



SUPERIOR COURT OF JUSTICE
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TITLE OF PROCEEDING: **ROMSPEN INVESTMENT CORPORATION v. TUNG KEE
INVESTMENT CANADA LTD. et al**

BEFORE JUSTICE: **Osborne**

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

The Receivership Application, the Two Sale Approval Motions and the Positions of the Parties

1. The Applicant, Romspen Investment Corporation (“Romspen”), seeks an order allowing the Application and appointing Ernst & Young Inc. as receiver and manager (the “Receiver”) over the assets and property of the Respondents / Debtors Tung Kee Investment Canada Ltd. (TKIC”) and Tung Kee Investment Limited Partnership (“TKIL”) including the property at 3143 19th Ave., Markham, Ontario (the “Property”).
2. The Property consists of three separate legally described parcels which collectively comprise an area of approximately 66.29 acres of developable vacant land. The Debtors had planned a mixed-use development including a film studio, offices a hotel and retail, although that did not proceed.
3. Within the Application, Romspen moves for an order approving an agreement of purchase and sale between Romspen and Times 1010 Inc. (“Times”) dated September 15, 2023, as amended (the “Times Transaction”), and authorizing the Receiver to complete the Times Transaction and vest title to the Property in Times. The Times Transaction is scheduled to close on November 15, 2023. Romspen has first position mortgage security registered against title to the Property.
4. Romspen also seeks as corollary relief a sealing order in respect of Confidential Exhibits 1 through 3 to the Supplementary Affidavit of Wesley Roitman sworn September 29, 2023, and the Confidential Appendices to the First Report of the Proposed Receiver.
5. Sow Capital Ontario Limited (“Sow”) moves by way of its own motion for an order authorizing and permitting the completion of the sale of the Property, under power of sale, to 2816513 Ontario Inc. (the “281 Transaction”). Sow does not oppose the appointment of the Receiver, but seeks in its motion an order that the Receivership Order, if granted, be suspended until after November 30, 2023, the scheduled closing date for the 281 Transaction.
6. The appointment of a receiver is not opposed by any party appearing today, and indeed is supported by the Respondents / Debtors as well as subsequent ranking mortgagees and the holder of a lien registered against title to the Property. As stated, Sow however seeks an order that no receivership powers be executed or acted upon until after the 281 Transaction closes.
7. Approval of either sale transaction is, obviously, contested.
8. Approval of the Times Transaction sought by Romspen is supported by Amber Mortgage Investment Corporation (“Amber”) as second mortgagee, 2149602 Ontario Inc. (“214”) as third mortgagee, and DX Strategies Inc. (“DX”) as lienholder.
9. I pause to observe that DX takes the position that it should be entitled to a priority over all five mortgages although all parties agree that priority and distribution issues are for another day and need not be determined to dispose of the competing motions today.

10. The third mortgagees, Frank Pa and Steven Tung, were represented in Court but did not take a position on either sale.
11. The Respondents / Debtors oppose the approval of either transaction and submit that only an auction conducted by the Receiver can generate the highest price for the Property. They further request that if either transaction is approved, this Court grant an order specifically reserving their rights to bring an action for improvident sale, as their counsel advised they intend to do.
12. By way of related relief, the Respondents / Debtors seek an order that the proceeds of sale be held in trust and not be distributed to any mortgagees until their improvident sale action has been determined.
13. The proposed Receiver, in its First Report dated October 4, 2023, supports and recommends approval of the Times Transaction and recommends that no auction process be undertaken, as the proposed Receiver does not believe that further marketing of the Property would yield any higher or better offers. It submits that the terms of the proposed approval and vesting order are reasonable.
14. Many of the background facts and the chronology are not in dispute.
15. Romspen advanced a secured loan to the Debtors, which are Ontario corporations. The loan has been in default since September 1, 2022. As of July 6, 2023, the amount owing under the Romspen loan was \$32,628,671.54. Interest accrues at a *per diem* rate of \$8359.84.
16. Romspen's security includes a first ranking mortgage over the Property and security interest over all of the personal property of the Debtors. The mortgage and the security documents contain contractual agreements to the appointment of a receiver upon default.
17. There are five mortgages registered on title to the Property including the Romspen mortgage and the Sow mortgage:

Ranking Priority	Creditor	Principal Face Amount
First	Romspen	\$30 million
Second	Amber Mortgage Investment Corporation	\$8.5 million
Third	2149602 Ontario Inc,	\$3,744,759.41 (Cdn) and \$26,279,223.54 (HK)
Fourth	Frank Pa and Steven Tung	\$3.54 million
Fifth	Sow Capital Ontario Limited	\$20 million

18. In addition to the mortgages, a construction lien and certificate of action are also registered against title to the Property. They reflect that the Respondent TKIC is indebted to DX Strategies Inc. in the amount of \$4,653,028.11 in respect of the supply of project management and architectural services.
19. Efforts on the part of the Debtors to refinance and sell the Property have not borne fruit.
20. On October 7, 2022, Romspen made formal demand for payment of its loan and issued a Notice of Intention to Enforce Security under section 244 (1) of the *Bankruptcy and Insolvency Act* ("BIA"). The cure period has long expired. The loan has not been repaid.

21. On October 25, 2022, Romspen issued a notice of sale under its mortgage, and on May 1, 2023, it accepted an offer to purchase the Property although the buyer terminated that agreement prior to the expiry of the condition period. The Property has been subsequently listed for sale by Romspen since April 4, 2023 with Royal LePage as broker.
22. Romspen has lost faith in the ability of the Debtors and their management to resolve the situation, with the result that it seeks the appointment of a receiver pursuant to both section 243(1) of the *BIA* and section 101 of the *Courts of Justice Act* (“*CJA*”).
23. The Appointment Order, if granted, authorizes the Receiver to sell the Property.
24. The Property has been marketed extensively since being listed with Royal LePage in April, and has been listed for sale on MLS for over 160 days. In addition, the Respondents and Sow have been attempting to sell and/or refinance the Property since at least 2021.
25. Romspen therefore seeks the approval of the Times Transaction and an order authorizing the Receiver to complete the Transaction and, upon delivery of a Receiver’s certificate, an order vesting title to the Property, free and clear of all Encumbrances other than Permitted Encumbrances as defined in the Times Transaction, in Times.
26. The Times Transaction reflects a purchase price that is higher than the fair market value of the Property as reflected in appraisals commissioned by each of Romspen and Sow. It is unconditional save for the issuance of an approval and vesting order.
27. For its part, Sow, as fifth ranking mortgagee, served its own Notice of Sale on May 17, 2023 and entered into the 281 Transaction on July 18, 2023. That agreement therefore predates the agreement for the Times Transaction. The 281 Transaction is now unconditional. Sow therefore seeks an order permitting it to complete its power of sale to 281 pursuant to section 23 of the *Mortgages Act*.

The Proposed Receivership

28. The first issue is whether a receiver should be appointed.
29. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?
30. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.
31. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (“*Elleway*”) at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.
32. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

- a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;
- b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
- c. the nature of the property;
- d. the apprehended or actual waste of the debtor's assets;
- e. the preservation and protection of the property pending judicial resolution;
- f. the balance of convenience to the parties;
- g. the fact that the creditor has a right to appointment under the loan documentation;
- h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- i. the principle that the appointment of a receiver should be granted cautiously;
- j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- k. the effect of the order upon the parties;
- l. the conduct of the parties;
- m. the length of time that a receiver may be in place;
- n. the cost to the parties;
- o. the likelihood of maximizing return to the parties; and
- p. the goal of facilitating the duties of the receiver.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

- 33. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54.
- 34. Accordingly, is it just or convenient to appoint a receiver in the present case. In my view, it is.
- 35. While certainly not determinative of the issue, the fact that the appointment of a receiver is not opposed by any party, and the somewhat unusual fact that the appointment of the receiver is in fact consented to and indeed supported by the Respondents / Debtors themselves, is very telling.
- 36. Romspen has a contractual entitlement to the appointment of a receiver in the event of a default, which has clearly occurred here, as is acknowledged by the Respondents. But even more substantively, I am satisfied that a Court-appointed receiver is appropriate here to bring order and transparency to the chaos that has been the hallmark of dealings with the Property for a considerable period of time prior to the bringing of this Application, and continue to date. This chaos is clearly evidenced by the competing

motions for sale approval and the strongly held views and acrimony between and among many of the key stakeholders even today.

37. Chaos is usually antithetical to the achievement of the overarching objective of maximizing recovery for stakeholders. I am satisfied that this objective can be achieved, and indeed in the present circumstances can only be achieved, under the supervision of a Court-appointed Receiver. I recognize, naturally, that if either Transaction is approved, the role of the Receiver will necessarily be materially impacted accordingly.
38. The factors relevant to the appointment of a receiver are easily satisfied here. The Romspen loan has been in default for over a year and has not been repaid notwithstanding demands, the section 244 *BIA* notice, and the Romspen notice of sale. The loan matured according to its terms on January 1, 2023. As is evident from the summary above, the Property is highly leveraged with numerous mortgages. Romspen has lost faith in the ability of the Debtors and their management to address the situation, and none of the efforts of the Debtors to refinance the loan or sell the Property have yielded any results.
39. A Court-appointed receiver will ensure that the interests of all of the stakeholders of the Debtors are considered.
40. The proposed Receiver is an appropriate candidate to fulfil this role and is extremely qualified to do so. It has consented to the appointment.
41. EY is appointed Receiver.
42. In my view, there is no basis or justification here to appoint the Receiver, but suspend or hold in abeyance its ability to exercise its receivership powers. Romspen and the supporting subordinate mortgagees all oppose any such suspension, and so do the Respondents who want the Receiver to immediately commence a sales and auction process.
43. The only party who submits that a suspension would be appropriate is Sow. It advances no adequate basis for what is, effectively, an adjournment of the appointment of the Receiver since for all practical purposes the appointment of the Receiver albeit with the suspension of its powers, amounts to the same thing.
44. Sow makes this request openly and transparently so that the Receiver cannot and will not interfere with the closing of the 281 Transaction. I am satisfied that there is no basis upon which the appointment of the Receiver, which I have found to be both just and convenient now, should be impaired and held in abeyance for approximately two months.
45. In certain circumstances, and particularly with the consent of the parties where there is a pending transaction that is scheduled to be completed imminently, it may well be appropriate to appoint a receiver but suspend for a brief period of time all or some of the powers granted to it under the receivership order. However, I would think it would be the relatively rare case where, on a contested basis, it is on the one hand just or convenient to appoint a receiver at a given point in time, and yet on the other hand also just and equitable that receivership powers not be exercised for a period of time.

Should Either Transaction be Approved?

46. The next issue is whether any (either) Transaction should be approved now, or whether a further sales process ought to be undertaken by the Receiver.

47. The factors to be considered by the Court in determining whether a sale transaction in a receivership should be approved are well settled:

- a. whether the party seeking sale approval has 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.

See: *Royal Bank of Canada v. Soundair Corp.*, [1991] 46 OAC 321 1991, CanLII 2727 (ONCA) at para. 16.

48. Courts have approved immediate sales of property (colloquially referred to as “quick flip sales”) in circumstances where a marketing process was conducted by a party other than a receiver, if the process was nonetheless fair and reasonable and where the court was of the view that no purpose would be served by a further marketing process: see *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 297 (ONSC); *Fund 321 Limited Partnership v. Samsys Technologies Inc.*, 2006 CanLII 13572 (ONSC); *Tool-Plas Systems Inc., Re*, 2008 CanLII 54791 (ONSC) at para. 15; and *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 (“*Montrose*”).

49. In such circumstances, the *Soundair* Principles still apply, but courts will scrutinize with special care the adequacy and the fairness of the sales and marketing process. D. M. Brown, J., as he then was, expressed it this way in *Montrose* at para. 10:

“Quick flip” or “pre-pack” transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a “quick flip” involving the appointment of a receiver and then immediately seeking court approval of a “pre-packaged” sale transaction may well represent the best, or only, commercial alternative to a liquidation. In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek* and *Royal Bank v. Soundair Corp.*, respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in “quick flip” transactions:

Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:

[T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor’s secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

50. I am satisfied that it is not appropriate in the circumstances of this case to direct the Receiver to conduct a further sales and marketing process, with the result that one or other of the two Transactions should be approved now.
51. The availability of the Property, and the opportunity to purchase it if such was desired, has not caught the market by surprise. On the contrary, it has been openly available for approximately two years.
52. I am satisfied that the potential reward to be realized with a further sales process is outweighed by the risk of lower recovery for stakeholders. The Respondents themselves have attempted to sell or refinance the Property since January 2022 and have failed.
53. The process undertaken by or at the direction of Romspen, which is discussed further below, has been robust. Royal LePage was engaged to list the Property for sale on MLS in April, 2023 at a listing price of \$69.5 million. Two offers were received by the initial bid deadline, and Romspen accepted the higher offer although it was subject to a due diligence condition. Regrettably, the buyer terminated the agreement and a few months later, on July 15, 2023, the same buyer submitted an unconditional offer with a purchase price equivalent to 75% of the price originally offered. Romspen did not accept that offer.
54. On July 12, 2023, the listing price of the Property was reduced by \$5 million to \$64.5 million.
55. Royal LePage conducted a process that I am satisfied was thorough and extensive. The Property was listed for sale on MLS for 162 days and exposed to a wide audience of land developers and commercial brokers. The process was multifactorial and included, among other things:
- a. physical signs at the Property;
 - b. advertising on the realtors' business websites and through marketing brochures, as well as advertising on over 100 other websites. Statistics from realtor.ca, the largest online search engine in Canada, reflect that the Property was viewed 6309 times on 32 sites;
 - c. proactive email announcements by Royal LePage to subscribers that included over 1000 cooperating and regional brokers and 201 land developers in Ontario. Of those recipients, 540 brokers and 70 land developers opened the email; and
 - d. advertising specifically to the Mandarin speaking and Asian market in Canada.
56. The Receiver recommends approval of the Times Transaction and states that it does not believe that further marketing of the Property will result in superior offers.
57. In its First Report, the (then proposed) Receiver concludes that Romspen sales process was conducted in a manner that:
- a. was fair to all who participated in it and consider the interests of all parties;
 - b. maintained appropriate efficacy, integrity, and a level playing field for all potential and actual bidders;
 - c. was marketed to a wide range of audiences, including land developers and commercial brokers;
 - d. made sufficient efforts to obtain the best price and not act improvidently; and
 - e. resulted in an offer for the Property that provides certainty as to closing, is higher than all other offers, and is also higher than the three appraisals commissioned for the Property (one by Romspen, and two by Sow).

58. All of these factors lead the Receiver to the conclusion that a further marketing campaign of the Property would not yield higher or better offers.
59. Even Sow submits that appointing a receiver, or at least appointing a receiver with the power to act immediately and not suspending those powers, would increase costs and likely would not realize a more favourable sale price with the result that creditors would be prejudiced (see Wong Affidavit, para. 30).
60. As against this, given the very significant encumbrances against the Property, interest is accruing at a rate of approximately \$709,000 per month. Those costs, combined with the additional professional fees reasonably expected to be incurred to conduct a sales and marketing process, weigh heavily in favour of a realization of proceeds as soon as possible.
61. Finally, I observe that in its responding materials filed on these motions, Sow did not redact confidential information in connection with the 281 Transaction specifically including the purchase price or the results of the appraisals that it had commissioned. That information is reproduced again in its factum, also openly filed. Even at the hearing of these motions, no sealing order was sought by Sow.
62. While this may not be fatal to the success of a further sales and marketing process if one were ordered, I agree with the conclusion of the Receiver that the disclosure of this confidential information is likely to have a negative impact on any future sales process, as it effectively sets a price ceiling at an amount between the two appraisal values now publicly disclosed by Sow. At best, it is unhelpful to a new sales process.
63. For all of these reasons, I am satisfied that a further sales process is neither necessary nor appropriate here.

Which Transaction Should be Approved?

64. The next question, then, is which Transaction ought to be approved: the Times Transaction or the 281 Transaction.
65. In my view, the Times Transaction should be approved.
66. While both Transactions are unconditional and the scheduled closing date for each of them is not sufficiently different to be a material factor (they are only two weeks apart, although given the dollar values at play in the present case even that short period of time represents an interest cost savings of approximately \$334,000 in favour of the Times Transaction), the Times Transaction represents the better outcome for all stakeholders.
67. The purchase price payable under the Times Transaction is higher than:
- a. the purchase price payable under the 281 Transaction;
 - b. the values reflected in the appraisal reports of the appraisers commissioned by each of Romspen (who commissioned one appraisal report from Altus), and Sow (who commissioned two appraisal reports, one each from Avison Young and Wagner Andrews Kovacs respectively); and
 - c. the purchase price payable under the purchase agreement entered into in April, 2023 by the Debtors and the proposed purchaser Lee Li international Inc., by a delta of \$4 million.
68. The proposed purchaser in the Times Transaction, Times 1010, is a well-known developer in the greater Toronto area with a good track record. It has carried on business in Ontario for over 35 years and has completed numerous commercial and residential developments. It has provided Romspen with a letter from its bank confirming that it has the financial resources to close the transaction.
69. On the other hand, the 281 Transaction was entered into on July 18, 2023 with an initial closing date of October 16, 2023. That was subsequently extended to November 30, 2023 although no explanation has

been offered as to why that extension was required or granted. This extension was also sought and granted after the deal had become firm and conditions waived or satisfied, with the result that the unexplained extension of closing is further perplexing.

70. The process leading to the 281 Transaction did not include many of the hallmarks of the typical power of sale process with attendant marketing and sale features. On the contrary, the affidavit evidence of Mr. Philip Wong on which Sow relies, is non-specific. He states that Sow engaged various “investment consultants” to market the Property to “potential investors” and that its investment consultant was actively speaking with the potential buyer but that buyer was “outbid”. There is no explanation for what any of this actually means, and raises more questions than it provides answers. I note that I have specifically reviewed and considered the evidence of Mr. Wong as set out in his affidavit at paragraphs 26 – 35. The Property was not listed on MLS nor widely advertised to the open market.
71. Moreover, Mr. Wong is a director of both the fifth mortgagee, Sow, which endorses and supports the 281 Transaction, and also of the Respondent TKIC. He was involved, at least for a period of time, and the pursuit of zoning and other municipal approvals in respect of the Property and the potential development thereof.
72. The evidence of the Respondents is to the effect that Mr. Wong, the principal of Sow, was a “business partner” of the Respondents, who was involved in both assisting them with their municipal zoning applications and communicating with potential purchasers. They say that Mr. Wong was “well apprised of all of the municipal approvals obtained”. However, they submit, “on or around June, 2023, the Respondents and Mr. Wong had a falling out. The Respondents have not had any business or personal dealings with Mr. Wong or Sow since then.”
73. The Respondents and Sow rely on this “falling out on or around June, 2023”, without further context or explanation, to support their argument that there has been no acting in concert between the Respondents and Sow.
74. There is no evidence of a non-arm’s-length relationship at the relevant time. However, in my view, the unexplained extension of the closing date reflects a greater execution risk with the 281 Transaction, and a sales process undertaken by Sow leading to that agreement that was at best more opaque, and was less transparent and clear, than was the process undertaken by Romspen.
75. Separate entirely from the involvement of Mr. Wong, the Respondents themselves submit, and the evidence of Pui Ling Lai on which they rely states, that the process undertaken by Sow “has not demonstrated that it has sufficiently exposed the Real Property to market” and that “the Real Property was marketed by Sow to a close small group of Sow’s private clients only. Sow did not retain industry recognized commercial realtors and did not demonstrate that it has the necessary commercial real estate experience to market this property for sale.”
76. Another factor is the fact that the affidavit filed by the proposed purchaser and the 281 Transaction (the relevance and appropriateness of which is discussed below) is from Hunter Lam, who is the Vice President of Business Development and Planning of Lee Li Holdings Inc., which he describes as a related and associated company of the proposed purchaser, 281. Lee Li was the purchaser in the earlier agreement of purchase and sale referred to above that ultimately did not close. The position of these parties is that they have no relationship with Sow, the fifth mortgagee who endorses and supports the closing of the 281 Transaction.
77. What remains unexplained is why Sow, who supported the earlier agreement at a purchase price some \$4 million lower than the purchase price reflected in the Times Transaction, now does not support approval of the latter.

78. Having considered all of the relevant factors, I find that the balance favours the process leading to the Times Transaction.
79. Moreover, and in any event, and as stated above, the purchase price payable under the 281 Transaction is less than the proceeds that will be generated under the Times Transaction net of the real estate commission payable to Royal LePage.
80. This itself is a significant factor. That significance is magnified, in my view, when one considers the lack of any explanation from Sow, as fifth mortgagee, to explain its support for the 281 Transaction and its opposition to the Times Transaction, since the risk that it will suffer a greater shortfall is greater with the 281 Transaction.
81. The Respondents rely on the Affidavit of Pui Ling Lai sworn October 5, 2023 in support of their position that neither Transaction should be approved and that the Receiver should undertake a sales and marketing process. They submit that neither Transaction represents the best and highest price for the Property and, as stated above, such can be realized only through a further sales process undertaken by the Receiver.
82. In my view, however, none of those submissions, which are advanced vigorously, can overcome the practical reality that the Property has been exposed to the market as described above for a very significant period of time, and to an audience that includes both any potential purchasers with access to realtor.ca, and specific, targeted marketing to known commercial real estate brokers and land developers. Yet, none stepped forward with a higher price or otherwise more favourable offer.
83. Finally, the Respondents submit that they are really the only fulcrum stakeholders affected by the result here, since Romspen in first position, and maybe also Sow in fifth position, will be paid out in full. They therefore submit that there is no prejudice to any of the mortgagees, specifically including Romspen and Sow, to permit the Receiver time to market and sell the property.
84. I cannot accept that there is no prejudice to the mortgagees. The market is uncertain as evidenced by, among other things, the lack of a large number of offers generally and by the fact that the purchaser under the April, 2023 transaction who initially walked away, subsequently submitted an unconditional offer but only at 75% of its originally proposed purchase price.
85. I cannot accept the bald assertion by the Respondents that this case is distinguishable from the facts in *Elleway*, since the facts here clearly demonstrate that there will be no erosion of realization on security by the mortgagees caused by additional delay. There may very well be erosion of realization by further delay, with the professional costs and the very significant interest that continues to accrue on all of the mortgages.
86. In short, I am satisfied that it is in the best interests of the stakeholders that, as recommended by the Receiver, the Times Transaction, representing an unconditional commitment to purchase the Property in a very short period of time, be approved, and that another sales process is unlikely to yield a higher or otherwise better offer for the Property.
87. It follows that I decline to impose the term urged by the Respondents to the effect that this approval is without prejudice to their right to still attack the transaction as an improvident sale. I accept the submission of Romspen that such a condition or term is antithetical to the basis upon which the sale transaction is approved in the first place. The purchaser in the Times Transaction wants, and in my view is entitled to, a vesting order confirming that title is free and clear. The other stakeholders equally desire this, in order that purchasers are properly incentivized to offer maximum value and favourable terms.
88. Finally, I observe that 281, the proposed purchaser in the 281 Transaction, submitted a Responding Motion Record containing the affidavit of a senior officer of 281 and related entities, submitted a factum, and had counsel who appeared on the motion.

89. As a preliminary matter, I accept the general proposition urged by counsel for Times 1010, that unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. As stated by Farley, J. in *Skyepharm PLC and Hyal Pharmaceutical Corporation*, 1999 CarswellOnt 3641, [1999] O.J. No. 4300, [2000] B.P.I.R. 531, 12 C.B.R. (4th) 87, 92 A.C.W.S. (3d) 455, 96 O.T.C. 172 at para. 8:

Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.

90. 281 argues here that the prohibition expressed in *Skyepharm* does not apply here since 281 does not come to Court as an unsuccessful purchaser, but rather as a successful purchaser under a power of sale proceeding who is entitled at law to have its agreement approved.
91. In the circumstances, and without granting standing, I agreed to hear brief submissions from 281, and, in fairness, therefore from Times 1010. I remain of the view that unsuccessful bidder has no standing to challenge a sale approval motion in respect of that sale to another purchaser. In my view, the fact that in this case the sale agreement was entered into before the Receiver was appointed, does not change that analysis.
92. 281 is still only a proposed purchaser pursuant to one of two transactions before the Court. Its views can and should be accorded little if any weight in a consideration of the appropriate factors affecting the determination of whether a "quick flip" transaction should be approved as set out in *Soundair* and *Montrose*.
93. Even if I am in error with respect to the weight to be given to any submissions from 281, they do not in any event change my conclusion as to the result here.
94. 281 argues that this Court cannot approve the Times Transaction since, as soon the 281 Transaction agreement of purchase and sale was entered into, a constructive trust arose resulting in an equitable conversion that transferred beneficial ownership in the Property to the purchaser under that agreement: in this case, 281.
95. It relies on the decision of the Court of Appeal for Ontario in *Simcoe Vacant Land Condominium Corp. No. 272 v. Blue Shores Developments Ltd.*, 2015 ONCA 378 at paras. 47 and 48.
96. I do not read that decision as supporting the relief sought by 281 in the present circumstances. In *Blue Shores*, the Court of Appeal stated that the common law has long recognized that a valid contract for the purchase and sale of land gives rise to a trust relationship, with the purchaser acquiring a beneficial interest, and that this principle applies to condominiums.
97. However, in *Blue Shores*, there was no insolvency of the debtor (or mortgagor), no competing power of sale proceedings, and no Court-appointed receivership. In my view, that case does not stand for the proposition for which it is advanced here, which is that, effectively and for all practical purposes, a mortgagee who holds a mortgage of an insolvent mortgagor/debtor who has defaulted on that mortgagee's mortgage as well as other mortgages registered on title to the same property, can circumvent completely a process already underway and somehow "trump" that process or the rights of any purchaser that derived therefrom, and force the completion of its own power of sale.

98. That would thwart a fair, open and transparent sales process intended to maximize the outcome for all stakeholders which is the outcome sought to be achieved by the application of the factors as set out in cases like *Soundair* and *Montrose*.
99. To be clear, it is certainly not the case that a mortgagee who holds a mortgage that is in default is not entitled to institute power of sale proceedings, or that a purchaser under that power of sale is not entitled to insist upon the completion of the transaction just because the mortgagor may be in default of its obligations under other mortgages registered against title to the same Property.
100. However, in circumstances such as those present here, where the power of sale proceeding instituted by Romspen was already underway, a subsequent ranking mortgagee ought not to be able to “jump the line” and, off on its own and without the knowledge or involvement of any other parties, enter into an agreement with the purchaser, and then take the position that such an agreement is beyond challenge because the purchaser enjoys an equitable conversion of the beneficial interest in the property through a constructive trust that arises upon execution of the agreement of purchase and sale.
101. The 281 Transaction resulted from the power of sale proceeding initiated by Sow, whose mortgage ranks fifth in priority. Separate and apart from the insolvency context referred to above, the position of Sow is that, as fifth mortgagee, it has the legal right to foreclose any rights of redemption held by prior ranking mortgagees, without paying out the amounts owing under those prior ranking mortgages, and circumvent a sales and marketing process already underway by the first ranking mortgagee. I do not accept that, in the particular circumstances of this case.

Sealing Order

102. Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.42, provides for the Court’s authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.
103. The Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (CanLII):

The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:

- a) court openness poses a serious risk to an important public interest;
- b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22.

104. Under the first branch of the three-part test, an “important commercial interest” is one that can be expressed in terms of the public interest in confidentiality. Here, as in *Sierra Club*, the moving party submits that the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information as well as maintaining the sanctity of contract.
105. As noted above, there is no opposition to the sealing order requested here. In my view, the test is easily met. The material sought to be sealed represents sensitive commercial information that could reasonably be expected to negatively affect any sales and marketing process in the event that the Times Transaction does not close and the Property must be marketed again.
106. Such a result would negatively affect the interests of all stakeholders and the process generally. The order sought is proportionate and time-limited, with effect only until the Transaction is completed.
107. The sealing order is appropriate and is granted.

Result and Disposition

108. The Receiver is appointed and the receivership is effective immediately. The form of receivership order is consistent with the Model Order with the Commercial List modified as appropriate to reflect the circumstances of this proceeding. The terms and scope of the receivership are appropriate.
109. The Times Transaction is approved and the Purchaser is entitled to an approval and vesting order.
110. The sealing order is granted.
111. Orders to go to reflect these Reasons. The draft orders submitted require modest changes to reflect the parties present, the materials reviewed, and the result. Counsel for Romspen may submit revised draft orders for signature through my judicial assistant, Ms. Mary Sibenik at mary.sibenik@ontario.ca.

Owen, J.