 operations need oversight or not, whether a
12 marketing plan should look like X or Y or a
13 combination, et cetera.

14 And then we would come back in front of you
15 or this court and -- on short notice, where the
16 receiver can make its application and make its
17 recommendations about what happens next.

18 But one, we can draft something that -- an
19 order for that. Two, you asked about
20 jurisdiction, and I say it's this simple. Both
21 the *BIA* and *Law and Equity Act*, which give you
22 the joint powers to do what you're doing today,
23 don't prescribe any powers that you must or
24 should give to a receiver. Where we get that is
25 the model receivership order. The model
26 receivership order is not binding on you ever.
27 What it does is give you a precedent, a template,
28 to work from.

29 THE COURT: M'mm-hmm.

30 CNSL W. ROBERTS: And we say it's as simple as this.
31 If you have the power to give a receiver this
32 many powers, well, then, by definition, you have
33 the power to give them this many, a subset. And
34 so -- and the *BIA* contemplates interim
35 receivers -- capital-I Interim Receivers -- which
36 is the same kind of idea: a shorter form,
37 sometimes limited powers receiver. And so I
38 don't think there should be any issue about you
39 having jurisdiction to do a staged approach,
40 because if you can do the whole thing, you should
41 do a subset.

42 THE COURT: It would be helpful if you just take me
43 back to that section. I brought my copy of the
44 *BIA*.

45 CNSL W. ROBERTS: Oh, so it's going to be in 244, and
46 I didn't bring mine.

47 THE COURT: Yeah, okay. You can find it later.

4
Submissions by Cnsl W. Roberts

1 CNSL W. ROBERTS: I'll bring it for you.
2 THE COURT: Yeah, so I can --
3 CNSL W. ROBERTS: So that's the jurisdiction issue.
4 But on the -- there's details, though -- and
5 I think the details is where there might be a
6 dispute and why I think you're going to need to
7 hear from Mr. Brandt and Mr. Ferris, because --
8 and I'm going to give you some foreshadowing of
9 the details.
10 We're going to say, okay, that investigative
11 court officer should go out and do these things,
12 but my friends are very worried about payables.
13 We're going to tell you that payables aren't a
14 worry. They've mischaracterized what the
15 payables are. I don't need you to make any
16 finding on that, but we're going to tell you
17 that's wrong. But what we should do is give that
18 court officer the power in this interim order to
19 borrow moneys and pay what payables it thinks is
20 necessary.
21 You're going to hear about an arbitration
22 that's scheduled to proceed in --
23 THE COURT: Next week.
24 CNSL W. ROBERTS: -- ten days.
25 THE COURT: Ten days.
26 CNSL W. ROBERTS: Mr. Ferris will tell you that's
27 really important, and for material sums of money,
28 and we say should proceed, and the receivership
29 shouldn't interfere with that. That's been
30 something that's been going on for four years
31 leading to its culmination. But meaning -- all I
32 mean to say is there's going to be some details
33 on what we propose in an interim staged order
34 that you're going to have to listen to us talk
35 about.
36 THE COURT: Right. And so who would fund this? If
37 Mr. Jackson's client won't fund it, then who
38 would fund it?
39 CNSL W. ROBERTS: Well, up until now, Mr. Matthews has
40 been funding the arbitration.
41 THE COURT: Okay. No, but who would fund this limited
42 receivership?
43 CNSL W. ROBERTS: Oh, we would give power to the
44 receiver to go borrow money.
45 THE COURT: Right, okay.
46 CNSL W. ROBERTS: And they could borrow from any third
47 party they choose.

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Submissions by Cnsl W. Roberts

1 THE COURT: Okay.
2 CNSL W. ROBERTS: And if Sanovest wants to get in the
3 mix and offer to lend that money, they can do so.
4 But there's a lot of parties out there who lend
5 into receiverships where they have the power of a
6 receiver, or the backing of a receiver's
7 certificate against significant lands.
8 THE COURT: Yeah.
9 CNSL W. ROBERTS: I don't think you're going to have
10 any trouble with a receiver borrowing what are
11 relatively modest sums to get through this next
12 phase. So that's where I was going to start. So
13 what we'll do for you is --
14 THE COURT: And just so --
15 CNSL W. ROBERTS: Please.
16 THE COURT: So again, seeing the actual -- the terms
17 of the proposed order would be helpful.
18 CNSL W. ROBERTS: Okay.
19 THE COURT: But what about a stay?
20 CNSL W. ROBERTS: I don't think -- we would say there
21 should be no stay in this interim period. There
22 doesn't need to be one.
23 THE COURT: All right.
24 CNSL W. ROBERTS: Until, if the receiver thinks there
25 should be something -- let me make up a timeline.
26 Let's pretend you said, receiver, I'd like to see
27 a report in 60 days, let's set a hearing. If
28 during this period the receiver thought something
29 needed to be addressed immediately, we would give
30 in the order the power for the receiver to come
31 back and deal with it.
32 We say there's nothing imminent. There's no
33 payable problem that's imminent, other than
34 getting Sanovest repaid, and that's the path
35 we're on.
36 THE COURT: What about the money that's owing to
37 the -- I think Langford? I'm worried about a
38 third party --
39 CNSL W. ROBERTS: Understood.
40 THE COURT: -- kind of stepping in basically doing
41 something that makes all of this for naught.
42 CNSL W. ROBERTS: I'll let my friends give you the
43 details of it, but what we say is there's a --
44 you would expect payables to accrue over the
45 summer when they're busy.
46 THE COURT: Right.
47 CNSL W. ROBERTS: And then start to be repaid over

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Submissions by Cnsl W. Roberts

1 time. But what Sanovest is doing is mixing up
2 two categories of payables, payables on the
3 development side and operations, and what you'll
4 see in the materials is the operations are
5 self-sustaining. The operations of the golf
6 course, tennis courts, fitness centre are not
7 insolvent.

8 On the development side, there are moneys
9 owing that need to be paid, but the reason
10 they're not paying is because Sanovest won't
11 agree to allow things to be sold. And so we'll
12 give you the details.

13 THE COURT: Okay.

14 CNSL W. ROBERTS: But we say that the risk that you're
15 concerned about is overblown.

16 THE COURT: Okay.

17 CNSL W. ROBERTS: That being said, we would happily
18 give the receiver the power to borrow moneys in
19 that intervening period to pay whatever amounts
20 the receiver decides need to be paid to avoid
21 exactly that risk.

22 We say two things: One, the result -- the
23 resolution should preserve value, minimize
24 prejudice, and as part of that, we absolutely
25 agree that there should be a way to deal with any
26 acute crises that arise. We say the answer to
27 that is not to start with a full-blown receiver.
28 The answer is to have a court officer go out,
29 decide what should happen next, make that
30 recommendation.

31 Which sort of gets me into the next point.

32 THE COURT: All right.

33 CNSL W. ROBERTS: We say -- and we're going to hear --
34 we say there's no need for a receivership over
35 operations. The receivership order put forward
36 by Sanovest is a blanket receivership that would
37 immediately have them take over operations and
38 maybe get carved back. They're asking for a
39 receivership that lasts years, and they're going
40 to run the golf course for years, and we say if
41 that's not necessary, it shouldn't be ordered, so
42 let's start small and build up.

43 On a more technical level, we say the
44 Sanovest application blurs the distinction
45 between a secured creditor's right to appoint a
46 receiver, which we don't quibble with the fact
47 that a secured creditor has a contractual right

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Submissions by Cnsl W. Roberts

1 to do so, and a partner's right to seek a
2 receiver. What they're asking for is not a
3 receiver that is limited to paying back the
4 secured creditor. They're acting with their hat
5 on as partner for a receiver to resolve the
6 partnership problems, and it matters because
7 there are very different threshold tests for
8 those two things.

9 Again, we're not quibbling that the
10 threshold for a secured creditor after default to
11 get a receiver isn't that high. There's still
12 *Maple Trade* factors to be looked at. There's
13 still rights of redemption to be considered, but
14 it's a lower threshold.

15 A partner seeking to put partnership assets
16 into receivership is extraordinary relief. It's
17 available, and you can do it, but it's a much
18 higher threshold than for a secured creditor, and
19 their materials don't draw that distinction. So
20 one of the things we say is, with the direction
21 given to a court officer when assessing next
22 steps under the preserve/maintain value should be
23 repaying Sanovest its secured debt. We want it
24 repaid. It's accruing interest. It's decreasing
25 the equity available to the other partners. We
26 want it repaid, which is why we have an
27 application to have it repaid by the sale of
28 specific assets.

29 THE COURT: But you wouldn't, in this case, in terms
30 of the modified approach you're taking now -- you
31 wouldn't dictate to the receiver which assets to
32 be sold.

33 CNSL W. ROBERTS: Correct. We would not.

34 THE COURT: Yeah.

35 CNSL W. ROBERTS: And we would expect the receiver to
36 look at all options: *en bloc* sales. Practically
37 speaking, this is a really big site. *En bloc*
38 sales may be great, but there's a limited pool of
39 people who have -- pick the number
40 \$200 million -- to buy golf courses and the full
41 development. It's just a smaller pool of
42 purchasers.

43 There's a larger pool of purchasers to
44 divide -- to buy pieces, and so we want the
45 receiver to look at both. In the material is a
46 plan that Dan Matthews engaged a realtor, put a
47 plan together how to do this.

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Submissions by Cnsl W. Roberts

1 THE COURT: That was Colliers.

2 CNSL W. ROBERTS: Colliers, exactly. And we don't say
3 that this court is going to direct the receiver
4 what the answer is, but we want the receiver to
5 look at all of that, but with a view to -- maybe
6 priority is the wrong word -- keep your mind on
7 the -- keep your eye on the ball, which is
8 Sanovest needs to be repaid.

9 We say that Sanovest is mischaracterizing in
10 our order the subdivision issue. These companies
11 are in the business of assembling lands,
12 subdividing lands and selling them. That's their
13 business. So in our order, when we say a court
14 officer should do the things this company already
15 does, this isn't a complicated thing. This is
16 what we do. For ten years -- 14 years now --
17 Mr. Matthews and Tian Kusumoto's father were in
18 the business of doing exactly these things. This
19 is not some insurmountable task. This is the
20 thing they do every day. They've sold -- and I
21 forget the number -- there are 3,000 families
22 living, from lots that were divided, built and
23 sold.

24 And so in our -- when it's not some fatal
25 flaw in our order, we say this is entirely
26 consistent with what this company has been doing
27 and should have been continuing to do if not for
28 the fight between partners.

29 THE COURT: But on the amended approach now you're not
30 asking me to issue an order --

31 CNSL W. ROBERTS: Correct.

32 THE COURT: -- that directs a subdivision.

33 CNSL W. ROBERTS: Correct.

34 THE COURT: Okay.

35 CNSL W. ROBERTS: Only for the receiver to consider
36 it. That's it. And then we also say that the
37 full receivership being put forward by Sanovest
38 is -- this is where you're going to have to hear
39 the details.

40 THE COURT: Right.

41 CNSL W. ROBERTS: Is an attempt to achieve a goal that
42 Tian Kusumoto can't achieve in the existing
43 litigation. So there are claims back and forth,
44 and the blunt instrument of a full-blown receiver
45 is a strategic attempt to avoid the repercussions
46 of conduct. And I don't ask you to make any
47 finding, and you'll have to hear my friends on

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Submissions by Cnsl W. Roberts

1 the details of that. But the receivership -- the
2 point of a receiver is an equitable remedy,
3 whether it's by secured creditor or partner, and
4 so all we say is you need mindful of, and you're
5 going to have to hear today's submissions on what
6 the -- what we say would be your unintended
7 consequences of doing a full-blown receivership
8 that then allows Mr. Kusumoto to avoid the
9 repercussions of his conduct.

10 I'll give you another example. The blanket
11 receivership order includes the Bear Mountain
12 BMA, the BMA lands, that we say they shouldn't be
13 in there. They don't owe any money to Sanovest.
14 It's an attempt to blur a line and achieve a
15 result.

16 Tian Kusumoto doesn't like the fact that his
17 father transferred lands and is trying to use
18 this receivership as a way of pulling them back
19 without actually taking you to evidence of why
20 those lands should be in there. These issues, we
21 say, would all be addressed by a court officer
22 who comes back and reports to you.

23 So I'm going to stop there with -- but I
24 take the two things: One, we're going to prepare
25 a draft order.

26 THE COURT: Yeah.

27 CNSL W. ROBERTS: I anticipate there's going to be
28 fights between my friend and I on some of the
29 details that might go with that.

30 THE COURT: Yeah.

31 CNSL W. ROBERTS: But we'll at least try and identify
32 those details so that we can see where this goes.

33 THE COURT: Yeah, because, to use that phrase, on your
34 client's amended approach, the devil is in the
35 details.

36 CNSL W. ROBERTS: The devil is in the details.

37 THE COURT: It is.

38 CNSL W. ROBERTS: Exactly.

39 THE COURT: Very much so.

40 CNSL W. ROBERTS: Yeah. But we do say that that
41 allows this court the flexibility to do the
42 things we say everyone should strive to do, which
43 is don't inadvertently prejudice or impair value.
44 Do it in a staged approach where we have -- these
45 parties are never going to trust each other.

46 THE COURT: Right.

47 CNSL W. ROBERTS: I'll give you an example. We're

10
Submissions by Cnsl W. Roberts

1 going to have a fight over who the court officer
2 should be. We've put forward BDO; they've put
3 forward A&M.
4 THE COURT: Well, I was going to ask you what -- A&M
5 already has counsel lined up, and they're ready
6 to go.
7 CNSL W. ROBERTS: BDO is also ready to go. They
8 haven't had counsel because they don't have
9 any -- they're not appointed.
10 THE COURT: All right.
11 CNSL W. ROBERTS: A&M doesn't have counsel. They're
12 not appointed yet. They don't have a hat on in
13 which to hire. They certainly have asked
14 Mr. Rubin --
15 THE COURT: Mr. Rubin.
16 CNSL W. ROBERTS: -- and Mr. Rubin is great; don't get
17 me wrong. But BDO is ready to go as well. I
18 highlight for you the worry that, for this to
19 work long term, these parties are going to --
20 both sides are going to have to some faith that
21 this court officer does it.
22 THE COURT: Right.
23 CNSL W. ROBERTS: And here's what they're going to
24 both think: Well, A&M's been talking to Tian
25 Kusumoto for months. BDO's been talking to Dan
26 for months. They're never -- and so we may get
27 to a point where we say to you, or I say to my
28 friend, we're going to have to pick somebody else
29 with that mistrust, because if we don't start
30 with these parties having some faith in that
31 court officer, we're going to be back in front of
32 you repeatedly having fights. Again, I just
33 highlight that.
34 THE COURT: But if you take out -- if you take out BDO
35 and A&M, you know, who's left in the pool?
36 CNSL W. ROBERTS: I can tell you my friends and I
37 would agree on a short list of people who are
38 appropriate --
39 CNSL K. JACKSON: Justice, I mean -- sorry. That's --
40 I appreciate my friend's optimism about us
41 agreeing on something like this, and I also
42 think -- just to be clear, he's giving you
43 evidence that A&M has been in discussions with
44 Tian Kusumoto for months.
45 THE COURT: Yeah.
46 CNSL K. JACKSON: That is absolutely not true, and if
47 we need somebody from A&M, I think they have met

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Submissions by Cnsl W. Roberts

1 once, and I think he's left you with the wrong
2 impression.
3 THE COURT: Okay.
4 CNSL K. JACKSON: But I should say also, they've met
5 with Mr. Matthews.
6 THE COURT: All right.
7 CNSL W. ROBERTS: I want to be clear, I'm saying the
8 view from each side will be the mistrust. I have
9 no -- A&M, I have all the -- I have all the
10 respect for in the world. But I also think there
11 are two or three or four other firms in this city
12 who could absolutely do as good a job that would
13 take away those problems.
14 THE COURT: All right. And are you going to -- is it
15 Mr. Ferris going to be up next?
16 CNSL W. ROBERTS: Yes.
17 THE COURT: Because I do want to hear about this --
18 the jurisdiction.
19 CNSL W. ROBERTS: I'm going to deal with a draft order
20 and jurisdiction.
21 THE COURT: So you'll come back to that?
22 CNSL W. ROBERTS: Yes.
23 THE COURT: Okay.
24 CNSL A. NATHANSON: Justice.
25 THE COURT: Yes, Mr. Nathanson?
26 CNSL A. NATHANSON: May I address you just for a
27 moment before Mr. --
28 THE COURT: Yes, of course.
29 CNSL A. NATHANSON: So I just want to register this
30 concern. I'm responding to an injunction
31 application under the oppression remedy, which I
32 think Mr. --
33 THE COURT: Ferris.
34 CNSL A. NATHANSON: -- Roberts -- well, Mr. Ferris is
35 going to, but Mr. Roberts has already said
36 they're not seeking the order that they're
37 seeking, and they're going to change the order.
38 THE COURT: Right.
39 CNSL A. NATHANSON: It's very important, so that we
40 can keep this on the rails, that I see the motion
41 I am responding to.
42 THE COURT: Right.
43 CNSL A. NATHANSON: So I'd like to see the text of the
44 draft order --
45 THE COURT: Right.
46 CNSL A. NATHANSON: -- by this afternoon, like, after
47 the lunch break so that I'm not prejudiced and I

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Submissions by Cnsl W. Roberts

1 can deal with this. We've had our materials in
2 for quite a long time.
3 THE COURT: Right.
4 CNSL A. NATHANSON: I understand things can change,
5 but it's necessary that I know the precise order
6 that I'm responding to.
7 THE COURT: Fair enough. I mean, that's why I asked.
8 I need to know what -- I'll just say to
9 Mr. Roberts, at the end of the day, what
10 Mr. Jackson's proposing, the broad form but the
11 right to come back and limit it, what you're
12 proposing is start out by saying to the receiver,
13 here's what we need to know, but you can come
14 back at any time -- any time on short notice and
15 say, it's not working; I need to do this.
16 CNSL W. ROBERTS: Yeah.
17 THE COURT: It's just two different sides of the same
18 coin, but I wonder if it gets you to the same
19 place. I was thinking that, all right,
20 jurisdiction, I need to see specifically what
21 you're proposing and who's going to fund it and
22 also who would the court's officer be.
23 CNSL W. ROBERTS: Two things. One, we have no
24 instructions to withdraw the motion in front of
25 you for that funding application. What I'm
26 saying is, as this progresses and things move --
27 THE COURT: Right.
28 CNSL W. ROBERTS: -- I'm going to come up with
29 something else. But just to Mr. Nathanson's
30 comment, that application still stands, and until
31 otherwise, he should respond to it. But I also
32 very much take his point. I am going to, on the
33 lunch break and start right now, draft a form of
34 order for people to comment on.
35 THE COURT: All right. Okay.
36 Okay, Mr. Ferris. What should I have in
37 front of me, then?
38 CNSL C. FERRIS: So let me just give you a little bit
39 of a roadmap.
40 THE COURT: Okay.
41 CNSL C. FERRIS: So if you have our argument, our
42 written argument.
43 THE COURT: Hang on a second. I've got your book of
44 authorities.
45 CNSL C. FERRIS: Actually, we're --
46 THE COURT: Yeah, I have your written argument.
47 CNSL C. FERRIS: We're going to give you a new copy.

13

Submissions by Cnsl C. Ferris

1 THE COURT: Should I give you the other one? I
2 haven't even marked it.
3 CNSL C. FERRIS: Yes, you can give me that one back,
4 and I'm going to tell you why I'm giving you a
5 new copy.
6 THE COURT: Okay. Madam Clerk, just give this back to
7 Mr. Ferris.
8 CNSL C. FERRIS: I'm giving you a new copy, not
9 because anything substantively has changed; only
10 because we've created a condensed book, and
11 there's references to the condensed book in this
12 new one.
13 THE COURT: So the condensed book that Ms. Hiebert
14 handed me, I should put aside?
15 CNSL C. FERRIS: Yes.
16 THE COURT: All right.
17 CNSL C. FERRIS: And you can put these condensed books
18 up.
19 THE COURT: Just give me a minute, then. Just bear
20 with me while I organize.
21 CNSL K. JACKSON: Justice, we don't have the tab
22 numbers. This argument has condensed book tab
23 numbers, not the other tab numbers, and we don't
24 have a condensed book or even an index.
25 THE COURT: So you need a concordance of some type.
26 CNSL K. JACKSON: We don't have an index at all. We
27 have no way of knowing which tabs they're
28 referring to.
29 CNSL C. FERRIS: What I'm going to do is I'm going to
30 give you my condensed book.
31 THE COURT: Why don't you take a look at it before we
32 carry on, just to make sure that --
33 CNSL K. JACKSON: As long as we have a condensed book,
34 we're fine.
35 CNSL C. FERRIS: I'll give you mine, because I'm only
36 going to refer the two different documents, and
37 then you can have that.
38 THE COURT: The affidavits under seal, do I need those
39 at hand right now?
40 CNSL C. FERRIS: You don't need them at hand right
41 now.
42 THE COURT: Okay. Thank you.
43 CNSL C. FERRIS: So Justice, I'm in the argument.
44 THE COURT: Right.
45 CNSL C. FERRIS: And I'll just tell you -- you'll see
46 that the argument has a table of contents.
47 THE COURT: Right. Your co-counsel will upload this

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Submissions by Cnsl C. Ferris

1 to the FTS?

2 CNSL C. FERRIS: Yes.

3 THE COURT: Okay, good.

4 CNSL C. FERRIS: And if you take a look at the -- if
5 you take a look at the index, you'll see there's
6 an overview.

7 THE COURT: Okay.

8 CNSL C. FERRIS: I'm going to deal with the overview.

9 THE COURT: Okay.

10 CNSL C. FERRIS: You'll see there then there's a more
11 detailed review of the facts, which goes down to
12 part 5, the selected sites. Mr. Brandt is going
13 to take you through those sections.

14 THE COURT: Okay.

15 CNSL C. FERRIS: Then there's the proper scope of
16 appointment.

17 THE COURT: Yeah.

18 CNSL C. FERRIS: That's one you'll hear from
19 Mr. Roberts again and myself. I'm going to do
20 the conclusion.

21 THE COURT: Okay.

22 CNSL C. FERRIS: So that's the batting order.

23 THE COURT: Good.

24 CNSL C. FERRIS: And so if I can take you to the
25 overview, start on the -- part 1, the overview,
26 and having -- having said that, I'm going to just
27 try to situate you here a little bit before I
28 start into the text.

29 THE COURT: Okay.

30 CNSL C. FERRIS: And I want you to -- I want you to
31 try to remember two facts: The first fact is
32 this, is that this is a very unusual application,
33 because generally when a company finds itself in
34 financial circumstances, there's been some
35 external factor which has happened to the
36 company. There's been a change of market,
37 there's been a loss of customers.

38 In this circumstance, absolutely nothing has
39 happened to the business of the company. This
40 company operated for a decade with the exact same
41 sources of revenue that it has today. It would
42 sell land strategically when it needed to to
43 continue selling -- paying its bills, and it
44 would draw on its financing when it needed to in
45 between those land sales.

46 The only thing that's happened to this
47 company, to its business, is that Tom Kusumoto,

15

Submissions by Cnsl C. Ferris

1 who's in the courtroom, was replaced by Tian
2 Kusumoto, and Tian Kusumoto decided to cut off
3 both of those funding sources, and I'll take you
4 through this, but he's refused about \$300 million
5 of offers for land, and he refused to advance
6 moneys under the loan, even though the loan has
7 not been topped out. And so that's the only
8 change.

9 And so what we have is we essentially have a
10 fabricated insolvency. This was an insolvency
11 caused by Mr. Tian Kusumoto. And why would he do
12 that? Well, I'm going to explain to you why I
13 think he would do it, but this is the oddest
14 situation, in that -- is that we have a creditor
15 who does not want to be repaid. Mr. Matthews
16 says, desperately tried for the last three years
17 to repay, and Mr. Kusumoto has refused attempts
18 for refinancing, and he's refused all sales. So
19 that's the first fact.

20 The second fact that I want you to keep in
21 your mind is the sum of \$13,500 a day. That is
22 the sum, roughly, that 599 and Mr. Matthews is
23 being diluted every single day by Mr. -- by the
24 Sanovest financing. And you'll hear from
25 Mr. Brandt that that's exactly what Mr. Kusumoto
26 said to Mr. Matthews, is that, I'll just sit here
27 and I'll dilute you.

28 And so why is Mr. Kusumoto doing this? He's
29 doing it as a means to acquire Mr. Matthews'
30 interest cheap. That's the end game. And why
31 does a full receivership order prejudice
32 Mr. Matthews? Because it fundamentally alters
33 the relationship between the shareholders and the
34 partners here to something which was not
35 contemplated by the expectations of the parties.
36 These parties expected that Mr. Matthews would be
37 operating the business as he had for over a
38 decade, that there would be an entitlement to
39 sell land to pay bills. The most basic
40 expectation of any partner or shareholder is that
41 a company will pay its bills when it's able, and
42 this company is able. It just won't. And he's
43 doing this because he wants to get rid of
44 Mr. Matthews.

45 Now, my friend Mr. Jackson started off by
46 saying, oh, you don't have to deal with any of
47 these issues of oppression; leave them aside.

16

Submissions by Cnsl C. Ferris

1 Well, of course he did, because, as Mr. Roberts
2 said to you, Mr. Kusumoto doesn't want to deal
3 with any of those allegations. He wants you to
4 consider this without considering his conduct.
5 He wants you to consider it without any of the
6 distractions of why he's doing this. And it's
7 very telling, in my mind -- very telling -- and I
8 think -- I could be wrong here -- I think these
9 are the only three pieces of evidence that
10 Mr. Jackson really took you to.

11 The first was the Colliers report, and the
12 reference in the joint book -- I have it here.
13 What's the reference in the joint book?

14 CNSL C. OHAMA-DARCUS: In the joint -- the condensed
15 book?

16 CNSL C. FERRIS: The condensed book.

17 CNSL C. OHAMA-DARCUS: It's at tab 3. Tab 3 of the
18 condensed book.

19 THE COURT: Your book or Ms. Hiebert's condensed book?

20 CNSL C. FERRIS: No, in my condensed book it's tab 3.

21 THE COURT: Okay.

22 CNSL C. FERRIS: And this is the Colliers report.

23 THE COURT: Okay.

24 CNSL C. FERRIS: And if I can take you to the page --

25 THE COURT: This is not under seal, this one.

26 CNSL C. FERRIS: This is not under seal.

27 THE COURT: All right.

28 CNSL C. FERRIS: So if I can take you to the heading
29 "Possible Marketing Approaches," which is on
30 page 118 of that document.

31 THE COURT: All right.

32 CNSL C. FERRIS: Yeah, it's 118. It says "Possible
33 Marketing Approaches."

34 THE COURT: Oh, these were the three -- Mr. Jackson
35 took me to these.

36 CNSL C. FERRIS: Yeah. So Mr. Jackson -- so there's
37 three distinct approaches that are being
38 considered.

39 The next page, this is where Mr. Jackson
40 took you to. He read you the rationale for the
41 *en bloc* sales.

42 THE COURT: Right.

43 CNSL C. FERRIS: And said, well, that was the
44 recommendation that was being made, but what's
45 happening on this page is they're considering the
46 pros and cons of the three different approaches.

47 THE COURT: M'mm-hmm.

17

Submissions by Cnsl C. Ferris

1 CNSL C. FERRIS: And then the recommendation is on the
2 next page where he didn't take you to, and the
3 recommendation is:

4
5 After careful consideration of the three
6 proposed disposition strategies, Colliers
7 has selected option 1, market the major
8 sites, but excluding Village Core for the
9 time being, as the best possible strategies
10 for Ecoasis, for the reasons set out in the
11 executive summary.

12
13 THE COURT: And what's Village Core?

14 CNSL C. FERRIS: It's the centre of town.

15 THE COURT: I see. Okay.

16 CNSL C. FERRIS: So what he -- what Colliers came to
17 was the conclusion that -- essentially what we've
18 proposed on this application -- is to pick a few
19 sites to sell, was the best marketing strategy,
20 not *en bloc*. And so while Mr. Jackson took you
21 to the concerns, that wasn't the overriding
22 recommendation of Colliers.

23 And so what happens next? Well, there's
24 tons of offers. And so can I take you to
25 paragraph -- I'm going to ask you to flip forward
26 in the written argument.

27 THE COURT: Okay.

28 CNSL C. FERRIS: To paragraph 72.

29 THE COURT: Right.

30 CNSL C. FERRIS: You'll see that there's an aggregate
31 value of \$332 million worth of offers over two
32 years. Sanovest and Tian Kusumoto did not permit
33 any of these to proceed to sale. You can look at
34 it. Any combination would have paid them off
35 years ago, instead of having the drip, drip, drip
36 of \$13,500 a day from Mr. Matthews. What
37 creditor doesn't want to get paid?

38 THE COURT: And the pinpoint, then, in paragraph 73,
39 which backs up your oral submission, but not
40 permitting them to proceed to sale, that's --
41 could you just show me that. Are you going to
42 come back to that later?

43 CNSL C. FERRIS: Mr. Brandt is going to take you
44 through the details.

45 THE COURT: Oh, okay. All right. Okay, great.

46 CNSL C. FERRIS: But that is -- he did not permit any
47 of them to proceed.

18
Submissions by Cnsl C. Ferris

1 THE COURT: Yeah.

2 CNSL C. FERRIS: So what does Mr. Jackson refer to
3 next? Well, he refers to the evidence of Dave
4 Clarke -- Dave Clarke, the former CEO of
5 Ecoasis -- and he just mentions him as someone
6 who should be listened to.

7 Well, actually, I'm going to come to
8 Mr. Clarke later. So let's just go to one
9 further tab.

10 THE COURT: Okay.

11 CNSL C. FERRIS: So in your -- in, I think it's the
12 second volume of the condensed book. It's the
13 first tab in that book. It's the letter of --
14 it's the letter of April 22nd.

15 THE COURT: Right, okay. It says "without
16 prejudice" -- oh, it's with prejudice. All
17 right.

18 CNSL C. FERRIS: So this is the letter that
19 Mr. Jackson took you to, and he referred to
20 what's page 38 there, that Mr. Matthews was
21 proposing that he would accept anything,
22 including an *en bloc* listing. You see there --

23 THE COURT: Oh, yeah, yeah.

24 CNSL C. FERRIS: -- under C, heading C(b). But you'll
25 see the purpose of this letter, if I can take you
26 back to the first paragraph of it. You'll see
27 that there is, first of all, an offer of
28 financing from Timber Creek Mortgage Services,
29 and that Sanovest, as lender, somehow is going to
30 reject the replacement financing, on page 37 in
31 the first full unnumbered paragraph.

32 Then there's a term sheet that's been
33 offered by Sanovest, which the issues with that
34 term sheet are noted, including the fact that
35 there's a \$280,000 fee to be paid, not upon the
36 loan being funded, but upon the signing of a term
37 sheet, whether or not the loan is funded. And
38 that's at the top of page 38, paragraph (c).

39 Then I'm going to read to you under
40 "Financing Alternatives" (c):

41
42 As set out in our March 26th, 2024 email,
43 Mr. Matthews continues to support an orderly
44 sale of assets as a means to pay out the
45 Sanovest loan.

46
47 So three months before this receivership petition

19

Submissions by Cnsl C. Ferris

1 is filed, Mr. Matthews is saying, anything here
2 (a) to (f) we can do to pay out the loan. So we
3 can have land and lot sales; we can do an *en bloc*
4 listing; we can do land sales to the partners.
5 So he's saying, we'll give you land. If you
6 don't like the prices, we'll give Sanovest and
7 Mr. Kusumoto land. He can take it and sell it
8 himself or keep it. An enforceable buy/sell
9 process; a partition of all of the assets of the
10 partners; anything Mr. Matthews is prepared to
11 discuss, any of the above-noted options as an
12 alternative for pursuing refinancing.

13 THE COURT: So that's (e) is the enforceable buy/sell
14 process.

15 CNSL C. FERRIS: Yeah.

16 THE COURT: Okay.

17 CNSL C. FERRIS: Nothing. Rejected, all. Holus-bolus
18 rejected.

19 Instead they demanded on the loan, and we're
20 here today. So we're now April to September,
21 drip, drip, \$13,500 every day of money from
22 Mr. Matthews' pocket going into Mr. Kusumoto's
23 because he won't respond to any alternative.

24 So now I'm going to take you to Mr. Clarke,
25 who is said to be this independent witness. Can
26 I take you to paragraph 122 in the argument. So
27 in the arbitration with the third party, there
28 was a liability fund. What's happening in ten
29 days is the next phase of the arbitration.

30 THE COURT: Yeah.

31 CNSL C. FERRIS: Because of the confidentiality I'm
32 just --

33 THE COURT: Someone is going to tell me some more
34 about that arbitration.

35 CNSL C. FERRIS: Well, we're going to have you read
36 some more of the arbitration. I don't want to
37 say it out loud.

38 THE COURT: Okay. All right.

39 CNSL C. FERRIS: So what I'm going to do here,
40 Mr. Clarke was the previous CEO of Ecoasis.

41 THE COURT: Okay.

42 CNSL C. FERRIS: CFO.

43 THE COURT: CFO.

44 CNSL C. FERRIS: He's now employed by the other side
45 of the arbitration. And I want you to read
46 paragraph 122 to yourself. This is from the
47 arbitrator's decision.

20

Submissions by Cnsl C. Ferris

1 THE COURT: Okay. I just read the first paragraph.
2 CNSL C. FERRIS: Okay. If you could read it all. So
3 that's the person being put forward, a person who
4 is engaged in that type of conduct, in that kind
5 of activity, is being put forward as somebody who
6 has provided independent evidence here. He was
7 in the courtroom yesterday, Mr. Clarke. Why
8 would Mr. Clarke be in the courtroom? Well, I
9 think probably -- and I don't know this -- but my
10 supposition is that Mr. Clarke would very
11 desperately like to avoid the arbitration going
12 forward.

13 Now, just building on what Mr. Roberts had
14 to say, in our submission -- and I'll just take
15 you to this paragraph 1 here in our overview,
16 which is that there is a -- sorry, I'm back in my
17 argument.

18 THE COURT: I have to just get there.

19 CNSL C. FERRIS: Apologies.

20 THE COURT: And is the arbitrator's decision that is
21 excerpted there in the evidence somewhere?

22 CNSL C. FERRIS: It is. And I've been informed by my
23 colleagues that I was overly cautious, that the
24 arbitrator's decision was filed because there was
25 an appeal filed.

26 THE COURT: Oh, all right.

27 CNSL C. FERRIS: Which has been dismissed -- or
28 withdrawn; I can't remember.

29 THE COURT: So it's public.

30 CNSL C. FERRIS: So it's a public document. And the
31 arbitrator's decision, somebody will give me the
32 reference. Tab 68.

33 THE COURT: All right.

34 CNSL C. FERRIS: Condensed book, tab 68, volume 2.

35 THE COURT: Okay.

36 CNSL C. FERRIS: So if I can just take you to
37 paragraph 1 in the overview.

38 THE COURT: Yeah.

39 CNSL C. FERRIS: Which is, to say it narrowly, is
40 fine, but there's a single narrow issue before
41 the court, which is what is the proper scope of
42 the appointee's powers over some of the -- all of
43 the assets of Ecoasis Developments LLP. And so
44 we say -- and we continue to say -- that this
45 court should be very mindful and very concerned
46 about getting too far into this relationship
47 between these two partners in light of the

21
Submissions by Cnsl C. Ferris

1 conduct. And my friend will talk about conduct
2 as well. But in light of this conduct, we should
3 do -- follow the principle of doing as little as
4 possible, interfere as little as possible, alter
5 the status quo as little as possible, do only
6 what needs to be done: pay off this loan and
7 don't alter the relationship meaningfully between
8 these two parties. There's lots of litigation
9 over that relationship, but this receivership
10 should not be the vehicle for parties to avoid
11 the consequences of their conduct. So that's my
12 off-the-cuff.

13 THE COURT: And I take it, then, that the issues
14 surrounding their respective conduct is what's
15 going to trial in January 2026.

16 CNSSL C. FERRIS: Correct. And you'll hear -- I
17 suspect you'll hear, because you heard it a
18 little bit in the case planning conference
19 yesterday from Mr. Byma, that one of the things
20 that Mr. Tian Kusumoto wants is he wants this
21 receivership order to affect that very litigation
22 that's going to deal with the parties *inter se*.
23 He stood up and said, well, the receivership
24 order might impact, because in a --

25 THE COURT: I don't know that he said he wanted to.
26 He said it might.

27 CNSSL C. FERRIS: He said it might, and we said it
28 didn't. But you can see where this is going.
29 We're going to avoid the consequences of the
30 conduct even further. We're going to say this
31 receivership order somehow impacts that and
32 pushes it off further.

33 And so when I say that we have to be very
34 concerned about the consequences of what we do
35 here so these parties can get their conduct
36 between themselves dealt with, they need -- we
37 need to be careful and cautious.

38 So I'm now going to go to the argument.

39 THE COURT: Sure.

40 CNSSL C. FERRIS: So I'm at paragraph 2, and I think
41 I've said that, which is that the appropriate
42 scope of the appointment is limited to the relief
43 that will end Sanovest's intentional blockage of
44 the partnership's development business and allow
45 the partnership to repay the Sanovest loan.

46 And I just -- just again, let's go up a
47 level. This is a land development company. It's

22

Submissions by Cnsl C. Ferris

1 like a mining company that's a mineral
2 exploration company. It has no cash flow until
3 it can sell its land. It's got golf course
4 operations, which you've heard from Mr. Roberts
5 are self-funding, but the golf course is there to
6 support the land development. And if it can't
7 sell land, then it's got no money. And every
8 year there's property taxes. So the only source
9 of money for this company is land sales, and
10 that's exactly what they did for ten years, or
11 they drew down on loans to ultimately pay back
12 through land sales. And so this company needs to
13 be allowed to do the business that it was
14 intended to do, and that's what we're trying to
15 accomplish.

16 We say that -- and I think Mr. Roberts has
17 said this -- that it's a blunt hammer, a full
18 receivership, which is unnecessary in the
19 circumstances. The current reality is that
20 Sanovest has manufactured a default under its
21 loan and seeks to leverage that default to
22 enhance its own position as a partner and
23 shareholder to the detriment of 599 and Matthews.
24 This is an attempt to stymie and oppress
25 Mr. Matthews and 599.

26 So I'm over on page 2 here, and this builds
27 on what Mr. Roberts has to say, but you have to
28 remember the hats that are worn by the parties.
29 So Sanovest, on this application, is a creditor
30 seeking repayment on its debt. That's evidenced
31 from the pleading and the relief sought. It
32 purports to protect and demand repayment on a
33 debt owing to it by the partnership.

34 And I just, you know, remind you that the
35 debt is somewhere between 50 or \$60 million, and
36 you've seen the estimate of value, appraised
37 value of the assets. And so it seeks an order
38 over many hundreds of millions of dollars of
39 assets to protect a loan of about one-fifth of
40 the size of the assets.

41 So just at that very basic level, there's no
42 risk here that they're not going to get repaid.
43 Like, not even close. They could be repaid many
44 times over. So we've put in their pleadings
45 there in paragraph 10, and it demands that it be
46 repaid, but at the same time, it expresses a
47 willingness to keep refinancing the project,

23

Submissions by Cnsl C. Ferris

1 agreeing that the project has significant value,
2 but purporting to disagree with the strategy to
3 realize on this value, a strategy that has been
4 in place for a decade with Tom Kusumoto and
5 Mr. Matthews.

6 The partners are currently unable to
7 generate revenue from the sale or development of
8 land because the partners agree that the project
9 has significant potential value; they disagree on
10 the appropriate strategy to realize on that
11 value.

12 Now, two things: One, the strategy has
13 already been employed for a decade. Lots of
14 sites have been sold. Secondly, does it really
15 sit well with the court that you have bills to
16 pay, there's people out there who are owed money
17 by this company. There's offers. Even if you
18 disagree with the overall strategy, couldn't you
19 just sell one little property, something that
20 doesn't impact the overall strategy, to pay off
21 those people that need their money? Does it
22 really make sense to spend three years driving
23 this company into a receivership application and
24 not try to pay off anybody just for your own
25 purposes? Is that really the type of conduct
26 that this court wants to reward?

27 You know, we say that this shows the
28 oppressive character of Sanovest's position in
29 its attempt to wear both hats before the court.
30 It seeks to exercise its right to be repaid while
31 simultaneously saying that repayment and debt
32 owing is unnecessary, provided that a neutral
33 third party with control of key aspects of the
34 operations is appointed to address partner
35 issues. It's trying to do both under the hat of
36 insolvency.

37 Tian Kusumoto claims to believe that a
38 receiver manager is required to ensure that the
39 partnership assets are safeguarded and their
40 value maximized for the benefit of the
41 partnership and other stakeholders. The receiver
42 manager is best -- is best positioned to
43 determine how best to monetize the partnership
44 assets, specifically its lands, including with
45 input from its partners.

46 Similarly, in Sanovest's written submissions
47 in the receivership petition, Sanovest and Tian

24

Submissions by Cnsl C. Ferris

1 Kusumoto's view is expressed in these terms:
2 Sanovest and Tian Kusumoto are of the view that,
3 since the parties are unable to advance,
4 development of the partnership's assets should be
5 sold *en bloc*. So that's their view. The only --
6 and you've heard that about how many people are
7 out there who have hundreds of millions of
8 dollars versus how many people are out there who
9 have 20 or 30 or \$40 million. So query whether
10 what he's really saying is, I want to buy them
11 all at a distressed price from Mr. Matthews.

12 The only practical and appropriate path
13 forward is the partnership assets and business to
14 be put in the hands of a court-appointed receiver
15 who can best determine how to monetize the assets
16 and who will be sufficiently funded to safeguard
17 the assets and ensure the continued operation of
18 the partnership during that process.

19 However, as stated by Tian Kusumoto in other
20 evidence given in support of the receivership
21 petition, I believe that a comprehensive and
22 coordinated approach is required. I believe the
23 respondents require access to funds to conduct
24 the process and the operating expenses. Sanovest
25 is prepare to provide those funds, but only if
26 there's a receiver in control of all of the
27 assets to ensure the process and expenses are
28 commercially reasonable and that it has over
29 sight to the process to safeguard shareholders'
30 interests.

31 Sanovest's interest is continuing as the
32 partnership's primary lender is also evident in
33 its recent presentation of a term sheet for a
34 loan of 85 million, and that's cited.

35 So seen for what it really is, Sanovest
36 seeks the appointed receiver, not to be repaid as
37 a creditor, though it's chosen the vehicle for
38 receivership position, but in order to circumvent
39 the substance of the ongoing litigation between
40 Sanovest and Matthews and further entrench its
41 position under the partner to the detriment of
42 Matthews.

43 And so the \$13,500 a day will continue, but
44 it will be more, because not only is it going to
45 be the ongoing debts of the company, there's
46 going to be the cost of the receiver, and not
47 just the receiver who's marketing, a receiver

25

Submissions by Cnsl C. Ferris

1 who's coming in and running the whole thing. The
2 most expensive receivership possible is going to
3 be funded by Mr. Kusumoto, who will be fully
4 supportive, and it will dilute Mr. Matthews on
5 top of the \$13,500. And so that's the goal.
6 That's what's happening here.

7 So I'm over at page 4 now. I'll try to get
8 through this section, and then --

9 THE COURT: Sure.

10 CNCL C. FERRIS: -- we can take the morning break.

11 So this is a continuation, as we've said, of
12 a long pattern of oppressive conduct by Sanovest
13 and Tian Kusumoto. Sanovest asserts that the
14 total amount owing under the Sanovest loan is
15 approximately \$62 million, and this is the
16 interest accruing per day. Every day the
17 Sanovest loans remains due, 599 and
18 Mr. Matthews's equity in the partnership erodes.
19 This erosion is taking place to Sanovest's
20 benefit as both creditor and partner.

21 Although the amount that is due on the
22 Sanovest loan is a matter of dispute, the
23 following table illustrates the interest that
24 would allow to the partnership over five years if
25 Sanovest were to continue to lend to the
26 partnership of 8 percent.

27 So if this receivership goes until the end
28 of 2025, all of a sudden we're up at \$71 million;
29 76 in 2026. Does it take two years to sell this
30 *en bloc*? Maybe. '27, 83 million. So you can
31 see the impact that that has on Mr. Matthews, who
32 is not the secured lender.

33 So erosion of 599 and Matthews' equity in
34 the partnership to Sanovest's benefit, as both
35 creditor and partner, has to have been Tian
36 Kusumoto's intent since at least 2021, when he
37 stopped paying any bills to anyone. As
38 Mr. Matthews has deposed:

39
40 Through the fall and summer of 2021, Tian
41 stated to me on several occasions --

42
43 And just so you know, we don't call him Tian in
44 the affidavits for any disrespect. It's just
45 because there's so many Kusumotos here, it's
46 easier.

47 THE COURT: Right.

26

Submissions by Cnsl C. Ferris

1 CNSL C. FERRIS:

2 Tian stated to me on several occasions that
3 his ultimate goal was to have Sanovest
4 purchase 599's equity in Bear Mountain on a
5 discounted or distressed basis, and that he
6 had the benefit of time to do so, since
7 Sanovest was continuing to earn interest on
8 the Sanovest loan, effectively eroding 599's
9 interest.

10 On August 13th, 2021, the partnership's
11 external accountant relayed the same message
12 to me in a telephone conversation that he
13 had had a conversation with Tian in which
14 Tian had stated that he was happy to wait
15 ten years and let the interest on the
16 Sanovest loan eat up all of 599's equity in
17 the project.

18
19 So how do you do that? You get the most broad
20 receivership, you ask the receiver to sell the
21 thing *en bloc* and you wait, and eventually
22 Mr. Matthews ends up with nothing.

23 Sanovest has effectively shut the taps to
24 funding under the Sanovest loan, while also
25 blocking the development's land sales and third
26 party financing, despite the balance of the loan
27 still being well below the current cap of
28 70 million.

29 At Exhibit M -- the cite is there --
30 Mr. Kusumoto attaches a loan summary showing
31 that, from June 30th, 2019, to March 15th, 2024,
32 Sanovest only advanced approximately \$6 million
33 to the partnership -- now, just think about that
34 for a second, because Mr. Jackson told you that
35 the property taxes are about \$1.6 million a year.
36 So in five years, Sanovest has advanced
37 \$6 million -- that doesn't cover the property
38 taxes -- less than the partnership's total
39 property taxes for the same period, while
40 receiving more than \$38 million from land sales
41 in repayments towards the Sanovest loan over the
42 same period.

43 This is the mischief of the relief sought by
44 Sanovest on this receivership petition. Such
45 mischief should not be sanctioned by this court,
46 considering Sanovest's relief. This needs to be
47 brought to an end. There needs to be what we say

27

Submissions by Cnsl C. Ferris

1 is someone to go with limited powers and to get
2 the Sanovest loan paid off, and that's where we
3 say this application should land, and so that's
4 probably a good spot for the morning break.

5 THE COURT: Very good. All right, thank you.

6 THE CLERK: Order in chambers. These chambers are
7 adjourned for the morning recess.
8

9 **(PROCEEDINGS RECESSED AT 11:16 AM)**

10 **(PROCEEDINGS RECONVENED AT 11:39 AM)**
11

12 THE COURT: Just before you carry on, Madam Clerk has
13 identified -- brought to my attention that new
14 numbers seem to be calling in or signing in to
15 the link, and she tried to find out who they
16 were, and they hung up. So when we see them try
17 to sign in again, I'm going to ask who they are,
18 because the first day someone asked if anyone was
19 counsel. I know that a media individual asked to
20 be admitted, and it was cleared through
21 Mr. Cohen, former Justice Cohen, and a link was
22 provided, and they know the rules about not
23 recording and about participating virtually.

24 But I want to make sure the other
25 individuals do as well, and I think one of them
26 is -- I did say that -- you know, one of them --
27 he didn't say, but I think Madam Clerk has been
28 given a number, that's Mr. Clarke, who you
29 referred to, and presumably -- well, I'll make
30 sure he knows the rules about recording and the
31 like. So if you see me interrupt you for a
32 minute, it's because we're trying to figure out
33 who's calling in.

34 CNSL C. FERRIS: Okay. Throw something at me if I
35 don't see you.

36 THE COURT: Okay.

37 CNSL C. FERRIS: Okay, Justice. I'm at the bottom of
38 page 5.

39 THE COURT: Right.

40 CNSL C. FERRIS: Sum of response. And I'm going to
41 take you through this section, and then I'm going
42 to pass this over to Mr. Brandt.

43 And so in opposing the funding application
44 and advancing the receivership position, we say
45 that there's five core points to Sanovest and
46 Tian Kusumoto's position, and those are
47 summarized at paragraph 4 of their funding

28

Submissions by Cnsl C. Ferris

1 submissions.

2 And so their first point is that they say
3 that the relief sought on our application will
4 not address the partnership's liquidity crisis.
5 And we say the statement is incorrect, that this
6 is a liquidity crisis that was created by
7 Sanovest now for over years, and that there has
8 been serious interest and offers from investors
9 to purchase development sites, and there's been
10 offers to finance, and so we don't see any real
11 problem with -- as Mr. Roberts said -- obtaining
12 some liquidity if that was limited receiver put
13 in place.

14 Second point, they say that the court can't
15 make the order, and whether this order is -- this
16 is the order that's referred to in our notice of
17 application, but in evidence, we say that that
18 too is incorrect. The relief sought in the
19 funding application is for the appointment of an
20 agent with powers to conduct a marketing and
21 sales process. It's not an order for
22 subdivision, nor does it contemplate a rewrite of
23 Sanovest's securities. Essentially, it gives
24 directions to that agent, if they needed to
25 subdivide, that they could do that and go through
26 the process.

27 On the contrary, 599 and Matthews seek
28 relief directed at paying off and eliminating the
29 need for the security held by Sanovest, which at
30 least on the face of the demand, is what Sanovest
31 should want. Indeed, Sanovest and Tian
32 themselves purport to recognize the need to
33 monetize the partnership's assets by asking the
34 courts to appoint a full receiver. So again, we
35 say it's an order that can be made.

36 They say that it doesn't address the
37 outstanding litigation, and I just want to take
38 you to where Mr. Jackson took you, which was this
39 list of litigation, which I think is attached to
40 my friend's oppression submissions as an exhibit
41 at the end, because there's some context here.
42 You see the schedule 1.

43 THE COURT: M'mm-hmm.

44 CNSL C. FERRIS: So you'll see the first two actions
45 there.

46 THE COURT: Yes.

47 CNSL C. FERRIS: So those are actions which have been

29

Submissions by Cnsl C. Ferris

1 settled, and the problem with the actions is
2 they're been settled within -- by Mr. Matthews at
3 a mediation at a level that is below what
4 Mr. Kusumoto wanted to settle for, but he's
5 refused to fund the settlement, and so that's why
6 those litigation matters are still outstanding,
7 is because there's been a settlement, and they've
8 sued to enforce the settlement.

9 Well, Mr. Kusumoto didn't attend the
10 mediation, so he needs to approve it, and first
11 of all approve it, and then the settlement needs
12 to be funded. But there's no real outstanding
13 risk. There's nothing pending in those
14 applications at this point in time, but that's
15 just another --

16 THE COURT: Are the settlement amounts confidential,
17 if they're suing to enforce? I could just make a
18 note of each one.

19 CNSL C. FERRIS: We'll check and we'll get you the
20 number.

21 THE COURT: All right.

22 CNSL C. FERRIS: Thank you. It's not confidential.

23 THE COURT: I could make a note of each one.

24 CNSL C. FERRIS: So that takes care of the first two.

25 THE COURT: Okay.

26 CNSL C. FERRIS: The next one is one of these matters,
27 Sanovest actions.

28 THE COURT: Right.

29 CNSL C. FERRIS: So that's what we say should be
30 ongoing.

31 The next is Mr. Kusumoto's debt action
32 against Mr. Matthews and the counterclaim of
33 Mr. Matthews against Mr. Tom Kusumoto.

34 THE COURT: Sorry, number 3 is the insolvency action;
35 right?

36 CNSL C. FERRIS: No, this is the action that was
37 filed --

38 THE COURT: Oh, the oppression action.

39 CNSL C. FERRIS: No, this is not. This is Sanovest
40 filed an action in May of 2022 against
41 Mr. Matthews -- his father, Tom Kusumoto. This
42 is over the parcel of land which --

43 THE COURT: Oh, that's what's going to trial in
44 January?

45 CNSL C. FERRIS: Yes, this is one of them that's going
46 to trial in January.

47 THE COURT: Right, one of them. Right.

30

Submissions by Cnsl C. Ferris

1 CNSL C. FERRIS: And so that's that one.

2 THE COURT: That's the one I heard about yesterday.

3 CNSL C. FERRIS: Yeah.

4 THE COURT: All right.

5 CNSL C. FERRIS: The next one is the one you also

6 heard about. This is the one where there's --

7 THE COURT: There's an application that's outstanding.

8 CNSL C. FERRIS: Correct.

9 THE COURT: To join it.

10 CNSL C. FERRIS: But that -- it's in the whole mix.

11 It's the same related parties.

12 The next one is the oppression proceeding,

13 which is, again, going to trial in January.

14 THE COURT: Right.

15 CNSL C. FERRIS: The next one after that is -- it's a
16 derivative action brought by Mr. Matthews and 599
17 on behalf of the partnership. Again, it's one of
18 the ones that's going to trial in January.

19 Number 7 is, again, the result of the
20 inability to sell any land, is that you can't pay
21 property taxes, and so that there will be a
22 charge on title with respect to that, and at some
23 point I guess the City of Langford could apply,
24 but there's been no applications in that made,
25 and it just -- it sits there.

26 And the last one is this receivership
27 petition. And so what you really have with
28 respect to third parties is you have two cases --
29 one is a settlement which needs to be approved
30 and funded, and one is property taxes which
31 should have been paid -- but there's nothing
32 pending or urgent about any of them. They've
33 been sitting for quite a while.

34 And so we say that there really is nothing
35 that would need to be dealt with with the
36 outstanding litigation, that the interparty
37 litigation needs to proceed. The other
38 litigation is not urgent or pending, and if
39 somebody was to do that, then a limited appointed
40 receiver could come to this court and ask for
41 some relief. So --

42 CNSL K. JACKSON: Justice, I just want to be clear on
43 one thing. My friend is talking about property
44 taxes being paid. They haven't. I just wanted
45 to be clear on that.

46 CNSL C. FERRIS: No, I said they have not been paid.

47 CNSL K. JACKSON: They have not been.

31

Submissions by Cnsl C. Ferris

1 THE COURT: They haven't been paid.
2 CNSL K. JACKSON: But that's not part of the
3 litigation is what I'm saying, Justice.
4 THE COURT: Right.
5 CNSL K. JACKSON: There's no litigation around
6 property tax.
7 THE COURT: There's a --
8 CNSL W. ROBERTS: It wouldn't be on the list, is what
9 I'm saying.
10 THE COURT: There's claim. Well, it's in the list.
11 CNSL K. JACKSON: But that's litigation. I think if
12 my friend is talking about the Langford action,
13 it's not about property taxes.
14 CNSL C. FERRIS: Sorry, it's --
15 THE COURT: Oh, it's not?
16 CNSL K. JACKSON: No.
17 CNSL C. FERRIS: Sorry, I apologize. It was a fee
18 payable to Langford for a parkway extension.
19 THE COURT: Oh. So there's no charge there.
20 CNSL C. FERRIS: No charge there.
21 THE COURT: Okay.
22 CNSL C. FERRIS: But again, it's just something which
23 would be an ordinary-course expense which has
24 been filed. Nothing's been pursued. There's no
25 urgency with respect to it. It's not like
26 there's a pending application or anything like
27 that.
28 THE COURT: Okay. All right. Thank you.
29 CNSL C. FERRIS: Apologies.
30 THE COURT: That's fine.
31 CNSL C. FERRIS: So what should be (d), which looks
32 like a second (b) on the page on my copy,
33 Sanovest says that the relief sought in the
34 funding application will not address the
35 deadlock. And again, we beg to disagree on this
36 minimalist approach that we suggest that you
37 take. As we've noted, the only deadlock is one
38 of Sanovest's own making, as Tian and Sanovest
39 seek to leverage their dual position as lender
40 and partner to benefit and entrench their
41 position to the detriment of 599 and Matthews.
42 The relief sought in the funding application
43 will address this deadlock by eliminating
44 Sanovest's status as lender and thereby
45 eliminating their incentive to delay and limit
46 cooperation. If they actually start paying
47 interest to a third party, that should

32

Submissions by Cnsl C. Ferris

1 incentivize them to be more cooperative.

2 And I should say that the financing that
3 Mr. Matthews had in place required that there be
4 land sales at some point to pay down the loan,
5 and that was why they wouldn't be approved.
6 Again, cut off the funding.

7 And then the last point is that Sanovest and
8 Tian Kusumoto say that relief from oppression is
9 not available to address issues within the
10 partnership. And again, we say that's incorrect.
11 And while there are limits to the scope of relief
12 under the corporate oppression remedy, you'll
13 remember that each of these partnerships is
14 operated by a company that manages them, and the
15 decisions that are made with respect to each of
16 those companies are decisions that are made with
17 respect by the board of each of those companies.
18 And so the approval of purchases, financing, that
19 goes to a board meeting at that corporate level.

20 And so this isn't a bare trust situation
21 where the corporation does nothing. These are
22 actually corporations that operate and make
23 fundamental decisions, and we say that that
24 distinguishes them from the cases that you'll
25 hear about from my friend Mr. Nathanson and
26 brings them within the corporate oppression
27 remedy.

28 THE COURT: One question I have for you, and others
29 may want to weigh in it on it as well, is if the
30 nature of the conflicting evidence relating to
31 the oppression action and the relief sought in
32 your client's application is such that it's -- I
33 determine it's inappropriate for a summary
34 application -- or put it another way, do I need
35 to -- I'll be more artful.

36 If I accept what Mr. Roberts is putting
37 forward, do I need -- is the only basis of which
38 I can accept that within the context of your
39 client's application in the oppression
40 proceeding, or can I make the type of order
41 Mr. Roberts is advocating -- perhaps not fully,
42 but with some changes -- within the context of
43 the insolvency proceeding and the application
44 brought by Sanovest?

45 CNSL C. FERRIS: So my answer --

46 THE COURT: Isn't there jurisdiction for me to do
47 that?

33

Submissions by Cnsl C. Ferris

1 CNSL C. FERRIS: Yeah, so my answer to you is you
2 could do it in both.
3 THE COURT: Okay.
4 CNSL C. FERRIS: You can do it in our application,
5 because our application is brought both under the
6 *Law and Equity Act*, as well as the oppression
7 proceeding.
8 THE COURT: Okay.
9 CNSL C. FERRIS: And you can do it in my friend's
10 proceeding because it's brought under the *Law and*
11 *Equity Act*, and you're not bound to accept their
12 order. It's in your discretion.
13 THE COURT: Right.
14 CNSL C. FERRIS: So you can carve up our order. You
15 can carve down their order. It's really, at the
16 end of the day, where you see all the factors
17 landing.
18 THE COURT: Right. Because you told me at the outset
19 your -- the relief sought under your client's
20 application is premised on -- is injunctive
21 relief, serious issue to be tried. But it
22 occurred to me, what if the test is different,
23 it's a *prima facie* case and it's a higher test or
24 more stringent test? Do I need to go that far
25 if, at the end of the day, the parties are
26 deadlocked and I look at them in terms of
27 receivership appointment under the *BIA*?
28 CNSL C. FERRIS: Yeah, so my answer to you is you
29 don't have to, but you can.
30 THE COURT: Okay.
31 CNSL C. FERRIS: And so, just to be clear here, like
32 my friends explained this up, ours is maybe a
33 little less surgical than theirs.
34 THE COURT: Okay.
35 CNSL C. FERRIS: But I'm trying to address a little
36 bit of both.
37 THE COURT: Yeah, right.
38 CNSL C. FERRIS: And Mr. Roberts is dealing just with
39 receivership.
40 THE COURT: Well, what you're -- in effect what you're
41 doing is giving me context -- factual context in
42 which you hope to persuade me that I shouldn't
43 issue the broad form of receivership order, at
44 least not at this juncture.
45 CNSL C. FERRIS: Correct.
46 THE COURT: Given the -- what you say are the facts
47 surrounding this deadlock.

34

Submissions by Cnsl G. Brandt

1 CNSL C. FERRIS: Correct.

2 THE COURT: Yeah, okay. All right.

3 CNSL C. FERRIS: And so I'll just finish up with this
4 point here, this last point. This is just on the
5 oppression point, the last sentence here that
6 this managing partner company -- and this is
7 important -- is the corporate vehicle that the
8 partners set up to manage their affairs. And so
9 that's what separates it from some of the other
10 vehicles that Mr. Nathanson will take you
11 through. This is the same vehicle that Sanovest
12 and Tian Kusumoto have sought to use their
13 efforts to oppress 599 and Matthews. So it's in
14 that vehicle that the suppression has occurred.

15 And so that is why we say that this is a
16 case where, notwithstanding the fact that there's
17 partnerships in place, the corporate oppression
18 remedies apply.

19 And with that, I'm going to turn the floor
20 over to -- the podium over to my friend
21 Mr. Brandt, who will take you through the facts
22 in a bit more detail.

23 THE COURT: Okay. Mr. Brandt?

24 CNSL G. BRANDT: Thank you, Justice. Just before I
25 begin, there is one other volume I wish to hand
26 up, and we've provided a copy of it to my
27 friends. It is a condensed book of just the
28 bodies of the affidavits, the core ones that I'm
29 going to be referring to in the factual
30 submissions. Just it makes a far smaller binder
31 than with the exhibits.

32 THE COURT: Thank you.

33 CNSL G. BRANDT: So Justice, I'm at page -- I'm at
34 paragraph 30 of the argument, beginning at
35 part 2, and in this section I'm providing a
36 snapshot of the partnership as it was during the
37 first eight years of its operation beginning in
38 2013, and some discussion of the parties'
39 reasonable expectations. And again, as my friend
40 Mr. Ferris said, this goes to both the relief
41 being sought in the oppression proceeding, and
42 also the factual background for the type of
43 receivership order that may be appropriate.

44 Just at paragraph 30 at the beginning, at
45 the Bear Mountain master-planned resort community
46 north of Victoria on Vancouver Island, as we've
47 heard, it's partly within the city of Langford

35

Submissions by Cnsl G. Brandt

1 and partly within the municipal district of
2 Highlands. As a master-planned community -- and
3 we'll talk a bit more about what that means.

4 THE COURT: Okay.

5 CNSL G. BRANDT: But they're structured to the land
6 planning. There are some house covenants with
7 respect to conformity and quality of
8 construction, and the community is centred around
9 amenities, including golf, but also tennis,
10 cycling, hiking, running, et cetera.

11 As a master-planned community, there are
12 many stakeholders, including residents, many of
13 whom are members of the golf -- golf course,
14 members, which includes nonresidents as well,
15 builders, businessowners, guests and visitors.
16 There are multiple amenities, multiple real
17 estate opportunities, including single-family,
18 townhouse, condominium, purpose-built rental and
19 hotels.

20 Mr. Matthews has been the president and CEO
21 of EBMD, which is the managing partner of both
22 the land partnership and the resort partnership,
23 since 2013.

24 I'm just going to go into this binder of
25 affidavits here at tab F, and paragraph 14.

26 THE COURT: And just to relate it back to which
27 paragraph of your written submissions does this
28 relate to?

29 CNSL G. BRANDT: I'm still at paragraph 30 here, but
30 I'm in the --

31 THE COURT: In which sub?

32 CNSL G. BRANDT: 30(a).

33 THE COURT: Okay, great.

34 CNSL G. BRANDT: And I'm just at the reference here to
35 Matthews #1, receivership, number 14.

36 THE COURT: Oh, yeah, okay. So that's tab --

37 CNSL G. BRANDT: Tab 7 of this -- sorry, tab F of this
38 affidavit binder.

39 THE COURT: Okay.

40 CNSL G. BRANDT: And just over -- at page 7, which is
41 tab 14, and then just over the page to page 8,
42 Mr. Matthews sets out a list of his duties and
43 responsibilities in his role as CEO, and that's
44 important, in part, because it goes to the -- one
45 of the financial factors here, which is the
46 management fee, and Mr. Tian Kusumoto's evidence
47 provided in his first affidavit in the

36

Submissions by Cnsl G. Brandt

1 receivership proceeding that it's unclear -- it's
2 unclear what role Mr. Matthews served for -- or
3 to earn his management fee.

4 And so here -- I won't read them all -- but
5 from (a) to (k) is the listing of Mr. Matthews'
6 duties and responsibilities as the CEO of EBMD,
7 as the person on the ground who's been overseeing
8 and managing this project since inception.

9 THE COURT: Okay.

10 CNSL G. BRANDT: Then there is also a reference
11 here -- I won't take the court to it, and it's
12 not in our condensed book -- but it's the same
13 Matthews #1 affidavit. Exhibits A to E are just
14 excerpts from the website that illustrate the
15 golf course, the tennis, the amenities of the
16 resort, and they show a professionally run,
17 high-caliber golf and tennis facilities there.

18 Today -- I'm at (b) now -- Bear Mountain
19 consists of approximately 1,400 single-family
20 residences, townhouses and condominiums, and is
21 home to more than 3,000 residents. Over the next
22 ten years Bear Mountain is projected to have at
23 least 3,000 homes and more than 8,000 additional
24 residents.

25 The assets -- we call them Bear Mountain --
26 consist of approximately 775 acres of land. It
27 includes two golf courses, tennis facility and at
28 least nine distinct potential development sites,
29 future development sites.

30 We've heard about the appraised value. I
31 won't repeat the number here. Obviously the fact
32 that the land vastly exceeds the amount of the
33 obligations owed by the partnership.

34 In addition to the current development
35 sites -- so those are the nine identified here --
36 there are some 540 acres of the partnership's
37 lands that are zoned for golf course and open
38 space, including -- and this is significant --
39 significant tracks of unused land that may be
40 subject to future rezoning.

41 And this is again important because it goes
42 to one of the points raised yesterday, and I'm
43 just into this affidavit binder again at tab C.
44 This is an affidavit that Mr. Matthews has
45 provided in this proceeding. And just over to
46 paragraph 12(a) that's on page 7, and here
47 Mr. Matthews responds to the assertion that was

37

Submissions by Cnsl G. Brandt

1 made yesterday, which is that if the three sites
2 that are being sought in our funding application
3 are ordered to be made part of a marketing
4 process, that would essentially take up or
5 eviscerate most of the partnership's developable
6 land. That is not fact.

7 So what Mr. Matthews deposes here at
8 paragraph 12(a) is that:
9

10 It's not correct that if the selected lands
11 are sold, the partnership will be left with
12 less than half of its developable land. The
13 partnership has land in both Langford and
14 District of Highlands that can be rezoned
15 for development. The reason why the
16 partnership has not applied for more density
17 to date is because we have significant
18 existing density. Prematurely increasing
19 the partnership's zoned developable land
20 base has the effect of increasing the total
21 amount of property taxes payable by the
22 partnership on an annual basis.
23

24 Mr. Matthews goes on to say that he's advised by
25 Mr. Mogensen, who's the land development manager
26 at the partnership, and he verily believes that,
27 based on land-planning exercises, we could
28 potentially increase our developable area within
29 the District of Highlands from 18 hectares to
30 76.5 with future rezoning, and on this basis, the
31 sales proposed in the funding application would
32 leave intact about 75 percent of the developable
33 area.

34 So we've heard evidence of the amount of
35 property taxes that the partnership already pays,
36 and Mr. Matthews' evidence here is clear that
37 this future land sits bare, the way the land was
38 when Bear Mountain was a mountain, and this whole
39 project, since inception, has been about taking
40 land, preparing it for development, including
41 through subdivision, rezoning, et cetera.

42 I'm at (f). The partnership and the resort
43 partnership employ approximately 80 to 150
44 managers and staff, depending on the season,
45 including five employees on the partnership's
46 development side and between 75 and 125 to 145 on
47 the golf and recreation side. The resort

38
Submissions by Cnsl G. Brandt

1 partnership has -- it's a large operation.

2 Here under paragraph 31 is an aerial plan
3 for all of the partnership's Bear Mountain
4 assets, just so the court can see a picture of
5 it, and what's identified here are the three
6 development sites that are proposed as part of
7 our funding application, the Victoria Peak site,
8 the Hole 5 site and the Players Drive site.

9 Notably, the Players Drive site, which has
10 substantial value, is -- the evidence is it's
11 ready to be sold as is. That site doesn't
12 require any subdivision or any other type of
13 bundling to be sold. It is ready to be marketed
14 without those steps. The other sites are also
15 ready to be marketed relatively quickly, and
16 we'll come to that evidence. And obviously, as
17 happens in a marketing process, the site may be
18 marketed with subdivision and so on to follow
19 under an LOI or as part of a marketing process.
20 It's -- these things happen concurrently over
21 time, because all of these take time for
22 conditional removal and take time to close.

23 I'm at paragraph 32. In or around 2011,
24 Matthews became interested in the Bear Mountain
25 project as a potential business opportunity. At
26 that time development at Bear Mountain was well
27 underway; however, the existing owners had run
28 into financial difficulties with the project's
29 asset -- and the project's assets had come under
30 creditor protection -- reorganized into the
31 control of HSBC.

32 And this, Justice, is part of what gives
33 rise to the concern over the full receivership
34 order in this case, is the stigma not only of a
35 receivership, but the stigma here of a second
36 receivership.

37 And I've just put -- I won't take the court
38 to it, but I've put a cite here to a news
39 article -- that's what's cited here at
40 Exhibit B -- from that time that demonstrates the
41 negative public perception that arose from the
42 receivership. And Matthews also gives evidence
43 on that, and I'll just read it. It's at --
44 Mr. Matthews' evidence is at F of the affidavit
45 binder.

46 He says in his last paragraph of the
47 affidavit:

39

Submissions by Cnsl G. Brandt

1
2 Having gone to market for third-party
3 funding, for both refinancing --
4

5 THE COURT: Just a minute, let me get there. Last
6 paragraph of the whole affidavit?

7 CNSL G. BRANDT: Of this affidavit, of tab F here.

8 THE COURT: Okay, just a minute.

9 CNSL G. BRANDT: He says two things in this paragraph.

10 THE COURT: Just let me get it. Okay, go ahead.

11 CNSL G. BRANDT: Thank you, sorry.

12 He says two things that are important in
13 this affidavit: one, that there's significant
14 market support for financing the partnership's
15 land assets, and that's on the basis that there
16 can be a sale of lands, and he says:
17

18 I am confident that there is strong market
19 support for financing the Partnership's land
20 assets. Therefore, there would be ample
21 financing available under a monitored sale
22 process to provide liquidity while land is
23 sold to provide operating capital and to
24 repay the Sanovest Loan.
25

26 And then says:
27

28 By contrast, I fear that appointment of a
29 receiver over all Partnership assets,
30 including the Resort Partnership's
31 operations, will reverberate negatively
32 through the Bear Mountain community, as it
33 would be perceived as similar to the 2009
34 creditor protection reorganization ... which
35 resulted in long-term reputational impact
36 and value suppression of the Bear Mountain
37 Project.
38

39 He believes such an outcome is unnecessary and
40 should be avoided.

41 The news article I referred to -- I won't
42 take the court to it. Actually, I'll provide
43 that reference subsequently.

44 THE COURT: All right.

45 CNSL G. BRANDT: I think it's in the condensed book.

46 All right. I'm at 33. In October 2013,
47 having previously partnered on a land development

40

Submissions by Cnsl G. Brandt

1 project at Whistler Mountain -- and that was
2 Mr. Matthews with Mr. Tom Kusumoto -- 599 and
3 Sanovest agreed to jointly acquire assets
4 associated with the Bear Mountain project. At
5 that time the Bear Mountain assets included the
6 two golf courses and practice facilities, the
7 hotel and extensive real estate holdings. And of
8 course, that was Mr. Tom Kusumoto.

9 The acquisition of the assets was carried
10 out through two limited liability partnerships.
11 We've heard about those two, and one we simply
12 call "the partnership" -- that's Ecoasis
13 Developments LLP -- and the other is Ecoasis
14 Resort and Golf LLP that we refer to as "the
15 resort partnership," and then there's the
16 managing partner, EBMD. It was incorporated for
17 that purpose, to be the managing partner for each
18 of the two partnerships, and it acquired one
19 partnership unit in each. Of course the balance,
20 as we've heard, are divided between 599 and
21 Sanovest.

22 Corporate documents are exhibited here at
23 (a) to (i). I won't take -- I won't go there
24 right now.

25 Now, upon -- when EBMD was incorporated,
26 Matthews and Tom Kusumoto were each appointed as
27 directors of the company. Matthews was appointed
28 as CEO and president of EBMD, responsible for
29 managing Bear Mountain's overall operation.

30 Paragraph 36. The partnership's acquisition
31 of the assets was financed by Sanovest under a
32 commitment letter dated October 8th, 2013, and I
33 believe we've already seen the Sanovest loan
34 agreement here. The terms of the -- and just to
35 begin with the term of this, because the term of
36 the loan here is for just over four years, and in
37 my submission, this speaks to the parties'
38 reasonable expectations as to the time horizon
39 that they were looking to.

40 And Matthews as well deposes to that, and
41 that is in this affidavit binder at A, and at
42 paragraph 22. And Mr. Matthews says:

43
44 At that time, Tom and I were uncertain as to
45 the time horizon for our involvement in the
46 Bear Mountain Project; however, we discussed
47 and anticipated a timeline of 10 years or

41

Submissions by Cnsl G. Brandt

1 less for realizing a reasonable profit on
2 our investment and exiting the project
3 through asset sales. With the time horizon
4 somewhat unknown, we agreed to the Sanovest
5 Loan having a term to November 30, 2017, on
6 the understanding that it may need to be
7 extended or increased.
8

9 Mr. Matthews has also given evidence in this --
10 in the oppression proceeding that a priority
11 would be for repayment down of the Sanovest loan.
12 Of course, we're now 11 years into the project,
13 and we see the Sanovest loan not having been paid
14 down and no plan in place, certainly not since
15 June of 2021, to pay down the Sanovest loan.

16 And that reference, Justice, is at
17 paragraph 14 of that same tab A in the
18 affidavits, where Mr. Matthews gives evidence as
19 to how he expected this would go and
20 paragraph (e) there's reference to generating
21 significant revenues from initial sales to pay
22 down the financing provided by Sanovest.

23 THE COURT: Okay.

24 CNSL G. BRANDT: So the loan was 8 percent annually.
25 It's compounded quarterly. \$700,000 lender's fee
26 paid from the initial advance, and the concept of
27 this loan was that Sanovest would advance funds
28 to the partnership for -- on notice, and the loan
29 document speaks to advances being made on -- I
30 believe it's two business days' notice for
31 partnership activities, and the loan sets out the
32 purposes and use of that, and that's reproduced
33 over at the next -- underneath this paragraph 38.
34 Purposes and use of the loan are set out here:
35 purchasing the property, construction and
36 developing the property, funding operations of
37 the golf courses and the hotel, other approved
38 uses, and the loan will be advanced in multiple
39 advances after not less than two business days'
40 prior written notice.

41 That is what is contemplated in the loan.
42 The loan was extended, of course, and a first
43 modification agreement was entered into on
44 June 15th, 2016. That extended the loan to
45 November 1st, 2021.

46 If we look, Justice, at the second
47 extension -- sorry, the first extension, and that

42

Submissions by Cnsl G. Brandt

1 is at tab 6.

2 THE COURT: Of the condensed book?

3 CNSL G. BRANDT: Of the condensed book.

4 THE COURT: Okay.

5 CNSL G. BRANDT: Paragraph 3 here states that:

6

7 Interest shall continue to accrue --

8

9 THE COURT: Tab 6, paragraph?

10 CNSL G. BRANDT: Tab 6. I'm just at paragraph 3.

11 THE COURT: Oh, it's a letter; right? June 15th.

12 CNSL G. BRANDT: Correct. It's a letter, June 15th,
13 2016. This is what is the first modification to
14 the original Sanovest loan agreement.

15 THE COURT: Right. So where's interest accruing?

16 CNSL G. BRANDT: Just over the page at "Term and
17 Interest Rate."

18 THE COURT: Oh, yes. All right. Okay, got it.

19 CNSL G. BRANDT:

20 The term of the loan shall be extended to
21 November 1, 2021. Interest will continue to
22 accrue on the balance outstanding under the
23 loan at the rate of 8 percent per annum,
24 calculated daily, not in advance, and
25 compounded quarterly from the funding date,
26 as defined in the commitment letter, for the
27 term of the loan.

28

29 So the point here is that interest continues to
30 accrue, compounded quarterly, and the repayment
31 of interest or of principal is really -- is
32 coming from Sanovest's charge and Sanovest's
33 right to repayment from the sale of lands. There
34 is no obligation for regular quarterly or monthly
35 payments under the loan. And so it's incorrect
36 to suggest that, prior to the loan expiry date,
37 that there was a default of the partnership's
38 repayment obligations under the loan. The loan
39 was further extended by a second modification
40 agreement.

41 Between -- now I'm in paragraph 44. Between
42 October 2013 and late 2016, the partnership
43 accomplished a number of key objectives with
44 respect to increasing land value, infrastructure
45 development, community engagement and raising the
46 profile of the resort communities golf courses
47 and other sporting amenities. In Mr. Matthews's

43

Submissions by Cnsl G. Brandt

1 affidavit -- I won't take the court to that right
2 now -- but in Matthews first affidavit in the
3 oppression proceeding, paragraph 29, he speaks to
4 a number of key objectives that were achieved.
5 Prime among those is achieving an increase in the
6 value of the land at Bear Mountain. And this is
7 one of the key aspects of the business model here
8 that would ultimately lead to the realization of
9 profits within a reasonable period of time, the
10 horizon that Matthews deposed to, which is you
11 take a community that is undeveloped -- there is,
12 essentially, an underdeveloped community there.
13 The project had started, of course, previously,
14 run into financial trouble. And by building out
15 communities, by servicing land, by achieving
16 rezoning and subdivision, by -- we just talked
17 about the parkway extension -- bringing transit
18 service to the mountain, you end up creating a
19 community that has its own momentum in terms of
20 driving land values.

21 And there's more evidence -- we'll come to
22 that -- but that's one of the key aspects of this
23 business model, is that the whole value of the
24 community, including the land assets held by Bear
25 Mountain, increases as a result of the prestige
26 development of the community that becomes
27 generated there.

28 And the evidence is -- well, we'll go
29 there -- that, by comparables to other
30 neighbourhoods in the greater Victoria area, the
31 Bear Mountain property achieved kind of a
32 doubling of its relative value to other
33 communities in the great Victoria area.

34 During this period the partnership also
35 planned and executed strategic sales of
36 single-family lots and development sites to
37 vertical builders. By 2016, the partnership had
38 received numerous expressions of interest for
39 bulk sites, including the *en bloc* sale of nearly
40 all of the Bear Mountain assets.

41 In response to this interest, Matthews and
42 Tom Kusumoto concluded that better market
43 information was needed in order to set pricing,
44 leading them to engage a commercial real estate
45 broker.

46 So what happened was in late 2016, the
47 partnership brought in the real estate marketing

1 firm Jones Lang & LaSalle, JLL, to review the
2 Bear Mountain assets and prepare a marketing
3 strategy that would consider bulk sales and a
4 global sale of all or most of the Bear Mountain
5 assets, and that engagement was announced to the
6 public in February of 2017.

7 Just at page -- tab 9 of the condensed book,
8 this is a newsletter that went out to homeowners
9 in the Bear Mountain community, message from Dan
10 Matthews, President and CEO of Ecoasis
11 Developments LLP, and Matthews goes on here to
12 discuss the engagement of JLL to move the
13 community into a next phase.

14 At tab 8, just behind -- back one tab, this
15 is a news article from *Western Investor*, and here
16 you see the headline, Justice, "Bear Mountain
17 Golf Resort Owners Ponder Sale." So it becomes
18 notorious fact known to the public by 2017 that
19 what is now being contemplated by the Ecoasis
20 ownership at Bear Mountain is sale -- substantial
21 sale of either the entire project or bulk site
22 sales for others to purchase and engage in a next
23 phase of development at Bear Mountain.

24 In 2017 JLL prepared a confidential
25 information circular for circulation to potential
26 purchaser groups, attracting expressions of
27 interest from several groups. In response to
28 those expressions of interest, Tian Kusumoto, who
29 at this point is not the director appointed by
30 Sanovest -- his father, Tom, is the director
31 appointed by Sanovest -- and Matthews evidence
32 was that, at times in this period, Tom Kusumoto
33 would engage Tian Kusumoto to provide some
34 assistance and perhaps provide some tax planning
35 advice or assistance to Tom in considering next
36 steps.

37 So Mr. Tian Kusumoto is involved, but he's
38 not the decisionmaker, and Mr. Matthews' evidence
39 on that point is that, whenever there was a
40 conflict, it was Tom Kusumoto that made the final
41 decision.

42 But here at this stage -- still at this
43 stage we see Mr. Tian Kusumoto being an
44 enthusiastic advocate for this sales process over
45 here, and here the cite here is from
46 Mr. Matthews' affidavit. There's an email from
47 Tian Kusumoto stating to the representative JLL:

45

Submissions by Cnsl G. Brandt

1
2 As I mentioned on the call, we do not expect
3 JLL to determine price, as this is up to the
4 bidders. We do expect from JLL to create a
5 fair and competitive market, and we are
6 comfortable accepting the price a fair
7 market decides. It is extremely important
8 to us that this process ends with a sale.
9

10 That was Mr. Kusumoto's view in 2017, and, as
11 I'll come to, in 2021 that attitude and approach
12 changes substantially at a time that is
13 coincident with Mr. Tian Kusumoto assuming what
14 we assume to be managing control of Sanovest.
15 That letter, just for reference -- I won't go
16 there -- it's at tab 10 of the condensed book --
17 that email, rather.

18 Matthews' evidence is that he and Tom
19 Kusumoto took a somewhat more sanguine or
20 balanced view of things. He's deposed that:

21
22 At times Tian expressed a desire for sales
23 that, in my view, would be at the expense of
24 the premier brand that the partnership had
25 worked hard to cultivate for Bear Mountain.
26 In contrast to Tian's sentiments, Tom and I
27 wished to pursue sales, but not for
28 below-market value or in a manner that
29 diminished the Bear Mountain project's
30 unique brand as an urban resort development.
31

32 That's Matthews' number 1 in the oppression
33 proceeding.

34 But I do want to also point out that Mr. Tom
35 Kusumoto, at this stage, is still quite a keen
36 seller, and I just need to identify that
37 reference.

38 THE COURT: Tom or Tian?

39 CNSL G. BRANDT: Tom. Tom Kusumoto is also still a
40 keen seller.

41 THE COURT: All right.

42 CNSL G. BRANDT: I'm just going to -- I think I'm
43 going to, unfortunately, have to go to the main
44 record here. Apologies.

45 THE COURT: Okay.

46 CNSL G. BRANDT: It's at tab 14 of volume 4.

47 THE COURT: Of the -- okay, of the application record.

46

Submissions by Cnsl G. Brandt

1 Okay.

2 CNSL G. BRANDT: It's also in the condensed book at
3 11, but we're here. So this is from Tom Kusumoto
4 to Dan Matthews, and you'll see, Justice --

5 THE COURT: If it's in 11, I'll just go to that.

6 CNSL G. BRANDT: Go to that. Let's do that.
7 Apologies.

8 THE COURT: That's fine.

9 CNSL G. BRANDT: This is from Tom Kusumoto to Dan
10 Matthews, and you'll see here that
11 tra@sanovestholdings, that's Tian Kusumoto's
12 email address.

13 THE COURT: Okay.

14 CNSL G. BRANDT: And Tom here is writing to Matthews
15 and Tian about some of the different offers
16 they're receiving, which is better, and there's
17 discussion here about a proposal in which the
18 potential purchaser was going to have
19 Mr. Matthews remain as a 20 percent operating
20 shareholder. That's the discussion.

21 Over at the next page, Mr. Tom Kusumoto says
22 as follows:

23
24 We are blessed with the best time to sell
25 BM.

26
27 Bear Mountain.

28
29 This project is probably the best large real
30 estate development available in Canada.

31
32 So the partnership is looking to sell, Matthews
33 and Mr. Tom Kusumoto, and they believe the time
34 is right to do so.

35 THE COURT: That's April 2021.

36 CNSL G. BRANDT: This is April 2021.

37 My next email is from May 3rd, and here --
38 so just background here is, again, the
39 partnership was receiving expressions of interest
40 from a new potential purchaser. Although
41 discussions and due diligence ensued with them,
42 that deal collapsed in early 2021 when the
43 purchaser group sought a significant price
44 reduction at the conditional removal stage. Tom
45 Kusumoto and Matthews did not agree to that price
46 reduction, although Mr. Tian Kusumoto continued
47 to press for a return to negotiations with the

47

Submissions by Cnsl G. Brandt

1 purchaser group.

2 And that is at Exhibit P to Mr. Matthews'
3 number 1, and that is the next page, page 12 of
4 the condensed -- next tab of the condensed book.
5 And just the first line here -- and again, this
6 is May 3rd:

7
8 Hi, Dan. Please feel free to contact the
9 purchaser if you think you can revive the
10 deal in any way. As I said ...

11
12 And it goes on about the role of Mr. Matthews
13 potentially continuing to operate there, and
14 Mr. Tian Kusumoto saying here as well that it
15 would be a sacrifice -- he understands it would
16 be a sacrifice for Mr. Matthews to remain for
17 several years, but his view is that Mr. Matthews'
18 involvement is what's going to help facilitate
19 this deal and get the best price for the
20 partnership. That's the context for Mr. Tian
21 Kusumoto's exhortation to Mr. Matthews to revive
22 the deal in any way he can.

23 THE COURT: So you're showing me all this to say
24 something happened, which it changed.

25 CNSL G. BRANDT: Something changed.

26 THE COURT: At this point he wants Mr. Matthews to
27 remain. He sees the value in him being there,
28 and let's see if we can sell these things, even
29 if some of it means it's a lower price than we
30 first thought; right?

31 CNSL G. BRANDT: Well, here I think he's saying that
32 this would be an increased price if Mr. Matthews
33 is able to remain.

34 THE COURT: Right. Right. But the previous emails
35 are, let's go back to this potential purchaser --

36 CNSL G. BRANDT: Oh, correct.

37 THE COURT: -- and see what we can do, even though
38 they came back with a lower price. And the next
39 one is a month -- less than a month later, we
40 want you to stay, Mr. Matthews.

41 CNSL G. BRANDT: Correct. We want Mr. Matthews to
42 stay in the context of a sale to a third party.

43 THE COURT: Increase value.

44 CNSL G. BRANDT: Increase the -- to a third party.

45 THE COURT: Just let me make a note of that, please.

46 CNSL G. BRANDT: Thank you.

47 THE COURT: Okay.

48

Submissions by Cnsl G. Brandt

1 CNSL G. BRANDT: All right. So what changed?

2 THE COURT: Right.

3 CNSL G. BRANDT: So in and around this time, the
4 partnership had been engaged with Colliers
5 International, a new firm now, to create an
6 approach of creating distinct development sites
7 on Bear Mountain lands, the idea being what we
8 heard from Mr. Ferris this morning, similar
9 concept, that you're going to get better value,
10 you're going to get more purchasers with
11 competition involving purchasing of potential
12 distinct sites, as opposed to -- and perhaps in
13 conjunction, though -- with an *en bloc* sale, as
14 opposed to exclusive *en bloc* sale process.

15 So that's Colliers' strategy, and Colliers
16 had scheduled a marketing launch for the Players
17 Peak site. That was scheduled for May 19th,
18 2021.

19 And now we see where this change occurs, and
20 we're talking about a period between May 3rd and
21 May 17th, 2021, where Mr. Tian Kusumoto
22 unilaterally halts that sales process, and that's
23 here at paragraph 55 of the argument. The email
24 doing this is at tab 14 of the joint book -- of
25 the condensed book, and that is at -- partway
26 into the book at -- or into the exhibit. It's at
27 exhibit page 274 on the top right.

28 THE COURT: Right.

29 CNSL G. BRANDT: Tian Kusumoto writes to the Colliers
30 representative and says:

31
32 We've had to delay board meeting and, as a
33 result, we haven't formed a special
34 committee yet to deal with sales.
35 Unfortunately, I think we'll have to delay
36 the launch until tomorrow.
37

38 The launch was scheduled for the next day.
39

40 Until the board of directors meets.
41

42 THE COURT: That's on 275 on my page.

43 CNSL G. BRANDT: That's over the page on 275, correct.

44 THE COURT: Okay. All right.

45 CNSL G. BRANDT: 274/75. And this is Mr. --

46 THE COURT: But that doesn't explain why the change.

47 CNSL G. BRANDT: Why the change.

49

Submissions by Cnsl G. Brandt

1 THE COURT: It just says there's a change.

2 CNSL G. BRANDT: So at this point the director of
3 Sanovest -- the director appointed by Sanovest to
4 EBMD was still Mr. Tom Kusumoto, but it was
5 around this time that Mr. Matthews learned that
6 there had been a change of control within
7 Sanovest, and Mr. Matthews learns at this time
8 that Tian Kusumoto had replaced his father in
9 the -- he's, I suppose, the president, I believe,
10 or director of Sanovest.

11 And shortly afterwards, within a couple of
12 weeks, on June 1st, Sanovest would replace Tom
13 Kusumoto with Tian Kusumoto as the new nominee.
14 So the change here that we submit explains this
15 change that occurred between May 3rd and
16 May 17th, is that now Mr. Tian Kusumoto sees
17 himself as in charge at Sanovest and is taking a
18 different approach than his father took
19 previously.

20 THE COURT: It still doesn't explain why. Because
21 you've shown me lead-up emails that show a
22 different approach to sales and the value of
23 Mr. Matthews.

24 CNSL G. BRANDT: So the inference is that Mr. Tian
25 Kusumoto is taking it -- now perhaps sees himself
26 as being in control of these assets and is
27 perhaps looking at things with a different time
28 horizon, a different risk appetite, a different
29 approach to development, all of which -- all of
30 which, of course, anyone moving into a new
31 leadership position at a family company is
32 entitled to take if those shareholders agree to
33 it.

34 But the difference here is that it was
35 Mr. Matthews and Mr. Tom Kusumoto who went into
36 business eight years earlier with a set of common
37 expectations that they held, and so that change
38 in Mr. Tian Kusumoto's approach is now -- begins
39 the process of what we see is the oppression
40 designed to force Mr. Matthews out. He doesn't
41 want to be in business with Mr. Matthews anymore,
42 and he's going to take a series of steps to use
43 the levers he has, now in control of Sanovest, to
44 ensure that that occurs.

45 Perhaps this is a convenient time.

46 THE COURT: Okay. Now, did you want to come back a
47 bit early, or do you need that time to review

50

Submissions by Cnsl G. Brandt

1 this draft order?

2 CNSL C. FERRIS: I think we probably would need that
3 time for the order and to take our clients
4 through it.

5 THE COURT: All right. And Mr. Nathanson wants to --

6 CNSL A. NATHANSON: Perhaps my friends could give me
7 an update on how long they expect to be, because
8 I want to make sure we have time to complete
9 tomorrow.

10 CNSL C. FERRIS: Again, I would need to do that over
11 lunch, speak with Mr. Brandt about what his
12 timing looks like, and speak with Mr. Roberts.
13 Maybe we can come back five or ten minutes early
14 and we can talk about the timing.

15 THE COURT: All right. So you want to come back --
16 you'll confer five or ten minutes early, or you
17 want to start court five or ten minutes early?

18 CNSL C. FERRIS: I'm in their hands. I can confer
19 with Mr. Nathanson five or ten minutes and then
20 we can tell.

21 THE COURT: Sure. Let's do that. All right. So I'll
22 come back -- Madam Clerk will call me, but
23 hopefully come back right at 2 o'clock.

24 CNSL C. FERRIS: Thank you.

25 THE COURT: It takes me a few minutes to walk down
26 here, for obvious reasons.

27 THE CLERK: Order in chambers. These chambers are
28 adjourned for the lunch break.

29

30 **(PROCEEDINGS RECESSED AT 12:34 PM)**

31 **(PROCEEDINGS RECONVENED AT 2:02 PM)**

32

33 THE COURT: Mr. Ferris.

34 CNSL C. FERRIS: Justice, just two housekeeping
35 matters, one I don't think is contentious, one I
36 think probably will be.

37 The first is the draft order that
38 Mr. Roberts was speaking of, I believe he's
39 circulated it to counsel.

40 CNSL W. ROBERTS: Future tense.

41 CNSL C. FERRIS: Future tense. He's about to.

42 THE COURT: Will be, okay.

43 CNSL C. FERRIS: He's about to, but what that probably
44 means is he won't be in a position to sort of
45 circulate it to the court or discuss it with you
46 until tomorrow morning.

47 THE COURT: Okay.

51
Discussion re timing

1 CNSL C. FERRIS: The second is timing.

2 THE COURT: Yeah.

3 CNSL C. FERRIS: And so this is what I think will be
4 contentious. Given what was said, our view is
5 that it's important to take the court through the
6 evidence, and so we think we need to book another
7 day. My friend, I think, takes a different view,
8 and I'll let him speak to that.

9 But I'll just give you one example before I
10 sit down. Mr. Jackson said there was \$14 million
11 in improvident transactions undertaken by
12 Mr. Matthews in a one-line sentence. We think
13 it's important to take you through the evidence
14 on that to explain that to you and why that's not
15 true, and that takes some time.

16 And so, you know, we'll be in your hands.
17 If you say, no, no, you've got to get done, we'll
18 get it done. But our view is, to present our
19 case properly, we need to take you through the
20 evidence.

21 THE COURT: So when you say another day, that means
22 for your side to finish --

23 CNSL C. FERRIS: No, I --

24 THE COURT: -- or another day in total?

25 CNSL C. FERRIS: -- think we could be finished at some
26 point tomorrow, maybe around lunch tomorrow or
27 maybe a little bit later, but I think probably by
28 lunch tomorrow. But I don't think a half a day
29 is enough for my friend and reply, so I think we
30 would need to book another day.

31 THE COURT: Okay. Who am I going to hear from next,
32 then? Mr. Nathanson?

33 CNSL A. NATHANSON: Thank you, Justice.

34 So I'm concerned. I'm concerned that this
35 is only arising at our prompting, having listened
36 to my friend. So just to -- the bottom line is,
37 in my submission, we should be managing to our
38 time estimate. There's no good reason we should
39 not. And as you've observed a number of times,
40 both by reason of the convergence, the changes in
41 my friends' position, the commercial convergence
42 of the parties' positions and that you're not in
43 a position to make determinations on all this
44 contested evidence, and it's not necessary to do
45 so to decide what order you're going to make,
46 this little detail which is causing the delay
47 problem.

52

Discussion re timing

1 But let me just -- so my essential position
2 is either you should --

3 THE COURT: Let me just -- I think Mr. Ferris -- I
4 don't know that he agrees with that, in the
5 sense, I think, they're going to be asking me to
6 make findings of fact. I think that's what I --

7 CNSL A. NATHANSON: Well, what Mr. Ferris told you
8 yesterday is that the injunction -- and I agree
9 with this -- he's got an injunction application.

10 THE COURT: Right.

11 CNSL A. NATHANSON: The injunction test applies, so
12 it's a question of is it a fair question or
13 strong *prima facie* case.

14 THE COURT: Right.

15 CNSL A. NATHANSON: But either way, you're not making
16 final findings of fact --

17 THE COURT: Right.

18 CNSL A. NATHANSON: -- about who did what to whom
19 here; right? And what you're going to be doing
20 is assessing the evidence to decide on the
21 relative merits of the two orders that are being
22 promoted.

23 THE COURT: Right.

24 CNSL A. NATHANSON: But my central point is either I'm
25 seeking a direction that my friends manage to
26 their time estimate or slightly beyond. I'm
27 willing to even compromise my time a bit further.

28 THE COURT: Yeah.

29 CNSL A. NATHANSON: Or, if there's to be more time, it
30 has to be quick, because there's commercial
31 urgency here.

32 THE COURT: Right.

33 CNSL A. NATHANSON: So I just want to give you two
34 minutes of context.

35 So these motions originally came on -- or my
36 friend delivered their motion May 10th. Their
37 time estimate was 90 minutes; right? They're
38 multiples of that already with almost a day to
39 go. This came on before Justice Basran on
40 June 24th.

41 THE COURT: Oh.

42 CNSL A. NATHANSON: Both motions. The common time
43 estimate at that time was two days. There were
44 discussions that didn't come to fruition that
45 resulted in insufficient court time. The matter
46 was put over.

47 My friend Mr. Ferris at that time said,

53

Discussion re timing

1 let's have three days to be safe; right? The
2 expansion continues. My friends are experienced
3 counsel. They knew the scope of the materials.
4 This was already set for hearing in June, so
5 there can't be any surprise.

6 And the further point I'll make is this. We
7 agreed to what, at least in my view -- but my
8 friends may not agree -- is an accommodation to
9 permit them to combine their response to
10 Mr. Jackson's motion and then make their motion
11 in the oppression proceeding. But the effect of
12 that is now we have counsel standing up and
13 standing down, and that was on the basis of the
14 shared three-day time estimate, and the effect of
15 that is that my friends are the big bulk in the
16 middle, and we're getting squeezed on the back
17 end. And so we can't have a procedural
18 accommodation become the occasion for what I
19 regretfully have to say is looking like a
20 filibuster to me.

21 So in my respectful submission, again, if
22 Your Lordship can give us -- if Justice can give
23 us a day next week, although Mr. Ferris says he
24 only has Thursday of next week -- that might
25 resolve the problem. But if we're looking at a
26 multi-week continuation --

27 THE COURT: No, I can tell you, it went through my
28 mind last night and this morning that I'd see how
29 it went today, that you might run out of time
30 tomorrow, and what could I do next week? I was
31 going to speak to Mr. Gallagher downstairs.
32 There are a couple of days I can't, but there are
33 some days I can give you a -- I can, if they can
34 give me a courtroom next week.

35 CNSL A. NATHANSON: So what I'm trying to say, in the
36 spirit of being somewhat constructive, is, if
37 it's next week, Mr. Jackson and I will turn
38 ourselves upside down, and we will get here.

39 THE COURT: Yeah.

40 CNSL A. NATHANSON: But there's not a good reason for
41 it, and if it's to go beyond next week, we
42 shouldn't do it, and my friends should huddle and
43 right-size what they want to do and be done by
44 the break tomorrow to give us a modicum of the
45 time that they agreed to.

46 THE COURT: Okay. My other hope had been that there
47 might be something coming from Mr. Roberts' draft

54

Discussion re timing

1 order that might lead to -- Mr. Jackson is
2 shaking his head.

3 CNSL A. NATHANSON: We have tried. This is part of
4 what derailed the hearing in June, is we thought
5 we would get an accommodation, and it hasn't
6 happened, and there's questions about why I
7 haven't got instructions yet, and all these kinds
8 of things.

9 THE COURT: Okay.

10 CNSL A. NATHANSON: So I just -- I can't be optimistic
11 about that, Justice.

12 THE COURT: Okay, all right. Fair enough. So what
13 I'll do is, at the afternoon break, I'll -- I'm
14 reluctant to deny anyone when they say they need
15 time to do a proper job to present their case,
16 but at the same time, there have to be limits
17 recognizing -- particularly in this case -- the
18 commercial urgency of it.

19 So if we do go into next week, I'm going to
20 need to have to set some fixed-in-stone deadlines
21 for remaining submissions.

22 CNSL A. NATHANSON: Thank you, Justice. Appreciate
23 that.

24 THE COURT: Okay.

25 CNSL C. FERRIS: Given what's been said, I don't think
26 I need to say anything other than my friends
27 delivered, I think, four affidavits after the
28 June hearing.

29 THE COURT: But is Thursday the only day you're free
30 next week?

31 CNSL C. FERRIS: Yes, I have cross-examinations in a
32 federal court matter on Monday, Tuesday and
33 Wednesday. I'm in the court of appeal on Friday.

34 THE COURT: Well, is it something that your able
35 co-counsel can deal with, or is it something
36 where you have to be here to --

37 CNSL C. FERRIS: If the court can't do Thursday, and
38 it can only do some other day, I'll take some
39 instructions from the client and talk to them
40 about it.

41 THE COURT: Okay.

42 CNSL C. FERRIS: But at this point, I'm trying to have
43 everybody here.

44 THE COURT: Okay. Well, let me see what I can do, but
45 if that's the way it's going to be, then I need
46 you to commit before 4 o'clock today as to how
47 much time you're going to need for the remainder

55

Submissions by Cnsl G. Brandt

1 of the day -- for the remainder of your
2 submissions in the main and then firm reply.

3 CNSL C. FERRIS: Yes.

4 THE COURT: I need that so that Mr. Jackson and
5 Mr. Nathanson can know that as well.

6 CNSL C. FERRIS: Thank you.

7 THE COURT: All right. Okay, Mr. Brandt.

8 CNSL G. BRANDT: Thank you, Justice.

9 Before the break I was at paragraph --
10 actually, just the beginning of part 3 of the
11 argument, in and around paragraph 53. We had
12 gone through the communications to Colliers, and
13 we've now hit the change on June 1st.

14 Your Lordship asked -- Justice asked prior
15 to the break, was there a reason for the change
16 in approach, other than just the change in
17 person?

18 THE COURT: Right.

19 CNSL G. BRANDT: And what I can say at this point,
20 there may be some inferences you can draw from
21 the evidence as we go, Justice, but there was
22 certainly no explanation given at that time to
23 Mr. Matthews.

24 THE COURT: There's nothing in the evidence to --

25 CNSL G. BRANDT: There's nothing other than inferences
26 that may be drawn, positions that Mr. Tian
27 Kusumoto takes as we go around partnerships with
28 vertical developers, things like that.

29 THE COURT: I see.

30 CNSL G. BRANDT: There's substantive -- substantial
31 amount of discussion on the issue of absorption
32 and absorption rates, and I'm going to come to
33 that as well as -- put it forward as, perhaps, an
34 excuse more than a reality for Mr. Kusumoto. But
35 beyond that type of evidence, there isn't
36 anything more direct.

37 THE COURT: Because this is not in the evidence, and
38 this is why I -- yesterday during the CPC when I
39 asked about why Mr. Tom Kusumoto was a defendant
40 and how that worked when he was the -- was a
41 principal of Sanovest, I was told that Tian
42 Kusumoto stepped in and took over, when he
43 alleges he discovered improprieties on the part
44 of his father in running the business -- running
45 Sanovest and dealing with the business. That's
46 just an allegation, but I was wondering if
47 there's anything in the evidence that would say,

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Submissions by Cnsl G. Brandt

1 that's the reason why there was a change in
2 attitude. He came in and saw there's significant
3 problem and said, that's it; this has got to
4 stop.
5 CNSL G. BRANDT: I'm not even sure if that much is in
6 the evidence.
7 THE COURT: Okay.
8 CNSL G. BRANDT: I don't think we have --
9 THE COURT: I mean --
10 CNSL G. BRANDT: -- much.
11 THE COURT: There's no evidence about any of that?
12 CNSL G. BRANDT: About the internal workings of
13 Sanovest.
14 THE COURT: Okay.
15 CNSL G. BRANDT: We have Mr. Matthews', you know,
16 evidence as to what he was told.
17 THE COURT: Yeah.
18 CNSL G. BRANDT: Which is that he learned around this
19 time that, in fact, there had been a change in
20 February of 2021 within Sanovest, that Tian was
21 the acting president, and that -- and that,
22 sorry -- that Tian was the acting president, that
23 Tom had remained involved from February for a
24 period of time to deal with the Colliers process
25 that was ongoing and other sales processes.
26 THE COURT: Right.
27 CNSL G. BRANDT: And that Tian had been sort of newly
28 appointed to the board of Sanovest at that time.
29 That's in Mr. Matthews' affidavit #1 in the
30 oppression proceeding. That's what we know, is
31 what he was told or what he learned at that time
32 from Tom.
33 THE COURT: Okay. So I'll disabuse my mind of any of
34 that, and we'll leave it on the basis that what
35 you say is in the evidence is a change in the
36 position regarding sales and Mr. Matthews from
37 father to son, and also from son's position up
38 until May -- early May, and then a complete
39 change with no reason provided.
40 CNSL G. BRANDT: I think that's a fair --
41 THE COURT: Nothing arising from the evidence.
42 CNSL G. BRANDT: -- a fair summary.
43 THE COURT: And then now it appears he's objecting --
44 blocking sales and not prepared to fund, and
45 that's what's created the financial disparity or
46 [indiscernible] circumstances with the business.
47 Is that a fair summary?

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1 CNSL G. BRANDT: That's a fair summary. There's a
2 third element to this.
3 THE COURT: Just a minute. Oh, okay. Go ahead. The
4 third element?
5 CNSL G. BRANDT: That is refinancing refusal.
6 THE COURT: Oh, okay. All right.
7 CNSL G. BRANDT: So there's no funding, there's no
8 sales and there's no refinance. And that's how
9 this -- those are the three prongs, I'll call
10 them, of the conduct that has -- you know, we say
11 is oppressive, but certainly has put the company
12 and the partnership into the positions they are
13 in today.
14 THE COURT: Okay.
15 CNSL G. BRANDT: Mr. Matthews deposes -- and I'm at
16 paragraph --
17 THE COURT: Sorry, and that then informs the equitable
18 considerations that I have to deal with when I
19 consider the scope of the receivership order.
20 CNSL G. BRANDT: That's correct, Justice, especially,
21 as Mr. Roberts said earlier, we're looking --
22 we're also under the realm of section 39 of the
23 *Law and Equity Act*.
24 THE COURT: Right.
25 CNSL G. BRANDT: We're also under the realm of
26 equitable receivership under the rules of court.
27 THE COURT: Okay.
28 CNSL G. BRANDT: Mr. -- I'm at paragraph 58 of the
29 written argument.
30 THE COURT: All right.
31 CNSL G. BRANDT: Mr. Matthews has deposed about his
32 expectations here, and this is where we say no
33 explanation is given, but the key factor here is
34 this is different than how the company had
35 operated and different than what Matthews
36 expected. He says that Tian's conduct in
37 blocking sales and applying various forms of
38 pressure was inconsistent --
39
40 ... is wholly inconsistent with the
41 expectations I had when EBMD was established
42 and contrary to how Tom and I managed EBMD
43 between 2013 and 2021.
44
45 He had no intention, he says, of remaining in the
46 project indefinitely while his equity is eroded
47 without distributions, and with a different

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1 business partner than he had started with.
2 That's just a summary there.

3 Mr. Matthews -- I'm over at 59 here -- has
4 given a lengthy excerpt, which I won't read, in
5 view of the time constraints, but Matthews gives
6 a summary here of his reasonable expectations,
7 and he also just notes here factually that:

8
9 In June 2021, the loan --

10
11 And we have this in Mr. -- in the loan schedule
12 in Mr. Kusumoto's affidavit, but the amount of
13 the loan outstanding is well below the
14 \$70 million limit. So in other words, there is
15 funding room under the Sanovest loan at this
16 point.

17 THE COURT: Okay.

18 CNSL G. BRANDT: And then he states, just the last
19 paragraph in this block quote:

20
21 Despite the available borrowing room under
22 the Sanovest loan agreement, Tian refused to
23 advance funds that I had requested in my
24 role as president and CEO. He indicated
25 that Sanovest would not be advancing further
26 funding to the partnership any time soon.
27 Proceeds of sale closings, which were
28 occurring in this period, must be paid to
29 Sanovest directly, without any reserve funds
30 retained within the partnership.
31

32 And there was provision in the Sanovest loan for
33 some of those funds to be held back in the
34 company to deal with taxes and other adjustments,
35 and Mr. Matthews' evidence here is that wasn't
36 occurring, so there isn't even that being held
37 into the property -- held into the company.

38 So starting at paragraph 61 here we deal
39 with the marketing and sales prong of the
40 oppression, and Matthews says that this has been
41 a constant theme since June of 2021.

42 An early example he cites at paragraph 62
43 is -- so this is the Colliers launch. It was
44 already put on hold on May 17th, as we saw, and
45 here again on June 7th, Mr. Kusumoto writes to a
46 Colliers representative asking to place the
47 marketing on hold. That's at tab 16 of the

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1 condensed book.

2 After some discussion, Mr. Tian Kusumoto
3 allowed the marketing process to move forward,
4 and then there were three letters of intent
5 received from three separate purchaser groups,
6 and they all provided nonbinding, but letters of
7 intent with values for their offer, and they were
8 all within the appraised value in the valuation
9 that Colliers had projected for the site. So
10 these were all offers received that were very
11 much in line with the orderly sales process that
12 Colliers had started on before Mr. Tian Kusumoto
13 was appointed as the Sanovest director.

14 So here Mr. Tian Kusumoto proposes to
15 Colliers that the partnership seek a revised
16 letter of intent for a higher price and remain as
17 a partner in future developments. So I'm going
18 to go to the section here. This is in the
19 combined affidavit binder at tab A, paragraphs 58
20 and 59.

21 THE COURT: Okay.

22 CNSL G. BRANDT: And Mr. Matthews says:

23
24 ... in response to the first offer received,
25 Tian proposed on July 26, 2021 to Colliers
26 that the Partnership ask them to provide a
27 new letter of intent with a higher price,
28 and that the Partnership remain a partner in
29 future development.

30
31 So he wants both those things.

32
33 Tian's email of July 26, 2021, stated in
34 part as follows:

35
36 What do you think if we asked them to
37 revise their LOI for a higher prices
38 but with us being passive/active
39 partners? I would think a BM partner
40 would command a higher valuation than a
41 cash offer and a commitment to the BM
42 future prospects. I would like to see
43 their pro forma to see how and how much
44 they will make off this acquisition. I
45 would recommend to the BoD that if
46 possible, we pursue a partnership that
47 will allow participation in the

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vertical development of Players Peak if
the pro forma justifies.

And this is a very different approach than
everything that existed in the eight years
before, and we saw only a month before
Mr. Kusumoto essentially imploring Mr. Matthews,
I know this isn't what we talked about, but why
don't you stay on; it will help us get the deal
closed. Now Mr. Kusumoto is talking about the
partnership as a whole joining with a vertical
developer.

As of -- back at 65. As of August of 2021,
two candidates remained for the Players Peak
site. Colliers strongly recommended engaging
with one of those candidates with a view to
entering into a purchase and sale agreement.
Colliers executive vice-president advised that,
quote:

In all of our engagements, we have never,
ever witnessed a vendor turn down a
record-breaking value.

And Colliers further warned that refusal to
engage with either candidate risked reputational
damage in the investor/developer community by
creating the perception that the partnership was
not a serious vendor.

Now, this email exchange is set out at
tab 17 of the joint book -- sorry, not the joint
book -- the condensed book. I'm just starting at
the back of the email here.

THE COURT: So book of affidavits?

CNSL G. BRANDT: This is the joint book of -- sorry,
the condensed book of documents at tab 17.

THE COURT: Okay.

CNSL G. BRANDT: And at the top of page 304 there is a
heading "Not Moving Forward With Either Offer,
and then over the page, this is the prophesy of
Colliers saying that:

Ecoasis and Bear Mountain faces reputational
damage by not following through with either
offer.

The response to all of this from Mr. Kusumoto is

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1 quite terse. It's at the front of that tab 17:

2
3 We cannot at this time accept the offer as
4 offer to purchase, as the price and terms
5 are unacceptable. Please set up a call so
6 we can advise on the messaging on our
7 withdrawal of the Players Peak offer.
8

9 So in my submission, not a well-explained
10 response, other than saying it's not acceptable.
11 And the reason this is important is because we
12 heard yesterday from my friend Mr. Jackson around
13 what Colliers, in its 2023 marking proposal,
14 described as skittishness in the market given
15 Bear Mountain's past history.

16 Well, this is a source of that skittishness,
17 and that's, in a sense, self-evident --
18 self-evidently the result of withdrawal from a
19 process that had commenced before Mr. Tian
20 Kusumoto became a director, that he stopped and
21 started and ultimately withdrew from.

22 THE COURT: Okay.

23 CNSL G. BRANDT: I'm at paragraph 66. Mr. Matthews
24 describes here that Mr. Tian Kusumoto continues
25 with proposals around vertical development that
26 had not been contemplated in Colliers' offering
27 memorandum, that this was also not what
28 Mr. Matthews agreed with, and that was shut down.

29 Over at paragraph 67, there was a similar
30 example of this type of event in October of 2021
31 when Mr. Tian Kusumoto wrote to a potential
32 purchaser group without consulting Mr. Matthews
33 saying:
34

35 I believe Dan has told you we are on pause
36 as we finish reviewing the development
37 strategy.
38

39 And this was -- this not an accurate statement,
40 and subsequently counsel for Matthews and 599
41 wrote to counsel for Kusumoto putting on the
42 record that this communication was not authorized
43 or coordinated and that the idea that
44 Mr. Matthews had delivered a similar message was
45 knowingly false.

46 I won't go there, but that letter is at
47 tab 19 of the condensed book.

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1 need appropriate time prior to the
2 commitment of any nonrefundable deposit to
3 come to a mutually agreeable valuation on
4 price for sale.
5

6 So there's no outright refusal, but there are
7 some concerns expressed that they say warrants
8 further discussion.

9 And if we go over the page to 93, we have
10 the response in Mr. Kusumoto to Mr. Matthews:

11 I think we should take a pause on trying to
12 sell BM/finding a partner and work towards
13 developing a master development plan and so
14 on.
15
16

17 So that process comes to a grinding halt at that
18 point, and Mr. Matthews' evidence is that he had
19 the impression that there was no meaningful
20 desire to engage here. That's what he says at
21 paragraphs 4 and 9 of his affidavit number 5.

22 THE COURT: Just a minute. So may I ask who -- we've
23 just admitted someone into the courtroom. Can I
24 ask who you are.

25 D. CLARKE: Yeah, it's David Clarke.

26 THE COURT: Okay, thank you. Okay.

27 CNSL G. BRANDT: I'm at paragraph 71. There's an
28 attempt here to extract concessions from
29 Matthews, signing a banking resolution and a
30 related party agreement. And what this email
31 says here is:
32

33 Hi, Dan. Please see the attached PSA
34 banking resolutions and confirm agreement to
35 the related party agreement. I will forward
36 the PSA to [that group] once received.
37

38 So that's what's happening here is the
39 negotiations are predicated on Matthews taking
40 certain steps that he doesn't agree fit the
41 parties' reasonable expectations with their
42 existing agreements and so on.

43 Paragraph 72, Mr. Ferris took you to
44 earlier, Justice, and this shows the aggregate
45 value of the different offers that were received
46 beginning in 2021 and all the way to
47 September 2023. This is enough to have paid off

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1 the Sanovest loan several times over.

2 The example that we're dealing with, just
3 with this group that collapsed in 2022 -- I'm
4 just at paragraph 75 of my argument -- is the
5 only example that Tian Kusumoto can point to of
6 engagement in any substantive way with a
7 potential purchaser, and he deals with that in
8 his affidavit #3 saying he hasn't blocked sales;
9 here's what he's done to try and forward this
10 process and it collapsed. But in his
11 affidavit #3, he does not include that Exhibit E
12 that we just saw, the "I believe we should take a
13 pause on trying to sell BM." That exhibit is not
14 included in his affidavit, and he makes no
15 mention of him being the person who ultimately
16 led that process to come to an end.

17 So in view of Matthews' evidence which,
18 again, highlights the admissions in
19 Mr. Kusumoto's affidavit, the assertion he says
20 that he actively participated in the discussions
21 and advanced the terms of a potential transaction
22 and assisted the partnership in pursuing
23 opportunities, that should be viewed with
24 caution, and we say ultimately is a position that
25 would be rejected.

26 So what is the impact on the result of the
27 blocked sales? This is at paragraph 77. What
28 this comes to is the loan at that time, only
29 three years ago, was \$46 million, in contrast to
30 where it is today, and even that is in part
31 disputed. We say it's lower because of amounts
32 on that loan that are actually attributable to a
33 separate loan that Tom advanced. But regardless,
34 it's very higher today.

35 And while there have been repayments from
36 lot sales during this period and very limited
37 advances from Sanovest, as we have needed, to
38 last them the amount needed to pay property
39 taxes, the interest accrued is approximately
40 12.8 million over that period.

41 The offer received in -- based on the offer
42 received in '21 and '22, which are noted
43 previously, taking just two of those, one that
44 had -- one that -- those two in aggregate
45 actually equal or slightly exceed the current
46 amount of the Sanovest loan, and they had -- one
47 had a four-month closing period; the other had an

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1 eight-month closing period. Those two together,
2 there would have been no loan by June of 2022 if
3 only two of those had been able to proceed, and
4 on that basis, we're looking at about \$11 million
5 in excess interest that's accrued on the loan
6 since June of '22.

7 Justice, so that is -- that is prong one.
8 That is the first aspect of this, which is sales
9 refusal.

10 The second aspect -- I'm starting at
11 paragraph 78 -- deals with funding and financing,
12 and here this takes various forms, including, as
13 we've talked about, failure or the advance funds
14 under the Sanovest loan agreement, but also
15 failure to approve payments for money that was in
16 the company and the use of property taxes, again,
17 as a tool to try and extract various forms of
18 concessions from Mr. Matthews.

19 So regarding property taxes -- I'm at
20 paragraph 79 -- in connection with the 2021
21 property taxes, Matthews deposed to discussions
22 with Mr. Kusumoto in which he stated, among other
23 things -- and this was on the eve of the
24 partnership's deadline to pay the 2021 taxes --
25 that Sanovest would only allow replacement of the
26 Sanovest loan -- sorry -- would not allow a
27 replacement of the Sanovest loan, but would only
28 provide financing at the partnership's 18 percent
29 cash call rate, not at the 8 percent rate as
30 contemplated under the loan agreement.

31 So here Sanovest is saying, we're not going
32 to advance you money as your lender, but as your
33 partner, we'll advance you cash at the cash call
34 rate of the partner. And I'm going to come to
35 this in a minute, but this is in the context of
36 the allegations against Mr. Matthews, as we say
37 is a pretext to further this aspect of the
38 oppression.

39 In that same conversation, Mr. Kusumoto
40 stated to Matthews that Sanovest could play
41 market price for its half-interest in the Bear
42 Mountain assets -- that's if Matthews was to
43 buy -- but Sanovest would only pay for Matthews'
44 half-interest at a distressed value if Sanovest
45 were to purchase.

46 Ultimately those property taxes were paid
47 late, again in a circumstance where there was

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1 borrowing room, vast amounts of borrowing room,
2 under the Sanovest loan agreement, incurred a
3 10 percent penalty of approximately \$140,000, and
4 at that point, because the loan was coming up, it
5 agreed to a further extension agreement to a term
6 to May 1st, 2024, with a 700,000 extension fee to
7 Sanovest. The property taxes were actually paid
8 not -- were paid in this situation from the
9 closing on a vendor take-back mortgage.

10 THE COURT: But you said that was \$700,000 fee paid to
11 Sanovest?

12 CNSL G. BRANDT: It's a -- like, an extension fee.

13 THE COURT: Extension fee, right, but was it just
14 added to the indebtedness?

15 CNSL G. BRANDT: It's added to the indebtedness, as
16 far as I understand.

17 THE COURT: All right.

18 CNSL G. BRANDT: This happened again in June of 2022.
19 On the very eve of the partnership's deadline to
20 pay the 2022 partnership taxes, Matthews -- Tian
21 Kusumoto wrote to Matthews saying that he wants a
22 managing partner resolution giving him authority
23 to act on behalf of the managing partners and the
24 partnerships to instruct, close, transact,
25 administer all the bank and credit card accounts
26 for the managing partner and the partnership.

27
28 This should include the ability for Tian to
29 appoint himself sole signing authority if he
30 seems it to be in the best interests of the
31 managing partner and the partnership.
32 Initially accounts will be set up for Tian
33 and Dan or staff, signature required, if
34 HSBC can correct the current signatory file.

35
36 So again, property taxes are due, and
37 Mr. Kusumoto is making a play to leave things for
38 now, but of course, he will have the sole ability
39 to change that at his whim.

40 Ultimately on August 18th of 2022, Sanovest
41 funded property taxes for partnership. That
42 payment was late, and that resulted in a
43 5 percent penalty.

44 In connection with other property taxes, as
45 of August 26th, 2022, Sanovest funded property
46 taxes for the Gondola lands, which are owned by
47 BMA, but only did so in the context of Tian

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1 Kusumoto seeking, again, concessions from
2 Matthews, and even while paying for the Gondola
3 lands, Sanovest refused to fund taxes for the
4 Bear Mountain Activity Centre property, which was
5 also owned by BMA. We're going to talk about
6 both of these a little more, the properties held
7 by BMA.

8 In 2023 Sanovest again refused to fund
9 property taxes for the BMAC property, despite
10 Matthews' exhortation that BMAC is a resort
11 partnership asset and should be formally
12 integrated with the resort partnership, a step
13 that Mr. Kusumoto has so far refused to carry
14 out, and Mr. Matthews alleges that that was done
15 for the purpose of maintaining BMAC as a point of
16 contention in the litigation in any event.

17 Mr. Tian Kusumoto, who also has no lack of
18 control over BMAC or BMA, given that he replaced
19 Mr. Tom Kusumoto as a director of BMA.

20 So I'll just pause just to give a tiny bit
21 of background on BMA. We're going to get to it a
22 little further. BMA is a company that was set
23 up, I believe, in 2016. It was set up by Mr. Tom
24 Kusumoto and Mr. Matthews at Mr. Tom Kusumoto's
25 request. The idea at that time that it was going
26 to hold certain opportunities that were best held
27 outside of the partnership, and that this would
28 create a certain amount of leverage in sales
29 processes.

30 From Mr. Matthews' point of view, or from
31 his side a different shareholder, and not 599315,
32 but a different shareholder, is the shareholder
33 in -- the 50 percent shareholder in BMA, and the
34 other 50 percent shareholder in BMA is a company
35 called SJN holdings.

36 THE COURT: SJN?

37 CNSL G. BRANDT: SJN, which is a company associated
38 with Mr. Tom Kusumoto, and it's not Sanovest. So
39 it has its own separate shareholders.

40 THE COURT: And you have 50 percent to SJN. The other
41 50 percent is to whom?

42 CNSL G. BRANDT: Is to a separate company associated
43 with Matthews. It's a different numbered company
44 associated with Matthews.

45 And so from Matthews' perspective,
46 transferring, for example, the Gondola lands made
47 sense commercially, because it was an aspect of a

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1 sale strategy that certain -- we're going to sell
2 the whole thing, but this is a different thing,
3 separate opportunity that could be held back in
4 the sale as well. That was the idea behind it.

5 From Mr. Matthews' perspective, he has no
6 concerns about this, because he owns 599. He
7 owns the other numbered company. And Tom
8 Kusumoto, who is the director appointed by
9 Sanovest, tells him, I'm going to -- essentially,
10 I'm going to consent to this on behalf of the
11 Sanovest. We're going to move this property into
12 a separate company that I also control. And
13 Matthews had no reason not to accept that. And
14 so that's why these properties end up getting
15 transferred into BMA.

16 In terms of the BMA property, this was
17 funded by the resort partnership and assigned
18 into BMA, owned by a nominee of BMA, but funded
19 by the resort partnership. And when Mr. Tian
20 Kusumoto -- and we'll come to some issues that
21 arose with BMA -- says this is a problem, this
22 was funded by the resort partnership; it needs to
23 go back into the resort partnership.

24 Mr. Matthews says, yes, it should be reintegrated
25 into the partnership.

26 THE COURT: But why am I hearing about this? How does
27 it bear on --

28 CNSL G. BRANDT: Yeah. No, fair question.

29 THE COURT: Because it's getting a bit granular.

30 CNSL G. BRANDT: I am getting a bit granular. So
31 it's -- to the immediate issue here.

32 THE COURT: Yeah.

33 CNSL G. BRANDT: We have a property that Mr. Tian
34 Kusumoto says should be made an asset of the
35 partnership. Mr. Matthews agrees it should be
36 made an asset of the partnership. We say
37 Mr. Tian Kusumoto doesn't allow that to actually
38 happen, holds it out as an issue of contention
39 and refuses to allow the property taxes to be
40 paid. That's one with BMA. The second issue
41 we're going to come to when we talk about this
42 \$14 million amount.

43 The BMA is itself -- and I'll just give a
44 small background on what it is. It was formally
45 known as the North Langford Recreation Centre,
46 and it's effectively a community centre that the
47 City of Langford sold to Bear Mountain, and it

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1 has a gym, a pool, a restaurant, et cetera, and a
2 membership program, and it's an integral part of
3 the -- it's one of the integral amenities that
4 are at the heart of this community, so it's a
5 centrally located amenity at the heart of the
6 Bear Mountain community.

7 So I won't go through all of the detail on
8 the next pages at paragraph 80. All this to say
9 is that that was an issue with Mr. Tian Kusumoto
10 interrupting the payroll for BMAC on a very short
11 notice, again trying to seek concessions from
12 Mr. Matthews, alleging that Mr. Matthews had
13 diverted funds to BMA, resulting in Mr. Matthews
14 having to pay payroll on very short notice. And
15 since that time, BMAC has operated with its own
16 revenues and its own expenses.

17 I'm at paragraph 81. There's a second
18 example here -- so another aspect of the
19 financial oppression relates to management fees,
20 and the way this occurred was in January 2023,
21 Tian Kusumoto rejected payment of what the
22 partnership's controller described as Matthews',
23 quote, standard monthly management fee of 15,750.
24 Tian Kusumoto asserted that he would not be
25 signing any cheques for signature until the
26 controller's payment authorization was revoked so
27 the company's controller could no longer
28 authorize ordinary-course payments, and that
29 management fee payment was cancelled.

30 I'm going to take the court to
31 Mr. Kusumoto's affidavit #1, which is in the
32 record at --

33 THE COURT: In the --

34 CNSL G. BRANDT: In the larger record at tab 6, and
35 volume 1.

36 THE COURT: M'mm-hmm.

37 CNSL G. BRANDT: Oh, sorry. I'm at tab 6, volume 1 of
38 the main record.

39 THE COURT: Page or exhibit number?

40 CNSL G. BRANDT: I apologize, Justice?

41 THE COURT: I'm in there, so where do I go?

42 CNSL G. BRANDT: Paragraph 61.

43 THE COURT: Okay.

44 CNSL G. BRANDT: Here Matthews says -- sorry, not
45 Matthews -- Mr. Tian Kusumoto says:

46
47 When I became a director of Sanovest and

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1 EBMD in 2021, I learned that the
2 Developments Partnership, Mr. Matthews
3 (through Ecoasis Innovative Communities
4 Inc.) received a management fee of \$15,000
5 per month, but that there was no written
6 agreement. Although Mr. Matthews has
7 exercised overall management of the
8 Partnerships, based on my involvement, it is
9 not clear what services are being provided
10 in exchange for this management fee.

11
12 And so what occurred here is this is obviously
13 Mr. Matthews' full-time job since 2013. He's
14 being paid a monthly management fee of \$15,000 a
15 month. Mr. Kusumoto takes the step in January
16 2023 of stopping that payment, and he provides
17 evidence that this was somehow news to him when
18 he became a director in 2021.

19 CNSL W. ROBERTS: Well, sorry, Justice. In fairness,
20 my friend should refer you to the next two
21 paragraphs of the affidavit.

22 CNSL G. BRANDT: Mr. Matthews is -- Mr. Kusumoto
23 advises Mr. Matthews that there ought to be a
24 formal agreement.

25 THE COURT: M'mm-hmm.

26 CNSL G. BRANDT: And that there is no discussion about
27 that agreement and that, as a result, he has not
28 authorized such payments.

29 There's another instance here at
30 paragraph 82 where there was -- there are funds
31 sitting in the resort partnership's account, so
32 we've seen, Justice, that there are accounts
33 payable, both by the resort partnership and by
34 the partnership, and what's occurring here is
35 what's happened over a very lengthy period of
36 time, is that revenues are earned by the resort
37 partnership, and the resort -- and then the
38 management of the partnership and the resort
39 partnership try and work out what expenditures
40 need to be paid on a priority basis, and that
41 involves funds being transferred on a very
42 regular basis from the resort partnership into
43 the partnership to pay the partnership's bills.

44 And Mr. Matthews' evidence in this regard is
45 that the monthly expenditures of the partnership
46 are approximately \$100,000 before property taxes,
47 and that, because there are effectively no

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1 revenues retained and little earned in the
2 partnership, that the only reason the
3 partnership's expenditures have been paid at all
4 is as a result of a transfer of funding from the
5 resort partnership into the partnership.

6 And so later when we come to talk about what
7 the appropriate order is going to be, we're going
8 to say -- and we have said -- there is no issue
9 with the resort partnership. It is
10 self-sustaining, and the reason why it's showing
11 accounts payable and aged accounts is because its
12 resources are being diverted on a very regular
13 basis to pay the partnership's accounts.

14 And this is an example here where
15 Mr. Kusumoto -- Mr. Matthews is requesting that
16 Mr. Kusumoto transfer funds -- authorizing a
17 transfer of funds from the resort partnership to
18 the partnership. Mr. Kusumoto does not do so,
19 and counsel here writes -- counsel for
20 Mr. Matthews writes to counsel for Mr. Kusumoto
21 objecting to this, and stating that cheques are
22 going to be bounced by the end of the day due to
23 insufficient funds. This is creating chaos for
24 staff, and that the controller, Mr. Gondoyano
25 [phonetic] is on the verge of a breakdown as a
26 result of the stress placed on him, and he later,
27 in fact, resigns as controller.

28 After this objection, the funds are
29 ultimately released, and there's a letter from --
30 there's two letters at tabs 44 and 45 of the
31 condensed book that have that exchange between
32 counsel.

33 To the extent that Mr. Kusumoto has
34 justified these refusals by a stated desire to
35 implement financial control, this stated desire
36 has not prevented Mr. Kusumoto from acting
37 unilaterally and without Matthews' authorization.
38 The evidence is here that approximately \$165,000
39 has been repaid to the CRA through payments that
40 Mr. Kusumoto initiated, and Mr. Matthews
41 complains that these payments were reckless
42 because --

43 THE COURT: Whose obligation?

44 CNSL G. BRANDT: It's a partnership obligation.

45 THE COURT: Okay.

46 CNSL G. BRANDT: To pay the CRA, but, while Matthews
47 requires Tian Kusumoto's sign-off for cheques and

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1 for transfers, Mr. Tian Kusumoto succeeded in
2 issuing these payments to the CRA, which has
3 impaired the partnership's ability to carefully
4 plan, which is a problem, given its cash
5 scenario. So that's the compliant here.

6 And what is stated in counsel's letter is
7 that here the reason that Mr. Tian Kusumoto
8 effected -- was able to effect these transfers is
9 because of Sanovest's desire to ensure that it
10 has first priority in any insolvency or
11 realization proceedings, rather than the CRA
12 having a priority over Sanovest's interests. And
13 that payment's been paid. Other payments
14 withheld, as we've seen, and that is part of the
15 overall picture of the financial oppression, all
16 while there's room under the Sanovest loan and
17 advances not being made.

18 I'm on to paragraph 85, and I'm into the
19 refinancing attempts of the Sanovest loan.
20 Matthews has deposed that, since the fall of --
21 and this is from his affidavit #1 in the
22 receivership proceeding -- that:

23
24 Since the fall of 2023, I have been going to
25 market in an effort to secure third party
26 financing for the partnership. In response
27 there has been series interest among
28 investors, but only provided that the
29 partnership has the ability to carry out
30 land sales. My counsel described these
31 efforts to Sanovest and Tian Kusumoto's
32 counsel in a letter dated October 19th
33 regarding financing, among other matters.
34 That letter noted, among other things, that
35 a potential lender was interested in
36 principle in advancing financing secured by
37 the Bear Mountain lands, but that he had
38 reviewed the pleadings in the various
39 litigation matters and is not prepared to
40 proceed under the current structure where
41 all land sales are effectively frozen, and
42 the lender was justifiably concerned that
43 the partnership will not have access to the
44 cash flow required to service and ultimately
45 repay a loan at maturity.

46
47 And Matthews says that was his evidence -- sorry,

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1 that that was his -- that was true.

2 Accordingly, the Sanovest loan is unable to
3 be replaced, effectively, because there is no
4 revenue coming in and sales are blocked, and as a
5 result, a lender has no assurance that they will
6 ultimately get repaid from sales, because that is
7 the partnership's business. That's its asset.
8 That's what it does. It's unable to develop and
9 sell land. It's unable to repay a lender. And
10 we've gone through the reason why those sales
11 have not occurred.

12 Early in 2024 Sanovest presented a term
13 sheet of its own, and that is at tab 17 -- sorry,
14 that is at tab 1 of the condensed book. And
15 Sanovest, in its term sheet, provides for a loan
16 to a cap of \$85 million at a rate of prime plus
17 3.05, prime being 7.2 at that time, increasing to
18 prime plus 6.05 thereafter, with a floor of
19 9.5 -- higher than the current loan -- paid for a
20 fee of 1 percent of the loan at closing, but the
21 fee would be earned on execution of the term
22 sheet. So query what happens if the term sheet
23 is executed and not closed.

24 The term of the loan was for 12 months only.
25 In sum, the term sheet would have put \$850,000 in
26 Sanovest's pocket immediately as a 1 percent
27 extension fee, increase the interest rate with a
28 need to renegotiate in 12 months' time, and based
29 on experience with Sanovest as lender,
30 significant questions as to whether there would
31 be funding, the extent of the funding and how
32 that would assist the partnership's current
33 funding situation.

34 On March of 2024 Matthews presented a term
35 sheet from Timber Creek Capital to replace the
36 Sanovest financing in full. The term sheet was
37 for a \$65 million loan, 24-month term, lower
38 interest rates than Sanovest term sheet and a
39 lower lender's fee that was only payable on
40 closing. The Timber Creek term sheet required
41 payment down of \$30 million from lot sales or
42 cash equity within 14 months or minimum monthly
43 payments of 3 million for the last ten months of
44 the term.

45 So here we have a lender who is willing to
46 advance funds to the partnership, but, like any
47 lender, seeks some assurance of either repayment

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1 from sales or at least monthly minimum payments
2 after a certain period of time.

3 On April 5th, 2024, Sanovest and
4 Mr. Kusumoto asked Mr. Matthews to return back
5 and eliminate the initial covenant, and when
6 Matthews attempted to do so, that potential
7 lender -- prospective lender viewed this as a
8 nonstarter and did not agree to continue the
9 negotiations. So this is entrenchment,
10 entrenchment of Sanovest's position as lender.

11 One of the objections that Sanovest has set
12 out is in the requirement to pay down the loan
13 over -- sorry. One of the objections that
14 Sanovest has raised is the requirement the pay
15 down the principle of the loan over the two-year
16 term of the loan and that that would be
17 insufficient to fully retire the Sanovest loan.
18 So the \$65 million is insufficient, and as a
19 result, Sanovest could not -- has issued this
20 demand and brought enforcement proceedings on its
21 loan requiring repayment.

22 Sanovest objects to the funding application
23 proposal on the basis -- on similar bases. They
24 say it's insufficient and they say it will take
25 too long. But we heard yesterday from my friend
26 Mr. Jackson that there's no assurance that a full
27 receivership process would be any shorter than
28 the process contemplated under the funding
29 application, and in fact, in our submission, it's
30 likely to be significantly longer, given the
31 scope of a full receiver exercising control over
32 all the lands and the operations.

33 As Mr. Ferris took the court to earlier, on
34 April 22nd, we -- counsel for Mr. Matthews set
35 out a list of six or any other reasonable options
36 that would resolve the issue with the loan.

37 THE COURT: Right.

38 CNSL G. BRANDT: And there was no response to that, no
39 engagement, and further no response to a letter
40 of intent delivered but Mr. Matthews to purchase
41 Sanovest's interest, and that is at
42 paragraph 53 -- sorry, at tab 53 and 54 of the
43 condensed book, with Mr. Matthews having
44 delivered a letter of intent.

45 So we have every option on the table for
46 this lender to be paid, and this lender wants
47 none of them. This is a lender that wants a

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1 receivership but does not want to be repaid.
2 Perhaps this would be a convenient time.
3 THE COURT: Okay. I'll check on Thursday of next
4 week, and then you give some thought to how much
5 time your side needs to finish up --
6 CNLSL G. BRANDT: Yes, Justice.
7 THE COURT: -- all of the submissions, and then we'll
8 take it from there. Thank you.
9 THE CLERK: Order in chambers. These chambers are
10 adjourned for the afternoon recess.

11
12 **(PROCEEDINGS RECESSED AT 3:01 PM)**

13 **(PROCEEDINGS RECONVENED AT 3:20 PM)**

14
15 THE COURT: So I've been able to move something, a
16 personal matter, and also organize with
17 scheduling next Thursday. We have the day set
18 for next Thursday.
19 CNLSL A. NATHANSON: Very grateful, Justice. Thank
20 you.
21 THE COURT: Thank you. I was able to work it out.
22 Start at 10 o'clock.
23 CNLSL C. FERRIS: Justice, we commit that we'll be
24 finished by the lunch break tomorrow.
25 THE COURT: All right. So what happens then is I hear
26 from Mr. Nathanson? Then from Mr. Jackson?
27 CNLSL A. NATHANSON: Mr. Jackson will reply on his
28 motion, then I will respond to my friend's
29 oppression motion.
30 THE COURT: And that will take us into next Thursday.
31 CNLSL A. NATHANSON: Yeah, I -- yes. Like, I think
32 Mr. Jackson will make his reply and I'll begin,
33 but I assume we don't with done.
34 THE COURT: Yes. And then is there a right of --
35 CNLSL A. NATHANSON: Yes, my friends have a right of
36 reply at the end, and we've discussed our time
37 estimate, and I've told Mr. Ferris I will be done
38 by the afternoon break on next Thursday.
39 THE COURT: Okay, great. All right.
40 CNLSL C. FERRIS: And that would -- having not heard --
41 I will take what time is allotted to me.
42 THE COURT: Okay, thank you.
43 CNLSL G. BRANDT: Thank you, Justice. Just before I
44 move on to my next section, I just wanted to go
45 back to paragraph 81 of my written argument, and
46 I had been speaking here about Mr. Matthews'
47 management fee and the unilateral step to prevent

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1 that from being paid in January of 2023. There's
2 just an additional reference that I wanted to
3 draw the court's attention to. That's at
4 paragraph -- sorry -- at tab 43 of our condensed
5 book. It's an email exchange with Mr. Clarke,
6 who at that time was the chief financial officer,
7 from 2015. And here Mr. Clarke is providing a
8 listing of the cheques issued that week on the
9 development and resort companies, and Tom
10 Kusumoto responds saying:

11
12 Please provide details for the expense of
13 15,750 for Ecoasis innovative expenses.
14 [Indiscernible] my review.
15

16 And Clarke responds saying:

17
18 Hello, Tom. This is not an expense report,
19 but rather the monthly management fee of
20 15,000 plus GST.
21

22 Tom Kusumoto says:

23
24 David, I feel silly. Sorry about that.
25

26 It's copied to Mr. Matthews and to TRK, to
27 Mr. Kusumoto. And there are other examples in
28 the record, but this is just one of this
29 management fee being a known, reported, recorded
30 expense, and despite those additional paragraphs
31 in Mr. Kusumoto's affidavit as to his reasons for
32 withholding them, the first paragraph, that he
33 learned about it in 2021, is not supported by the
34 long history of that, including this exchange
35 where he is copied on it.

36 I'm going to move to just a section here on
37 the current state of the partnership's affairs.

38 THE COURT: That's at page 25? Or here we are.

39 CNSL G. BRANDT: At the beginning of page 102 of
40 the -- paragraph 102 of the argument.

41 THE COURT: All right.

42 CNSL G. BRANDT: As noted above, the partnership holds
43 all the units in the resort partnership, apart
44 from one held by EBMD, and therefore the resort
45 partnership comes under the general umbrella of
46 the assets belonging to the partnership.
47 However, since their inception in 2013, they have

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Submissions by Cnsl G. Brandt

1 always operated in distinct spheres, with the
2 resort partnership carrying on the golf, tennis
3 and recreation business, and the partnership
4 carrying on the real estate holding and
5 development business. That division is reflected
6 in the partnership agreements, and on a
7 day-to-day business, the resort partnership owns
8 and operates the sporting and recreational
9 facilities at Bear Mountain. Those are, of
10 course, the two Nicklaus-designed golf courses,
11 the mountain course and the valley course, and
12 the Bear Mountain Tennis Centre, which has
13 Canada's largest indoor and outdoor -- outdoor
14 rec play courts.

15 It was also intended that the resort
16 partnership operate the activity centre, which I
17 have discussed already and here's the full
18 listing of the amenities associated with that
19 community centre, and that has not been
20 transferred back into the resort partnership. We
21 understand that Sanovest is not seeking the
22 appointment of a receiver over BMAC or the
23 operations of BMAC in this petition.

24 Matthews' duties in overseeing the resort
25 partnership's overall operations include the
26 golf, tennis and retail operations, along with
27 all future resort operating components, and
28 that's part of the plan to continually build out
29 the amenities here as part of the overall plan
30 to -- trend or trajectory of increasing the land
31 values through amenities.

32 Matthews also leads and works with the
33 employees, including the golf and tennis
34 managers, the [indiscernible] team, horticulture
35 team and administration team. We heard evidence
36 of the number of employees there that vary
37 seasonably, but it's a large operation. Matthews
38 leads the golf and tennis membership engagement
39 and oversees the maintenance and renovation of
40 those assets.

41 Golf is a key part of this community, and
42 Matthews' personal involvement in golf and
43 organizations has been an essential ingredient in
44 the growth of the Bear Mountain community.
45 That's one of the unique aspects that Matthews
46 has brought since 2013 here.

47 Mr. Larocque is the general manager of the

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1 resort partnership operations. He's provided two
2 affidavits in these proceedings, and we say as
3 well that the resort partnership's business
4 itself, when viewed in isolation, is profitable,
5 but it's due to the access of revenues from land
6 sales that the resort partnership has been
7 funding the partnership to meet the partnership's
8 basic operating needs of \$100,000 a month before
9 property taxes.

10 Currently the resort partnership is
11 experiencing strong revenues. We heard some of
12 this yesterday, the evidence of Mr. Larocque
13 showing that, despite the failure of a water
14 pump, the year-over-year revenues are the highest
15 that been since 2013.

16 THE COURT: Mr. Jackson's point was that, in spite of
17 that, even though it's a sensational year, the
18 overall accounts payable are still roughly the
19 same as they were. And I take it your point
20 earlier was, well, that's because the resort
21 partnership subsidizing the partnership.

22 CNSL G. BRANDT: Correct.

23 THE COURT: All right.

24 CNSL G. BRANDT: I have some additional points on
25 that.

26 THE COURT: Okay. All right.

27 CNSL G. BRANDT: Just very briefly, though, that if
28 you compare the two, the aged accounts are coming
29 closer to being paid, so aging is not as serious
30 as it was. The overall amounts are comparable.
31 That being said, the resort partnership obviously
32 money comes in and out of the account at various
33 times. I don't have evidence on this, but I'm
34 instructed that the cash position is somewhat
35 better than it was. That was a low day.

36 THE COURT: No, but --

37 CNSL G. BRANDT: All this is variance.

38 THE COURT: No, but here -- I don't think I should
39 consider anything that's not in the evidence,
40 unless everyone agrees it's a fact I can rely on.

41 But the point Mr. Jackson made is, if it's
42 that great, why aren't the accounts payable --
43 why isn't the overall number coming down, or why
44 isn't it coming down for at least the resort
45 partnership if it's doing that well? And I
46 thought you said earlier that, well, their
47 financial ability -- resources are constrained

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Submissions by Cnsl G. Brandt

1 because they're supporting the partnership.

2 CNSL G. BRANDT: Correct.

3 THE COURT: And I don't recall where the evidence is
4 on that, but I assume you're going to take me to
5 that in due course.

6 CNSL G. BRANDT: I will do that. And my only point
7 earlier was not -- not intending to give
8 evidence, but rather, just -- what we're looking
9 at are two snapshots, and neither certainly gives
10 the full picture of what's happening.

11 THE COURT: No, I know, but in terms of the evidence,
12 Mr. Jackson's point is, well, if it's -- I really
13 can't place any weight on that evidence for the
14 purpose of considering the receivership aspect of
15 the application, because if it's that good, you'd
16 expect a greater dent in the accounts payable.

17 CNSL G. BRANDT: Correct. So I'll take the court to
18 the affidavit.

19 THE COURT: Have I -- I hope I didn't -- have I
20 summarized that right?

21 CNSL K. JACKSON: No, I think that's right, Justice.

22 THE COURT: Mr. Jackson, sorry if it wasn't right.

23 CNSL K. JACKSON: No, my point on that was -- you're
24 right -- I mean, apart from the CapEx on
25 maintenance, there was the point that revenue is
26 revenue. Bottom line is more important than
27 revenue, and having a great revenue in a year in
28 history doesn't mean that you're actually doing
29 well profitably, and you're not paying down the
30 aged payables. And that was where I took you to
31 the two comparisons from May to August.

32 THE COURT: Right.

33 CNSL K. JACKSON: That doesn't show any meaningful
34 decrease.

35 THE COURT: Okay. And so I understand Mr. Brandt's
36 point, the answer to that -- the answer to that
37 submission is -- and I'll hear from you in
38 reply -- is, well, that's because resort is
39 supporting partnership.

40 CNSL K. JACKSON: Yeah, I think they said historically
41 they paid property taxes which is, you know,
42 1.6 million a month, and that didn't happen this
43 year, of course.

44 THE COURT: A year.

45 CNSL K. JACKSON: A year. Oh, my goodness. A year.

46 THE COURT: I'll let you reply.

47 CNSL K. JACKSON: Right, right.

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1 THE COURT: But I want to hear -- I'll have to -- I
2 want to see the evidence, but that's what I took
3 the answer to your submission to be.
4 CNSL K. JACKSON: Right. I think that's -- yeah.
5 THE COURT: And so if that's the case, I need some
6 help seeing that, because --
7 CNSL G. BRANDT: So I have a couple of references
8 here. One is the affidavit #2 of Mr. Matthews.
9 It's at tab B of the book of affidavits here, the
10 condensed book of affidavits, paragraph 28,
11 Mr. --
12 THE COURT: Just a minute. Let me just get that out
13 here. So which paragraph? You said paragraph
14 number?
15 CNSL G. BRANDT: 28.
16 THE COURT: Okay.
17 CNSL G. BRANDT:
18 Although sufficient to maintain the golf and
19 recreation operations in isolation --
20
21 So this is Mr. Matthews' evidence here.
22
23 -- operating revenue from the Resort
24 Partnership is not enough to cover the Bear
25 Mountain Project's total outstanding
26 payables and ongoing expenses.
27
28 So that's what Mr. Matthews' evidence is, is the
29 revenue from the resort partnership can't pay for
30 everything, and it was never the intention to pay
31 for everything.
32 THE COURT: No, but you went further than that, and
33 you said the reason the resort is in -- can't
34 deal with all its payables is because it's
35 diverting some of its funds to support the
36 partnership.
37 CNSL G. BRANDT: That's right. And --
38 THE COURT: Yeah, and so I just want to see where I
39 can -- where that's tethered to some evidence.
40 CNSL G. BRANDT: And at paragraph 27, so just above,
41 this is where Mr. Matthews makes this point here.
42 THE COURT: Okay.
43 CNSL G. BRANDT:
44 Funds earned by the Resort Partnership have
45 been regularly transferred to the
46 Partnership by way of intercompany loan,
47 with virtually no revenue retained in the

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1 Resort Partnership resulting in the Resort
2 Partnership having significant accounts
3 payable ...
4

5 THE COURT: Okay.

6 CNSL G. BRANDT: So that's Mr. Matthews' evidence, and
7 his evidence as well in his affidavit #1 --
8 sorry, his affidavit #2 provided in the
9 oppression proceeding -- oh, that is there -- is
10 that cash is being managed on a day-by-day basis,
11 and that includes the management of cash required
12 to cover the expenses of both the partnership and
13 the resort partnership.

14 And so when they manage cash, they look at
15 it wholistically, what needs to be paid in
16 priority, but the only source of revenue, in
17 effect, is the resort partnership, and that's at
18 paragraph 31, the daily management strategy.

19 THE COURT: Okay.

20 CNSL G. BRANDT: I'll also point out, when we see
21 these accounts payable, they've been accruing for
22 a period of time that long precedes -- long
23 precedes -- the May 1st term date on the Sanovest
24 loan, and so the reason for this accrual of
25 accounts payable is not only because of the need
26 to divert revenues from the resort partnership to
27 the partnership, but also because there are no
28 land sales, so no revenue. There are very
29 limited advances under the Sanovest loan
30 agreement, and there's no refinancing. This is
31 not an issue that's arisen since May 1st, not by
32 any means.

33 THE COURT: Okay.

34 CNSL G. BRANDT: So at paragraphs 112 and 113 I
35 discuss the cash flow situation here. Revenues
36 are good, and as I say, there has been some
37 reduction to the older accounts payable.

38 Now, one of the resort partnership's largest
39 recurring expenses has been \$360,000 for the cost
40 of lease space at the hotel, and I'm going to
41 discuss the next section, that the resort
42 partnership has not renewed its resort
43 partnership lease with the hotel, and as of
44 July 1st, 2024, it's effected a transition of
45 operations away from the leased facilities.

46 Paragraph 115. When the partnership and
47 resort partnership purchased the hotel --

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1 purchased, sorry, the project in 2013, those
2 assets included the -- what's known as the Westin
3 Bear Mountain Hotel. There's been a fraught
4 relationship with the hotel. The current owners
5 purchased the hotel from the resort partnership
6 in 2019, and the parties' arrangements included
7 two agreements by which the resort partnership
8 was to continue to operate from the hotel
9 premises, including office space, pro shop,
10 locker rooms and storage space.

11 An arbitration was commenced regarding
12 contractual relationships between the resort
13 partnership and the hotel, and the court has
14 reviewed a portion of the hotel liability
15 decision that my friend Mr. Ferris took the court
16 to earlier.

17 Just in paragraph 119 here, this notes the
18 circumstances by which the hotel liability
19 decision has become part of the public record due
20 to an appeal and a petition that were launched to
21 challenge.

22 THE COURT: And what was the decision? I was only
23 taken to the comments regarding Mr. Clarke.

24 CNSL G. BRANDT: Yes, Justice. So the application for
25 leave to appeal was dismissed by the court of
26 appeal.

27 THE COURT: Right.

28 CNSL G. BRANDT: And there are reported reasons that
29 are referenced at 120 of the argument. The hotel
30 petition was discontinued.

31 THE COURT: So the arbitration decision was to dismiss
32 the petition?

33 CNSL G. BRANDT: I apologize. So there was an appeal
34 of the arbitration decision.

35 THE COURT: Yeah, but I don't know what the
36 arbitration decision was is what I'm trying to
37 get at.

38 CNSL G. BRANDT: So the appeal was dismissed. So the
39 decision on --

40 THE COURT: I've got that. What was the decision at
41 first instance?

42 CNSL G. BRANDT: So the decision on liability --

43 THE COURT: Yes.

44 CNSL G. BRANDT: There was a decision on liability.

45 THE COURT: And what was it?

46 CNSL G. BRANDT: That -- and I'm just cautious about
47 what I'm going the say about it, although I think

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1 it is all in evidence. Yeah, the decision is in
2 evidence.

3 THE COURT: So did the arbitrator dismiss the claim
4 and that was the appeal?

5 CNSL G. BRANDT: No. So the arbitrator allowed the
6 resort partnership's -- like, the resort
7 partnership was successful in the arbitration
8 on --

9 THE COURT: Oh, so they were the --

10 CNSL G. BRANDT: They were the claimants.

11 THE COURT: Okay. I thought it was the other way
12 around.

13 CNSL G. BRANDT: They were the claimants alleging
14 breaches of the contractual relationship with the
15 hotel.

16 THE COURT: Against the --

17 CNSL G. BRANDT: The hotel operators.

18 THE COURT: Okay. And they were successful?

19 CNSL G. BRANDT: They were successful on liability.

20 THE COURT: All right.

21 CNSL G. BRANDT: And what remains in the hotel
22 arbitration is described at paragraph 124, which
23 I'll just invite the court to read.

24 THE COURT: So what I don't understand is in
25 paragraph 120 it says:

26
27 The hotel entities filed a notice of
28 discontinuance of the hotel petition.

29
30 That's why I thought they were the claims.

31 CNSL G. BRANDT: So they were -- so there were two
32 proceedings in the BC Supreme Court that
33 challenged the arbitration.

34 THE COURT: Oh, I see.

35 CNSL G. BRANDT: The first was an outright appeal.

36 THE COURT: Okay.

37 CNSL G. BRANDT: And the second was a petition --

38 THE COURT: Okay. All right.

39 CNSL G. BRANDT: -- seeking to set it aside.

40 THE COURT: So then what's happening now is the
41 assessment of damages at arbitration?

42 CNSL G. BRANDT: Correct.

43 THE COURT: Okay. And that's -- when does that start?

44 CNSL G. BRANDT: So that's what's set to begin -- that
45 next phase is set to begin on September 23rd.

46 THE COURT: And how does a receivership order -- no
47 matter how broad or narrow it is -- affect the

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1 arbitration?
2 CNSL G. BRANDT: Well, we say there should be no stay
3 of the arbitration.
4 THE COURT: Yeah, but if your client's -- but if the
5 partnership is -- I'm sorry, is it the resort or
6 the partnership? It's the resort? If they're
7 the claimant and they are successful on liability
8 at the arbitration, why would there be a stay of
9 their claim? Stays against them are stayed;
10 right?
11 CNSL G. BRANDT: Correct. So there should be no
12 effect.
13 THE COURT: Right. But the other side is not seeking
14 a stay, are they?
15 CNSL K. JACKSON: No, Justice. It wouldn't arise --
16 sorry, the ordinary stay provision, of course,
17 wouldn't affect that.
18 THE COURT: Yeah.
19 CNSL K. JACKSON: Hence we've sought nothing.
20 THE COURT: No relief in relation to the arbitration.
21 CNSL K. JACKSON: Not at all. Not at all.
22 THE COURT: Okay.
23 CNSL A. NATHANSON: Sorry, Justice. I
24 [indiscernible]. I know almost nothing about
25 this, but I note that my friend's submission
26 seems to describe that there are claims going
27 both ways and there was some accounting claimed
28 by the hotel against the partnership as well as
29 claim from --
30 THE COURT: Okay, that's what I was wondering what
31 was --
32 CNSL A. NATHANSON: Right. So I don't know the
33 answer. I'm just trying to observe that there
34 seems to be a cross-claim.
35 THE COURT: Yeah. But I thought the way it landed was
36 there's only one liability decision in favour of
37 the resort -- let's call it the resort
38 partnership -- and whatever -- whatever might
39 have been advanced by the other side has been
40 dismissed.
41 CNSL C. FERRIS: Justice, I think if you read the next
42 paragraph, 125, it will explain all that to you.
43 THE COURT: Okay. All right.
44 CNSL C. FERRIS: Thank you.
45 THE COURT: 125?
46 CNSL C. FERRIS: Yes.
47 THE COURT: Okay. Well, what are those accounting

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1 claims? So that's the cross-claim, then, the
2 accounting claims?

3 CNSL G. BRANDT: So there's a cross-claim there.
4 There are two -- already essentially cross-claims
5 for equivalent value, but the main claim on
6 liability exceeds those cross-claims by a very
7 substantial amount. So by far and away, the main
8 issue, by scale alone, is the damages for the
9 matters that were found in the liability decision
10 by which the hotel entities are liable to the
11 resort partnership.

12 THE COURT: So your concern is that a receivership
13 order would affect a stay of the claims
14 against -- the cross-claims against the
15 partnership.

16 CNSL G. BRANDT: Well, my friend says that's not being
17 sought.

18 THE COURT: Okay.

19 CNSL G. BRANDT: So in that case, I have no concern.

20 CNSL C. FERRIS: There's two worries. One is, does
21 the receiver get conduct of that arbitration on
22 behalf of the resort partnership? Under the full
23 receivership order, the receiver would now have
24 conduct of it. We don't want that. This has
25 been going on for five years. The receiver knows
26 nothing about it. So the first step is, does the
27 receiver get conduct of it?

28 And then for the cross-claims back, if those
29 are stayed, then that party, the hotel, could
30 say, well, this isn't fair. My claims are
31 stayed, but yours aren't, and so it turns into a
32 mess. Or the short answer is, we say that
33 whatever order is made shouldn't impact --

34 THE COURT: In other words, whatever happens, carve
35 out the arbitration.

36 CNSL C. FERRIS: Correct. Exactly.

37 THE COURT: Mr. Jackson, is there --

38 CNSL K. JACKSON: Well, you know, I mean, I think --
39 Justice, I think, just by operation of the way
40 these things work, if the proceeding continues at
41 the instance of the debtor company, there's no --
42 you can't say, well, we get to go and you don't.

43 THE COURT: Right.

44 CNSL K. JACKSON: That's just not how it works, of
45 course. And so that's not a concern. But
46 practically speaking, if this arbitration can
47 proceed, then it should proceed.

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Submissions by Cnsl G. Brandt

1 THE COURT: Right. And the concern is the receiver,
2 under the broad-form order, might be said to have
3 had --

4 CNSL K. JACKSON: I think it would.

5 THE COURT: -- control of it well. Is there some
6 way -- are you seeking that -- if your friends
7 say, well, that should be carved out?

8 CNSL K. JACKSON: Yeah. Right. I mean, so two
9 things. I mean, it would -- you know, at first
10 instance, if there's a receivership order made,
11 the chose in action invests in the receiver's
12 control; right?

13 THE COURT: Right.

14 CNSL K. JACKSON: You know, practically speaking, that
15 happens all the time, and if they want, they just
16 allow counsel -- existing counsel to continue,
17 and it doesn't look any different whatsoever,
18 despite the fact that they're taking instructions
19 from the receiver and not principal of the
20 company. So what?

21 So I don't think there's any mischief in
22 that whatsoever. I can talk with my friend and
23 get instructions, because I don't think there's
24 any concern about a receiver saying, look, you
25 know, three weeks from now, if they want to go
26 ahead with it and it's got funding, then go
27 ahead. So I can get instructions. I don't
28 think -- this isn't going to be an issue.

29 THE COURT: And a stay wouldn't prohibit, then, the
30 cross-claim.

31 CNSL K. JACKSON: No, not at all, and to the extent we
32 need to clarify, that's fine.

33 THE COURT: Okay.

34 CNSL K. JACKSON: I don't think there's any concerns
35 here.

36 THE COURT: Okay. Well, I'll let you work that out
37 with Mr. Roberts, then. Thank you. All right.
38 Mr. Brandt, thank you.

39 CNSL G. BRANDT: Thank you. This is why I'm doing the
40 facts.

41 THE COURT: All right.

42 CNSL G. BRANDT: Thank you, Justice.

43 So there's been -- I'm just going to skip
44 down to paragraph 128 here of my argument.

45 THE COURT: All right.

46 CNSL G. BRANDT: In parallel to the arbitration -- and
47 I just want to be careful because there is some

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Submissions by Cnsl G. Brandt

1 overlap here with details of the commercial
2 arrangements.

3 THE COURT: Right.

4 CNSL G. BRANDT: There has been a dissatisfaction with
5 the space that is being used -- that was being
6 used at the hotel, and there's a letter at -- in
7 one of the unfilled affidavits, which I'll take
8 the court to, that summarizes the -- some of the
9 outstanding issues.

10 THE COURT: And why do I need to know about this?

11 CNSL G. BRANDT: You don't need to know -- you don't
12 need to know that, actually, and to the extent
13 you do, it's set out in paragraphs (e) to (h)
14 here of the argument.

15 THE COURT: Let me just read that, then. This is
16 paragraph 129?

17 CNSL G. BRANDT: Yes.

18 THE COURT: This bears on the arbitration right?

19 CNSL G. BRANDT: It bears on several matters, which
20 I'll come to, in part on the arbitration, in part
21 on the way that Mr. Matthews' management
22 decisions have been impugned.

23 THE COURT: Oh, I see. Okay.

24 CNSL G. BRANDT: All right. And Mr. Larocque here has
25 given evidence as well on some of the issues that
26 this has caused.

27 Now, we have evidence in this proceeding
28 from Mr. Malak and Mr. Clarke. They provided
29 affidavit evidence, which was referenced here,
30 that the hotel is prepared to renew its lease to
31 the partnership on, quote, commercial terms,
32 provided that Mr. Matthews is not involved.

33 And so what we have here -- so what has
34 occurred is there's been a transition away from
35 the hotel. We'll come to some of the evidence of
36 what's happened. Bear Mountain Activity Centre
37 is being used as a check-in place. There is a
38 pro shop there, and that is golf cart storage and
39 charging that was done in the hotel. That's
40 happening in a separate location. And so despite
41 the fact that this is saving \$360,000 a year,
42 despite the significant dissatisfactions and
43 dysfunctions and the sworn evidence from
44 Mr. Malak and Mr. Clarke that they would love to
45 work with the project, but not with Mr. Matthews,
46 this -- the evidence coming from Mr. Tian
47 Kusumoto is that that was somehow a wrong

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Submissions by Cnsl G. Brandt

1 decision to separate from the hotel, and an
2 example of Matthews' mismanagement.

3 THE COURT: Okay. All right.

4 CNSL G. BRANDT: Okay. So here's what I'm going to
5 come to on this. So at paragraph 135, Matthews
6 and 599 submit -- first, before I go there, I
7 just have reproduced in the argument 133. This
8 is affidavit under seal. Mr. Matthews deposes as
9 to his concerns as to what's occurring in the
10 other relationships.

11 And here we say that the evidence of
12 Mr. Tian Kusumoto, Mr. Clarke and Mr. Malak
13 should be treated cautiously in determining what
14 is in the best interests of the resort
15 partnership. Ultimately we say this is a fact --
16 this is not a factor that should result in a
17 receiver being appointed over the resort
18 partnership operations.

19 And we're particularly concerned about the
20 evidence of Mr. Clarke, and I'm going to go to
21 this. We've already seen the findings made in
22 respect to Mr. Clarke at -- in the hotel
23 liability decision. I'm going to start with just
24 the affidavit of Mr. Clarke. It's at volume 8
25 and tab 18.

26 THE COURT: All right.

27 CNSL G. BRANDT: All right. So this is the affidavit
28 that Mr. Clarke has given in this proceeding.

29 THE COURT: All right.

30 CNSL G. BRANDT: And beginning at paragraph 25,
31 Mr. Clarke gives evidence as to what he asserts
32 to be Mr. Matthews' mismanagement of the project.
33 He states at 25 that he has concerns over
34 marketing and sales' management, that he doesn't
35 believe Matthews operates strategically.

36 27, that he has found that Matthews has
37 often acted in a self-interested manner with
38 respect to the partnership, and that there were
39 assets, and at 27:

40
41 As a result of such transactions and other
42 issues, I formed the view that Matthews was
43 not acting in the interests of the
44 Partnership.

45
46 28:
47

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Submissions by Cnsl G. Brandt

1 In late 2019, I raised my concerns with Tom
2 Kusumoto and Matthews and resigned from my
3 role. I told Tom and Matthews that I could
4 not continue in my role as CFO with the
5 ongoing lack of direction in the company,
6 the instability of the Partnership and what
7 I saw as financial mismanagement and
8 misconduct under Matthews' leadership.

9

10 So those are the -- this is the evidence given by
11 Mr. Clarke as to Matthews' mismanagement.

12 Now, as a result of the --

13 THE COURT: So his business associate and his wife are
14 the owners/operators of the Westin Bear Mountain
15 Golf Resort. That's the hotel?

16 CNSL G. BRANDT: Westin is the hotel.

17 THE COURT: That's the hotel.

18 CNSL G. BRANDT: That's the hotel.

19 THE COURT: Okay. So his partner is an owner and
20 operated the hotel. All right. Okay.

21 Associate. Business associate.

22 CNSL G. BRANDT: Now, previously --

23 THE COURT: What do you need me to go to next?

24 CNSL G. BRANDT: So now I'm asking you to go to our
25 condensed book, please.

26 THE COURT: Okay. Right.

27 CNSL G. BRANDT: Here Mr. --

28 THE COURT: Tab?

29 CNSL G. BRANDT: I'm at volume 2 of the condensed
30 book, and tab 73.

31 THE COURT: Okay, just a minute. Okay.

32 CNSL G. BRANDT: And here Mr. Clarke has given a
33 witness statement in the arbitration, and this
34 witness statement came in to -- it was filed into
35 court as part of the challenge to the
36 arbitration.

37 THE COURT: So where do I find that in here?

38 CNSL G. BRANDT: So at --

39 THE COURT: Oh, here it is. I've got it. 144?

40 CNSL G. BRANDT: Yeah.

41 THE COURT: All right. Page 144.

42 CNSL G. BRANDT: Exactly. And Matthews -- sorry. And
43 Mr. Clarke states that, for two separate reasons,
44 he made the decision to cease working in his
45 role, his prior role. First he says:

46

47 Since the fall of 2016, the GT operator --

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Submissions by Cnsl G. Brandt

1
2 And I take this to be a subset of the
3 partnership.
4

5 -- had been publicly trying to find a buyer
6 for the real estate and hotel assets. My
7 primary role is to assist with information
8 packages, site visits and any due diligence
9 requests for potential deals. The GT
10 operator was not interested in continuing
11 their ownership of Bear Mountain. There was
12 no assurance that any current staff would
13 have continued employment with a new
14 purchaser. As such, there was uncertainty
15 regarding my situation.

16 In addition, as the chief financial
17 officer, I was often put into difficult
18 positions between the two GT operator
19 partners and their representatives when it
20 came to providing information.
21

22 THE COURT: So GT operator, that's --

23 CNSL G. BRANDT: I understand that's an entity
24 associated with the resort partnership.

25 THE COURT: Okay. No, the hotel or the resort?

26 CNSL G. BRANDT: The partnership. It is the formal --
27 I'm told it's the resort partnership. That is
28 the resort partnership. That's one and the same.

29 THE COURT: Okay. All right. All right. Okay.

30 CNSL G. BRANDT:

31 In addition, as the chief financial
32 officer --
33

34 There's no dispute this is Mr. Clarke acting in
35 his role as the chief financial officer.
36

37 -- I was put into difficult positions
38 between the two GT operator partners and the
39 representatives when it came to providing
40 information. This created unnecessary
41 stress for me, and I was often blamed for a
42 variety of issues, including a lack of
43 information, providing too much information,
44 unclear financial disclosure and missed
45 budgets and timelines. All these issues
46 were often out of my control or had occurred
47 at the direction of one partner at the

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Submissions by Cnsl G. Brandt

1 expense of the other. It became all too
2 clear to me that the internal conflict of
3 the GT operator would not be resolving
4 itself in the near term, and I no longer
5 wanted to be part of these struggles.
6

7 So that's one issue. And then he cites a
8 personal issue that -- I'm told GT stands for
9 golf and tennis operator, and that that is the
10 resort partnership.

11 Mr. Clarke then gives evidence as to a
12 second personal issue which relates to a conflict
13 over a family situation he had and discovering
14 correspondence from Mr. Matthews to Mr. Tom
15 Kusumoto where there was a loss in faith of him.
16 And he, as a result, decided that he could no
17 longer work there. He says:

18
19 I unequivocally declare that the decision
20 not to renew my agreements with the GT
21 operator had nothing to do with any
22 enticement or inducement from any outside
23 source.
24

25 So -- and again, at just paragraph 13, he met
26 with Matthews and Kusumoto in Vancouver and
27 explained to them that he was not happy with the
28 events of the past 18 months and could not see a
29 way to continue with them. He stated that he
30 could not -- that he would not leave them without
31 a transition plan and he would work out a way to
32 stay on for a few months beyond his contract
33 date.

34 So his explanation here is very different,
35 markedly different, from the explanation provided
36 in the affidavit sworn in this proceeding, that
37 he left because of Matthews' management concerns.

38 THE COURT: Okay.

39 CNSL G. BRANDT: And what's more than that -- what's
40 more than that, we have recent evidence that
41 Mr. Clarke and Mr. Tian Kusumoto have been having
42 some communications which cause significant
43 amount of concern.

44 So there's a photograph in Mr. Tian
45 Kusumoto's affidavit number 3. It's at tab 22,
46 and that's at volume 8.

47 THE COURT: Sorry, affidavit #2, you said?

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Submissions by Cnsl G. Brandt

1 CNSL G. BRANDT: Sorry, it is in the condensed book.
2 So it's just here. It's affidavit #3 of
3 Mr. Kusumoto, Exhibit Q. I'm going to just take
4 the court to that in the condensed book.
5 THE COURT: Okay. Just so which tab is it in the
6 condensed book, then?
7 CNSL G. BRANDT: Tab 74 here.
8 THE COURT: Okay, just a minute while I get it. So
9 you're saying that there's something about their
10 relationship that raises further concerns?
11 CNSL G. BRANDT: Yes, Justice. It will just take me a
12 moment to get here, but I will get here.
13 So these are -- there's three photographs
14 here at 74. One is a picture of the transition
15 into the new pro shop. A second one is a
16 photograph of what -- of the person directing
17 someone to the new front desk for the golf
18 operations and so on.
19 And then at page 3 there's a photograph of a
20 cart charging facility.
21 THE COURT: Right.
22 CNSL G. BRANDT: Mr. Kusumoto does not identify the
23 source of that image. We've made requests for
24 the image source, and ultimately on the morning
25 of an application brought to compel disclosure,
26 Mr. Kusumoto identified David Clarke as the
27 source of that image, and that is --
28 THE COURT: Okay. But how does this --
29 CNSL G. BRANDT: How is that relevant?
30 THE COURT: So what? Why does it matter?
31 CNSL G. BRANDT: So the -- so that image --
32 THE COURT: I have to tell you what I'm looking at is
33 a pretty poor copy, so I don't know if there's --
34 maybe that doesn't matter.
35 CNSL G. BRANDT: A poor copy?
36 THE COURT: A poor copy of the photo.
37 CNSL G. BRANDT: So that image --
38 THE COURT: I wouldn't have known it's a charging
39 station. Anyway, I'll take your word for it now.
40 CNSL G. BRANDT: It's a charging station. I do have a
41 better photograph of it as well.
42 THE COURT: For golf carts; right? Okay, so why does
43 this matter?
44 CNSL G. BRANDT: So over at tab 75 of the condensed
45 book.
46 THE COURT: Okay.
47 CNSL G. BRANDT: This is Mr. Clarke providing that

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Submissions by Cnsl G. Brandt

1 image to Mr. Kusumoto.

2 THE COURT: Okay.

3 CNSL G. BRANDT: And it's a much better image here.

4 THE COURT: All right. Okay.

5 CNSL G. BRANDT: Now, what's striking is the very same
6 image surfaced two months earlier as an
7 attachment to an anonymous email from
8 2024bminfo@protonemail.com, essentially an
9 anonymous email address, to Island Golf Carts,
10 which is a local golf cart dealer and servicer
11 and a company with which the resort partnership
12 has a long-standing and important business
13 relationship. And that email is over at the next
14 tab.

15 THE COURT: 76?

16 CNSL G. BRANDT: And you can see --

17 THE COURT: 76?

18 CNSL G. BRANDT: 76, and you can see this is the
19 identical photograph.

20 THE COURT: One second.

21 CNSL G. BRANDT: Over at page 4.

22 THE COURT: Oh, yeah, okay. All right.

23 CNSL G. BRANDT: Over at page 4. And this anonymous
24 email address is writing to the supplier saying:

25
26 Nice way the golf cart fleet is being kept
27 at Bear Mountain. These will be worth
28 nothing after a few months of being kept
29 outside and uncovered. The garbage
30 can-covered chargers is a nice touch too ...
31

32 And then this goes from Island Golf Carts to
33 Mr. Larocque, who has provided evidence in this
34 proceeding:
35

36 Not sure who sent this to us.
37

38 And the point is that it appears that Mr. Clarke
39 is the source of both images.

40 THE COURT: Okay.

41 CNSL G. BRANDT: And he is, on the one hand,
42 collaborating very closely with Mr. Tian
43 Kusumoto; on the other hand, sending emails to
44 the suppliers of the partnership undermining and
45 denigrating the partnership's trade
46 relationships, and as currently the person who
47 acts as CFO for the hotel is asking for the hotel

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Submissions by Cnsl G. Brandt

1 to continue its relationship with the resort
2 partnership and denigrating Mr. Matthews.

3 And what comes across is a very clear split
4 in allegiances, which we say is not, by any
5 means, in the best interests of the resort
6 partnership.

7 THE COURT: So apart from the obvious point that you
8 said -- you're suggesting I shouldn't give any
9 weight to Mr. Clarke's evidence -- are you going
10 further than that saying there's something
11 inappropriate in the relationship between
12 Mr. Clarke and Mr. Tian Kusumoto?

13 CNSL G. BRANDT: I'm saying the court should be very
14 careful about -- in all the context of how this
15 proceeding has come forward, to then grant a
16 receiver over the partnership and the resort
17 partnership and the operations of the resort
18 partnership in a way that takes control away from
19 Mr. Matthews, in the context of the other
20 elements of the oppressive conduct here, because
21 all of this appears to be a control play against
22 Mr. Matthews. That's the point.

23 And the court's process should not be --
24 should not be allowed to be the vehicle by which
25 oppressive conduct and this type of cooperation
26 can be used to wrest control away from one of the
27 partners, particularly -- and the CEO who's been
28 in place since 2013 -- particularly in the
29 absence of any final determination on any of
30 these issues.

31 And then just, again, with respect to
32 alignment here, we have Mr. Clarke, who is the
33 CFO of the hotel where there is a very large
34 proceeding upcoming.

35 THE COURT: Right.

36 CNSL G. BRANDT: And again, this is a factor that
37 bears on the motivation of what happens and bears
38 on what we say is the appropriate order that
39 should be made with respect to the arbitration
40 proceedings.

41 THE COURT: All right. But if I take Mr. Clarke's
42 evidence out of the -- out of consideration
43 because I view that I shouldn't give any weight
44 to it, at least for the purpose of this -- these
45 applications, what you're saying, then,
46 effectively, although you haven't said it
47 directly, is there's no other evidence before me

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Submissions by Cnsl G. Brandt

1 to suggests that Mr. Matthews should not -- that
2 I should issue an order that presumptively denies
3 Mr. Matthews the ability to continue to operate
4 the business. That's something I should leave to
5 the receiver to determine.

6 CNSL G. BRANDT: Well, we're saying there should be no
7 receivership order placed over the resort
8 partnership.

9 THE COURT: Oh, the resort partnership.

10 CNSL G. BRANDT: In general. There's no basis for it.

11 THE COURT: All right. Okay. But he's also -- so
12 that it should only be over the partnership, but
13 isn't he -- I mean, perhaps I conflated the two,
14 but I thought he was also running the operation
15 of that on a day-to-day basis. Am I wrong in
16 that?

17 CNSL G. BRANDT: He is also running the operation of
18 the partnership, but the partnership's main
19 function --

20 THE COURT: No, I've got --

21 CNSL G. BRANDT: -- is to develop lands.

22 THE COURT: Right.

23 CNSL G. BRANDT: And it has no revenue right now;
24 right?

25 THE COURT: No, I know. But if I grant even a limited
26 receivership, one of the things I wanted was to
27 hear back from the receiver as to the propriety
28 of Mr. Matthews continuing to operate the
29 business, and I had, in my mind, conflated the
30 two.

31 CNSL G. BRANDT: And we say that those are separable.

32 THE COURT: So if we keep the resort out of it,
33 there's still the issue of who runs -- who runs
34 the partnership's business; right? And so
35 would -- even on the limited receivership order,
36 wouldn't I ask -- why wouldn't I ask the receiver
37 to provide me with its recommendation on that
38 basis?

39 CNSL G. BRANDT: You may wind up with an order asking
40 the receiver to opine as to whether it's
41 appropriate for Mr. Matthews to remain the CEO
42 with respect to the partnership business, but
43 there's no reason to seek a parallel --

44 THE COURT: Order of the resort.

45 CNSL G. BRANDT: In order to make the first order,
46 right.

47 THE COURT: Okay.

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Submissions by Cnsl G. Brandt

1 CNSL G. BRANDT: And currently -- and I think,
2 Justice, you had it correctly sort of in your
3 mind -- is because my friend is seeking a full
4 receivership order that covers both.

5 THE COURT: Right.

6 CNSL G. BRANDT: That's what they are --

7 THE COURT: Mind you, if I order a receiver appointed
8 over the partnership business alone, presumably
9 the receiver steps in and takes control of it in
10 any event, but may decide it's appropriate to
11 delegate day-to-day operations to Mr. Matthews.

12 CNSL G. BRANDT: It is correct that the resort
13 partnership is an asset of the partnership.

14 THE COURT: All right.

15 CNSL G. BRANDT: But as I say, the operations are
16 entirely separable.

17 THE COURT: No, I got that. I'm just dealing with
18 what happens if I issue a receivership order that
19 doesn't cover the resort assets, that deals with
20 everything else the partnership has. By
21 operation of the order, the receiver takes
22 control. But the receiver would nonetheless come
23 back with a recommendation as to who should run
24 that business; right?

25 CNSL G. BRANDT: Well, again, functionally these are
26 separate businesses.

27 THE COURT: I have that. I have that point. I'm
28 dealing with a different point in terms of, all
29 right, Mr. Clarke's evidence is out of the
30 consideration, out of the piece; I don't make an
31 order -- a receivership order that deals with the
32 resort. What you're saying, then, is, apart from
33 Mr. Clarke's evidence, there's nothing else that
34 impugns Mr. Matthews' ability to run the
35 business.

36 CNSL G. BRANDT: Well, there are allegations against
37 Mr. Matthews --

38 THE COURT: But they're allegations.

39 CNSL G. BRANDT: -- that he's made -- that he has
40 engaged in certain self-interested dealings.

41 THE COURT: Right.

42 CNSL G. BRANDT: And presumably my friend is going to
43 say that this means that Mr. Matthews is not a
44 trustworthy person to run the resort partnership.

45 THE COURT: Right.

46 CNSL G. BRANDT: And we're going to -- in the morning
47 I'm going to deal with those allegations and why

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Submissions by Cnsl G. Brandt

1 they should not be given any weight either.

2 THE COURT: Right. But one of the things Mr. Jackson
3 had said to me early on in his submissions when I
4 put them to him is he said, look, the receiver
5 can come back and provide a recommendation that
6 perhaps it is appropriate for Mr. Matthews to run
7 the businesses, because he has intimate knowledge
8 of the day-to-day operations.

9 So I guess what I'm trying to get at is,
10 even if I grant the order your client is seeking,
11 it's appropriate to ask the receiver for its
12 recommendation about Mr. Matthews' ability to run
13 the partnership business.

14 CNSL G. BRANDT: So again, we go back to where my
15 friend Mr. Roberts began, which is if we can --
16 if we can -- if the order that results from this
17 hearing is the order that interferes the least
18 with the operation of this business and that
19 stigmatizes the least -- to the least extent the
20 operation of this business, then why wouldn't the
21 court do that?

22 THE COURT: Right.

23 CNSL G. BRANDT: And so if the starting place is an
24 order that addresses the partnership and the land
25 issue, which is really where the funding is going
26 to come from to repay the Sanovest loan, there's
27 no amount of money that's going to come in from
28 the resort partnership operation that's going to
29 meaningfully pay down the Sanovest loan. That
30 operation is self-sustaining. It may be
31 profitable, but it's not going to pay down the
32 \$63 million or whatever the figure is; right?

33 And so dealing with that principle of
34 impairing the least, interfering the least with
35 the operation of this business --

36 THE COURT: Right.

37 CNSL G. BRANDT: -- we'd be looking at the receiver
38 coming in, if that's what's appointed or whatever
39 the title is, to investigate what should be a
40 sales strategy to enable repayment of the loan.
41 And in order to do that, there's no reason to
42 engage in the resort partnership business.

43 THE COURT: No, but given that the resort partnership
44 is an asset of the partnership, even on a
45 limited-basis receivership order, wouldn't I --
46 why wouldn't I ask the receiver to come back and
47 give me its recommendations, taking a look at all

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Submissions by Cnsl G. Brandt

1 of the assets to appropriately monetize them?
2 If the receiver steps in and looks at it and
3 said, look, I know you asked me to look at what
4 properties can be sold to monetize it to pay
5 creditors, meet payroll and pay Sanovest, but I
6 can tell you that the resort partnership is in
7 trouble and needs to be managed as well --

8 CNSL G. BRANDT: And so --

9 THE COURT: -- by an independent person, why wouldn't
10 I get that, still look at the matter
11 wholistically?

12 CNSL G. BRANDT: So a receiver may well come back and
13 say, this is a problem, there's some reason to
14 look at this, but we say the starting place is
15 to -- and again, we're monetizing assets to
16 repay --

17 THE COURT: No, I know that's what you're --

18 CNSL G. BRANDT: And there's no monetization that is
19 meaningfully going to come from the resort
20 partnership.

21 THE COURT: I know that's your client's position, but
22 you see, I don't know that, and there's a dispute
23 between the parties about that. So even if I
24 grant a limited receivership order now that
25 doesn't cover the resort, given that it's an
26 asset of the partnership, why wouldn't I ask the
27 receiver for its recommendation concerning all of
28 the assets? The receiver will talk to your
29 client, get its input, talk to Mr. Kusumoto and
30 come back with a recommendation.

31 And the receiver may say, look, the resort
32 needs to be sold or there needs to be somebody
33 step in and run it for effectively. I don't know
34 that.

35 CNSL K. JACKSON: Justice, sorry. I know we're
36 running a bit late.

37 THE COURT: That's all right.

38 CNSL K. JACKSON: I might be able to assist on this
39 point.

40 THE COURT: All right. Am I missing something?

41 CNSL K. JACKSON: Not at all, Justice, and in fact, I
42 may be able to advance that very discussion.

43 THE COURT: All right.

44 CNSL K. JACKSON: We've had this conversation over the
45 break today with our client, and the suggestion
46 is, from us now, is if you put the receiver in
47 over the assets, all of the assets, and that

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Submissions by Cnsl G. Brandt

1 includes the business, the resort business,
2 because that's an asset, and the receiver deals
3 with the lands -- now, I don't -- it doesn't
4 sound like there's anything happening with the
5 lands particularly -- we can carve out the
6 management.

7 And so in other words, you leave EBMD to
8 manage the resort business. Not the resort
9 lands -- I mean, to the extent that they're using
10 them, of course, but not to have to sell the
11 resort, so just to manage the resort business.
12 And then a month later, or whatever the court
13 decides, comes back and says, this is working
14 fine or it's not.

15 It addresses a couple of concerns: One, the
16 cost, at least for the first month, and maybe
17 longer; it addresses the concern that I suppose
18 Mr. Matthews has that he shouldn't have control
19 of that operation wrested from him.

20 THE COURT: Right.

21 CNSL K. JACKSON: At least not without the receiver's
22 recommendation in that regard; and three, this
23 arbitration that seems to be a concerning coming
24 up in ten days, that's the resort's arbitration.
25 There's no stay attached to the resort business.
26 The operation carries on. And so --

27 THE COURT: But if I do it the other way, even on the
28 limited basis I had been discussing with your
29 friend, if it's broad enough to instruct the
30 receiver to come back with his recommendation
31 about what to do with the resort --

32 CNSL K. JACKSON: I think you'll have a difficult time
33 incrementally ratcheting up in the sense that
34 you're not appointed over the assets.

35 THE COURT: I know.

36 CNSL K. JACKSON: You don't have access to the books
37 and records. I mean, there's no difference.

38 It's not going to change --

39 THE COURT: Well, I have to provide that appointment.

40 CNSL K. JACKSON: Exactly, and so --

41 THE COURT: And that's why I've got to hear from
42 Mr. Roberts tomorrow about what jurisdiction do I
43 have under the BA?

44 CNSL K. JACKSON: Well, I've seen his order, and I
45 don't know that you do. Not what he's proposing,
46 Justice.

47 THE COURT: Okay. Because, you know, ultimately if I

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Submissions by Cnsl G. Brandt

1 have these competing allegations and there is a
2 concern over stigma and staged approach, and I've
3 got allegations that it's your client that's
4 causing the financial liquidity issues, of course
5 the least harm done with an order the better, but
6 at the same time, wouldn't I want -- why wouldn't
7 I want the report from the receiver on a
8 wholistic basis on the appropriate things to do
9 that doesn't tie its hands?

10 CNSL K. JACKSON: Well, the receiver has to be put in
11 place over the assets, and then it can come back
12 about the operations.

13 THE COURT: Yeah. Anyway, that's --

14 CNSL K. JACKSON: That makes a lot of sense. I agree,
15 Justice.

16 CNSL G. BRANDT: Justice, we don't have a major
17 concern with a reporting -- a reporting mandate.

18 THE COURT: Yeah, okay. Okay. Anyway, so we'll
19 adjourn to tomorrow and -- okay, very good. Oh,
20 and Ms. Ohama; right?

21 CNSL C. FERRIS: Ohama-Darcus.

22 CNSL C. OHAMA-DARCUS: Yes.

23 THE COURT: You're going to get me an order from the
24 CPC at some point?

25 CNSL C. OHAMA-DARCUS: Yes, we haven't been able to
26 prepare it yet, but we'll get it to you tomorrow.

27 THE COURT: Tomorrow? Okay, very good.

28 CNSL C. OHAMA-DARCUS: Thank you.

29 THE COURT: Okay, thank you very much, everyone.

30 CNSL G. BRANDT: Thank you, Justice.
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101
Reporter certification

1 THE CLERK: Order in chambers. These chambers are
2 adjourned.
3

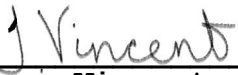
4 (PROCEEDINGS ADJOURNED AT 4:12 PM TO
5 SEPTEMBER 12, 2024)
6

7 REPORTER CERTIFICATION
8

9 I, Tiffany Vincent, Official Reporter in the
10 Province of British Columbia, Canada, BCSRA
11 No. 576, do hereby certify:
12

13 That the proceedings were transcribed by me
14 from audio provided of recorded proceedings, and
15 the same is a true and correct and complete
16 transcript of said proceedings to the best of my
17 skill and ability.
18

19 IN WITNESS WHEREOF, I have hereunto
20 subscribed my name on this day, the 25th of
21 September, 2024.
22

23
24 
25 _____
26 Tiffany Vincent
27 Authorized Reporter
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No. S234048
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE JUSTICE WALKER)

Vancouver, BC
September 12, 2024

BETWEEN:

599315 B.C. Ltd. and Daniel Matthews

Petitioners

AND:

Ecoasis Bear Mountain Developments Ltd.,
Ecoasis Developments LLP, and
Ecoasis Resort and Golf LLP, Tian Kusumoto,
and Sanovest Holdings Ltd.

Respondents

No. S243389
Vancouver Registry

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE RECEIVERSHIP OF ECOASIS
DEVELOPMENTS LLP AND OTHERS**

BETWEEN:

Sanovest Holdings Ltd.

Petitioners

AND:

Ecoasis Developments LLP,
Ecoasis Bear Mountain Developments Ltd.,
Ecoasis Resort and golf LLP, 0884185 B.C. Ltd.,
0884188 B.C. Ltd., 0884190 B.C. Ltd., 0884194 B.C. Ltd.,
BM 81/82 Lands Ltd., BM 83 Lands Ltd., BM 84 Lands Ltd.,
BM Capella Lands Ltd., BM Highlands Golf Course Ltd.,
BM Highlands Lands Ltd., BM Mountain Golf Course Ltd.
and Bear Mountain Adventures Ltd.

Respondents

EXCERPT FROM PROCEEDINGS IN CHAMBERS
(Proceedings from 10:02 AM to 10:25 AM,
10:40:00 AM to 11:48:37 AM, and 3:01:20 PM to 4:05:42 PM)

COPY

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J. Reid**

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1
Submissions re notice of application by Cnsl G. Brandt

September 12, 2024
Vancouver, BC

(EXCERPT FROM PROCEEDINGS)

(PROCEEDINGS COMMENCED) ([10:02:39 AM])

THE CLERK: In the matter of 599315 BC Limited versus
Ecoasis and Bear Mountain Developments Limited on
action S234048 and Sanovest Holdings Limited
versus Ecoasis Developments LLP in action
S2433889, Justice.

THE COURT: Thank you.
Mr. Brandt?

SUBMISSIONS RE NOTICE OF APPLICATION BY CNSL G. BRANDT:

CNSL G. BRANDT: Thank you, Justice.

I'll try and be quick this morning and go
through some of the essential things. I'm not
going to spend all -- all my time this morning in
written argument, so --

THE COURT: Okay.

CNSL G. BRANDT: -- I'll let the court know once I --
I -- I'm out of there.

THE COURT: Okay.

CNSL G. BRANDT: For now, I'm going to start at
paragraph 158 of the written argument.

THE COURT: Yesterday, you left off at 135 or
something. So you're going to move ahead, then?
Okay.

CNSL G. BRANDT: I'm going to move ahead. I'm --

THE COURT: 158?

CNSL G. BRANDT: Yeah. For now.

THE COURT: Okay. Okay.

CNSL G. BRANDT: I -- I can certainly commend that the
court will rely on the written argument for some
of the details regarding the transition out of the
hotel. That's the section 141 to 148.

And the -- the next section, from 149 to 153,
deals with the current financial situation of the
partnership, and that's been addressed to some
extent already.

THE COURT: Okay. Thank you.

CNSL G. BRANDT: We're relying on the argument on -- on
the filing matters, essentially. Not -- not an
urgent matter.

2

Submissions re notice of application by Cnsl G. Brandt

1 THE COURT: All right.

2 CNSL G. BRANDT: In -- into paragraph 158, the status
3 of financial statements, Sanovest and Mr. Tian
4 Kusumoto have asserted as one of the issues here
5 said to affect the partnership is the financial
6 statements not being available.

7 Mr. Matthews -- this is at tab 77 of the
8 condensed book -- has provided a -- his
9 comprehensive response to this and a letter from
10 counsel.

11 And the material part is actually set out in
12 the submission -- in our written submission.

13 THE COURT: Yeah.

14 CNSL G. BRANDT: So I won't go to tab 77. But it says,
15 as follows -- and, actually, I'll just ask the
16 court just to read this, given that it relates to
17 the arbitration.

18 THE COURT: So they are completed but not filed yet.
19 So does Mr. Tian Kusumoto have copies of what's --
20 what's in draft? Because I understand in 10 -- in
21 160, there are disagreements about --

22 CNSL G. BRANDT: Yes. Yes, so -- so, yes, exactly.
23 Paragraph 160, what it addresses here -- this is
24 Mr. Matthews's evidence --

25 THE COURT: Yeah.

26 CNSL G. BRANDT: -- is that the two -- 2019 and 2020
27 statements are in draft and that -- and he's
28 prepared to sign those draft statements, but
29 Mr. Kusumoto refuses to accept this. And, as a
30 result, that has a knock-on effect on the
31 subsequent financial statements.

32 And what these -- the -- these 2019 and 2020
33 statements and the transactions there relate to,
34 among other things, the characterization of the
35 purchase of the BMAC property. And -- and so
36 it's, in part, the dispute -- it's, in part, the
37 unavailability of information and delay and, in
38 part, dispute over the transactions that are in
39 issue that have resulted in current financial
40 statements not being available.

41 THE COURT: All right.

42 CNSL A. NATHANSON: Justice, I hesitate to interrupt my
43 friend. It's a small point. But at paragraph 159
44 of his written submissions, the quote is
45 inaccurately -- this is a typographical error.
46 It's attributed to Mr. Kusumoto when it should be
47 to Mr. Matthews.

3

Submissions re notice of application by Cnsl G. Brandt

1 So the quote -- the inset quote at the top of
2 page 37 -- you see the reference? It says
3 "Kusumoto number 1," and that should be Matthews
4 number 1.

5 THE COURT: Oh, okay. All right.

6 CNSL A. NATHANSON: I just wanted you to know that so
7 you don't think that's my client's evidence.

8 THE COURT: All right.

9 CNSL G. BRANDT: Apologies for that.

10 THE COURT: All right. Thank you. Okay.

11 CNSL G. BRANDT: All right. Now, I just want -- just
12 in terms of dealing with some of the third-party
13 litigation matters, the court asked yesterday
14 about the Gold Tees matters, the two proceedings
15 there. And there is a settlement agreement.
16 There is settlement -- settlement terms that were
17 reached at mediation that were never ratified --
18 that were not ratified by Mr. Kusumoto and,
19 therefore, not ratified by the board of directors
20 of EBMD. And so the matter remains outstanding.
21 It's being defended by the partnership on the
22 basis that there is no settlement.

23 But the application to enforce the
24 settlement -- and this is the -- the two matters
25 involving Mr. Constable and Gold Tees. The
26 application-enforced settlement is for \$1.5
27 million. That's effectively the net amount that's
28 in issue in both of those litigation matters.

29 I do have a copy of the application that I've
30 given to my friend. I'm not sure if the court --

31 THE COURT: These are the Nanaimo registered matters?

32 CNSL G. BRANDT: Correct. Correct.

33 THE COURT: I don't need them. So, essentially, your
34 clients are -- are putting the blame on
35 Mr. Kusumoto's feet. There's a settlement, he's
36 refused to endorse it, therefore, the board can't
37 approve it, and there's a lawsuit to enforce the
38 settlement?

39 CNSL G. BRANDT: The lawsuit would be resolved if
40 the -- the -- both lawsuits would be resolved if
41 the settlement were endorsed.

42 THE COURT: And -- and who's -- and who's defending the
43 lawsuit? The partnership?

44 CNSL G. BRANDT: The partnership is defending the
45 lawsuit jointly. Jointly instructed. And
46 there's, yeah, counsel specifically retained for
47 that purpose.

4

Submissions re notice of application by Cnsl G. Brandt

1 THE COURT: Separate law -- separate counsel?

2 CNSL G. BRANDT: Separate counsel.

3 THE COURT: Okay.

4 CNSL G. BRANDT: All right. Paragraph 165, these are
5 the -- what we've called the selected sites.
6 Again, I'm -- that there are three sites that have
7 been identified for sale in Victoria. Peaks
8 Height [phonetic], which has a -- a valued
9 estimate that's set out here.

10 At paragraph 169, the Hole 5 multi-parcel --
11 THE COURT: Can -- can I just go back? Sorry. So how
12 does that work, then? If the partnership's
13 defending on the basis no settlement was agreed
14 but your client -- Mr. Matthews is saying it was
15 reached? How does -- how do you -- how does that
16 reconcile?

17 CNSL G. BRANDT: Well ...

18 THE COURT: Because it seems to be that if I were on
19 for the plaintiffs in those actions, I would be
20 pointing to your client's evidence in this action.

21 CNSL G. BRANDT: Well, so --

22 THE COURT: And there's no defence.

23 CNSL G. BRANDT: So Mr. Matthews is also -- we're --
24 we're also separately counsel for Mr. Matthews
25 also -- also defending on the basis that the
26 settlement required approval of the board of
27 directors.

28 THE COURT: Oh, I see. Okay. Okay. Condition
29 precedent. There was a -- there was a condition
30 to the settlement.

31 CNSL G. BRANDT: That's -- that's the position of both
32 the partnership and Mr. Matthews.

33 THE COURT: Okay. All right. So Mr. Matthews is being
34 separately represented?

35 CNSL G. BRANDT: So -- so Mr. Matthews -- we're
36 representing Mr. Matthews --

37 THE COURT: Yeah.

38 CNSL G. BRANDT: -- in that matter.

39 THE COURT: Yeah.

40 CNSL G. BRANDT: And the partnership is separately
41 represented on joint instructions.

42 THE COURT: Okay. Okay.

43 CNSL G. BRANDT: So I -- just this next section of the
44 argument, which I -- I don't propose to go to in
45 great detail, are the sites that have been
46 identified -- three sites that collectively have,
47 we say, value that will more than retire the

5

Submissions re notice of application by Cnsl G. Brandt

1 Sanovest loan.

2 And just noting that the Player -- that the
3 Players Peak parcel, that's the one at
4 paragraph 173, is ready to be marketed and sold
5 without any further bundling or -- of any kind.

6 And for the other two sites, they can be
7 prepared for marketing quickly -- the Victoria
8 Peak within 60 days. And obviously, as was
9 pointed out yesterday, the business of this
10 partnership -- land partnership has always been to
11 market and sell. That's going to involve certain
12 bundling or subdivisions to effect that. That's a
13 part of their ordinary business.

14 And the marketing process can begin before
15 all the steps are finalized.

16 All right. I -- some of this -- some of
17 these next paragraphs have already been dealt with
18 to the extent that the 2023 Colliers report
19 recommends a selected site approach. That's
20 what's being advanced here.

21 Just in the next section, I've already made
22 submissions yesterday that this will be
23 approximately 75 percent of the total expected
24 development area in tact, even though certain of
25 that land has not yet been rezoned for
26 development.

27 All right. I'm going to move off my written
28 argument address.

29 The allegation that there -- that there is
30 sort of a \$14 million amount that's being removed
31 from the partnership, and this \$14 million amount
32 has somehow created an illiquidity crisis for the
33 partnership. I'm going to start just into the
34 record at tab 14, the joint application record.
35 It's the affidavit number 1 of Mr. Matthews.

36 THE COURT: Okay.

37 CNSL G. BRANDT: And I'm at Exhibit DD. It's an email
38 from Mr. Kusumoto to Mr. Matthews.

39 THE COURT: Okay.

40 CNSL G. BRANDT: So this is -- this is part of the
41 correspondence that starts to be exchanged between
42 Mr. Matthews and Mr. Kusumoto following
43 Mr. Kusumoto taking on the role of Sanovest's
44 nominee to the directors. I'm just into the
45 fourth paragraph here with regards to shareholder
46 loans.

47 THE COURT: Okay.

6

Submissions re notice of application by Cnsl G. Brandt

1 CNSL G. BRANDT: Just in the -- in the middle, we have
2 Mr. Kusumoto stating:

3
4 In addition, I feel that security on your
5 home is warranted given that we are
6 unresolved on how to move forward and your
7 plan for repayment for the more than \$12
8 million of indebtedness that's in the air. I
9 was extremely troubled to learn that the
10 gondola site that was taken from Ecoasis
11 without consultation is actually worth 5
12 million, and the CRA would likely ask for 1.3
13 million in taxes from its sale in 2019. This
14 should be your liability as the gondola site
15 should be returned to Ecoasis as you have no
16 means to pay for it.

17
18 So -- so this is -- I'm going to go through
19 several of these examples --

20 THE COURT: Right.

21 CNSL G. BRANDT: -- where these allegations are raised.

22 THE COURT: You're going to have to help me explain
23 what that's about.

24 CNSL G. BRANDT: So ...

25 THE COURT: Why -- why it matters.

26 CNSL G. BRANDT: Why it matters. So the allegation is
27 that \$14 million was removed by Mr. Matthews from
28 the partnership. And as -- as -- as has been
29 said, this -- that the liquidity crisis --
30 effectively part of the reason that my friends say
31 a receiver is required to assume conduct of both
32 the partnership and the Resort partnership is
33 because -- it's not because Sanovest has refused
34 land sales. It's not because Sanovest has refused
35 advances under the loan. It's not because
36 Sanovest has refused refinancing of the loan.
37 It's because there's 14 million missing dollars
38 that Matthews took.

39 CNSL K. JACKSON: Justice, I'm going to rise briefly on
40 that. I think my friend is -- is not correct in
41 his summary of our submissions. It has nothing to
42 do with liquidity. We never suggested that these
43 allegations related to the liquidity crisis faced
44 by Resorts.

45 It is a reference to -- it was -- it was
46 raised as a reference to the issues that exist
47 between the partners and the allegations going

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Submissions re notice of application by Cnsl G. Brandt

1 back and forth.

2 CNSL A. NATHANSON: Oh, I -- I -- Justice, sorry.
3 This -- this is the challenge of a complicated
4 matter coming on quickly. I think I have to
5 correct Mr. Jackson and be a little bit fair to
6 Mr. Brandt here.

7 There were -- are documents where our
8 client -- and you'll see some in my submissions
9 this afternoon where my client said, we wouldn't
10 be in this pickle if you didn't take all this
11 money.

12 THE COURT: M'mm-hmm.

13 CNSL A. NATHANSON: So I -- I think Mr. Brandt is fair
14 to -- to make the point that he does. We don't
15 say it's the whole reason, but I think Mr. Jackson
16 maybe didn't appreciate there's some evidence
17 buried that does kind of connect --

18 THE COURT: It's not something Mr. Jackson raised, it's
19 something --

20 CNSL A. NATHANSON: No, no, no.

21 THE COURT: You're --

22 CNSL A. NATHANSON: That's why I'm -- no, but I'm just
23 saying --

24 THE COURT: You're going to raise it.

25 CNSL A. NATHANSON: -- I'm -- I'm defending Mr. Brandt
26 in saying he's being fair in this instance --

27 THE COURT: Yeah, I understand.

28 CNSL A. NATHANSON: -- in the submission he's making.

29 THE COURT: Right. Right.

30 CNSL G. BRANDT: It's not -- sorry. My point --

31 THE COURT: Yes.

32 CNSL G. BRANDT: -- is, Justice, it wasn't the reason
33 that it was in my submissions.

34 THE COURT: Yeah. And it's not -- it doesn't ground,
35 necessarily, the -- the receivership application.

36 CNSL G. BRANDT: No.

37 THE COURT: You -- you say it's a whole -- a whole
38 different --

39 CNSL A. NATHANSON: Well, reasons for -- reasons for
40 the illiquidity are -- are --

41 THE COURT: Yeah.

42 CNSL A. NATHANSON: -- not relevant at all.

43 THE COURT: Right.

44 CNSL G. BRANDT: So, Justice, three things in response
45 to that.

46 First, it was -- it was raised yesterday as
47 part of the factual matrix here.

8

Submissions re notice of application by Cnsl G. Brandt

1 THE COURT: Yeah.

2 CNSL G. BRANDT: Secondly, it's an allegation that's
3 used to justify a receiver that's going to remove
4 Mr. Matthews from his position, effectively.

5 And -- and -- and, thirdly, because we say
6 part of the unfairness and part of the oppression,
7 the grounds and remedy we're seeking, is the
8 refusal of funding under the Sanovest loan.

9 One of the justifications put forward -- and
10 this is what Mr. Nathanson --

11 THE COURT: Oh, I see. Okay.

12 CNSL G. BRANDT: -- was referring to is we're not going
13 to fund only to have our money misappropriated by
14 Mr. Matthews.

15 And we see that theme or trope through in the
16 last three years. And -- and that's, in part, why
17 I'm responding to it.

18 THE COURT: Is that, then -- I asked you yesterday,
19 what was the reason for the sudden change? If you
20 recall, we just had this colloquy yesterday
21 because you pointed to Mr. Tian Kusumoto's
22 position up to early in May and then the sudden
23 change. And you say there was no evidence about
24 that; I had to make -- draw inferences. Is this,
25 potentially, one of the reasons?

26 CNSL G. BRANDT: Yeah, so -- so what we're going to see
27 here -- and -- and I'm going to come to the
28 submission -- is one of the changes that occurs is
29 Mr. Tian Kusumoto comes in as a Sanovest
30 representative to EBMD.

31 THE COURT: Right.

32 CNSL G. BRANDT: Starts to disagree with decisions that
33 Mr. Tom Kusumoto made while he was in that
34 position.

35 THE COURT: Right.

36 CNSL G. BRANDT: And -- and that -- and that is what we
37 see happening here is Mr. Tian Kusumoto trying to
38 undo transactions that were authorized by Mr. Tom
39 Kusumoto, presumably because he believes and --
40 and he's alleged in the claim initiated by
41 Sanovest that those were the results of Mr. Tom
42 Kusumoto's breaches of duty. They were not in the
43 best interest of Sanovest.

44 And so I think it is fair to infer that
45 that's part what -- what represents the change,
46 the overall -- not only on sales but the overall
47 change of direction here is Mr. Tian Kusumoto

9

Submissions re notice of application by Cnsl G. Brandt

1 coming in and saying, well, part of what was done
2 here while his father was in place is not in the
3 best interest of the company. And -- and, in
4 part, Mr. Matthews -- the other side of that is
5 pivoting and -- and pinning that on Mr. Matthews.
6 I'm into tab 85 now back in the -- in the
7 condensed book.

8 THE COURT: Just a second.

9 CNSL G. BRANDT: Second volume.

10 THE COURT: Yeah, just a moment.

11 CNSL G. BRANDT: And so this -- this is an email from
12 August 18th, 2021, from Mr. Kusumoto to
13 Mr. Matthews. And I'm just going to just take the
14 court just to the first paragraph in that email
15 where Mr. Kusumoto says to Mr. Matthews:

16 I'm surprised and disappointed by your
17 characterization of my comments during our
18 monthly telephone conferences. It appears
19 that you are trying to paint me up as the bad
20 guy by purposely deflecting the primary issue
21 of you owing --

22

23 Matthews owing,

24

25 -- Ecoasis more than 14 million.

26

27 And then:

28

29 If you simply repaid all the money you owed
30 to Ecoasis, there would be no liquidity
31 issue.

32

33

34 And that -- that's the allegation is that this
35 \$14 million has created a liquidity issue.

36 So over at the next tab of the ...

37 THE COURT: Tab 86?

38 CNSL G. BRANDT: Just need to correct that reference.

39 I'll come -- I'll come back to this in just
40 one moment.

41 THE COURT: All right.

42 CNSL G. BRANDT: I'll provide the reference in a
43 moment. It's -- it's a letter from my friend
44 Mr. Nathanson to Mr. Ferris on April the 5th,
45 2024, that also simply just refers to there being
46 a solvency crisis of Mr. Matthews's own making.

47 THE COURT: M'mm-hmm.

10

Submissions re notice of application by Cnsl G. Brandt

1 CNSL G. BRANDT: That's -- that's a minor point. I
2 don't need to go into that detail.

3 So I do want -- what I do want to get into is
4 what the alleged self-interested transactions are.
5 What -- what is this \$14 million said to be made
6 up from.

7 And to assist there, I'm going to go into
8 Mr. -- into tab 17 of the -- of the main record
9 again.

10 THE COURT: Just a second. Can I put away tab 14, or
11 do I need that out?

12 CNSL G. BRANDT: No, I think you can ...

13 THE COURT: So I -- what you're showing me is you're
14 showing me evidence of Mr. Tian Kusumoto blames
15 Mr. Matthews for creating the liquidity crisis.
16 Your clients have taken -- you've taken the
17 evidence -- or your client's showing me that they
18 blame Mr. Tian Kusumoto for the present crisis
19 because he's not advancing funds, blocking sales,
20 et cetera.

21 And you've -- you've told -- so I take it
22 you're showing me all of this to say there's a
23 contested -- there's contested evidence between
24 parties as to who's responsible for the liquidity
25 crisis and the -- the deadlock. Right?

26 CNSL G. BRANDT: Right. Right. I mean, what I'm
27 saying here is this -- is this \$14 million
28 number --

29 THE COURT: Yeah.

30 CNSL G. BRANDT: -- is -- two things about it. There's
31 nothing about this number -- or the -- the amount
32 of this figure that actually represents cash is
33 very -- is -- is not anywhere near \$14 million and
34 that the transactions that are complained of were
35 all transactions that were authorized by Tom
36 Kusumoto. Those are -- those are my --

37 THE COURT: No, but, presumably -- but there's an issue
38 with that because the allegation is he acted -- he
39 acted improper -- well, *malafide*. He's into
40 self-dealing -- self-interested dealing.

41 So where I was going to go next is how can I
42 decide any of this on -- on these -- these
43 competing applications? What I'm faced with is
44 competing allegations between the parties and
45 conflicting evidence as to who did what to cause
46 the present deadlock and the liquidity crisis. I
47 can't -- how can I decide if Tom Kusumoto acted

11

Submissions re receivership matter by Cnsl W. Roberts

1 properly or not, whether he acted *malafide*,
2 whether Mr. Tian Kusumoto was properly -- properly
3 saying, look, I'm not going to advance any more
4 money in the wake of all of these things? Right?

5 What I'm facing is the parties have come
6 before the court saying each of the other is fully
7 responsible for the present problem, the present
8 deadlock.
9

10 (EXCERPT ENDS) ([10:25:05 AM])
11 [SUBMISSIONS BY CNSL G. BRANT]
12 (EXCERPT BEGINS) ([10:40:00 AM])
13

14 THE COURT: Mr. Roberts.
15

16 **SUBMISSIONS RE RECEIVERSHIP MATTER BY CNSL W. ROBERTS:**
17

18 CNSL W. ROBERTS: Thank you, Justice.

19 I'm going to try and take you reasonably
20 quickly through a few issues.

21 One, we say the line is -- when you're
22 considering a receivership order or competing
23 receivership orders, you should be striving to
24 interfere with the operations as little as
25 possible.

26 Two, that what Sanovest is asking for is
27 overly broad. They're asking for, (a), to be
28 repaid their debt, and, (b), effectively to wind
29 up the partnership.

30 And they haven't met the threshold for that
31 latter portion. We're not really disputing that
32 they haven't met the threshold for the former as
33 secured creditor. But for the latter, we say they
34 haven't met their threshold.

35 And what we've proposed, as modified -- and
36 I'll take you through -- meets both of those
37 criteria. One, it's as little as possible -- as
38 necessary, maybe, is better to say. As little as
39 necessary. It acknowledges their position of
40 secured creditor and moves them towards repayment,
41 interferes as little as possible, and it is
42 open-ended. To --

43 THE COURT: You said the law is clear on that point.

44 Do you have any cases you can point me to?

45 CNSL W. ROBERTS: I'm going -- I'm -- I'm going to take
46 you there. And I don't know if I said "clear,"
47 but I'm going to take you to law.

12

Submissions re receivership matter by Cnsl W. Roberts

1 THE COURT: I took -- I took that as an effect of your
2 submission that is law is clear.

3 CNSL W. ROBERTS: On the -- on the do as little as
4 possible?

5 THE COURT: Yeah.

6 CNSL W. ROBERTS: Yes.

7 THE COURT: And only as necessary.

8 CNSL W. ROBERTS: Yeah. How about this: Madam Justice
9 Fitzpatrick seems to think it's clear, so I'll --
10 I'll start.

11 I'm in the written argument. I'm not going
12 to take you through a lot, but I want to highlight
13 a few points.

14 I'll just get my argument back up. Hang on a
15 second.

16 THE COURT: That's the written argument of ...

17 CNSL W. ROBERTS: Of 599, again, and Matthews.

18 THE COURT: Yeah, regarding the receivership
19 application.

20 CNSL W. ROBERTS: So I'm three-quarters of the way in,
21 page 47, paragraph 206.

22 THE COURT: You have -- this must be an extra copy.
23 You handed me one that was cerlox-bound?

24 CNSL W. ROBERTS: I -- it's the same one you should
25 have had moments ago --

26 THE COURT: Oh.

27 CNSL W. ROBERTS: -- that Mr. Brandt was referring to.

28 THE COURT: Oh, the written -- oh, right. Okay. So
29 this is -- okay. All right. So this is ...
30 Okay. Thank you.

31 CNSL W. ROBERTS: So the first bit I'm going to --

32 THE COURT: So which paragraph are you in? I'm sorry.

33 CNSL W. ROBERTS: I'm at page 47, paragraph 206.

34 THE COURT: Okay. Okay.

35 CNSL W. ROBERTS: And I'm going to start with just the
36 basics.

37 And there's actually no disagreement about
38 what is the legal test for the appointment of a
39 receiver. And I do want to highlight, again, the
40 distinction between the right to appoint a
41 receiver as a secured creditor and the application
42 under the *Corporations Act*, the *Law and Equity Act*
43 of a partner.

44 And so we have the applicable -- well,
45 starting at 206, the applicable test, there's no
46 dispute.

47 We rely also on section 227 of the

13

Submissions re receivership matter by Cnsl W. Roberts

1 *Corporations Act*, which, again, leaves the court
2 with a broad discretion to do what it thinks is
3 right.

4 I'm at 212:

5
6 However, contrary to Sanovest and Tian
7 Kusumoto's submissions, it is not clear that
8 the standard of a strong *prima facie* case
9 necessarily applies to the relief sought in
10 the funding application.

11
12 I want to draw that distinction.

13 In order -- I'm going to call their -- their
14 partnership receivership, and I don't mean that in
15 capitals. I just wanted to distinguish between
16 two hats they're wearing. In their partnership
17 receivership application, they're effectively
18 seeking interim relief akin to an injunction.

19 And because they have no contractual right to
20 seek that as a partner, they have to do it under
21 either the *Law and Equity Act* or the *Company Act*.

22 And so the test for that is similar to an
23 injunction order. [Indiscernible] and it has to
24 be a prong -- strong *prima facie* case.

25 THE COURT: Just hang on.

26 CNSL W. ROBERTS: Please.

27 THE COURT: I thought the application of the receiver
28 was based on the *BIA* and section 39 of the *Law and*
29 *Equity Act* and nothing -- and --

30 CNSL W. ROBERTS: There's --

31 THE COURT: -- including whether that was a contractual
32 right to appoint a receiver. But it was -- I
33 didn't appreciate it was grounded on --

34 CNSL W. ROBERTS: Our --

35 THE COURT: -- the partnership. The way you said
36 "their" -- "their," so I thought you meant
37 Sanovest.

38 CNSL W. ROBERTS: They brought theirs under 243 and
39 section 39 in the *Law and Equity Act*.

40 THE COURT: Right.

41 CNSL W. ROBERTS: Ours is also under section 227 of the
42 *Company Act*.

43 THE COURT: Right. But a moment ago, you said "their
44 partnership."

45 CNSL W. ROBERTS: Oh, then I misstated, then.

46 THE COURT: I thought --

47 CNSL W. ROBERTS: I'm -- I'm -- I'm -- what I'm trying

14

Submissions re receivership matter by Cnsl W. Roberts

1 to do is draw the distinction --
2 THE COURT: Yeah.
3 CNSL W. ROBERTS: -- between them bringing an
4 application as a secured creditor --
5 THE COURT: Right.
6 CNSL W. ROBERTS: -- which we say, if they were only
7 saying as secured creditor, I want my money
8 back --
9 THE COURT: Right.
10 CNSL W. ROBERTS: -- then the receivership application
11 should be crafted to do that.
12 THE COURT: Right.
13 CNSL W. ROBERTS: Which we say ours does. Which is, if
14 you sold these three things, their debt is repaid,
15 and it's over.
16 THE COURT: Yeah.
17 CNSL W. ROBERTS: They're asking for more. They
18 want -- I'm going to go to big picture.
19 THE COURT: Yeah.
20 CNSL W. ROBERTS: There's Developments and Resorts.
21 THE COURT: Right.
22 CNSL W. ROBERTS: Developments is where all the land
23 is. Resorts is operations.
24 THE COURT: Okay.
25 CNSL W. ROBERTS: If they only wanted to be repaid as a
26 secured creditor, they would only be seeking a
27 receiver over Developments to sell just enough
28 land to pay them 60 million or \$70 million.
29 They're not. They're seeking a receiver over
30 both Developments and Resorts. Resorts is not
31 going to get them repaid any money.
32 THE COURT: Right.
33 CNSL W. ROBERTS: The land is what's going to get them
34 their money as secured creditor. But they want a
35 full receiver.
36 And so the distinction -- the point I want to
37 make is they're asking for a full receivership
38 wearing two hats: one as secured creditor, one as
39 a partner in this business.
40 I say the tests are different for those two
41 things.
42 The former is a lower threshold because they
43 have a contractual right to seek it.
44 THE COURT: Okay. Well, even apart from the
45 contractual right, it's a --
46 CNSL W. ROBERTS: Apart from a contractual right --
47 THE COURT: -- lower threshold.

15

Submissions re receivership matter by Cnsl W. Roberts

1 CNSL W. ROBERTS: -- it's an extraordinary remedy.

2 And so if they want the extraordinary remedy,
3 they want receivership that does more than repays
4 the debt, they have to meet a higher threshold,
5 and that higher threshold includes a strong *prima*
6 *facie* case on their evidence of what's going wrong
7 here.

8 And so what we say is we've crafted an order
9 that we say does what needs to be done, the
10 minimum necessary to, (a), get them repaid as
11 secured creditor, which is, let's go out and sell
12 what needs to be sold to pay your \$60 million.
13 And we've added in -- in the submissions over the
14 last two days an investigatory power so that if
15 there is more that needs to be done, this receiver
16 can then make the report about what more needs to
17 be done. Because we say they haven't met the test
18 for the extraordinary relief for the receivership
19 over Resorts and the receivership over more assets
20 than are necessary to repay them their debt.

21 THE COURT: So, I'm sorry, I thought the other day your
22 client had moved to a broader approach, which was
23 keep Resorts out of it, but in terms of
24 Developments, the partnership, appoint a receiver,
25 and let the receiver come back and tell the court
26 what a proper approach would be, and a --

27 CNSL W. ROBERTS: Right.

28 THE COURT: -- receiver could also tell the court,
29 look, one of the assets is resorts, and that needs
30 to be folded in or it -- or it doesn't.

31 CNSL W. ROBERTS: That's where we've moved to.

32 THE COURT: Okay.

33 CNSL W. ROBERTS: Correct.

34 THE COURT: Because right now, I'm hearing you say,
35 well, no, it's back to --

36 CNSL W. ROBERTS: Sorry.

37 THE COURT: -- well, don't -- tell the receiver it's
38 these specific profits that you have to deal with.
39 So I want to make sure I'm clear.

40 CNSL W. ROBERTS: So, yeah. Thank you. So let's start
41 with the -- the applications that were originally
42 in front of you --

43 THE COURT: Right.

44 CNSL W. ROBERTS: -- which is full receiver and this
45 one.

46 CNSL K. JACKSON: I wonder if it might be helpful --
47 we've seen the draft order. It might be --

16

Submissions re receivership matter by Cnsl W. Roberts

1 CNSL W. ROBERTS: I'm -- I'm going to take you to it.

2 CNSL K. JACKSON: Okay.

3 CNSL W. ROBERTS: I promise.

4 CNSL K. JACKSON: Okay.

5 THE COURT: I'm aware that there was a -- the original
6 application -- one was very broad.

7 CNSL W. ROBERTS: Yeah.

8 THE COURT: And your client was, look, tell the
9 receiver he can only sell these specific pieces of
10 property.

11 CNSL W. ROBERTS: Yes.

12 THE COURT: And then you -- you moved away from that
13 the other day.

14 CNSL W. ROBERTS: Yes.

15 THE COURT: Yeah. Okay.

16 CNSL W. ROBERTS: And where we -- where we've moved --
17 we've tried to move into here.

18 THE COURT: Yeah. All right.

19 CNSL W. ROBERTS: In fact, by noon today, I'm going to
20 tell you we'll move even farther --

21 THE COURT: All right.

22 CNSL W. ROBERTS: -- to get -- to get to what we say is
23 only that which is necessary.

24 THE COURT: Okay.

25 CNSL W. ROBERTS: But it's -- exactly, in broad
26 strokes, it's receiver over Developments with the
27 only power to come back to develop a sales program
28 and make a recommendation to you about it, not a
29 receiver over Resorts because we say, (a), it's
30 not necessary today and, (b), the high threshold
31 hasn't been met.

32 But the power for that receiver to
33 investigate and come back to you -- and just as
34 you put it, if the receiver says, this needs to be
35 brought in, and they make that recommendation, you
36 can make the order that you see fit with a couple
37 of corollaries to it -- of course, devil in the
38 details -- power to get funding and for the
39 arbitration proceedings to be carved out so those
40 aren't interfered with over the next two weeks.

41 THE COURT: But why would I, in your model, tell the
42 receiver, specifically develop a proper sales -- a
43 sales program? Why wouldn't I say to the
44 receiver, you step in and take control of the
45 assets, and you come back and tell me what can be
46 done, if anything, to monetize the assets?

47 In other words, why go any -- why go further

17

Submissions re receivership matter by Cnsl W. Roberts

1 than to specifically say to the receiver, your
2 role is limited to developing a sales program?

3 CNSL W. ROBERTS: I -- I agree.

4 THE COURT: Okay.

5 CNSL W. ROBERTS: And we'd be perfectly happy with
6 that.

7 THE COURT: Okay.

8 CNSL W. ROBERTS: What we didn't -- what we didn't want
9 to do was constrain -- maybe a different way.

10 We're trying to find something here.

11 THE COURT: You want -- you don't want the Resorts --
12 you don't want Resorts to be brought in the
13 receivership; correct?

14 CNSL W. ROBERTS: At least not yet.

15 THE COURT: Not yet.

16 CNSL W. ROBERTS: Yeah.

17 THE COURT: I got -- yeah.

18 CNSL W. ROBERTS: And what we say is if the receiver
19 comes back and decides that he should, then my
20 friends will end up where they want to be. My
21 friends want to be all the way over here with the
22 full receiver. If the receiver agrees with them,
23 that's where we'll end up.

24 THE COURT: Right.

25 CNSL W. ROBERTS: We don't think the receiver is going
26 to agree with them.

27 THE COURT: And does your -- and does your model as the
28 receiver have the -- the right and authority to go
29 in and look at the books of Resorts?

30 CNSL W. ROBERTS: Yes. And so the draft -- I'll take
31 you through it. The draft order we had was the
32 receiver has -- if you remember under -- under the
33 model were 2(a) through (l) are powers to go in.

34 THE COURT: Right.

35 CNSL W. ROBERTS: And in 3, we included all of that --

36 THE COURT: Okay.

37 CNSL W. ROBERTS: -- so that the receiver can compel
38 all of the Ecoasis parties --

39 THE COURT: Right.

40 CNSL W. ROBERTS: -- and the two partners to give over
41 whatever information the receiver needs to make
42 that determination.

43 THE COURT: Okay.

44 CNSL W. ROBERTS: So --

45 THE COURT: Okay.

46 CNSL W. ROBERTS: -- the first point I just wanted to
47 make was that the extraordinary relief being

18

Submissions re receivership matter by Cnsl W. Roberts

1 sought --

2 THE COURT: Yeah.

3 CNSL W. ROBERTS: -- I say you're not there, that they
4 haven't given you enough to make that
5 determination.

6 And I'm going to, then, skip to -- you had
7 asked what jurisdiction there is --

8 THE COURT: Right.

9 CNSL W. ROBERTS: -- to do an invest -- I called it an
10 investigatory receivership but not for any real
11 reason. And I'm going to pass you up a couple
12 things: one, the case in the Ontario court of
13 appeal talking about investigatory receivers, and
14 then I'm going to pass up two orders made by Madam
15 Justice Fitzpatrick, where she appointed BDO first
16 as an investigator and then converted that
17 investigation into a receivership. The
18 receiver -- the investigator was told to go out
19 and investigate, come back, tell me what I should
20 do, and then converted it.

21 And just I reference --

22 CNSL L. HIEBERT: Do you have copies for anyone else?

23 CNSL W. ROBERTS: Yeah. Yes, I have copies for
24 everybody else. Hence the stack.

25 Ms. Jess Reid from MLT Aikins is here, the
26 proposed receiver's counsel. And her comment
27 on --

28 THE COURT: So there's -- there's a new counsel? Who?

29 CNSL W. ROBERTS: Oh, sorry.

30 THE COURT: She's here?

31 CNSL W. ROBERTS: She's here.

32 THE COURT: All right.

33 CNSL W. ROBERTS: And she's the proposed BDO -- our
34 proposed receiver. She's proposed counsel for the
35 proposed receiver just in case you had questions
36 on what happened in the one that Madam Justice
37 Fitzpatrick did --

38 THE COURT: I see.

39 CNSL W. ROBERTS: -- when she appointed an investigator
40 or on the workability of our investigatory
41 receiver proposal.

42 THE COURT: And I take it that the premise -- the
43 starting point in the analysis is section 243, and
44 you're saying -- are you saying under 243-1(a)
45 I -- the order -- that the BIA authorizes me to
46 issue an order that permits the receiver to take
47 possession of -- of all or substantially all of

19

Submissions re receivership matter by Cnsl W. Roberts

1 the inventory --
2 CNSL W. ROBERTS: Correct.
3 THE COURT: -- not the assets? So you say that's the
4 basis of which I can hive off Resorts.
5 CNSL W. ROBERTS: And the three subsections of 243 are
6 disjunctive.
7 THE COURT: Right.
8 CNSL W. ROBERTS: So it starts with all or
9 substantially all.
10 THE COURT: Right.
11 CNSL W. ROBERTS: And then -- and then in (c) --
12 THE COURT: So --
13 CNSL W. ROBERTS: Anything -- anything else you deem
14 advisable.
15 THE COURT: All right.
16 CNSL W. ROBERTS: And the case I'm going to take you to
17 in the Ontario court of appeal is going to be
18 Ontario Superior -- *Courts of Justice Act*.
19 THE COURT: Okay.
20 CNSL W. ROBERTS: Which is similar to our *Law and*
21 *Equity Act* --
22 THE COURT: Okay.
23 CNSL W. ROBERTS: -- and essentially says -- just going
24 to be passing up the language for it.
25 THE COURT: All right.
26 CNSL W. ROBERTS: Assuming I can find it.
27 So just for ease of reference, it's essential
28 section 39 of the *Law and Equity Act*.
29 THE COURT: Thank you.
30 CNSL W. ROBERTS: And section 101 of the *Courts of*
31 *Justice Act* just so you can see all --
32 THE COURT: Thank you.
33 CNSL W. ROBERTS: -- the ...
34 So in section 39 of the *Law and Equity Act* --
35 THE COURT: Right.
36 CNSL W. ROBERTS: -- and you've seen this dozens of
37 times -- in 39(1) where it's just and convenient
38 as the broad --
39 THE COURT: Right.
40 CNSL W. ROBERTS: -- wording.
41 And then in 101 of the *Courts of Justice Act*,
42 the tail end where it appears to a judge of the
43 court to be just or convenient to do so.
44 THE COURT: Effectively the same language.
45 CNSL W. ROBERTS: So if I can take you to *Akagi* --
46 THE COURT: Okay.
47 CNSL W. ROBERTS: -- which is the court of appeal. A

20

Submissions re receivership matter by Cnsl W. Roberts

1 different scenario -- a quite different scenario.
2 It was dealing with enforcement of a judgment.
3 But there -- the court went on to discuss exactly
4 the issue -- we're talking about investigatory
5 receiverships.

6 At paragraph 65 of that decision, they start
7 the discussion.

8 THE COURT: Right.

9 CNSL W. ROBERTS:

10
11 The idea of appointing a receiver or monitor
12 with investigative powers -- and sometimes,
13 with only those powers --
14

15 I'll stop there for a second 'cause that was one
16 of the questions you had asked yesterday: Can it
17 be investigative only?
18

19 -- and sometimes, with only those powers --
20 has emerged in recent years. This court has
21 not previously been asked to consider
22 whether, or in what circumstances, a section
23 [sic] 101 receiver may be empowered in this
24 fashion.
25

26 And they're just talking about what would be, for
27 us, a section 39 receiver:
28

29 For the purposes of this appeal, it is not
30 necessary that the contours of such an
31 appointment be traced in a detailed manner.
32 Suffice it to say that the idea of appointing
33 a receiver investigate into the affairs of a
34 debtor is not itself unsound. Rather, it is
35 the runaway niche of the use to which the
36 concept has been put in this case that gives
37 rise to the problem.
38

39 So this case had other issues in it:
40

41 Indeed, whether it is labelled as [sic] an
42 'investigative' receivership or not, there is
43 much to be said in favour of such a tool, in
44 my view -- when it is utilized in appropriate
45 circumstances and with appropriate
46 restraints. Clearly, there are situations
47 where the appointment of a receiver to

21

Submissions re receivership matter by Cnsl W. Roberts

1 investigate the affairs of ... a debtor or to
2 review certain transactions -- including
3 even, in proper circumstances, the
4 affairs ... and transactions concerning
5 related non-parties -- will be a proper
6 exercise of the court's 'just and convenient'
7 authority ...

8
9 And cites:

10
11 It goes without saying that the root
12 principles governing the appointment of any
13 receiver remain in play in this context,
14 however ... in this respect, two 'bookend'
15 considerations, are particularly germane. On
16 the one hand, the authority of the court to
17 appoint a receiver under section 101 of the
18 *Courts of Justice Act* 'where it appears ...
19 just or convenient to do so' is undoubtedly
20 broad and must be shaped by the circumstances
21 of individual cases. At the same time,
22 however, the appointment of a receiver is an
23 extraordinary and intrusive remedy and one
24 that should be granted only after a careful
25 balancing of the effect of such an order on
26 all of the parties and others who may be
27 affected ...

28
29 I'll stop there for a second.

30 THE COURT: M'mm-hmm.

31 CNLSL W. ROBERTS: Again, I -- I take that as support of
32 what we're pitching to you, which is building up.
33 Start with the least intrusive thing possible and
34 then, as necessary, increase:

35
36 In the case of a receivership in aid of
37 execution, at least, the appointment requires
38 evidence that the creditor's right to
39 recovery is in serious jeopardy.

40
41 Not an issue here:

42
43 It is the tension between those two
44 considerations that defines the parameters of
45 a [sic] receivership orders ... in aid of
46 execution.
47

22

Submissions re receivership matter by Cnsl W. Roberts

1 So then they go on and discuss a couple of other
2 cases where it's happened.

3 THE COURT: M'mm-hmm.

4 CNSL W. ROBERTS: At 69:

5
6 The first is *Stroh V. Millers Cove Resources*
7 *Inc.* ... Because it involved an oppression
8 remedy claim --

9

10 Just like here,

11

12 -- the appointment ... of an inspector under
13 the *OBCA* was an available option. Justice
14 Farley appointed a receiver to take control
15 of the assets of a company and to investigate
16 and conduct an independent review of certain
17 self-dealing transactions by the company's
18 majority shareholder, of which the company's
19 directors were unaware. In affirming his
20 decision, the Divisional Court underlined
21 that 'the main thrust' of the order was to
22 ensure that the company's assets and
23 arrangements '[could] be fully examined and
24 considered so that future actions [could]
25 then be planned'.

26

27 Which is exactly what we're proposing:

28

29 It is important to note that in *Stroh* the
30 defendant corporation was not an operating
31 company and that Farley J. only granted the
32 receivership remedy after giving counsel the
33 opportunity to reattend ... and make further
34 submissions about whether the officer to be
35 appointed should be a receiver/manager, a
36 monitor, an inspector or something else.

37

38 And the inspector is a *Company Act* --

39 THE COURT: Right.

40 CNSL W. ROBERTS: -- animal:

41

42 He ultimately concluded that the only way the
43 investigation stood any chance of discuss
44 (because of the secrecy of the majority
45 shareholder and the power it exercised) was
46 to appoint a receiver with the authority
47 sought [sic].

23

Submissions re receivership matter by Cnsl W. Roberts

1

2 If I can take you down to 81.

3 THE COURT: So the issue, then, is what -- what

4 authority -- and not authority but what statute

5 should be given to the receiver under your model

6 to investigate -- to take control of and

7 investigate --

8 CNSL W. ROBERTS: Yes.

9 THE COURT: -- without running the business of -- of

10 the -- of the Resorts.

11 CNSL W. ROBERTS: So if -- if I could divide them into

12 two things. One, can I satisfy you with a good

13 idea --

14 THE COURT: Yeah.

15 CNSL W. ROBERTS: -- in deciding this? Two, under what

16 jurisdiction?

17 What we say is you have multiple sources of

18 jurisdiction here. Section 39 or under the

19 *Company Act*, which our application is going under

20 227, which is similar to an investigative --

21 THE COURT: An inspector has different rights --

22 CNSL W. ROBERTS: Agreed.

23 THE COURT: -- than --

24 CNSL W. ROBERTS: And we -- we actually think, in this

25 case, the receivership order gives more powers

26 because then -- I'll take you through what we've

27 proposed.

28 THE COURT: Okay.

29 CNSL W. ROBERTS: Because then you have a court order

30 that that receiver can show to the people and say,

31 I need information X; please give it to me,

32 including third parties. And we say that's the

33 least -- it's the least intrusive.

34 THE COURT: Okay.

35 CNSL W. ROBERTS: So I'm at 81. And, again, this is

36 just on the least intrusive idea --

37

38 Secondly, the *Loblaw* -- *Loblaw* receivership

39 was very carefully tailored to preserve

40 Loblaw's right to recover without providing

41 the receiver with overreaching powers to

42 interfere with the rights of others. The

43 *Loblaw's* receivers mandate was 'to locate,

44 investigate and monitor' ... it was not

45 empowered to seize and freeze, as was the

46 receiver here. Nor were the targeted

47 individuals and entities whose assets were

24

Submissions re receivership matter by Cnsl W. Roberts

1 encumbered and affairs interfered with
2 anywhere nearly as widespread or tangentially
3 associated with the parties to proceeding as
4 is the case here ...

5
6 Again, I just want to say they're commenting,
7 essentially, on let's interfere as little as
8 necessary in the circumstances.

9 Then I want to give you -- I passed up two
10 orders of Justice Fitzpatrick where BDO was
11 appointed.

12 THE COURT: All right.

13 CNSSL W. ROBERTS: First, as --

14 THE COURT: Which one would you like -- oh, they're
15 both the same case.

16 CNSSL W. ROBERTS: They're the same case. And just by
17 date, the first one is -- is Justice Fitzpatrick
18 appointing BDO as an investigator under the
19 *Companies Act* to go out and take steps to
20 investigate and report back.

21 THE COURT: Okay.

22 CNSSL W. ROBERTS: And then the second -- so the first
23 is January 25th, 2023 --

24 THE COURT: Okay.

25 CNSSL W. ROBERTS: -- and the second is her appointing
26 BDO or converting -- because I'm looking at the
27 second order, the first paragraph. So they
28 discharged as investigator, and then, in
29 section 3, appointed as receiver to transition.

30 There's going to be two things: one,
31 jurisdiction to start the investigation and
32 transition to receiver; two, crafting -- even
33 across statutory jurisdictions, crafting a remedy
34 that works in any particular situation is what she
35 did.

36 And we say, in support of BDO's appointment,
37 it's a task they've done before and can do again.

38 So if I can -- I just want to take you to the
39 order put forward -- the order put forward by
40 Sanovest because I want to draw a distinction.
41 Volume 1, tab 1, the first thing anybody looks at
42 when they look at these 42 volumes of paper.

43 Attached to that is their -- is their draft order.

44 THE COURT: Just a minute. All right.

45 CNSSL W. ROBERTS: It's -- it's not numbered -- did you
46 find their draft order in there?

47 THE COURT: It says "order" --

25

Submissions re receivership matter by Cnsl W. Roberts

1 CNSL W. ROBERTS: Yeah.

2 THE COURT: -- right here?

3 CNSL W. ROBERTS: That's it. Thank you.

4 THE COURT: Okay.

5 CNSL W. ROBERTS: So I'm going to start with the
6 appointment at paragraph 1. So "Partnership" --
7 you'll see at the top of that page -- partnership
8 are all collectively -- all of the entities.

9 THE COURT: Oh, hang on.

10 CNSL W. ROBERTS: The top of page 2, just the
11 definition, "Partnership."

12 THE COURT: Oh, yeah. Right. Thank you.

13 CNSL W. ROBERTS: So it's everybody.

14 THE COURT: Yeah.

15 CNSL W. ROBERTS: And then under paragraph 1, "The
16 Appointment," you'll see the appointment is as
17 receiver --

18 THE COURT: Yeah. Yeah.

19 CNSL W. ROBERTS: -- first the BMA lands, which we say
20 they certainly haven't satisfied you today that
21 there should be any receiver over the BMA lands.
22 That's a point very much in dispute. And then,
23 two, the property of all of the partnership.
24 Everything. No distinction made between Resorts
25 and Developments. No distinction made between
26 what lands are necessary to be sold or dealt with.
27 Full receiver over everything.
28 Over at paragraph 2(c):

29
30 To manage, operate, and carry on the business
31 of the partnership.
32

33 Full stop. To take on every management role
34 involved in the resort, the golf course, land
35 development, everything. As you heard, this is
36 going to be a long process. It's going to be
37 however many months to get you a plan and however
38 many months to implement the plan and close the
39 payout. Anyone who says that's less than two
40 years is fooling themselves. This is a receiver
41 to run this for two or more years. At whose cost?

42 CNSL K. JACKSON: Justice -- Justice, what -- what
43 evidence is there of that? That's -- that's --
44 that's -- that's a pure hype -- that's a pure
45 supposition and, frankly, hyperbole.

46 CNSL W. ROBERTS: Well, okay. So if there's any
47 confusion about how long this process would

26

Submissions re receivership matter by Cnsl W. Roberts

1 take -- this order contemplates that their
2 receiver will go and make you a report, and
3 there's no fixed timeline -- will make a report on
4 a sales process. That sales process itself, the
5 marketing of lands, is not a two-month process, is
6 not a three- or four-month process. It's a long
7 process. It's very significant.

8 THE COURT: So even under your model, it's --

9 CNSL W. ROBERTS: Agreed. I -- I just say under
10 anyone's model, we -- we -- none of us should be
11 blind to the practical ramifications of what's
12 being asked.

13 And for that whole time, we're proposing that
14 that a receiver run it.

15 Under 2(j):

16 To initiate, manage, and direct all legal
17 proceedings.

18
19
20 No distinctions made between what's happening in
21 the future, what's happening now, or the
22 arbitration that's happening --

23 THE COURT: Well, I'm going to suggest to carve that
24 out.

25 CNSL W. ROBERTS: And then you saw in 3 --

26 THE COURT: Right.

27 CNSL W. ROBERTS: -- is they are to come back and seek
28 approval.

29 THE COURT: Right.

30 CNSL W. ROBERTS: And -- and the point I want to make
31 is this is not a targeted, nuanced approach.

32 THE COURT: Right.

33 CNSL W. ROBERTS: This is a hammer. We say there
34 should be no doubt that, in the resort operations,
35 they run golf courses, and they have golf
36 tournaments, they have venues, they have events.
37 It should be apparent to anyone that a receiver
38 appointed to run this puts uncertainty -- I'll go
39 no farther than that -- puts uncertainty into the
40 marketplace. And so anybody who's booking a
41 tournament, booking an event, booking anything is
42 going to have uncertainty. And all I mean by that
43 is it doesn't enhance value. Having a receiver
44 run the resort doesn't enhance value. We say
45 it -- it has to prejudice value in terms of
46 ongoing operations.

47 THE COURT: Okay.

27

Submissions re receivership matter by Cnsl W. Roberts

1 CNSL W. ROBERTS: What you haven't heard yet is
2 Sanovest's willingness -- other than carving out
3 the arbitration -- to move off a full
4 receivership. And, again, if I can go back, this
5 is -- this is a commercial divorce, really. Both
6 of these parties, despite whatever personal
7 hamminess and mistrust they have with each other,
8 shouldn't be coming here and doing things that
9 causes unnecessary harm to the business.

10 CNSL A. NATHANSON: Sorry, Justice. I -- I -- just in
11 the interest of time, we did say, yesterday,
12 that -- that -- that Sanovest is fine carving out
13 the -- the management of the resort's operation,
14 of the golf and tennis operations, and -- and
15 having the receiver report back about the
16 necessity for someone else to do that. That
17 was -- that was what I said yesterday. So -- so
18 my friend doesn't get bogged down in that, I think
19 we can move past that point.

20 CNSL W. ROBERTS: Excellent. I can tell you right now,
21 we're not that far apart.

22 THE COURT: Okay.

23 CNSL W. ROBERTS: I'm looking for and can't find a
24 draft order I want to -- I want to give you. And
25 so I want --

26 THE COURT: I'm hanging in suspense waiting --

27 CNSL W. ROBERTS: I know.

28 THE COURT: -- waiting for you.

29 CNSL W. ROBERTS: This is me -- this is me stalling
30 because I can't find it.

31 THE COURT: If you're not that far apart ...

32 CNSL W. ROBERTS: All right. We're not far off the
33 break. Can -- could we possibly --

34 THE COURT: All right.

35 CNSL W. ROBERTS: -- get a break --

36 THE COURT: All right. Sure.

37 CNSL W. ROBERTS: -- and I will find somewhere --

38 THE COURT: All right.

39 CNSL W. ROBERTS: -- that stack of paper, the thing I'm
40 looking for?

41 THE COURT: Okay. All right.

42 THE CLERK: Order in chambers. Chambers is adjourned
43 for the morning recess.

44
45 **(PROCEEDINGS ADJOURNED FOR MORNING RECESS)**

46 **([11:09:13 AM])**

47 **(PROCEEDINGS RECONVENED) ([11:48:37 AM])**

28

Discussions re scheduling

(EXCERPT ENDS) ([11:48:37 AM])
[DISCUSSION RE RECEIVERSHIP AGREEMENT]
[SUBMISSIONS BY COUNSEL]
(EXCERPT BEGINS) ([3:01:20 PM])
(PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
([3:01:20 PM])
(PROCEEDINGS RECONVENED) ([3:25:22 PM])

THE COURT: Mr. Jackson.

THE CLERK: Back on the record, Justice.

THE COURT: Thank you.

DISCUSSIONS RE SCHEDULING:

CNSL K. JACKSON: Thank you, Justice. Working parallel here on -- as we go.

I gathered from my friend Mr. Roberts that the agreement is back on, if you will. Not that I'd say it was ever off.

But what we're going to do, with leave, is Ms. Hiebert and Mr. Roberts will leave and work on some language. It's not going to get done before 4:00 today. I trust that the tweaks we see from Mr. Roberts are -- are -- are not too consequential and not too different from what was put before the court. We will see.

What I'm hoping we can do is reserve that one hour on Wednesday. And -- and one of two things will happen. One, we'll have a settled form of order between us where we come to you and say, here it is, and speak to that. The other one is we don't, in which case I may be here saying, I wish to enforce the agreement we have that was on record. And we'll have a transcript, and we'll go through the order then.

THE COURT: I -- I'm supposed to be hearing a -- a matter on -- on Tuesday at 10:15. It's a continuation that involves -- Mr. Brusan's [phonetic] involved, Mr. Gruber. It's a continuation, ongoing matter.

CNSL K. JACKSON: Yes.

THE COURT: And every time it's set for a day, it lasts an hour --

CNSL K. JACKSON: Well ...

THE COURT: -- or an hour and a half.

CNSL K. JACKSON: On Tuesday.

THE COURT: So I think what we should do is -- is plan

29

Discussions re scheduling

1 on -- on Tuesday afternoon.
2 CNSL K. JACKSON: Yes.
3 THE COURT: And -- and I'm going to have schedule -- I
4 mean, I can do it on Wednesday. I just spoke to
5 scheduling. But I'm already here Tuesday. I
6 think, if the parties can get this done sooner,
7 it's better.
8 CNSL K. JACKSON: We -- we will -- we will be available
9 Tuesday afternoon.
10 THE COURT: So I think plan at 2:00, but we'll have
11 them reach out to Mr. Brusan and find out Mr. --
12 is it going -- going to go past 2:00? If it is,
13 we'll go to -- I'll just tell them they have to
14 stop at 3:00.
15 CNSL K. JACKSON: Sure.
16 THE COURT: So I'll just set this down at 2:00. 2:00.
17 CNSL K. JACKSON: We'll send down a requisition, then.
18 THE COURT: Yeah.
19 CNSL K. JACKSON: Very good.
20 THE COURT: On Tuesday.
21 CNSL K. JACKSON: And we'll get it done. Thank you,
22 Justice.
23 THE COURT: Okay. If there is a form of order that you
24 agree to in the meantime --
25 CNSL K. JACKSON: It's not agreed to.
26 THE COURT: Okay. Set -- let's schedule, and I'll post
27 it to the FDS --
28 CNSL K. JACKSON: Okay. Great.
29 THE COURT: -- immediately. If you have two competing
30 drafts and it's just a matter of me sealing [sic]
31 the order, post them to the FTS. I can look at
32 them Monday.
33 CNSL K. JACKSON: Very good.
34 THE COURT: I'll actually be here on Monday.
35 CNSL K. JACKSON: Very good.
36 THE COURT: But I -- and if I need to speak to
37 everyone, I'll do it by Teams. But I won't be
38 here all day Monday. But Tuesday, I'm here.
39 CNSL K. JACKSON: Very good. We will -- we will work
40 together to do that, Justice.
41 THE COURT: All right. Okay.
42 CNSL W. ROBERTS: And I -- Justice, I'll just say
43 briefly my clients have asked that I say the
44 agreement was always on.
45 THE COURT: Okay.
46 CNSL W. ROBERTS: We just want to make sure we put in
47 front of you the terms of that agreement.

30

Discussion re case plan orders by Cnsl C. Ohama-Darcus

1 THE COURT: Okay. All right.

2 CNSL W. ROBERTS: Which, hopefully, we'll do by
3 Tuesday.

4 THE COURT: Okay. And I'll -- I'll keep Thursday
5 booked in any event.

6 Mr. Nathanson.

7 CNSL W. ROBERTS: And if --

8 THE COURT: Hopefully it won't be necessary.

9 CNSL W. ROBERTS: -- I can be excused.

10 THE COURT: Yes, of course.

11 Ms. Hiebert, you can be excused.

12 CNSL A. NATHANSON: Justice, I -- I -- I think what I'm
13 going to suggest, in view of the --

14 THE COURT: Yeah.

15 CNSL A. NATHANSON: -- twists and turns we've had, is
16 that I should continue --

17 THE COURT: Yeah.

18 CNSL A. NATHANSON: -- and not lose the half hour.

19 THE COURT: Yeah, I agree.

20 CNSL A. NATHANSON: But -- I hope it will be
21 unnecessary, but I -- I'm in your hands, of
22 course.

23 THE COURT: No, I think -- I think we should carry on.

24 CNSL A. NATHANSON: So I'm going to be nearly done my
25 lengthy introduction.

26 THE COURT: And just for a -- Madam Clerk told me you
27 have -- you have an order. I'm sorry.

28 THE CLERK: For the CPC? Yes.

29 THE COURT: Okay.

30 CNSL C. OHAMA-DARCUS: Yes.

31 THE COURT: And just deal with it -- just --

32 CNSL A. NATHANSON: Of course.

33 THE COURT: -- get that out of the way.

34 CNSL A. NATHANSON: Yes, of course.

35 CNSL C. OHAMA-DARCUS: Thank you.

36

37 **DISCUSSION RE CASE PLAN ORDERS BY**

38 **CNSL C. OHAMA-DARCUS:**

39

40 CNSL C. OHAMA-DARCUS: We have three orders. Everyone
41 has signed off. All counsel signed off on them.

42 THE COURT: Okay.

43 CNSL C. OHAMA-DARCUS: The terms are mirrored --

44 THE COURT: Okay.

45 CNSL C. OHAMA-DARCUS: -- between three orders. It's
46 been vetted. They've been all -- all --

47 THE COURT: This is what I -- I ordered the other day?

31

Submissions re notice of application by Cnsl A. Nathanson

1 CNSL C. OHAMA-DARCUS: Yes.

2 THE COURT: All right. Okay. Okay.

3 CNSL C. OHAMA-DARCUS: Thank you, Justice.

4 And as well, while I'm standing, we had
5 the -- thank you -- the debt action that we had
6 discussed --

7 THE COURT: Oh, yeah.

8 CNSL C. OHAMA-DARCUS: -- resetting the -- the
9 application for a hearing.

10 THE COURT: Yeah.

11 CNSL C. OHAMA-DARCUS: I have a notice of application
12 that I can hand up for the court. We are happy to
13 set down the matter for half a day, and we would
14 be grateful for the court's help in --

15 THE COURT: Right. But you were going to give me --

16 CNSL C. OHAMA-DARCUS: Yes, I have two dates.

17 THE COURT: Okay.

18 CNSL C. OHAMA-DARCUS: October 11th and October 15th
19 are the two dates that work across counsel.

20 THE COURT: I had hoped counsel could give me block --
21 greater blocks. I've got to go downstairs and say
22 to them, look --

23 CNSL C. OHAMA-DARCUS: Okay.

24 THE COURT: -- this is important. It's not just two
25 dates, it's a whole series of dates that they're
26 available. So can you let me know that on
27 Tuesday, please?

28 CNSL C. OHAMA-DARCUS: I will get you a whole series of
29 dates.

30 THE COURT: This is not --

31 CNSL C. OHAMA-DARCUS: Absolutely.

32 THE COURT: I mean, maybe it will work, but, look, it's
33 like ...

34 CNSL C. OHAMA-DARCUS: Better chances.

35 THE COURT: Right.

36 CNSL C. OHAMA-DARCUS: Yes.

37 THE COURT: Weeks -- I need much greater blocks of time
38 than that.

39 CNSL C. OHAMA-DARCUS: Thank you. We will provide that
40 on Tuesday.

41 THE COURT: Okay. Thank you.

42 All right, Mr. Nathanson.

43 CNSL A. NATHANSON: Thank you, Justice.

44

45 **SUBMISSIONS RE NOTICE OF APPLICATION BY**

46 **CNSL A. NATHANSON:**

47

32

Submissions re notice of application by Cnsl A. Nathanson

1 CNSL A. NATHANSON: So I'm just completing my
2 introductions. I'm not in the --

3 THE COURT: Right.

4 CNSL A. NATHANSON: -- written submissions.

5 But so the -- the two other prongs, the short
6 answers. So the second prong is we say that Tian
7 Kusumoto and Sanovest did not block lot sales. So
8 the first point is you were shown -- and I'll come
9 back to this -- in my friend's submission a long
10 chart with over \$300 million of what were said to
11 be sales that Mr. Kusumoto blocked.

12 THE COURT: Right.

13 CNSL A. NATHANSON: But substantially all of those were
14 superseded by a different plan: to sell the
15 entirety of the assets with two small exceptions
16 to a company in Victoria that's referred to in the
17 submissions. I'll come back to it.

18 THE COURT: To sell on-block to a company?

19 CNSL A. NATHANSON: An on-block. So, in other words,
20 it doesn't -- my point is it's academic because
21 there were offers, offers, offers.

22 THE COURT: Right.

23 CNSL A. NATHANSON: They weren't actually offers. They
24 were tire-kicking.

25 THE COURT: They were --

26 CNSL A. NATHANSON: They weren't offers that could be
27 accepted.

28 THE COURT: -- letters of intent, I think.

29 CNSL A. NATHANSON: Yes. But -- but, like, conditional
30 and not ones capable of acceptance.

31 But some of them even came from the person
32 who then they presented a joint on-block offer
33 too. So the loan gets overtaken. Right? You
34 can't sell the same property twice, as Ms. Hiebert
35 likes to remind me.

36 So the individual offers you were told that
37 were blocked were superseded.

38 And then the other thing that you weren't
39 told about was that the partners signed -- so,
40 again, the -- the -- the burden of it is
41 Mr. Kusumoto's Dr. No and he shuts all the doors.

42 THE COURT: Right.

43 CNSL A. NATHANSON: Right? But the other thing you
44 weren't told about was an extraordinary joint
45 resolution of the partners to find an equity
46 investor that Mr. Kusumoto and Mr. Matthews both
47 signed in July of 2022. Right?

33

Submissions re notice of application by Cnsl A. Nathanson

1 So a different -- all -- all kinds of
2 different potential solutions to the problem.

3 But you're being told that my client's
4 shutting all the doors like -- like one of those
5 rooms that compacts someone. But that's not the
6 case.

7 And, as I told you, the last summary point
8 here is that Mr. Kusumoto didn't block. He said
9 he wanted the alternatives evaluated. And we'll
10 see that evidence.

11 THE COURT: He wanted what?

12 CNSL A. NATHANSON: The alternatives evaluated.

13 THE COURT: All right.

14 CNSL A. NATHANSON: I'm not going to sign on to this
15 until we've looked at -- and then the two that
16 you'll see in the evidence are either let's
17 partner with someone else -- it's referred to as
18 vertical developments. So rather than just
19 selling off land to have somebody else develop and
20 make a higher profit margin -- higher risk,
21 potentially higher margin -- he wanted an
22 investigation of should they be in that business,
23 or should they be looking at on-block sales?

24 Mr. Matthews didn't want to do that.

25 The third prong -- sorry, I'm ahead of
26 myself.

27 THE COURT: That's all right.

28 CNSL A. NATHANSON: The third prong is that Sanovest
29 and Tian Kusumoto did not refuse to permit
30 refinancing. And you're going to see a
31 substantial body of evidence from me in board
32 minutes, in correspondence, in letters to counsel,
33 all of which say that Mr. Kusumoto was prepared to
34 look at refinancing, authorized Mr. Matthews to
35 bring refinancing proposals.

36 But Mr. Matthews didn't bring refinancing
37 proposals.

38 And the only one that came -- there's only
39 one prospective alternative lender that's ever
40 turned up twice, and the first one wasn't until
41 November 24th, 2023.

42 And you can see the poverty of this
43 submission, which is you wouldn't permit anyone
44 else. Like, you wanted to keep your boot on our
45 throat, and it can only be you.

46 By the way, we'll see the agreements that
47 Sanovest is entitled to be the preferred lender.

34

Submissions re notice of application by Cnsl A. Nathanson

1 But Mr. Kusumoto said he was prepared to step
2 aside if there was a -- an actual concrete, better
3 deal.

4 But the proof here is in 2022, after you can
5 see this evidence of correspondence in 2021 where
6 Mr. Kusumoto says, well, I don't agree with a
7 bunch of things you're doing, but if you can get a
8 better offer, I'll look at it. And then nothing
9 comes. And then what does Mr. Matthews do the
10 next year? He renews the Sanovest loan again in
11 2022.

12 And, Justice, the last point here is that
13 even as this end game became evident in the spring
14 of this year -- right? Like, there was a --
15 May 1st, 2024, the loan is due. What are we going
16 to do? And you're going to see some -- you're
17 going to see Sanovest offering to renew again,
18 despite all the defaults, even -- and Mr. Matthews
19 balking.

20 But even as that is happening, Sanovest was
21 saying, we're prepared to renew the loan on a
22 without-prejudice basis and -- and keep the
23 partnership from going under, and we'll step
24 aside. So, in other words, we'll do a temporary
25 renewal. And if you can find something better,
26 we'll look at it, and we'll step aside.

27 And he was -- Mr. Matthews was -- despite his
28 strong optimism expressed here, he wasn't able to
29 come up with anything new. And we're going to see
30 that one Timber Creek letter that he was able to
31 come up with. And -- and you were referred to a
32 bit of evidence where Timber Creek ultimately
33 said, we're not lending it.

34 So those, again, are not the actions of
35 someone who's shutting that door, who's saying,
36 there's no lender but me.

37 Justice, just to finish the introduction --
38 and, sorry, I may -- I -- I need to make this last
39 commercial point. For part of the period that
40 you'll recall when interest rates spike -- for
41 part of the period, the Sanovest loan is under
42 market. Right? The interest rate of 8 percent
43 was below market. And, in fact, the -- the one
44 proposal that Mr. Matthews gave was significantly
45 above 8 percent interest rate.

46 And so that's, again, contrary to the
47 narrative of Sanovest choking off its partner

35

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1 because it's not in its interests to have the
2 money extended at 8 percent if the market is
3 several points above that.

4 And, in fact, you'll see in one of the
5 documents I'll show you, Mr. Kusumoto says, yes,
6 I'm prepared to step aside because I can earn a
7 higher return with my money elsewhere.

8 So the whole narrative of oppressive --
9 oppression and engineering of insolvency, in my
10 submission, is built on sand. Doesn't exist.

11 So to complete my introduction, I just want
12 to show you the introduction -- sorry, the table
13 of contents, which is inadequate. Normally, I
14 would say I have three points here. I have more
15 than three points.

16 THE COURT: Yeah.

17 CNSL A. NATHANSON: But the table of contents. If you
18 go a couple pages back, bottom of page i.

19 THE COURT: M'mm-hmm.

20 CNSL A. NATHANSON: You're there?

21 THE COURT: Yeah.

22 CNSL A. NATHANSON: You can note my eight points. And
23 I'm not -- I'm not going to do them all as lengthy
24 as I have.

25 So the first one is the line on the very
26 bottom of the page.

27 THE COURT: M'mm-hmm.

28 CNSL A. NATHANSON: My first point is:

29
30 Resort to the oppression remedy --

31
32 THE COURT: Right.

33 CNSL A. NATHANSON:

34
35 -- is not available in a partnership dispute.

36
37 That's what Mr. Ferris was addressing. I'll come
38 back to that.

39 Over the page, second proposition:

40
41 599 does not have a strong case that Sanovest
42 breached its reasonable expectations.

43
44 And can I make one more pre-loaded
45 [indiscernible]? I think where Mr. Ferris and I
46 part company on this -- this -- this nice
47 corporate law question of does the oppression

36

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1 remedy apply here -- and I'll show you some cases.
2 What Mr. Ferris is overlooking is that the
3 cornerstone of the oppression remedy is the
4 protection of reasonable expectations of
5 shareholders qua shareholders. But all of the
6 reasonable expectations that are being asserted
7 here are qua partner, not qua shareholder.

8 And as I'm going to show you in the relief --
9 well, we'll come to it in the oppression claim --
10 Mr. Ferris showed you some paragraphs about trying
11 to alter the control. For example, Mr. Kusumoto
12 out, new director in or a buy-out or whatever.

13 But, Justice, think of the substance for a
14 second. What would -- what would removing
15 Mr. Kusumoto or appointing a new director or
16 making 599 the only shareholder of EBMD
17 accomplish? It would change control of the
18 partnership. It would change control of the
19 fiduciary that operates the partnership.

20 What is the relief in the oppression case?
21 Rewrite the partnership agreement, deny Sanovest
22 interest under its loan agreement.

23 Those -- the expectations that have been
24 asserted here are not expectations qua
25 shareholder. The shareholder -- it's true there's
26 a corporate vehicle, but the corporate vehicle is
27 performing an agency function. And the
28 expectations that Mr. Matthews describes are all
29 expectations about the substance of the venture,
30 which the parties agreed would happen as partners.

31 So Mr. Ferris is wanting you to myopically
32 focus on stage 1, which is, is there a
33 corporation? Yes. Like, I'm not -- I'm not
34 making a standing argument. I'm making a question
35 of substance.

36 Justice Harris in the court of appeal says
37 the oppression remedy cannot be an imperial
38 remedy. Right? It's powerful. It's about
39 fairness. Right? It's wide. It's highly
40 discretionary. But if you let it roam, it can be
41 a tiger.

42 And what Justice Newbury and Justice Harris
43 and other judges have said in their decisions is
44 we have to keep it within appropriate limits.
45 It's the charter of rights on share -- minority
46 shareholders.

47 But the fact that, within this -- if we had

37

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1 the -- you know, the [indiscernible] org chart
2 that we were able to give you, the fact there's a
3 corporation somewhere in the org chart doesn't
4 change the substance of the relationship that
5 these parties agreed to and embarked on, which was
6 partnership.

7 So that's why I say they can't get to the
8 oppression remedy.

9 But I hasten to add that doesn't end the
10 story. You still have your insolvency
11 jurisdiction.

12 THE COURT: M'mm-hmm.

13 CNSL A. NATHANSON: Right? So --

14 THE COURT: Yeah.

15 CNSL A. NATHANSON: -- I want to be clear. I -- all
16 that -- I think I -- I know you have this point.
17 Forgive me. But the whole point of all of these
18 submissions is really to do two things: turn you
19 to the right jurisdictional direction and show you
20 the full range of the equities that are at play in
21 the insolvency land and show you you should turn
22 yourself away from what I say is jurisdictional
23 danger by treating this as an interim oppression
24 agreement.

25 That's the -- my whole [indiscernible].

26 THE COURT: M'mm-hmm.

27 CNSL A. NATHANSON: So my third proposition is halfway
28 down the page in this table of contents.

29 THE COURT: Okay.

30 CNSL A. NATHANSON: And it is that damages are an
31 adequate remedy for Mr. Matthews and 599. So you
32 want to make a 3 beside that.

33 And then three lines down, my fourth
34 proposition is the court has no power to order the
35 partnership's property subdivided.

36 You've heard a lot about that. Just -- I'll
37 make just two quick points on that.

38 One is subdivision is a statutory process.

39 It's not a process that's ordered by a court.

40 It's decided by an approving officer under the
41 *Land Act* with a whole bunch of conditions. And so
42 it's not anything that you could order.

43 THE COURT: I thought I'd been told I'm not being --

44 CNSL A. NATHANSON: Well --

45 THE COURT: -- I'm not being asked about it.

46 CNSL A. NATHANSON: -- that's what my friends say.

47 That's not the language of the order --

38

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1 THE COURT: Right.

2 CNSL A. NATHANSON: -- I say.

3 THE COURT: Right.

4 CNSL A. NATHANSON: But you could get past that. But
5 you could -- you could say, okay, well, I'm just
6 directing the receiver to investigate that. And
7 I'm not against that.

8 But I'm making maybe a small point, but as I
9 read the order, there has to --

10 THE COURT: That's what -- that's what it says. I --
11 I -- I thought Mr. Roberts said they backed away
12 from it.

13 CNSL A. NATHANSON: Well, yes. Okay. So let me move
14 on. But I -- I just wanted to make sure you have
15 that. There's a jurisdiction --

16 THE COURT: And I asked the question, what jurisdiction
17 do I have? And my jurisdiction --

18 Something's happened to my mic. It's just
19 blasting. Now -- now it's okay.

20 Do I have to order a subdivision? And -- and
21 that's what I was told.

22 CNSL A. NATHANSON: I think, happily, where we're going
23 to get to is you're going to make an order.
24 You're going to make it on terms, and you're going
25 to avoid that problem.

26 THE COURT: Right.

27 CNSL A. NATHANSON: And it's true that, ultimately,
28 I -- I suppose the work-around that my friends
29 have identified in their inelegant draft order is
30 that you can direct investigation in pursuit of
31 that but only that it's pursuit; like, it's not a
32 guarantee.

33 Which kind of comes to our point, which is
34 that whole process that my friends say, what will
35 shake the money out of the tree to pay Sanovest --

36 THE COURT: Right.

37 CNSL A. NATHANSON: -- is a lengthy, costly, very
38 uncertain process.

39 THE COURT: Well, I think I said when Mr. Jackson was
40 on his feet, wouldn't -- wouldn't the receiver
41 be -- have the authority to investigate all
42 avenues, including a potential subdivision and
43 provide that recommendation?

44 CNSL A. NATHANSON: And -- and -- and we're with you.

45 THE COURT: Okay.

46 CNSL A. NATHANSON: That's -- that's our point. We
47 don't want -- Justice, you've said, why would you

39

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1 not ask the question? Like, that's the burden of
2 what you've been saying. Like, why -- why put any
3 kind of constraints on? Why wouldn't we try to
4 find the right answer and --

5 THE COURT: Right.

6 CNSL A. NATHANSON: -- look at all the alternatives?

7 That's my point too.

8 THE COURT: Yeah.

9 CNSL A. NATHANSON: I'm completely with you on that.

10 I'm -- I'm not trying to stop any question being
11 asked. I want the commercial right answer.

12 THE COURT: Yeah. Okay.

13 CNSL A. NATHANSON: The next proposition, Justice, is
14 two down. So this is number 6, if I'm counting
15 correctly.

16 THE COURT: I had -- before or after?

17 CNSL A. NATHANSON: I'm sorry. Sorry, yes. You're
18 exactly right. The next one is the very next
19 line, 5:

20
21 It would not be equitable to rewrite the
22 parties' security agreements or deprive
23 Sanovest of its mortgage and other security
24 while leaving it unpaid.

25
26 And the point there is that you -- you call my
27 friends and said this several times -- we don't
28 agree on the amount owing on the Sanovest loan.
29 We agree at -- that, at minimum -- we agree that
30 50 million is owed. We say it's 64. But there's
31 a very real problem if Sanovest's security is sold
32 out from under it and it's not -- its loan is not
33 repaid and it's left holding the bag.

34 And you'll recall the -- my next point
35 involves a distribution order, which, according to
36 my friends, if they're still prosecuting this,
37 there'd be money that would be paid contrary to
38 waterfalls and the parties' agreements and
39 contrary to the security.

40 The court can't -- I mean, have you seen --
41 the oppression normally does give you broad
42 powers, but it wouldn't be equitable to rewrite
43 the parties' agreements and it would result in an
44 unjust enrichment.

45 So that's point 5.

46 The next line is point 6. That's what I just
47 said:

40

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1
2 The distribution scheme is contrary to the
3 express terms of the parties' agreements.
4

5 The next line, my seventh point:
6

7 Appointing a receiver is consistent with a
8 parties' reasonable expectations, a judicial
9 sale of the properties is not.
10

11 The simple point there is the receiver is, as you
12 would expect, a specifically available contractual
13 remedy under the GSA and the mortgages. There's a
14 specific term in the partnership agreement that
15 says partners will not seek judicial sale of the
16 properties owned by the partnership.

17 And then my -- my eighth point is the one
18 opposite page 87, that:
19

20 The protection of third parties and the
21 public interest favour the appointment of a
22 receiver, not a partial sale of the
23 properties.
24

25 And you've asked questions that show you're alive
26 to that concern. You're alive to the challenges
27 faced by other creditors, the actions that other
28 creditors might take that might cause upset,
29 ensuring that we don't have an unseemly race to
30 the courthouse, equitable treatment, all those
31 kinds of considerations.

32 And my friends have done a good job of
33 showing all the various stakeholders who are
34 interested in the outcome, including, dare I say,
35 municipal and other levels of government who have
36 tax entitlements who need to plan for the services
37 they're giving, who are not having their taxes
38 remitted. That is a very real concern that would
39 be addressed by the appointment of a receiver that
40 will -- that is a risk that will continue if
41 present -- we have present management.

42 But I -- I'm not resiling from what we've
43 said, which is we can take this one step at a
44 time.

45 All right. That's my introduction, Justice.

46 THE COURT: Okay.

47 CNSSL A. NATHANSON: If I can take you to the facts,

41

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1 I'll just do what I can. I won't rush you.

2 THE COURT: No.

3 CNSL A. NATHANSON: So I'm at page 4, paragraph 15.

4 THE COURT: Okay.

5 CNSL A. NATHANSON: I'm going to try to point out
6 sometimes headings, because the headings will help
7 you, to just bring you in the structure of the
8 argument. But I won't be --

9 THE COURT: Yes.

10 CNSL A. NATHANSON: -- plodding.

11 So this section deals with what's the -- this
12 is in narrative form -- what's the structure of
13 the management of the partnership and the
14 organization?

15 So you've heard it's a limited liability
16 partnership managed by EBMD.

17 And then you'll see at paragraph 17 that:

18
19 At all material times, Mr. Matthews has been
20 a director and the president and chief
21 executive officer of EBMD.

22
23 So -- and he's invoked that authority as in, I'm
24 the highest ranking member of management.

25 And then you'll see in the succeeding
26 paragraphs what you've already heard about, which
27 is originally Tom Kusumoto was a director. In
28 2021, he was replaced by his son, Tian.

29 The next -- over the page on paragraph 20,
30 this is -- the point is important. You've heard
31 it, but I'm not sure the importance was really
32 conveyed yet.

33 So you've heard that Tian Kusumoto is the
34 CFO, but this is what Mr. Matthews says about
35 that. He describes him -- well, I -- "nominally"
36 is my word, but this is what Mr. Matthews says,
37 and I'll show you this evidence. He says:

38
39 This title was not reflected -- intended to
40 reflect the role of an organization's working
41 CFO.

42
43 And then when, for example, in August 2023, Tian
44 Kusumoto asked Mr. Matthews to let him instruct
45 the accounting staff -- as one might expect a CFO
46 to do -- and speak to them directly, Mr. Matthews'
47 response was, as president and CEO, I am primarily

42

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1 responsible for instructing the accounting staff
2 in their day-to-day operations.

3 The reason that's important is because there
4 are all kinds of accounting, tax, statutory
5 remittance, books and records problems. And they
6 lie at the feet of Mr. Matthews because he's kept
7 the power for himself. And they're not
8 Mr. Kusumoto's fault. They -- you might think
9 that the CFO would bear responsibility if the
10 accounting is a mess, as is the evidence we're
11 going to see. But it's Mr. Matthews that's kept
12 the reigns on the books.

13 And so if I can just show you in the -- my
14 fatter -- this -- the condensed book, and the
15 other is the supplementary condensed book.

16 THE COURT: Right.

17 CNSL A. NATHANSON: If we could turn to tab 4, please.
18 This is Mr. Matthews' affidavit number 1 in the
19 oppression proceeding. If you turn to the -- the
20 page numbers I'll use are at the top right, Bates
21 numbers. So 45, the second page in. It's
22 paragraph 49 if you're with me, Justice.

23 THE COURT: Right.

24 CNSL A. NATHANSON: So there's -- he -- there --
25 they're talking about May 2021, so just Tian
26 becomes a director. There's reference to a --
27 discussions about a special committee.

28 And then Mr. Matthews says:

29
30 As I understand it, there was an internal
31 Sanovest decision that Tian would wholly
32 replace Tom as Sanovest's representative to
33 EBMD's board. I agreed that Tian would hold
34 the officer position of CFO. As EBMD already
35 employed a controller and an external
36 accountant, this title was not intended to
37 reflect the role of an organization's working
38 CFO.
39

40 So, again, that's -- my point is just the
41 accounting books and records problems, Mr. Tian
42 Kusumoto's on the outside, Mr. Matthews is on the
43 inside.

44 The next section of the argument is the
45 partnership's current business and assets. You've
46 heard enough about this. You have a good sense of
47 this. I don't need to go through how this is all

43

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1 held and organized.

2 If you go on to page 7, paragraph 33, under
3 the heading "The Partnership and the Partnership
4 Agreement." I'm just going to summarize from
5 here, and then I'll show you the agreement very
6 briefly, Justice.

7 So as you've heard, the partners' respective
8 interests are Sanovest and 599 equally as to
9 almost 50 percent and then EBMD owns -- owns a
10 small share, which is what -- units, which is what
11 entitled it to be a managing partner.

12 Paragraph 34:

13
14 Sanovest and 599 own the shares of EBMD
15 equally. Historically, they've each
16 nominated a director. And, as a result, the
17 partnership is a 50/50 partnership, and the
18 governance of the partnership requires the
19 agreement of both.

20
21 And, in fact, you'll see that in the partnership
22 agreement where there are provisions for
23 extraordinary resolutions. So it preserves this
24 equality, which my client also describes as part
25 of its reasonable expectations, which is good.
26 But when the parties are disagreeing and it's a
27 50/50 partnership, then it's deadlocked. Right?

28 Over the page:

29
30 The partnership is governed by a written
31 limited liability agreement made in 2013.

32
33 And that, Justice, if you can just open up -- and
34 I'll continue -- is at tab 5 of the condensed
35 book -- an excerpt of it is, in any case.

36 THE COURT: Okay.

37 CNSL A. NATHANSON: I'll just continue. Well, I'll
38 show you some specific provisions in a moment.
39 But in paragraph 36:

40
41 So under the terms of this agreement, EBMD is
42 the managing partner. It has exclusive
43 authority to manage and operate --

44
45 I'm reading from paragraph --

46 THE COURT: Yeah.

47 CNSL A. NATHANSON: -- 36, Justice,

44

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1
2 -- and to bind the partnership and the
3 partners in respect of the business and
4 assets.
5

6 So the partnership -- the partnership acts only
7 through the managing partner EBMD, and the
8 partnership's property is held by EBMD for the
9 benefit of the partners in accordance with the
10 agreement and the Act.

11 And -- and, Justice, this is obvious --
12 forgive me -- but this isn't a corporation
13 governed by the constitutional document of a
14 shareholders agreement. This is a partnership
15 whose constitutional document is a limited
16 liability partnership agreement.

17 So, again, the point of that is my --
18 oppression is the wrong framework. The fact that
19 there's a corporation in the org chart doesn't let
20 the oppression remedy run around like a tiger.

21 Paragraph 38 of my written submissions. The
22 business of the partnership is set out in
23 section 2.3. It's excerpted there on page 9.
24 Justice, I won't read it to you, but you'll
25 just -- this is the salient point. Under 2.3(b),
26 the business includes to develop, construct, sell,
27 and operate the property.

28 One of the arguments that's been made is
29 development isn't part of our Bear Mountain
30 business terms. It's not part of our business
31 plan. We've never been developers. We're just
32 servicing lots and then selling them off to other
33 people to develop.

34 Well, I'm going to show that that's not
35 actually true as -- in terms of how the
36 partnership conducted itself. But in terms of its
37 constitutional document, it's part of the business
38 of the partnership. Doesn't mean that they always
39 will, but it's one of the -- what the parties
40 agreed were their purposes.

41 And continuing at paragraph 39. And you see
42 this. It continues to be suffused throughout the
43 agreement. And I just refer to it here in 39.
44 EBMD, as a managing partner, is empowered, for
45 example, to enter into agreements to construct,
46 develop, redevelop, sell, or operate the
47 partnership property, which includes all the

45

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1 development land you've been hearing about.

2 Paragraph 40, the partnership agreement
3 provided that EBMD is required, as you would
4 expect, to keep proper, complete, and accurate
5 books of accounting and records of the business of
6 the partnership. It was required to prepare and
7 submit to the partners -- including Sanovest --
8 for their approval an overall business plan for
9 the development of the lands, Justice, a
10 development budget, annual operating budgets,
11 annual updates, and financial reports.

12 And you see that, over the page in the
13 written submissions -- you see at page 10, the
14 proper, complete, and accurate books under 13.2.

15 And then look at the heading, 13.3.

16
17 (a) an overall business plan for the
18 development of the lands --
19

20 And then, Justice, this is important. If you see
21 at the end of (a),
22

23 -- with annual updates thereto.
24

25 Makes total sense. Right? Market conditions
26 change, business changes, interest rates change,
27 whatever.

28 Development budget, annual operating budget.
29 Justice, is there such a document? No,
30 there's not. What does Mr. Matthews say? That's
31 the Bear Mountain business terms. We didn't write
32 them down anywhere. But he says, that was our
33 business plan.

34 And you'll see throughout the evidence Tian
35 Kusumoto saying and Sanovest writing -- including
36 through counsel, saying, we want the business plan
37 that our agreement says we're supposed to have,
38 Mr. Matthews.

39 And then you see the reporting by the
40 management committee.

41 And then in the last two lines of 13.4, there
42 should be a summary report regarding the status of
43 the development of the partnership property in
44 relation to the approved business plan.

45 So the partners have to approve. It's not
46 Mr. Matthews saying, I'm the CEO; I get to decide
47 what we do. The partners are supposed to do that,

46

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1 and that makes obvious sense.

2 Just a couple more quick points, Justice.

3 THE COURT: Okay.

4 CNSL A. NATHANSON: And paragraph 41, the budgets' work
5 plans contemplated under section 13.3 had to be
6 approved by extraordinary resolution. This is my
7 point. An extraordinary resolution is like a
8 special resolution, so it requires here --

9 THE COURT: Yeah.

10 CNSL A. NATHANSON: -- three-quarters. So, in other
11 words, the overall business plan, development
12 plan, operating budgets had to be approved by
13 both. So they're equal, and they can both block
14 and veto.

15 Paragraph 42, partnership agreement's set out
16 a scheme for the allocation of net income and the
17 distribution -- and the distribution of what's
18 called distributable cash. So this is what I call
19 the waterfall.

20 And so the way the waterfall works is
21 summarized here. It goes first to the partners to
22 satisfy tax liabilities, then to pay off any
23 partner loans -- there are none here. Then,
24 equally, *pari passu* up to 15 million. Then, if
25 you're with me at point 4, the partners holding
26 class C units up to 30 million. Only Sanovest
27 owns class C, so that's Sanovest's preference in
28 the waterfall. My friends say in the footnote
29 that this is still disputed, and it's certainly
30 something they're trying to rewrite in their
31 oppression case, but it's right in the agreement.
32 And then, thereafter, *pari passu* for the balance.

33 So you see it's just a tiered waterfall.

34 And -- and I think you have the point, which
35 is if you mentally compare that to what my friends
36 call the funding order in their notice of
37 application, it's a different waterfall.

38 So paragraph 43 is -- what I say is common
39 ground, but my friends tell me it, apparently, is
40 not.

41 Paragraph 45, this is the point I've made
42 that no partner would seek to compel the sale of
43 any property of the partnership. And it's
44 reproduced there in 3.4. I won't read it to you.

45 And then 46, the partnership agreement
46 modified the general no-conflict rule that applies
47 to fiduciaries. It provided that the partners

47

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1 could hold interest in other businesses, even if
2 competitive, and, if so, they would not be
3 required to account. And that's set out in 3.9.

4 And the -- the further point is that the
5 partners agree that Sanovest would be the
6 preferred lender. So I say the effect of that is
7 when my friends say Mr. Kusumoto has conflict and
8 he can't decide on anything to do -- that has
9 anything to do with financing, I say, no, the
10 structure, the architecture that the parties
11 agreed on at the outset contemplated that he
12 could.

13 And if it were otherwise, then Mr. Matthews
14 truly would have imperial authority.

15 So, Justice, if I could just -- I'm just
16 going to --

17 THE COURT: Yes.

18 CNSL A. NATHANSON: -- do -- I'm just going to turn
19 pages for you, and then I think that will be --
20 actually, I see the time, so I -- I won't.

21 But paragraph 5 is an excerpt of the
22 condensed book. It's an excerpt at tab 5 of the
23 partnership --

24 THE COURT: Oh.

25 CNSL A. NATHANSON: -- agreement.

26 THE COURT: Oh, at tab -- yeah.

27 CNSL A. NATHANSON: It has many of those provisions. I
28 put them all in the agreement because I -- or the
29 argument because I just thought it would be easier
30 for you.

31 THE COURT: So what you're in the process of doing is
32 showing me the evidence that you say answers the
33 question I put to Mr. Brandt several times: Why?
34 Why? Why is Mr. Tian Kusumoto taking the
35 positions now that he's taking?

36 CNSL A. NATHANSON: 'Cause he doesn't have the things
37 that he's supposed to have.

38 THE COURT: Right. And --

39 CNSL A. NATHANSON: That's the point.

40 THE COURT: And just -- I think, before we adjourn, you
41 said early -- a few moments ago that -- that --
42 that supposedly the individual letters of -- the
43 expressions of interest to purchase that I -- I
44 was told Mr. Kusumoto blocked, you said --

45 CNSL A. NATHANSON: Yeah.

46 THE COURT: -- they were superseded by -- by an actual
47 offer to buy on-block --

48

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1 CNSL A. NATHANSON: But -- but --

2 THE COURT: -- by -- by an individual who had made some
3 of those primary --

4 CNSL A. NATHANSON: Yes. Yes, but -- sorry, in the --
5 just to clarify.

6 THE COURT: Yeah.

7 CNSL A. NATHANSON: It was Mr. Kusumoto and
8 Mr. Matthews --

9 THE COURT: Yeah.

10 CNSL A. NATHANSON: -- jointly signed and proffered an
11 agreement after negotiations to sell all of this.

12 THE COURT: Can -- can you just show me where that is?

13 CNSL A. NATHANSON: Yeah.

14 THE COURT: I just --

15 CNSL A. NATHANSON: It's -- if you look at my small --

16 THE COURT: Start --

17 CNSL A. NATHANSON: -- my small condensed book.

18 THE COURT: Right. Jumped out -- that jumped out at
19 me.

20 CNSL A. NATHANSON: Good. So it should.

21 So if you could turn -- it's over two
22 documents. So at tab 2 of the small condensed
23 book, Justice.

24 THE COURT: Right. Okay. Just a minute.

25 CNSL A. NATHANSON: So the thin, grey book.

26 THE COURT: Yeah. We just get -- right.

27 CNSL A. NATHANSON: So the -- the first one -- this
28 is -- this is -- leads up to it. This is the
29 joint partners resolution that I mentioned to you
30 a few minutes ago signed by both 599 and
31 Sanovest -- by Matthews --

32 THE COURT: Yeah.

33 CNSL A. NATHANSON: -- and Tian Kusumoto -- where they
34 resolve that the partners are -- authorized the
35 partnership through the managing partner to pursue
36 a direct or indirect equity investment.

37 THE COURT: That was the other thing I was going to ask
38 you.

39 CNSL A. NATHANSON: Yes.

40 THE COURT: All right.

41 CNSL A. NATHANSON: -- including to but not limited to
42 selling 100 percent of the assets.

43 So they -- what -- what -- when my friends
44 say "blockage," I say, there's an extraordinary
45 resolution in 2022 where they agree what they're
46 going to try and do. That's not blocking. The
47 fact that Mr. Kusumoto doesn't sign on to

49

Submissions re notice of application by Cnsl A. Nathanson

1 everything Mr. Matthews wants to do doesn't mean
2 he's shutting every door.

3 THE COURT: M'mm-hmm.

4 CNSL A. NATHANSON: So that's that.

5 And then the sale -- you don't have the
6 contract, but what you have is the email that
7 attaches it.

8 THE COURT: Okay. Where's that?

9 CNSL A. NATHANSON: So the next -- very next tab.

10 THE COURT: Great. All right.

11 CNSL A. NATHANSON: So August -- you can see
12 August 9th, 2022 -- I won't name the -- the --

13 THE COURT: Yeah.

14 CNSL A. NATHANSON: -- company. It's got the name of
15 one of the recipients in the email. And you see
16 Dan Matthews is copied, and the subject is
17 "Agreement for purchase and sale for Bear
18 Mountain."

19 THE COURT: Right.

20 CNSL A. NATHANSON: And you can see the attachment is a
21 signed PDF. Are you with me, Justice?

22 THE COURT: Right.

23 CNSL A. NATHANSON: And then this is what Tian writes:

24

25 As discussed, please find the attached --

26

27 THE COURT: Yeah.

28 CNSL A. NATHANSON:

29

30 -- agreement of purchase and sale which Dan
31 and I have agreed to and signed. The main
32 points are as follows and are inline with
33 what we discussed.

34

35 The purchase price is redacted, but:

36

37 It's for all the properties we own except
38 Cypress Gates and the rec centre.

39

40 Acceptance is said to be by the end of the month.
41 A not -- a refundable deposit, some other dates.
42 And Tian Kusumoto -- Tian Kusumoto says:

43

44 Dan and I have agreed to begin work on a
45 master development plan with --

46

47 And then the entity -- the buyer's -- the putative

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Submissions re notice of application by Cnsl A. Nathanson

1 buyer's name:

2
3 Please reach out to Ryan, who is the land
4 development manager, to discuss first steps,
5 budget, and timeline. I propose we submit
6 the costs initially with the end owners of BM
7 bearing the cost proportionally. We look
8 forward to working with --
9

10 The entity,

11
12 -- in preparing a master development plan for
13 Bear Mountain.
14

15 So part of the sale contemplates that there --
16 they might stay in as equity for the deal.

17 And -- and what Mr. Byma has reminded me is
18 that we've excluded the actual attachment for
19 confidentiality reasons, but it could be provided
20 to you.

21 My only point is, again, the doors aren't all
22 being shut. There are a bunch of things that they
23 are agreeing on. And because they didn't come to
24 fruition doesn't make this all oppressive.

25 THE COURT: So what happened here? Is it --

26 CNSL A. NATHANSON: It -- the buyer --

27 THE COURT: -- is there --

28 CNSL A. NATHANSON: -- didn't proceed.

29 CNSL G. BRANDT: No, that's -- that's not correct.
30 That's not correct.

31 CNSL A. NATHANSON: Well, my friend can correct me,
32 then.

33 CNSL G. BRANDT: So what happened is -- is -- what
34 occurred at tab 24 of our condensed book is that
35 there was a letter that was sent from that
36 potential buyer that expressed some concerns about
37 a response that Mr. Kusumoto had given around
38 purchase price and a number of other things.

39 And on receipt of that letter, Mr. Kusumoto
40 writes to Mr. Matthews and says, I think we should
41 take a pause in selling BM at the mountain -- at
42 the moment. That -- that's why that process ends.
43 That's at tab 24 of our --

44 THE COURT: I remember you showed me --

45 CNSL G. BRANDT: -- condensed --

46 THE COURT: -- that.

47 CNSL A. NATHANSON: So we'll -- we'll -- we'll come

51

Submissions re notice of application by Cnsl A. Nathanson

1 back to you on this because I think I understand
2 from Mr. Byma, who is a bit more [indiscernible]
3 on this than I am, that we'll -- when we come --
4 if we need to come back next week -- which I truly
5 hope we won't -- we'll deal with that. But we say
6 this happened differently.

7 And -- and, again, if you just take on what
8 my friend said -- so my friend's saying, well,
9 there was something in the further negotiation
10 process that Tian Kusumoto said that he didn't
11 like. That's a far cry from he's been Dr. No and
12 blocked everything. Right? There's no -- those
13 two documents are pretty significant steps, both
14 of which are jointly agreed by him and
15 Mr. Matthews that would have unblocked all of
16 this.

17 So it -- that's my only point. The
18 difference between my friends and I, I'm saying
19 it's way less black and white. I'm not -- you
20 know, then my friends want to say -- and that's
21 why I say they can't get over a strong *prima facie*
22 case.

23 THE COURT: Okay. Well, thank you. So we'll adjourn
24 over the -- to 2:00 on Tuesday. And probably,
25 Mr. -- Mr. Jackson, if you happen to speak to
26 Mr. Brusan and Mr. Gruber, I'll probably hear
27 before scheduling gets ahold of them --

28 CNSL K. JACKSON: Right.

29 THE COURT: -- that you're -- you're going to be in
30 front of me at 2:00 that day.

31 CNSL K. JACKSON: Very good.

32 THE COURT: And I'll work something out with them if
33 they have to go.

34 CNSL W. ROBERTS: We -- we very much appreciate your
35 assistance, Justice.

36 THE COURT: I'm -- I'm hopeful that if -- if what
37 Mr. Roberts says, if there's a deal and they never
38 resiled from the deal, that -- that it's just a
39 matter of paper. And -- and if there's a dispute
40 over the terms of the order, I can help resolve
41 that on -- on Tuesday.

42 CNSL W. ROBERTS: It should be resolvable, Justice.
43 And if there's one or two minor points --

44 THE COURT: Yeah.

45 CNSL W. ROBERTS: -- we do have you.

46 THE COURT: Yeah. Okay. Okay. Well, thank you very
47 much, everyone.

52

Submissions re notice of application by Cnsl A. Nathanson

1 CNSL W. ROBERTS: Thank you, Justice.

2 THE COURT: We'll adjourn.

3 THE CLERK: Order in chambers. This chambers is
4 adjourned.

5

6

(PROCEEDINGS ADJOURNED) ([4:05:42 PM])

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3:01:20 PM to timestamp 4:05:42 PM, inclusive, are
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proceedings, recorded on a sound recording
apparatus, transcribed to the best of my skill and
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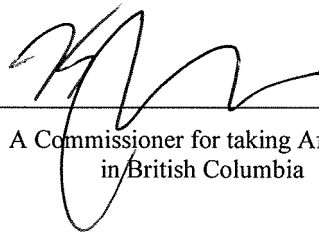
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This is Exhibit "B"
Referred to in the Affidavit of
SUZANNE VOLKOW
Sworn before me this 30 day of
May, 2025

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking Affidavits
in British Columbia

From: [Lars Brusven](#)
To: [Gordon Brandt \(3167\) - 14Flr](#)
Cc: [cferris](#); [Caitlin Ohama-Darcus](#); [Andrew I. Nathanson](#); [Eric Pedersen \(Velletta Pedersen Christie\)](#)
Subject: RE: [EXT] Ecoasis - Actions No. S-234048, S-234047, S-226218, S-223937 [FMD-CANADA.FID4038156]
Date: May-27-25 11:57:45 AM

Gordon:

Thank you for your correspondence proposing to adjourn the June 2025 examinations for discovery, pause further steps in the litigation until September 2025, and adjourn the January 2026 trial.

In the insolvency proceeding, in addition to our proposed application seeking an expansion of the Receivership Order, we now have instructions to bring an application seeking declarations from the court regarding the amount owing to Sanovest by the Respondents, and the validity and priority of the security interests granted in favour of Sanovest pursuant to the Loan Agreement, the guarantees, and the security. We anticipate delivering those application materials by the end of this week.

Sanovest may seek to have additional issues in the litigation between our clients summarily determined within the insolvency. The timing of these steps will be subject to a further applications, but could be as soon as this fall.

With respect to the examinations for discovery, we intend to proceed with Mr. Matthews' continued discoveries on June 23-25, as scheduled.

We agree that the sale price of the Partnership's assets affects the potential damages in the Oppression and Partnership Actions if you are able to establish liability. But those damages are just one issue of many in the litigation. That single issue does not justify adjourning the discoveries. It is the ultimate sale price, (not the Receiver's sales and marketing plan) that is most relevant, and that sale price will not be known until much later than the September 2025 date you have proposed for the parties to move forward.

If Mr. Matthews elects to again adjourn the discovery of Tian Kusumoto, he is taking the risk that Tian Kusumoto will not be examined prior to the potential applications to summarily determine some or all of the issues in the litigation. If you do not proceed with your discovery on the dates we agreed to, we are not available again until late September at the earliest. If you choose to postpone your examinations, we do not agree that they should take priority over the above-mentioned applications.

We do, however, require certainty on whether you are proceeding in June or not. If you do

not send us an appointment to examine Tian Kusumoto by May 30, we will release the dates.

It follows from the foregoing that we do not consent to pause all steps in the litigation until September 2025.

Finally, we do not consent to adjourn the January 2026 trial date. If you provide us with your application materials and more detailed reasons, we will seek instructions. However, if the January 2026 trial date is adjourned, we are not available for a trial commencing in August 2026. Our next available date for a 30 day plus trial is in early 2027.

Lars Brusven (He/Him)

Partner

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Sent: May-23-25 4:42 PM

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Subject: RE: [EXT] Ecoasis - Actions No. S-234048, S-234047, S-226218, S-223937

Thanks Gordon. We are considering your note below and will be in touch. Have a good weekend.

Lars Brusven (He/Him)

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Sent: May-21-25 4:15 PM

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Subject: [EXT] Ecoasis - Actions No. S-234048, S-234047, S-226218, S-223937

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Andrew, Lars, Eric,

We write with respect to the upcoming examinations for discovery in these matters as well as the trial dates more generally. As you know, we previously adjourned the examinations for discovery of Tian Kusumoto that were set in March 2025. We did so on the basis that we required additional clarity as to the Receiver's intended sales and marketing plan in order to focus the examination. The same considerations apply to the trial overall, given the damages claims arising from the allegations of blocked land sales, among other issues.

Unfortunately, we are today not much further advanced than we were in March. The Receiver has not yet provided an indication as to when it expects to present a sales and marketing plan to the Court, much less the contents of such a plan or the expected timeline of a sales process.

In the circumstances, proceeding with the examinations for discovery of Mr. Matthews and Mr. Kusumoto in June is likely to result in wasted costs, as additional examination time will later be required. Although we understand that delaying examinations at this stage could jeopardize the trial date, that risk arises independently as in the absence of an identified sales process, let alone sales, the facts relating to damages remain in flux. This creates significant evidentiary challenges, including with respect to properly instructing any damages expert in providing an opinion as to loss.

In the circumstances, we propose that the parties agree to pause further steps in the litigation until September 2025. We can further evaluate the timelines at that stage based on the marketing and sales process as it develops over the summer. Given the likelihood that the January trial dates no longer appear to be feasible, we would also propose to adjourn those dates in favour of available dates beginning August 4, 2026.

Please advise as to your clients' position on the above. If your clients are not in agreement, we expect that we will seek instructions to suspend the current case plan timelines and adjourn the trial dates given the extended nature of the Receiver's process, which has run significantly beyond the timelines that were expected last September.

We look forward to hearing from you.

Regards,

Gordon



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