

Court File No. CV-18-598008-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**M.O.S. MORTGAGEONE SOLUTIONS LTD.**

Applicant

- and -

**FINGAL PROPERTIES HOLDINGS INC.**

Respondents

**CONFIDENTIAL SUPPLEMENT TO FOURTH REPORT  
OF THE RECEIVER**

**October 8, 2019**

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## **I. INTRODUCTION**

1. This is the Second Confidential Supplement referred to in the Receiver's Fourth Report. Capitalized terms used but not defined herein have the meanings ascribed thereto in the Fourth Report.
2. For the reasons set out in the Fourth Report, the Receiver is seeking a sealing order in respect of this Second Confidential Supplement and its appendices.
3. The Second Confidential Supplement deals principally with events during the second phase of the sale process; i.e., the period after the relaunch of the sale process in late May of 2019, as described in the Fourth Report.
4. A copy of the CBRE Appraisal, which estimated that the market value of the Property "as is" as at October 4, 2018 was \$5 million, is attached as an appendix to the First Confidential Supplement.

## **II. SECOND PHASE OF SALE PROCESS**

### **Market Feedback During First Phase**

5. As noted in the First Confidential Supplement, CW advised the Receiver that during the first phase of the sale process, some prospective purchasers had expressed concerns about the Property, including the fact that it has been marketed extensively over a number of years. In addition, it was known that the Property had been purchased out of a receivership in 2014 and little or no progress in the completion of the partially constructed improvements have been made since that time.

6. The commentary from potential bidders that the Receiver obtained from CW was that there was a large sense of a project that had sat idle since 2014 with the result that at the very least there has been 4-5 years of lost life of building elements and systems and at worst there has been degradation in the building elements and systems.
7. The commentary also noted that the market for this sort of development has greatly softened in the last few years, such that the sale of the Property for \$7,500,000 in 2014 was likely not replicable now, even assuming it is in the same condition, which may not be the case. As discussed below, however, the Recommended Offer is for \$7,500,000.

#### **Offers Received in Second Phase Sale Process**

8. The Fourth Report provides details on the marketing of the Property in the second phase of the sale process.
9. A total of 4 parties submitted offers to the Receiver, primarily through CW, in the second phase of the sale process. With respect to each of the offers received, the Receiver consulted with CW, and in addition reported to the mortgagees so that they would have an opportunity to provide their views.

##### **a) Offers from Offeror**

10. The sequence of events leading to the Offeror APS is set out in the Fourth Report. A copy of the Offeror APS, entered into by the Receiver on June 13, 2019 subject

to its obtaining an approval and vesting order, is attached as **Confidential Appendix “1”**.

11. The salient features of the Offeror APS, which was substantially in the form of the Receiver's Form APS except regarding the addition of purchaser's conditions, were as follows:

- (a) Purchaser: Offeror (Bridlepath Capital Corporation and Consortia N.A. Limited, solely on behalf of a company to be incorporated and not in their personal capacity).
- (b) Purchased Assets: The Property and books and records of Fingal, on an “as is, where is” basis and with limited representations and warranties by the Receiver.
- (c) Purchase Price: \$8,200,000.
- (d) Deposit: Initially \$100,000 (about 1.2% of the purchase price), to be increased to \$300,000 (about 3.7% of the purchase price) on satisfaction of the Additional Conditions (defined in the next subparagraph). The deposit was subsequently increased on two occasions to a total \$450,000 (about 5.5% of the purchase price) pursuant to amending agreements to the Offeror APS extending the time for satisfaction of the Additional Conditions.
- (e) Material conditions in favour of the Purchaser: Standard conditions (e.g., obtaining by the Receiver of an approval and vesting order), but conditions added relating to obtaining satisfactory financing, the Offeror having the Property inspected by its professional consultants

to determine that the buildings on the Property are in sound structural and mechanical condition and the approval of the terms of the Offeror APS by the Offeror's solicitor (collectively, the "**Additional Conditions**").

- (f) Material conditions in favour of the Receiver: Only standard conditions (e.g., obtaining by the Receiver of an approval and vesting order).
- (g) Closing Date: 10 days after the date of obtaining an approval and vesting order.
- (h) Payment of Purchase Price: Balance due on closing.

12. Despite the Offer's insistence on including the Additional Conditions, after consulting with CW and receiving the mortgagees' input, the Receiver concluded that it should enter into the Offeror APS, subject to Court approval, principally on the basis that the purchase price was the highest offered to that time in the sale process and was significantly higher than the previous highest purchase price offered: \$8,200,000 compared with the \$7,100,000 purchase price in the terminated Initial Approved APS, a difference of \$1,100,000. As such, it appeared that the Offeror APS, if approved by the Court and successfully completed, would generate sufficient net proceeds to pay the entire amount (subject to verification) of Fingal's indebtedness to First Source as well as a material amount of Fingal's indebtedness to Moya.

13. As indicated in the Fourth Report, the Additional Condition relating to the approval of the terms of the Offeror APS by the Offeror's solicitor was satisfied on June 24,

2019, and after a series of extensions to the time for satisfaction of the remaining Additional Conditions, the Offeror waived the financing condition on September 3, 2019. That left the sound structural and mechanical condition of the building (the “**Building Condition**”) as the sole remaining Additional Condition. It was the Offeror’s failure to be satisfied on the Building Condition by the last extended date for its satisfaction, September 11, 2019, that resulted in the automatic termination of the Offeror APS under its terms since the Offeror did not waive the Building Condition.

14. The original date for satisfaction of the Building Condition was July 15, 2019. The Offeror requested several extensions due to a series of delays in its professional consultants conducting inspections of the Property and a further series of delays in these consultants providing their reports to the Offeror.
15. After consulting with CW and the mortgagees, the Receiver granted the extensions requested since not doing so would have exposed the estate to the risk of the Offeror terminating the Offeror APS, and the loss of the favourable purchase price, and to the uncertainties of having to continue to market the Property and potentially obtain a lower price, while professional fees and expenses and interest and costs on the indebtedness owed to the mortgagees would continue to mount. The Final extension granted on September 3, 2019 was in consideration of the Offeror increasing the deposit paid to that time from \$150,000 to \$450,000.
16. On September 11, 2019, the last extended date for the satisfaction of the Building Condition, the Offeror claimed in an email to the Receiver that its detailed investigations had revealed that there is substantial mold damage to the Property,



the remediation of which would likely cost in excess of \$ 2,000,000, based on not only a detailed environmental report from a qualified environmental engineer, but also substantiated by actual bids received from three different mold remediation contractors. The cost to complete the project after the mold remediation, claimed the Offeror, would be much higher than it had originally anticipated, due not only to the poor condition of the building structure and finishes that have been previously constructed, but also due to various components of the Property not being built to code.

17. The Offeror went on to state in its email that it would only be prepared to waive the remaining condition in the Offeror APS based on an abatement of the purchase price to \$5,750,000. This represented a decrease of \$2,450,000 (almost 30%) in the purchase price. This proposed abatement was subject to final approval of the Offeror's Board of Directors as well as execution of an amending agreement acceptable to its lawyers. In subsequent communications with the Receiver, the Offeror proposed a further extension of the time to satisfy the Building Condition.

**b) Offers from the Recommended Purchaser and Termination of Offeror APS**

18. On the afternoon of September 11, 2019, prior to the pending automatic termination of the Offeror APS at 6:00 p.m. that day if the Building Condition were not by then satisfied or waived by the Offeror, the Receiver received an offer from the Recommended Purchaser in substantially the form of the Receiver's Form APS and without any additional purchaser's conditions, for a purchase price of \$7,500,000. This offer price was \$1,750,000 higher (almost 30.5%) than the

\$5,750,000 proposed by the Offeror that day. This was the third offer from the Recommend Purchaser in the second phase of the sale process: the first was submitted on July 17, 2019 for a lower price, and the second was submitted on September 3, 2019 for the same price as the third offer but with a lower deposit.

19. Since the Recommended Purchaser's September 11<sup>th</sup> offer was:
  - (a) for an amount significantly higher than the Offeror's proposed reduced price (which itself was subject to its Board's approval);
  - (b) for an amount \$400,000 higher than it had offered in the Recommended Purchaser's offer submitted on July 3<sup>rd</sup> and provided for a \$1,000,000 deposit;
  - (c) subject to only standard conditions and not to any due diligence, and
  - (d) recommended to the Receiver by CW,

and the Property had already been exposed for approximately 9 months, the Receiver determined that allowing the Offeror APS to terminate and accepting the Recommended Purchaser's September 11<sup>th</sup> offer was the best course of action in the circumstances and so informed the mortgagees in an email sent on September 11, 2019.

20. Therefore, on September 12, 2019, after the automatic termination of the Offeror APS at 6:00 p.m. on the previous day, the Receiver signed back the Recommended Purchaser's September 11<sup>th</sup> offer with a few relatively minor changes. The Recommended Purchaser's acceptance of the Receiver's sign-back (the "**Recommended APS**") was provided to the Receiver on September 13, 2019. The Recommended Purchaser has paid the required total deposit of

\$1,000,000 to the Receiver. A copy of the Recommended APS is attached as **Confidential Appendix “2”**.

21. The Receiver’s reasons for recommending that the Court approve its acceptance of the Recommended APS are set out in the Fourth Report and are summarized in a subsequent section of this Second Confidential Supplement, after a section dealing with other offers received during the second phase of the sale process.

**c) Other Offers Received**

22. Before the Receiver’s negotiations with the Offeror that led to the Offeror APS were completed, the Receiver received an offer from another party. That party was Mike Anobile. Since the purchase price offered, \$6,500,000, was significantly lower than the range of prices being discussed with the Offeror, and the offer contained a broad due diligence condition, the Receiver did not engage in negotiations with this party.
23. On July 11, 2019, when the Property was still subject to the Offeror APS, Riverside Living (2016) Inc. (“**Riverside**”) submitted to MOS an offer to the Receiver for \$8,900,000. There was ambiguity in this offer on whether it contained a purchaser’s due diligence condition. After telephone conversations among the Receiver, GSNH and Riverside’s counsel, Riverside resubmitted its \$8,900,000 offer to the Receiver on July 12, 2019 in substantially the form of the Receiver’s Form APS and without a purchaser’s due diligence condition. The Offer contemplated a \$500,000 deposit, which was not paid on the submission or resubmission of the offer.

24. The Receiver reported to the mortgagees on the offers received from Riverside and on subsequent developments relating thereto, as described in the following paragraphs.
25. Further telephone conversations among the Receiver, GSNH and Riverside's counsel took place over the next few days on the possibility of Riverside increasing its offer (which it declined to do), relatively minor changes to the offer and whether Riverside's counsel was in funds (he was not) to pay the \$500,000 deposit should the Receiver decide to accept Riverside's offer if the Offeror APS terminated.
26. On July 15, 2019, Riverside once again resubmitted its \$8,900,000 offer incorporating the minor changes requested by the Receiver, but Riverside's counsel advised the Receiver that he still was not in funds to pay the \$500,000 deposit.
27. On July 17, 2019, Riverside's counsel informed the Receiver by email that "the funds [for the deposit] are ready but not released to me as one of the partners has yet to sign off on the deal." This was the first indication to the Receiver that Riverside had not yet obtained all internal approvals for its offers despite the fact that it had already submitted two offers without conditions requiring internal approvals. As a result of this and Riverside's counsel still not being in funds to pay the deposit, the Receiver concluded that it would be futile to continue discussions with Riverside and proceeded to grant the Offeror an extension to the time for satisfaction of the Additional Conditions in the Offeror APS.

**d) Recommended APS**

28. By way of expansion to the facts disclosed in the Fourth Report, the salient terms of the Recommended APS are as follows:

- (a) Recommended Purchaser: Lape Holdings Corp., who was also the Initial Approved Purchaser in the Initial Approved APS, approved by the Court in the Initial Approval and Vesting Order. As discussed in the Third Report and Fourth Report, the Recommended Purchaser terminated the Initial Approved APS on May 6, 2019 after a further extension of the due diligence period in the Initial Approved APS was denied by the Receiver.
- (b) Purchase Price: \$7,500,000.
- (c) Deposit: \$1,000,000 (more than 13% of the purchase price), paid in full to the Receiver.
- (d) Purchased Assets: The Property and books and records of Fingal, on an “as is, where is” basis and with limited representations and warranties by the Receiver.
- (e) Material conditions in favour of the Purchaser: Only standard conditions; e.g., obtaining by the Receiver of Approval and Vesting Order on or before October 20, 2019.
- (f) Material conditions in favour of the Receiver: Only standard conditions; e.g., obtaining by the Receiver of Approval and Vesting Order on or before October 20, 2019.

(g) Closing Date: The later of 10 days after the date of obtaining the Approval and Vesting Order or November 8, 2019.

(h) Payment of purchase price: Balance due on closing.

29. As indicated in the Fourth Report, after consulting with the mortgagees and CW, the Receiver concluded that based on:

- (a) the steps taken in the first and second phases of the sale process;
- (b) the length of the sale process to date;
- (c) the thorough exposure of the Property in the sale process;
- (d) the various amounts offered in the offers received;
- (e) the fact that two conditional agreements of purchase and sale terminated as a result of conditions not being satisfied;
- (f) the \$7,500,000 purchase price in the Recommended Offer is \$2,500,000 (50%) higher than the \$5,000,000 amount of the "as is" CRBE Appraisal (specific amounts were not included in Fourth Report); and
- (g) the \$7,500,000 purchase price is the highest offer not conditional on some form of due diligence received during both phases of the sale process (this ground was not included in Fourth Report),

the Recommended Offer is the best option in the circumstances for the stakeholders of Fingal. The Receiver has therefore entered into the Recommended APS, which is subject to Court approval.

30. Also relevant to the Receiver's recommendation are the factors noted in the Market Feedback section above; namely the extensive market exposure of the

Property over several years during a receivership of the former owner in 2014 and subsequently by Fingal, the stalled progress since 2014 in the completion of the improvements (with resulting loss of 4-5 years of building elements and systems and possible degradation, as actually claimed by the Offeror) and the softening of the market for this type of development since 2014.

31. Additional factors relating to the Receiver's recommendation and the reasons for the Receiver's request that the Second Confidential Supplement and the appendices thereto be sealed by this Honourable Court until after the Recommended APS closes are set out in the Fourth Report.

### III. DISTRIBUTION

32. First Source's total secured claim as at November 8, 2019, the earliest closing date under the Recommended APS, is \$6,380,679.70.
33. On October 2, 2019, GSNH provided to counsel for First Source and Moya the Receiver's draft Statement of Estimated Net Realizations for Mortgagees as at November 8, 2019. The Receiver has prepared an updated Statement of Estimated Net Realizations for Mortgagees as at November 8, 2019, a copy of which is attached as **Confidential Appendix "3"**. The updated statement includes the actual fees, disbursements of the Receiver and GSNH for the period June 1, to September 30, 2019, replacing the estimates used in the draft statement, and shows an estimated balance of \$5,863,858 available for distribution to First Source as at November 8, 2019, before deducting any additional reserves for future costs and expenses.

34. As of the date of this Fourth Report, the Receiver has not been advised that both First Source and Moya have consented in writing to the amounts of the distribution payment or payments to First Source, net of a reserve to remain in the Receiver's possession for existing and future costs and expenses of the Receiver. Therefore, pursuant to the General Order the Receiver seeks authority to make a distribution payment or payments to First Source in the amount authorized by the Court out of available net proceeds held by the Receiver, net of a reserve for additional existing and estimated future costs and expenses of the Receiver, upon (a) First Source entering into a reimbursement agreement with the Receiver on terms satisfactory to the Receiver, and (b) the expiry of the applicable appeal period from such authorization order without a notice of appeal or notice of motion for leave to appeal being delivered. Having regard to all relevant factors, the Receiver is of the view that a distribution payment in the amount of \$5,650,000 to First Source is an appropriate amount in the circumstances.

#### **IV. CONCLUSION**

35. For the reasons set out herein, the Receiver recommends that the Court approve the Recommended APS and grant a vesting order since it is the best achievable result at the current time for the estate of Fingal and its approval is not opposed by any of the mortgagees.

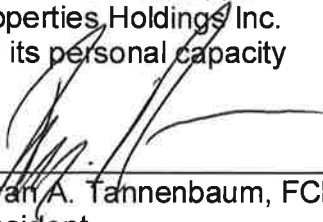
All of which is respectfully submitted to this Court as of this 8<sup>th</sup> day of October, 2019.

***[Signing page follows]***



**RSM CANADA LIMITED**

In its capacity as Court-appointed Receiver of  
Fingal Properties Holdings Inc.  
and not in its personal capacity



Per: Bryan A. Tannenbaum, FCPA, FCA, FCIRP, LIT  
President