

Court File Number: CV-21-00669408-00CL

**Superior Court of Justice**  
Commercial List

**FILE DIRECTION/ORDER**

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

**C&K MORTGAGE SERVICES INC. and 975393 ONTARIO INC.**

Applicant

AND

**AXESS PICKERING LTD.**

Respondents

Case Management  Yes  No by Judge: \_\_\_\_\_

Counsel	Telephone No:	Email/Facsimile No:
<b>See counsel/participant sheet attached hereto</b>		

- Order     Direction for Registrar **(No formal order need be taken out)**  
 Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

Adjourned to: \_\_\_\_\_

Time Table approved (as follows): \_\_\_\_\_

Hearing Date: January 20, 2022

## ENDORSEMENT

[1] Alvarez & Marsal Canada Inc. in its capacity as Court-Appointed Receiver (the "Receiver") of the assets, undertakings and properties of Axess Pickering Ltd. (the "Debtor"), seeks an approval and vesting order in respect of a sale transaction (the "Transaction") contemplated by an agreement of purchase and sale between the Receiver and 1000059279 Ontario Inc. or an assignee thereof (the "Purchaser") dated December 22, 2021, together with any further minor amendments thereto which may be deemed necessary by the Receiver in its sole opinion (the "Sale Agreement") for the sale of the Debtor's property located at 1525 Pickering Parkway, Pickering Ontario (the "Property").

[2] The Receiver's Second Report dated January 14, 2022 outlines information relating to the receivership proceedings pertinent to the relief sought on this motion.

[3] The Sale Agreement was entered into following a sales process conducted in accordance with the terms approved by an earlier order of this court made on November 8, 2021 (the "Sale Process Order"). The purchase price is in excess of the value ascribed to the Property in both an earlier appraisal completed in February 2021 and an appraisal commissioned by the Receiver in November 2021. The Receiver believes that it represents the best opportunity to obtain value for the Debtor's stakeholders. It is supported by the applicants.

[4] So as to protect the stakeholders in the event that the Sale Agreement does not close, and to protect the confidentiality of the court approved sale process, a partial sealing order (the "Partial Sealing Order") is sought in respect of the confidential appendices (E, F and G) attached to the Receiver's Second Report that contain information about the Sale Agreement itself (until the Transaction closes) and about all other offers received (subject to further order of this court).

[5] No stakeholder who received the notice of motion and Second Report of the Receiver has indicated any opposition to the proposed vesting and approval order. However, SageWise Capital, the second mortgagee, has raised some questions about the second of two proposed interim distributions provided for therein to be made out of the sale proceeds upon closing the Transaction (the "Proposed Interim Distributions"):

- a. First, to repay the indebtedness with respect to the Receiver's Borrowing Charge; and
- b. Second, to the Applicants up to the amount of the indebtedness owed to the Applicants.

[6] The rationale for the Proposed Interim Distributions is that paying down these debts that stand in undisputed priority to all other debts stops the interest accumulating to the benefit of all stakeholders. The Receiver has advised the court that the sale proceeds from the Transaction will not be exhausted by the Proposed Interim Distributions. To the contrary, the Receiver anticipates that the proceeds from the Transaction will be sufficient to repay the amounts outstanding to the Secured Creditors and fund the remainder of the Receivership proceedings.

[7] Pine Ridge (an earlier owner and vendor of the property that has asserted various claims in and to the Property that it acknowledges having agreed to subordinate and postpone only to the

first mortgagee/Applicants) asserts that it has an interest in the Property that ranks in priority ahead of the second mortgage and the third mortgage (the “priority dispute”). The second and third mortgagees disagree with Pine Ridge’s assertion of priority, but themselves may not be entirely aligned in interest on this issue. Because of this priority dispute, the Receiver believes it would be appropriate for the parties to review and consider their respective positions concerning priorities before any further distributions are made. However, because Pine Ridge acknowledges that its rights were expressly subordinated to the Applicants’ first mortgage security on March 1, 2021, the Receiver does not believe that the priority disputes between Pine Ridge and any other creditors should impact or delay the Proposed Interim Distributions.

#### Considerations Raised in Connection with the second Proposed Interim Distribution

[8] There is no dispute that the Applicants rank ahead of all other stakeholders in priority and are entitled to a distribution from the proceeds arising from the Transaction. The Receiver considers it to be in the best interests of other creditors to stop the running of interest on the indebtedness owed to Applicants as promptly as possible, which can be achieved through the Proposed Interim Distribution to the Applicants.

[9] SageWise Capital, the second mortgagee, suggests that because the second mortgage was registered on the same day as the Applicants’ first mortgage, if there is to be an interim distribution to the Applicants then SageWise Capital’s second mortgage should similarly be paid out by way of an interim distribution. It is suggested that the same logic, of stopping the continued accrual of interest on its debt, applies.

[10] This position is opposed by Pine Ridge Management and RNV Investments and Gina Batista (3<sup>rd</sup> mortgagees). They do not agree that an interim distribution to SageWise Capital is appropriate while the priority dispute remains extant. The second mortgagee is not in the same position as the first mortgagee because of the priority dispute. Thus, the first suggestion that SageWise should be included in this initial interim distribution is not compelling or valid.

[11] The second, alternative, suggestion made by SageWise Capital at the hearing was that the court hold off in approving interim distributions to any creditors pending the determination of the priority dispute, so that all distributions to creditors can be made at the same time. This, it was suggested, would keep the pressure on all creditors to promptly address and attempt to resolve, whether by agreement or court order, the priority disputes in a timely and cost effective manner.

[12] There may be some strategic suasion to this position. However, it is not a reason to delay the repayment of a secured creditor whose security and priority is undisputed when that delay will cost all of the stakeholders the value of the ongoing interest on a debt that would be kept outstanding after the closing of the Transaction for the sole purpose of creating a strategic negotiating incentive. It is not realistic to suggest that the resolution of the priority dispute could be achieved in the window between now and the proposed closing of the Transaction even if this strategic “pressure” is exerted.

[13] This is not a matter that would qualify for urgent scheduling on the commercial list. The practical reality is that the court’s availability and the time needed to properly present the issue for the court’s determination (or for the parties to reach an informed settlement) will inevitably take

longer than the three weeks between now and the anticipated closing of the Sale Transaction. After the closing the interest on the first mortgage can and should be eliminated by the Proposed Interim Distributions.

[14] The other stakeholders should not be disadvantaged for asserting their rights by the continued interest accrual on the first mortgage after the closing. There has not been any suggestion of delay on any party's part. To the contrary, counsel for Pine Ridge Management indicated a willingness to engage now in discussions, while the closing of the Transaction is pending. The Receiver has agreed to immediately seek a scheduling appointment with the commercial list office so that a motion for directions to determine any priority disputes can be scheduled and timetabled.

[15] I do not accept either of the suggested alternatives of SageWise Capital regarding the Proposed Interim Distributions. The Proposed Interim Distributions are appropriate and in the interests of all of the stakeholders and are approved.

#### Conclusions, Orders and Directions

[16] The Vesting and Approval Order is in a form that is consistent with the Commercial List Form of Approval and Vesting Order, as supplemented to include the court's approval and authorization of the Proposed Interim Distributions, the Partial Sealing Order and various other administrative matters including the approval of the Second Report of the Receiver.

[17] I am satisfied that the requirements of *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) are met in this case. The Receiver has run a robust sales process and thoroughly canvassed the market. The fairness, efficacy and integrity of the process is evident and has not been challenged or questioned by any stakeholder. There is no reason to believe that any better price could have been obtained for the Property. This is all reinforced by the fact that the approval and vesting aspects of the order sought are unopposed.

[18] The Receiver has requested the Partial Sealing Order (of the unredacted version of the Sale Agreement, the bid summary and post-sales process bid) to eliminate the risk that a future sales process might be impaired if for any reason the Transaction does not close and the Property has to be remarketed. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information. These salutary effects outweigh any deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

[19] The proposed sealing order is as narrow as possible (only those exhibits that pose a risk are being sealed) while still achieving the legitimate requirement of protecting a potential future sales process. Accordingly, it appropriately balances the open court principle and legitimate commercial requirements for confidentiality. I am satisfied that the proposed Partial Sealing Order is appropriate under the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements. The nature and scope of the Proposed Sealing Order is consistent with the court's practice of granting limited sealing orders in conjunction with the approval and vesting orders.

[20] The Vesting and Approval Order shall go in the form signed by me, dated January 20, 2022.

[21] The Receiver is directed to contact the commercial list scheduling office and request a scheduling conference, before me if I am available, to set a hearing date and timetable any priority disputes. A proposed timetable should be circulated for comment and contribution by all interested stakeholders in advance of this scheduling conference.



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Kimmel J.

January 21, 2022

## SUPERIOR COURT OF JUSTICE

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**Counsel/Participant Slip for Justice Kimmel**

**January 20, 2022**

In the Matter of: C&K Mortgage Services -v- Axess Pickering Ltd.  
Court File No. CV-21-669408-00CL

***In Attendance:***

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*(Lawyer for the Applicants, first mortgagee)*

Mr. Gary Gruneir: *President of C&K Mortgage Services Inc.*

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(*Principals of debtor/parent of debtor*)

Dr. Abraham King

**REGISTRAR: K. BACHEW**

**REPORTER: N/A**