

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

VECTOR FINANCIAL SERVICES LIMITED

Applicant

- and -

168 OLD KENNEDY INC.

Respondent

APPLICATION UNDER s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

**FACTUM OF THE RECEIVER**

**Re: Sale Approval**

May 8, 2020

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

155 Wellington St. W., 35<sup>th</sup> Floor

Toronto, ON M5V 3H1

Tel: 416.646.4300

Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)

Tel: 416.646.4330

[jeff.larry@paliaroland.com](mailto:jeff.larry@paliaroland.com)

Elizabeth Rathbone (LSO# 70331U)

Tel: 416.646.7488

[elizabeth.rathbone@paliaroland.com](mailto:elizabeth.rathbone@paliaroland.com)

Lawyers for the Receiver, RSM Canada Limited

**PART I. NATURE OF THE MOTION**

1. This is a motion brought by RSM Canada Limited ("**RSM**"), in its capacity as court-appointed receiver (the "**Receiver**") of the property municipally known as 168 Old Kennedy Road, Markham, Ontario (the "**Property**") for orders, among other things:

- (a) authorizing and directing the Receiver to enter into and carry out the terms of the transaction (the "**Transaction**") contemplated by an agreement of purchase and sale between the Receiver and Wu, Xiao Ling In Trust for a company to be incorporated (now incorporated as 2753129 Ontario Inc.) (the "**Purchaser**") dated April 6, 2020 and amending agreement made as of April 21, 2020 (collectively, the "**APS**"), together with any further minor amendments thereto deemed necessary by the Receiver in its sole opinion;
- (b) vesting title to the Property in 2753129 Ontario Inc., free and clear of claims and encumbrances, upon closing of the Transaction under the APS and the delivery of a Receiver's certificate to the Purchaser;
- (c) approving the Receiver's Second Report dated April 29, 2020 (the "**Second Report**") and the Receiver's conduct and activities to April 29, 2020 discussed therein;
- (d) sealing Confidential Appendix "K" to the Second Report until the closing of the sale of the Property;
- (e) directing amount(s) to be paid by the Receiver from the net proceeds from the sale of the Property;

- (f) authorizing the Receiver to make the Interim Distribution (as defined herein) to Vector Financial Services Limited (“**Vector**”);
- (g) approving the Receiver’s cash receipts and disbursements for the period December 6, 2019 to April 22, 2020; and
- (h) approving the fees of the Receiver and its counsel for the period ending March 31, 2020.

## **PART II. OVERVIEW**

- 2. The Receiver has entered into the APS to sell the Property to the Purchaser subject to the approval of this Court.
- 3. The Receiver believes that the APS represents a commercially reasonable disposition of the Property, and recommends that the Court approve the pending Transaction because:
  - (a) the Property was publicly listed for sale;
  - (b) the Property was exposed to the market for a sufficient period of time in the Sale Process (as described and defined below) approved by this Court and conducted by the Receiver and Avison Young (“**Avison**”);
  - (c) the Property was marketed by Avison, an experienced commercial real estate brokerage;
  - (d) the marketing process was conducted fairly, and in accordance with the sale process approved by this Court;

- (e) the Sale Process led to multiple offers for the Property, and culminated with the APS with the Purchaser;
- (f) the APS represents the most advantageous offer for the creditors of 168, taking into account both the current economic climate in light of the COVID-19 pandemic and the ongoing interest costs being incurred by the debtor, 168 Old Kennedy Inc. (“**168**” or the “**Debtor**”); and
- (g) the APS has the support of Vector, which holds the first-ranking and largest registered interest on title to the Property.

4. The Receiver has filed under seal a confidential appendix, which contains, among other things, summaries of the offers received for the Property, and a copy of the APS and the amendment to the APS.

5. The Receiver requests that Confidential Appendix “K” to the Second Report be sealed pending closing of the Transaction in order to avoid prejudice in the event that the contemplated sale does not close.

### **PART III. FACTS**

#### **A. *The Property***

6. The Property consists of approximately 1.46 acres of vacant, undeveloped land located at 168 Old Kennedy Road, Markham, Ontario.<sup>1</sup>

7. The Property is owned by 168.

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<sup>1</sup> Second Report, Motion Record of the Receiver (“Receiver’s MR”), Tab 2, para. 12, p. 45/155 of the PDF of the Receiver’s MR (the “PDF”).

**B. The Receivership**

8. Vector is a private lender and mortgage broker in the business of originating and administering mortgage loans in Ontario. Vector holds a first mortgage against the Property in the principal amount of \$5,940,000 (the “**Vector Mortgage**”).<sup>2</sup>

9. The Debtor failed to repay the principal amount of the loan on the maturity date of the Vector Mortgage and failed to pay other amounts properly due and owing under the mortgage. On December 6, 2019, pursuant to an application made by Vector, RSM was appointed as receiver of the Property.<sup>3</sup>

**C. Sale Process**

10. On February 21, 2020, the Honourable Justice McEwen issued an Order (the “**Sale Process Order**”), *inter alia*, approving and authorizing the Receiver to commence the sale process proposed by the Receiver (the “**Sale Process**”).<sup>4</sup>

11. The marketing of the Property commenced on February 3, 2020. Interested parties were informed that the deadline for offers for the Property to be received was 4:00 p.m. on March 12, 2020 (the “**Offer Deadline**”).<sup>5</sup>

12. The Receiver provided Avison with a baseline Agreement of Purchase and Sale (the “**Baseline APS**”) for distribution to parties who intended to make an offer to

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<sup>2</sup> Second Report, Receiver’s MR, Tab 2, para. 13, p. 45/155 of the PDF.

<sup>3</sup> Second Report, Receiver’s MR, Tab 2, paras. 14-16, p. 46/155 of the PDF.

<sup>4</sup> Second Report, Receiver’s MR, Tab 2, para. 5, p. 43/155 of the PDF; Appendix C to the Second Report, pp. 91-93/155 of the PDF.

<sup>5</sup> Second Report, Receiver’s MR, Tab 2, para. 18, p. 46/155 of the PDF.

purchase the Property and requested that all offers be made on the form of the Baseline APS, with any changes marked.<sup>6</sup>

13. Further steps taken by Avison in connection with the marketing of the Property included the following:

- (a) on February 3 and 26, and March 10, 2020, emails giving notice of the acquisition opportunity were sent to 889, 1,283 and 1,298 parties, respectively;<sup>7</sup>
- (b) a brochure was prepared and provided to interested parties who clicked on the link in the email;<sup>8</sup>
- (c) on February 11 and 13, 2020, an advertisement of the acquisition opportunity was published in the Globe and Mail newspaper;<sup>9</sup>
- (d) on February 14, 2020, a listing for the Property was posted on the MLS system;<sup>10</sup>
- (e) on February 14, 2020, two “For Sale” banners were installed on the fence at the Property;<sup>11</sup> and
- (f) an online data room was set up and parties that signed a confidentiality agreement (“**CA**”) were given access to additional information on the

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<sup>6</sup> Second Report, Receiver’s MR, Tab 2, para. 19, p. 46/155 of the PDF.

<sup>7</sup> Second Report, Receiver’s MR, Tab 2, para. 20, p. 46/155 of the PDF.

<sup>8</sup> Second Report, Receiver’s MR, Tab 2, para. 20, p. 47/155 of the PDF.

<sup>9</sup> Second Report, Receiver’s MR, Tab 2, para. 20, p. 47/155 of the PDF.

<sup>10</sup> Second Report, Receiver’s MR, Tab 2, para. 20, p. 47/155 of the PDF.

<sup>11</sup> Second Report, Receiver’s MR, Tab 2, para. 20, p. 47/155 of the PDF.

Property.<sup>12</sup> CAs were signed by parties in respect of 16 potential purchasers.<sup>13</sup>

14. In addition, and to further assist with the Sale Process, the Receiver engaged Pinchin Ltd. to prepare an updated Phase I Environmental Site Assessment (the “**Phase I ESA**”) for the Property. A copy of the Phase I ESA dated March 10, 2020 received from Pinchin Ltd., was posted to the data room that day.<sup>14</sup>

***D. The Offers for the Property***

15. As of the Offer Deadline, seven offers were submitted to Avison for the Property.<sup>15</sup>

16. Following receipt of these offers, and after review and consultation with Avison and Vector, parties representing the four offers regarded as having the most favourable terms (the “**Four Parties**”) were contacted and invited to improve or amend their offers and resubmit by noon of March 17, 2020. Two of the Four Parties elected to amend their original offers to purchase as of March 17, 2020.<sup>16</sup> Subsequently, on March 19, 2020, one of the Four Parties withdrew its offer.<sup>17</sup>

17. After reviewing the remaining three offers and consulting with Avison and Vector, on March 27, 2020, the Four Parties were advised by Avison that Vector was prepared to provide financing to a prospective purchaser, and the Four Parties were provided with

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<sup>12</sup> Second Report, Receiver’s MR, Tab 2, para. 20, p. 47/155 of the PDF.

<sup>13</sup> Second Report, Receiver’s MR, Tab 2, para. 35, p. 50/155 of the PDF.

<sup>14</sup> Second Report, Receiver’s MR, Tab 2, para. 22, p. 47/155 of the PDF.

<sup>15</sup> Second Report, Receiver’s MR, Tab 2, para. 24, p. 48/155 of the PDF.

<sup>16</sup> Second Report, Receiver’s MR, Tab 2, para. 25, p. 48/155 of the PDF.

<sup>17</sup> Second Report, Receiver’s MR, Tab 2, para. 26, p. 48/155 of the PDF.

the terms of the potential financing (the “**Vector Financing**”). The Four Parties were invited to amend their offers, including by taking into consideration the proposed Vector Financing, and to resubmit their offers by March 31, 2020.<sup>18</sup>

18. Three parties elected to amend their offers to purchase and the party that had previously advised that it was withdrawing its offer confirmed that it had no further interest in the Property (the “**Third Round Offers**”).<sup>19</sup>

19. The Receiver reviewed and considered each of the Third Round Offers, including terms such as the offered purchase prices, proposed due diligence periods, due diligence terms, and likelihood of closing on a timely basis. The Receiver ultimately proceeded, with the concurrence of Vector, to finalize the offer submitted by the Purchaser.

20. The Receiver worked with Cassels Brock & Blackwell LLP, Vector’s counsel, retained by the Receiver to provide assistance effecting a sale of the Property, to have certain of the terms of the Purchaser’s offer amended in order for the Receiver to be in a position to accept that offer.<sup>20</sup>

21. On April 8, 2020, the Receiver accepted the Purchaser’s offer and executed the APS. The APS was subject to a 10 calendar day conditional period, due to expire on April 18, 2020.<sup>21</sup>

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<sup>18</sup> Second Report, Receiver’s MR, Tab 2, para. 27, p. 48/155 of the PDF.

<sup>19</sup> Second Report, Receiver’s MR, Tab 2, para. 28, p. 48/155 of the PDF.

<sup>20</sup> Second Report, Receiver’s MR, Tab 2, para. 29, p. 49/155 of the PDF.

<sup>21</sup> Second Report, Receiver’s MR, Tab 2, para. 30, p. 49/155 of the PDF.



22. On April 17, 2020, the Purchaser advised that while it was prepared to proceed with the purchase, it was seeking a reduction in the purchase price, as well as an extension of three days to the due diligence period.

23. After negotiations between the Receiver and the Purchaser, on April 22, 2020, a Waiver and Amending Agreement made as of April 21, 2020 (the “**Amending Agreement**”) was executed and the APS became final, subject to the approval of the Court. Terms of the Amending Agreement included an adjustment to the purchase price, an increase in the quantum of the deposit due, and the waiver by the Purchaser of its conditions.<sup>22</sup>

**E. Vector’s Secured Claims**

24. Vector has provided to the Receiver a Mortgage Payout Statement current to May 26, 2020, the anticipated closing date for the Transaction (the “**Vector Statement**”) based on the terms of the APS. According to the Vector Statement, the amount owing by the Debtor to Vector and required to discharge the Vector Mortgage will be, as of the anticipated closing date, \$6,825,009.22, inclusive of principal, interest, fees and the Receiver Certificate Advance (as defined below).<sup>23</sup>

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<sup>22</sup> Second Report, Receiver’s MR, Tab 2, para. 31, p. 49/155 of the PDF.

<sup>23</sup> Second Report, Receiver’s MR, Tab 2, para. 39, pp. 51-52/155 of the PDF; Appendix E to the Second Report, pp. 106-107/155 of the PDF.

**F. Proposed Distribution**

25. The Receiver proposes to make the following payments from the net proceeds of sale from the Property, after payment of property taxes and commissions payable to Avison in respect of the sale of the Property:

- (a) the advance totaling \$15,000 under Receiver Certificate No. 1 plus interest to Vector (the “**Receiver Certificate Advance**”);<sup>24</sup>
- (b) the amount of \$71,262.51, being the total of amounts owing to the Receiver and its counsel on account of their respective unpaid accounts;<sup>25</sup> and
- (c) a distribution to Vector consisting of (i) a non-cash payment representing the financing that the Receiver understands Vector is providing to the Purchaser on closing in the amount of \$4,800,000 (the “**Mortgage Amount**”) plus (ii) a cash payment of up to the amount of the Vector Statement less the Mortgage Amount and the Receiver Certificate Advance (the “**Interim Distribution**”).<sup>26</sup>

**PART IV. ISSUES, LAW AND ARGUMENT**

26. The Receiver’s motion raises the following two legal issues:

- (a) should the Court approve the APS?

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<sup>24</sup> Second Report, Receiver’s MR, Tab 2, para. 41, p. 52/155 of the PDF.

<sup>25</sup> Second Report, Receiver’s MR, Tab 2, para. 41, p. 52/155 of the PDF.

<sup>26</sup> Second Report, Receiver’s MR, Tab 2, para. 44, p. 53/155 of the PDF.

- (b) is it appropriate for the Court to seal Confidential Appendix “K” to the Receiver’s Second Report pending the closing of the Transaction contemplated by the APS?

**A. *The Court Should Approve the APS***

27. The factors to be considered by this Court in its assessment of the approval of a sale by a receiver are well established. A court should consider:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.<sup>27</sup>

28. Having regard to the foregoing, the Receiver submits that this Court should approve the APS and the related relief sought by the Receiver in order to give effect to the Transaction contemplated by the APS. In particular, the Receiver notes the following:

- (a) the Property was publicly listed for sale;<sup>28</sup>
- (b) the Property was exposed to the market for a sufficient period of time in the sale process conducted by the Receiver and Avison;<sup>29</sup>

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<sup>27</sup> *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#) at para 16.

<sup>28</sup> Second Report, Receiver’s MR, Tab 2, paras. 20, 34, pp. 47, 50/155 of the PDF.

- (c) The sale process conducted by the Receiver and Avison was consistent with the process approved by this Court, and provided appropriate exposure of the Property to the market;<sup>30</sup>
- (d) the Property was marketed by Avison,<sup>31</sup> an experienced commercial real estate brokerage;
- (e) the sale process led to multiple offers, and culminated with the APS with the Purchaser;<sup>32</sup>
- (f) the selling price for the Property is reasonable given the information provided to the Receiver and taking into account both the current economic climate in light of the COVID-19 pandemic and the ongoing costs being incurred by 168;<sup>33</sup> and
- (g) the APS has the support of Vector.<sup>34</sup>

29. These factors are consistent with a properly run sales process pursuant to *Soundair*.

30. Further, following the properly run sale process, due diligence by multiple prospective purchasers, and extensive negotiation, the Receiver is of the view that the APS represents the most advantageous offer for the creditors of the Debtor, and

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<sup>29</sup> Second Report, Receiver's MR, Tab 2, para. 34, p. 50/155 of the PDF.

<sup>30</sup> Second Report, Receiver's MR, Tab 2, para. 34, p. 50/155 of the PDF.

<sup>31</sup> Second Report, Receiver's MR, Tab 2, paras. 19-20, pp. 46-47/155 of the PDF.

<sup>32</sup> Second Report, Receiver's MR, Tab 2, paras. 24-31, pp. 48-49/155 of the PDF.

<sup>33</sup> Second Report, Receiver's MR, Tab 2, para. 36, p. 51/155 of the PDF.

<sup>34</sup> Second Report, Receiver's MR, Tab 2, para. 29, pp. 49/155 of the PDF.

recommends approval of the APS. As the Ontario Court of Appeal agreed with and adopted in *Soundair*,

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.<sup>35</sup>

31. In the present case, there are no exceptional circumstances which would warrant a rejection of the Receiver's recommendation.

**B. The Court Should Seal the Confidential Appendix**

32. As noted above, the Receiver seeks an Order sealing Confidential Appendix "K" to the Receiver's Second Report pending the closing of the Transaction contemplated by the APS.

33. The limited circumstances in which this Court should seal part of a record before it were described by the Supreme Court of Canada in the case of *SierraClub of Canada v. Canada (Minister of Finance)*.<sup>36</sup>

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<sup>35</sup> *Soundair* at para 21.

<sup>36</sup> *SierraClub of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#) at para. 45 [*"SierraClub"*].

34. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

- (a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

35. In the context of court-supervised sale proceedings, this Court has routinely applied *SierraClub* and held that it is appropriate to seal information and documentation filed in support of a motion to approve a sale where the materials “disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought”.<sup>37</sup>

36. Sealing these materials is necessary to protect the integrity and fairness of the sales process, preventing competitors or potential bidders from gaining an unfair advantage by obtaining commercially sensitive information, and ensuring the Receiver can maximize value for the Property if the contemplated Transaction does not close.<sup>38</sup>

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<sup>37</sup> *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#) at para. 32 [*GE Canada*].

<sup>38</sup> *GE Canada* at paras. 32-34.

**PART V. ORDER REQUESTED**

37. Further to the foregoing, the Receiver respectfully requests orders substantially in the form attached as Appendices “A” and “B” to the Notice of Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

May 8, 2020



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Jeffrey Larry/Elizabeth Rathbone

**Paliare Roland Rosenberg Rothstein LLP**

Lawyers for RSM Canada Limited

## SCHEDULE “A” – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#)
2. *SierraClub of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
3. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#)



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PROCEEDING COMMENCED AT  
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**FACTUM OF THE RECEIVER**

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**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

155 Wellington Street West  
35th Floor  
Toronto, ON M5V 3H1  
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Fax: 416.646.4301

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