ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.:	**CV-23-00707839-00CL**	**Date:**	**June 11th, 2024**

NO. ON LIST: 1

TITLE OF PROCEEDING: **KEB Hana Bank v. Mizrahi Commercial (The One) LP., *et al***

BEFORE: **JUSTICE OSBORNE**

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ENDORSEMENT OF JUSTICE OSBORNE:

1. The Court-appointed Receiver seeks various relief on this motion, proposed to be granted in three orders of this Court:

    a. a proposed SISP Approval Order:

        i. approving a sale and investment solicitation process ("SISP");

        ii. authorizing and directing the Receiver and Jones Lang LaSalle Real Estate Services Inc. (the "Broker") to implement the SISP;

        iii. approving the Broker Agreement and the retention of the Broker under the terms thereof;

    b. a proposed Reconfiguration and LC Order:

        i. approving the Letters of Credit Arrangement pursuant to which the Receiver proposes to issue letters of credit in favour of the City of Toronto in respect of municipal requirements, together with related relief, including authority to use the Property and/or borrowings under the Receivership Funding Credit Agreement ("RFCA") to purchase such investments as may be required to fully collateralize the Replacement LCs and grant the Royal Bank of Canada ("RBC") a security interest in the RBC Collateral Account and the RBC Collateral;

        ii. granting to RBC a charge on the RBC Collateral Account in the RBC Collateral as additional security in connection with the letters of credit, which shall form a first charge on the RBC Collateral Account and the RBC Collateral;

        iii. approving the Reconfiguration Plan for the Residential Component of the Project to allow for the reconfiguration of level 62 and above to accommodate an additional 88 condominium units, together with related relief;

        iv. approving the Second Report and the activities of the Receiver described therein;

    c. a proposed Holdback Release Order:

        i. authorizing the Receiver to pay the Holdback Amount on behalf of the Nominee as specified in Appendix "C" to the Second Report, and to pay additional holdback amounts pursuant to the Provincial Lien Legislation owing to a Holdback Party as set out in the motion materials; in each case, subject to the Holdback Release Conditions being satisfied or waived; and

        ii. implementing a claims bar against the Holdback Amount (or to funds or entitlements in the place thereof), except for the payments of the Holdback Amount to the Holdback Parties, for the period prior to the Effective Date.

2. At the conclusion of the hearing, I granted the orders with reasons to follow. These are those reasons.

3. Defined terms in these reasons have the meaning given to them in my prior orders and endorsements made in this proceeding, in the motion materials or in the Second Report, unless otherwise stated.

4. The Receiver relies upon the Second Report of the Court-appointed Monitor, together with the appendices thereto, dated May 28, 2024.

5. The Service List has been served with the motion materials. The Reconfiguration and LC Arrangement Order is unopposed. The Holdback Release Order is unopposed by any party, as revised. This is discussed further below. The SISP Approval Order, in the form and on the terms proposed, is opposed by the Coco Parties.

6. I will address the three proposed orders in turn.

Reconfiguration and LC Arrangement Order

7. The proposed Reconfiguration and LC Arrangement Order is sought, obviously, mid-construction. The Project, an 85 story condominium, hotel and retail tower located at the southwest corner of Yonge Street and Bloor Street West, Toronto, is not complete.

8. As originally designed, the Project was intended to be comprised, when fully constructed, of a Commercial Component occupying four underground parking levels and 16 above ground levels comprised of a ground level and concourse retail spaces, food and beverage spaces on levels three and four, and a premium hotel space on levels five through 16, together with a Residential Component occupying levels 17 through 84 with an outdoor amenity space on level 85.

9. As of the date of this hearing, concrete tower slabs have been poured up to level 56, and the exterior curtain wall has been erected to level 26.

10. Consistent with the mandate given to the Receiver in the appointment order, it has assessed and evaluated various potential-maximizing opportunities and alternatives for the Project. Those include alternatives to the existing floorplate configuration of the Residential Component. In this context, the Receiver has developed the Reconfiguration Plan which contemplates that floors at level 62 and above in the Residential Component of the Project are proposed to be reconfigured to accommodate an additional 88 condominium units.

11. As more fully set out in the Second Report, the Receiver, in consultation with its advisors (including JLL and Skygrid), has determined that implementing the Reconfiguration Plan is necessary to improve the salability of condominium units in the Project and maximize value.

12. In the existing configuration, the Upper Levels (above level 61) include 69 units, with an average size of over 2600 ft.^{2} per unit. At present, those are the largest, most expensive units in the Project since there are only two or four units per floor (as opposed to six or 10 units per floor below level 62).

13. Of the Upper Level units, only 19 are subject to conditional sales agreements ("CSAs"). Of those, nine are in default with respect to the deposit requirements.

14. The Reconfiguration Advisors have concluded after extensive analysis that there is an extremely limited market for units of the size and sale price of those located in the Upper Levels under the Base Configuration, and that the timeline required to sell the volume of those Units that remain available would be significant. I pause to observe that this is, in part, illustrated by the fact that 72% of those Upper Level units remain unsold and, as noted above, nine (or almost half) of the 19 sold units are in deposit default.

15. In considering alternative configurations for the Upper Levels, the Reconfiguration Advisors, which include the proposed broker, JLL, Skygrid and the Project's architect and engineering consultants, among others, have considered various inputs including current market conditions, fair market values, anticipated rate of sales, as well as the limits of such reconfiguration presented by zoning and other municipal permit requirements and the existing infrastructure of the Project. They have done so while ensuring that any reconfiguration would maintain the Project's existing aesthetics, high-quality construction and luxury look and finishes.

16. After full consideration of all of these factors, and consultation with the Senior Secured Lenders, the Receiver has determined it is appropriate to proceed with the proposed Reconfiguration Plan to enhance the value of the Project.

17. To simplify the design and construction process, and importantly, to avoid impacting the Schedule, the design drawings are (for floors comprising four, six and ten Unit layouts) consistent with the respective layouts contemplated in the Base Configuration. The Receiver has prepared a cost-benefit analysis to compare the economic impact of the Reconfiguration Plan against the Base Consideration. It yields the conclusion that the Reconfiguration Plan is anticipated to generate substantial additional net realizable value, relative to the Base Configuration.

18. I also observe that the impact on existing Unit buyers will be relatively minor and the Reconfiguration Plan seeks to minimize any impact. As noted above, nine affected Units are in deposit default. As to the other 10 affected Units, the Reconfiguration Plan provides for virtually identical units (same square footage, exposure and layout) for 8 of them. I observe that it also provides for virtually identical units on a higher floor than contemplated under the Base Configuration in respect of 4 of the 9 Units in deposit default.

19. The Receiver continues to consider design alternatives to allow for the creation of Equivalent Units, or otherwise provide for an acceptable alternative, for the remaining two Qualified Units that do not have a specific location assigned under the Reconfiguration Plan. The Receiver is of the view, based on consultation with Skygrid and the consultants to the Project, that it is feasible from a design and constructability perspective to combine certain Units in the Reconfiguration Plan to provide an Equivalent Unit for each of the remaining two Qualified Units.

20. Finally, of the five Default Units for which there is no Equivalent Unit available, three of the purchaser parties had not paid any deposit at all, and the other two had each paid only $20,000 of their required deposits (which, at the time of the Second Report, totalled approximately $870,000 in one case, and over $6.2 million and the other case). Those purchasers are both in default according to the terms of the respective CSAs. Accordingly, for these and other reasons identified during its investigations and inquiries, the Receiver has significant concerns about whether the Defaulting Purchasers were or are willing or able to complete the sale transactions in any event. Those concerns are set out in the Second Report (paragraph 7.16).

21. As a result of these concerns, the Receiver sent default notices to the purchasers of each of the five Default Units for which there is no equivalent Unit on May 1, 2024. Those Default Notices required each Defaulting Purchaser to cure their default by May 13, 2024, by paying the overdue deposit amounts, failing which the CSA would be terminated and any deposit amounts that had been paid, forfeited. None of the purchasers responded to the Notice, and none paid any further deposit amounts. Accordingly, the CSA for each of those five Default Units has been terminated.

22. The remaining four Default Units will be monitored as to status, although I observe that three of the four are not impacted by the Reconfiguration Plan in any event.

23. For the reasons set out in the Second Report and amplified in the submissions of counsel for the Receiver at the hearing and supported by counsel for the Senior Secured Lenders, I am satisfied that

the Reconfiguration Plan will achieve the intended objectives and should be approved. I accept the recommendation and advice of the Receiver that it is the best option available within existing practical constraints to maximize returns from the Project. I am reinforced in this view by the fact that the Reconfiguration Plan is not opposed by any party.

24. I am also satisfied that the relief sought in respect of the Letters of Credit ("LCs") should be approved. The Debtors currently have six LCs totaling approximately $2.24 million issued by KEB Hana, which are collateralized. Those LCs support various obligations to the City of Toronto, including in connection with a heritage easement, park areas, streetscaping and storm sewers. KEB Hana has advised the Receiver that it will not renew those LCs as they mature.

25. In addition, the City of Toronto has also required that the Debtors provide an additional LC in the amount of $1 million to backstop an indemnity relating to a temporary street occupation permit required for the Project.

26. RBC has agreed to replace the existing LCs and to provide the new required LC on the terms contemplated by the Letters of Credit Arrangement.

27. This relief is not opposed. I am satisfied that it should be approved, and it follows that the granting of the RBC Charge to collateralize the seven LCs to be provided (to replace the collateralization of the existing LCs in favour of KEB Hana and collateralize the new 7th LC), should also be approved. These LCs, provided to the municipality, are normal and ordinary course requirements for a project of this scale and complexity, and are necessary for this Project to continue.

28. They are approved, together with the corresponding Charge.

Holdback Release Order

29. Since its appointment, the Construction Manager has been meeting with trades and suppliers to transition their contracts previously held with the Former Developer, to new subcontracts with the Construction Manager. Certain subcontractors have required that their proportional entitlement to the statutory holdback under the Provincial Lien Legislation be released, as a condition to executing new subcontracts with Skygrid.

30. The Receiver is aware of 38 subcontractors from whom statutory holdback was retained, totaling approximately $13 million (the "Holdback Amount") for work performed prior to the Effective Date.

31. The proposed order would authorize the Receiver to pay the Holdback Parties their proportionate share of the Holdback Amount in accordance with the Holdback Schedule, as well as to pay any post-Effective Date holdback amounts owing to subcontractors where such Holdback Party has fully completed its scope of work and is not required for continued construction.

32. I am satisfied that the Holdback Schedule is appropriate. Notice of the proposed payment of the Holdback Amount will be provided to all known contractors, subcontractors and suppliers for which the Receiver has contact information. The payment will be subject to the Holdback Release Conditions. More than 45 days have passed since the Effective Date.

33. In short, the proposed order will facilitate the entry by the Construction Manager into new sub-contracts and otherwise contribute to the continuation of the construction of the Project for the benefit of stakeholders. In my view, disruption to or suspension of construction is to be avoided if at all possible.

34. The Holdback Release Order is not opposed by any party, acknowledging as I do the submissions of Gamma Windows and Walls International Inc. which have resulted in amendments to the draft order to carve out that party from the effect of the order. The Holdback Release Order, as revised, is

supported by the Senior Secured Lenders and I am satisfied that it is appropriate for the reasons set out in the Second Report. It is approved.

Proposed SISP

35. The proposed SISP Approval Order would approve the SISP and authorize the Receiver, *nunc pro tunc*, to enter into the Broker Agreement with JLL will allow on the terms proposed. The full Broker Agreement is in the motion materials (Second Report, Appendix "E").

36. I will address JLL and the proposed Broker Agreement first. JLL was retained in March, 2024, following a request for proposal (RFP) process, to design and present a proposed SISP that contemplated value-maximizing transactions or investments for the sale of the Project, or in the alternative, go-forward arrangements with developers, with a view to achieving in either case, the continuation of the construction of the Project without disruption.

37. The basis for the recommendation of the Receiver to select JLL and to retain that broker on the terms set out in the Broker Agreement are fully set out in the Second Report (6.9 – 6.14). I am satisfied that the recommendation of the Receiver should be accepted.

38. JLL is qualified, experienced and capable of acting as the Broker for this Project and has substantial experience, particularly in residential, hotel and commercial asset disposition, marketing and sale, including but not limited to sales in the context of insolvency proceedings. JLL has a broad and extensive sales network across North America and internationally.

39. I am also satisfied that the proposed fee structure for the Broker in the SISP is reasonable, represents competitive market terms, and is appropriate in the circumstances. The fee schedule is fully disclosed in the motion materials. It contemplates a flat fee for any Third Party Transaction, and a transaction fee in addition thereto essentially on a sliding scale, designed to incentivize the Broker to maximize the quantum of any third-party investment.

40. The Coco Parties do not oppose the retention of the proposed Broker or the terms of the Broker Agreement, including the fee structure, although as more particularly discussed below, they submit that the proposed fee structure with its contemplated highest fee threshold category beginning at $1.1 billion, is reflective of the fact that there is no genuine belief that the SISP will generate any higher amount.

41. No party other than the Receiver has filed any evidence in respect of the proposed retention of JLL or the proposed terms of the engagement. For the reasons fully set out in the Second Report as amplified by the submissions of counsel for the Receiver and for the Senior Secured Lenders, and summarized above, I am satisfied that the retention of the Broker is appropriate.

42. This Court has broad discretion pursuant to s.243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, to approve the engagement by the Receiver of a real estate broker and to approve broker agreements.

43. As described above, the Receiver conducted an RFP process, carefully considered the proposals received, consulted with the Senior Secured Lenders and their advisors, and selected JLL for the reasons set above, and with which I agree.

44. Accordingly, the retainer of JLL and the Broker Agreement are approved.

45. With respect to the SISP itself, all parties (including, for greater certainty, the Coco Parties) are, or at least were previously, in agreement that a SISP should be conducted. Indeed, the Coco Parties emphasized their frustration that it has not been commenced sooner.

46. The Receiver, together with various inputs including from the proposed Broker as described above, has designed the SISP to canvass the market, efficiently and effectively, for any and all potential forms of value-maximizing transactions or investments for the sale of the Project or, alternatively, for go-forward arrangements with developers or others for completion of construction and the later sale of Units and the Commercial Component.

47. Significant work prior to the proposed implementation of the SISP has been undertaken, all with a view to ensuring that the Project was positioned and construction was advanced to a point where the SISP had the best chances of success. The Project is now at that point.

48. The pre-SISP work streams included the Reconfiguration Plan discussed above, finalizing arrangements with the Construction Manager (the Skygrid construction management contract has now been executed), reaching arrangements with trades, developing a revised budget and schedule, and selecting a Broker. The virtual data room is now ready.

49. Accordingly, I am satisfied that now is the appropriate time to approve and implement a SISP.

50. The Receiver submits that a broadly marketed and flexible SISP in the form presented is the best way to proceed in order to solicit interest in the Project and, to put it plainly, to demonstrate through testing of the market whether there is value in the Project beyond the amounts owed to the Senior Secured Lenders.

51. The proposed SISP will, as described briefly above, solicit interest in the opportunity to do one of two things.

52. First, it will solicit the interest of any party to acquire or invest in the entire Project, or in either of the Residential Component or the Commercial Component, pursuant one or more sale or investment transactions. In other words, a proposal need not contemplate an acquisition or investment in the entire Project.

53. Importantly, however, the proposed SISP contemplates a Minimum Bid Threshold of $1.2 billion. Accordingly, any Transaction Proposal or Transaction Proposals must have a purchase price or investment amount, in the aggregate, that equals or exceeds $1.2 billion, being the Minimum Bid Threshold required by the Senior Secured Lenders. This is discussed further below.

54. Second, the proposed SISP will solicit interest, in the alternative, of any party to enter into an arrangement with the Senior Secured Lenders to complete the construction, development and realization of value from the Project on terms acceptable to them, as well as to the Receiver. Put simply, this alternative contemplates an arrangement to facilitate the continuation and completion of construction of the Project, and deferring the sale of Units and/or the Commercial Component until a later date.

55. The proposed SISP has two phases, and the terms and relevant timelines are fully set out in the Second Report. They are designed to give interested parties sufficient time to perform diligence and pursue the Opportunities, balanced as against the need to advance this restructuring as quickly as reasonably possible.

56. I pause to observe that, as noted above, the virtual data room is ready now. Moreover, I accept the submission of the Receiver, supported by the Broker, that the scale, complexity and value of this Project is such that the universe of potentially interested parties will be relatively small and will likely consist of highly sophisticated, experienced, industry players.

57. During Phase I, the Broker will solicit indications of interest in the form of non-binding letters of intent, to be submitted by a Phase I Bid Deadline of July 30, 2024. Phase II will include the opportunity for additional due diligence with a view to bidders submitting a final binding Transaction, Proposal or

Development Proposal by the Phase II Bid Deadline of September 24, 2024. The Receiver may terminate the SISP following Phase I if no Qualified LOIs are received.

58. The Receiver and the Senior Secured Lenders submit that proceeding with the SISP now, and on the proposed terms, is in the best interests of the stakeholders and will address the threshold issue "hanging over" the Project at this time, in the sense of determining whether there is a third party transaction available that will maximize value and facilitate completion of the Project, or alternatively establish that the Senior Secured Lenders, as the priority economic stakeholder in the Project, will need to pursue their recovery through the completion of the construction and realization of the Project, either on their own or in conjunction with a new developer that may emerge as a result of the SISP.

59. This Court has held that when considering a sales solicitation process, the Court should assess the following factors (See: *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

    a. the fairness, transparency and integrity of the proposed process;
    b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
    c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

60. These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

    a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
    b. the interests of all parties;
    c. the efficacy and integrity of the process by which the party obtained offers; and
    d. whether the working out of the process was unfair.

61. In *Nortel Networks Corporation (Re),* [2009] O.J. No. 3169, 2009 CanLII 39492 (ONSC) ("*Nortel*"), Morawetz, J. (now Chief Justice Morawetz) described several factors to be considered in a determination of whether to approve a proposed sales process, including:

    a. is a sale transaction warranted at this time?
    b. will it benefit the whole economic community?
    c. do any of the debtor's creditors have a *bona fide* reason to object to a sale? and
    d. is there a better viable alternative?

62. In short, the Court must consider whether the proposed sale process will optimize the chances, in the particular factual circumstances of any case, of securing the best possible price for the assets being proposed to be sold: *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 5338 at paras 7–8.

63. Substantial deference should be given to the business judgment and recommendation of a Court-appointed receiver as an officer of the Court with expertise and insolvency proceedings: *Marchant Realty Partners Inc v. 2407553 Ontario Inc*, 2021 ONCA 375 at paras 10, 15 and 19. See also *Ontario Securities Commission v. Bridging Finance Inc*, 2022 ONSC 1857 at paras 43–45.

64. In my view, this is particularly applicable where, as here, the recommendations of the Receiver are informed by the additional expertise of the proposed Broker, the Construction Manager and are fully supported by the fulcrum creditors, the Senior Secured Lenders as informed by their own advisors.

65. In the present case, those Senior Secured Lenders have first-ranking security over the Property of the Borrower and GP Inc., including the Project. Today, they are owed approximately $1.5 billion, including amounts advanced by the RFCA Lender pursuant to the Receivership Order. The Borrower is in default of the Credit Agreement. The Senior Secured Lenders fully support the SISP on the proposed terms.

66. In particular, they support, and candidly admit that they have insisted upon, the inclusion of a Minimum Bid Threshold of $1.2 billion. This represents approximately 80% of the outstanding indebtedness owed to them, a threshold below which they will not support any Bid.

67. Submitting that they could have proposed a Minimum Bid Threshold of 100% of the principal and interest owed to them, they take the position that this notional "discount" to 100% debt recovery is intended to maximize the chances of the SISP soliciting interest from the market, and represents a compromise on their part. Moreover, they emphasize that the SISP also contemplates an alternative transaction in the absence of a sale, in which case the Minimum Bid Threshold is not relevant at all.

68. Given the position of the Senior Secured Lenders, but importantly, informed also by its own analysis (informed in turn by the input from the Broker), the Receiver supports the inclusion of this Minimum Bid Threshold. The Receiver submits that it would be both a waste of resources and would be disingenuous to the market and inefficient to conduct the sales process without a Minimum Bid Threshold and thereby represent to the market that any bid, at any quantum, had a realistic prospect of being accepted, when in fact such is not the case.

69. As noted above, the Coco Parties fully support a SISP in principle. They object to approval of this SISP on the proposed terms, however, with the result that they oppose approval of the SISP and submit that it is doomed to failure with the result that it should not be approved on these terms at this time.

70. The Coco Parties have not, however, filed any evidence on this motion. In particular, there is no evidence to challenge the evidence put forward by the Receiver in the Second Report. Instead, they have filed a "Notice of Objection" without affidavit or other evidence (factual or expert).

71. The Coco Parties object to several proposed terms of the SISP. Most particularly, they oppose the Minimum Bid Threshold of $1.2 billion. They submit that "it is a certainty" that this bid floor will result in no qualified bids, and will deter purchasers from engaging in the SISP. Indeed, they go further and submit bluntly that: "[t]he SISP with this bid floor has been intentionally designed to fail - that is, to produce no bids - so as to then justify permitting the Senior Secured Lenders to finance construction of the Project for the next 3 ½ years."

72. The Coco Parties go even further still and submit that the Receiver is "well aware that the SISP as designed with this bid floor will produce no bids". While stating that they "do not question and are not impugning the competence or integrity of the Receiver", the Coco Parties submit that the Senior Secured Lenders are purporting to "dictate a commercially unreasonable path" and that the Receiver is accepting this because it believes that because those parties are the fulcrum creditors and their interest is the only economic interest at stake.

73. Accordingly, the Coco Parties ask this Court to do one of two things:

    a. "if the Court is satisfied that the position of the Senior Secured Lenders entitles them to do as they wish, then the court should dispense with the pretense of a SISP that is designed to produce no bids … and set up the Senior Secured Lenders' funding plans". They submit that the Receiver should bring a motion to approve construction financing plans and "dispense with the pretense of a market check"; or

b. "if the Court believes that a SISP is an appropriate course to pursue, the Court should be satisfied that the SISP is structured to maximize the prospects of receiving bids rather than serve only to confirm that there are no other bids on the terms dictated by the Senior Secured Lenders".

74. The Coco Parties submit that what is unprecedented in this case is that the Senior Secured Lenders are insisting on a Minimum Bid Threshold, but are not credit bidding their debt or stepping forward with a stalking horse bid. Instead, it is submitted, they are "simply blocking the sale of the Project" by imposing a bid floor of $1.2 billion that precludes anyone else from buying the Project. The submission is that they are, at once, both refusing to put forward their own bid, yet at the same time insisting on a process that by design precludes anyone else from buying the Project.

75. The Coco Parties submit that this amounts to an unacceptable "third alternative" by which the Senior Secured Lenders "are entitled to both block a sale of the collateral to others, even though they are unwilling to purchase the collateral themselves" and further that by so doing, the Senior Secured Lenders "are now obstructing one of the principal objectives of the receivership remedy: the realization upon the collateral over which the receiver is appointed".

76. This is strong language indeed. While attempting to qualify their submissions by saying they do not impugn the integrity of the Receiver, the Coco Parties effectively do just that, by maintaining their submission that the Receiver is improperly acquiescing to the demands of unreasonable creditors acting in their own self-interest (the Senior Secured Lenders) and endorsing and recommending to this Court a process that is not only doomed to fail, but is one which the Receiver knows full well is doomed to fail, and yet is recommending it anyway.

77. Moreover, and as noted above, the Coco Parties make these submissions in the absence of putting forward any evidence. There is not, for example, any expert evidence from an appraiser, valuator, real estate broker or other experienced market participant to challenge the position of the Receiver and the Broker. There is certainly no challenge to the independence or expertise of JLL, although the Coco Parties submit that the fact that the fee schedule does not include defined incentivization levels above the Minimum Bid Threshold amount of $1.2 billion is itself evidence of the fact of the lack of any *bona fide* belief in the Receiver or the Broker that there will be any such bid.

78. I observe that there is no request for an adjournment from the Coco Parties, nor any suggestion from them that if an adjournment were granted, such evidence would be available.

79. In the absence of any evidence from the Coco Parties, I am left with the evidence in the Record which consists (in relevant part) of the Second Report of the Receiver and the Affidavit of Mark Sheeley sworn June 5, 2024 filed on behalf of the Senior Secured Lenders.

80. Having considered the evidence as against the *Soundair* Principles and the other factors set out above relevant to the determination of whether a proposed sales process should be approved, I am satisfied that the proposed SISP should be approved.

81. First, I am satisfied that now is the appropriate time to canvass the market for interest through the proposed SISP. Simply put, it is in the best interests of all stakeholders, not only the Senior Secured Lenders (although certainly, including those parties) to find out, now that the Project is sufficiently advanced so as to be at a marketable stage, whether there is any market interest.

82. To be very clear, in making this conclusion, I accept the (obvious) fact that no one knows what potential bids the process may yield. But that is exactly the point. In my view, it is in the best interests of the stakeholders to find out the answer to that question and let the market speak. It may very well be that, just as the Coco Parties submit, there will be no Qualified Bid (i.e., one that includes, on its own or when aggregated with others, a Minimum Bid Threshold of $1.2 billion).

83. What I cannot do is conclude today on the evidence that such will inevitably be the result, and I certainly cannot reach that conclusion, contrary to the recommendation in the Second Report and the clear and unequivocal submissions of the Receiver and of the Senior Secured Lenders that they, respectively, are of the view that the proposed SISP has a reasonable chance of success and should be undertaken.

84. To go even further, I certainly cannot reach that conclusion with any degree of likelihood or certainty, let alone such as would be required, in my view, to deprive the stakeholders of the chance of testing the market and applying the ultimate litmus test of market appetite. There is simply no evidence upon which I can conclude today that the proposed SISP is hopeless, let alone disingenuously and intentionally so.

85. I also note that while the Senior Secured Lenders are acting in their own self-interest, as is their right as creditors, it is their money principally at risk as interest continues to accrue. They are fully supportive of the proposed process and the time it will take.

86. I further note that the Receiver has a different mandate, and reports to a different constituency: it is a Court-appointed officer with the fiduciary duties appurtenant to that office. While the Receiver is entitled, indeed in the circumstances of this case it is obligated, to take into account the views of the fulcrum creditors, its mandate is broader than that of any individual stakeholder and includes the duty to make recommendations to the Court in the best interests of all stakeholders. I am satisfied that it has done that, in recommending approval of the SISP.

87. I also reject the submission that the Senior Secured Creditors are required to make a binary decision: either step up with a stocking horse bid, or agree to a sales process without any Minimum Bid Threshold.

88. First, there is no requirement that they put forward a stalking horse bid, just as there is no foregone conclusion that such a proposal would make the SISP more beneficial to stakeholders in any event. Creditors are entitled to consider whether or not they wish to put forward such an offer.

89. Second, I do not accept the submission that an automatic consequence of the decision by a fulcrum creditor to not propose a stalking horse bid has the effect of preventing that creditor from insisting on a minimum bid amount or any other terms of a proposed SISP. The fact that a fulcrum creditor may insist on any particular term does not mean that a Court-appointed Receiver, or this Court, will accept such a proposed term, and the result may be that the proposed sales process is not approved.

90. At the risk of being repetitive, I note that any proposed sales process, including all of its terms, must be evaluated as against any available alternatives and considered, according to the *Soundair* Principles and the other factors set out above. The constellation of relevant factors includes,, but is certainly not limited to, the presence or absence of a stalking horse bid and any minimum bid amount, together with all other proposed terms. The analysis is necessarily informed by the particular facts of any individual case, and what is appropriate in one case may be wholly inappropriate in another.

91. Third, I reject the submission that a requirement imposing a minimum bid amount generally, or the requirement of the Minimum Bid Threshold of $1.2 billion proposed in this particular case, is inappropriate.

92. Courts regularly impose minimum bid amounts, and there is nothing improper about doing so. Sometimes, they are imposed without that label, although that is precisely what they are in the sense that courts regularly approve SISPs with a term stipulating, for example, that any qualified bid must satisfy the indebtedness of a creditor with first ranking security. In effect, that is simply a minimum bid amount equal to 100% of the indebtedness of the fulcrum creditor.

93. In the present case, the Senior Secured Lenders propose the Minimum Bid Amount of $1.2 billion. That is a very material sum, to be certain. However, it represents approximately 80% of their outstanding indebtedness. Is it an arithmetically calculated amount? No. Is it a judgment call on their part? Yes. It represents a commercial decision on the part of those parties to require that bids, individually or in the aggregate, yield an amount roughly equal to an 80% recovery rate on their debt, or risk that the proposed SISP may not be approved by the Court.

94. Even if it is approved, they are accepting the risk that it may not yield any qualified bids, with the result that they will be left with the Project, and will be compelled to consider whether they wish to finance the completion of the Project without a transaction, or try again.

95. I pause again to observe for completeness that as noted above, the proposed SISP here contemplates an alternative to an investment or sale as set out above, such that the Minimum Bid Threshold would not be relevant anyway.

96. Having considered the legal test as against the evidence in this case, I am satisfied that the inclusion of this term is reasonable and appropriate. I accept the submission of the Receiver that there is little utility in conducting a sales process to yield a bid below the Minimum Bid Threshold that the Receiver knows will not be accepted by the Senior Secured Lenders.

97. Potential bidders, particularly in a complex mid-construction scenario such as the stakeholders are faced with here, and with a Project of such scale and value, will likely expend material resources in conducting due diligence and considering whether to submit a bid. In my view, all parties are assisted, and the process is improved, if potential bidders have an understanding of whether or not a potential bid has a reasonable prospect of gaining traction.

98. For all of these reasons, I am satisfied that the proposed SISP, including the Minimum Bid Threshold, is appropriate and should be approved.

99. I have also considered the other objections to the process submitted by the Coco Parties (See, for example, Notice of Objection at paragraph 21). In the main, these objections relate to the built-in flexibility of the process, including what I accept is potentially significant discretion on the part of the Receiver to adapt and modify the process as it advances, including the discretion to terminate the process. If Phase I is unsuccessful, the Receiver can change milestones if appropriate, it can require non-disclosure agreements from bidders and their advisors, there is no fixed deposit amount, and it can amend other terms.

100. In my view, it is appropriate to grant the discretion to the Receiver to the extent provided for in this proposed SISP. It is neither efficient nor beneficial to require the Receiver to return to Court, with the attendant expense to all stakeholders, on potentially multiple locations, to tweak the process as it advances.

101. I accept that the process may have to be modified as it proceeds, and that the Receiver is well placed to conduct the process, with the Broker, within the parameters of the Court order approving the SISP. The Receiver is the Court-appointed officer, and in my view, if it cannot be entrusted with the (limited and defined) discretion to adjust the process along the way to yield the maximum beneficial outcome for stakeholders, it ought not to be acting as the Court-appointed officer in the first place.

102. I am satisfied that this Receiver, assisted by JLL, Skygrid and the other advisors, will carry out its mandate according to the terms I have imposed. Finally, if an issue arises that cannot be resolved, any affected party can seek directions from this Court.

103. I pause to observe that both the Coco Parties on the one hand, and the Senior Secured Lenders on the other hand, made opaque references to other proceedings and other facts not before this Court as

potentially impacting the motivations of various parties. In the complete absence of evidence, however, I have given no weight to these submissions.

104. On this record, the Notice of Objection of the Coco Parties is filed on behalf of Coco International Inc. and 12823543 Canada Ltd. I have considered the objections raised, and the weight that should be given to those objections raised by these parties.

105. Coco International is a subordinate lender to the Project, and a party to the Coco Priority Agreements with the Senior Secured Lenders and the Borrower.

106. I accept the submission of the Senior Secured Lenders that the purpose and intention of the parties in entering into the Coco Priority Agreements was to give effect to the first ranking security interest of the Senior Secured Lenders.

107. As a term of the Coco Priority Agreements, Coco International subordinates and postpones its security and indebtedness in all respects to the security indebtedness of the Senior Secured Lenders, which must be paid in full before Coco International is entitled to be paid anything with respect to the Subordinate Indebtedness (Priority Agreement, Clause 6).

108. In addition, pursuant to Clause 13 of the Priority Agreement, Coco International agreed that in the event that the [senior indebtedness] is in default (as it now is), "no actions, steps or proceedings can be taken by or on behalf of [Coco International] that might negatively or detrimentally impact upon the Senior Secured Lenders' ability to expeditiously complete the development, construction management of the Project and/or which might restrict, inhibit, hinder or delay the sale and closing of any portion of the Commercial Component or the individual condominium unit sale transactions in respect of the Condominium Project by or on behalf of the Senior Lender".

109. Finally, and perhaps most importantly, pursuant to Clause 23, in the context of an insolvency involving the Registered Owner, the Beneficial Owner and the Collateral (as this proceeding is), until the Senior Indebtedness is paid in full, Coco International will not "seek any relief or file any motion, application or other action in respect of the Collateral or the Registered or Beneficial Owner without the prior written consent of the Senior Secured Lenders". No such consent has been sought or granted.

110. The Coco Parties submit that none of these contractual provisions operate so as to prevent them from raising objections as they do to the mechanics of a sale process. In my view, the Coco Parties are affected stakeholders and they are entitled to be heard on issues such as the proposed SISP. That is exactly why I have given them that opportunity to be heard, and considered carefully their objections.

111. However, those objections must be informed by, and considered in the context of, the contractual obligations to which the Coco Parties (as sophisticated and well advised commercial parties) consented and agreed. I accept the submission of the Senior Secured Lenders that the objections by the Coco Parties to various terms of the proposed SISP, and to the Minimum Bid Threshold in particular, are (at least) a breach of Clause 23 of the Priority Agreement and their covenant not to seek any relief in respect of the Collateral or the Registered or Beneficial Owner without the prior written consent of the Senior Secured Lenders.

112. This flows from my interpretation of the Priority Agreements to determine the intent of the parties and the scope of their understanding, giving the words the parties used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 47.

113. Even absent the contractual obligations, however, and while a subordinate lender, such as is Coco International here, is certainly entitled to be heard, generally, the position of the senior lender, and particularly a party such as the Senior Secured Lenders here who are the fulcrum creditors will be

accorded more weight. Unless and until the Senior Indebtedness has been repaid in full (and that is far from certain here), the Subordinate Lender has no economic stake in the proceeding.

114. As submitted by the Senior Secured Lenders, it is ironic that the proposed SISP to which the Coco Parties object (on the basis that the costs ought not to be incurred and the time required to run a sales process ought not to be spent) affords the only hope that recoveries might exceed the value of the indebtedness owed to the Senior Secured Lenders such that the Coco Parties might recover anything on their own indebtedness.

115. It is even more ironic that the Coco Parties object to the Minimum Bid Threshold at 80% of that indebtedness, when in fact they are "out of the money" and not contractually entitled to recover anything on their own indebtedness unless and until the Senior Secured Lenders recover fully 100% of their own indebtedness.

116. Finally, with respect to the other Coco party to the Notice of Objection, 12823543 Canada Ltd., it is an equity holder of one of the Borrowers. Specifically, it is a limited partner in, and a 50% equity holder of, the corporate general partner of one of the Borrowers under the Credit Agreement. As such, it is at best an equity holder, the interest of which would rank subordinate to the interests of all creditors in any event. In the circumstances, it is not anticipated that all secured creditors will be paid in full, let alone all unsecured creditors.

117. Accordingly, and having considered the objections raised by the Coco Parties, I am satisfied that the SISP should be approved on the terms proposed.

Result and Disposition

118. For all of the above reasons, the SISP Approval Order, the Reconfiguration Plan and LC Order, and the Holdback Release Order, are approved.

119. Orders to go in the form signed by me today. They are effective immediately and without the necessity of issuing and entering.

Osborne, J.