

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF
JUSTICE ACT, R.S.O. 1990 C. c.43, AS AMENDED**

BETWEEN:

DOWNING STREET FINANCIAL INC., IN TRUST

Applicant

-and-

**HARMONY VILLAGE-SHEPPARD INC., AS GENERAL PARTNER OF HARMONY
VILLAGE-SHEPPARD LP and CITY CORE DEVELOPMENTS INC.**

Respondents

**FACTUM OF THE APPELLANTS FORTRESS SHEPARD (2016) INC.,
FORTRESS REAL DEVELOPMENTS AND DEREK SORRENTI**

June 29, 2017

ROBINS APPLEBY LLP
Barristers + Solicitors
2600 - 120 Adelaide Street West
Toronto, ON M5H 1T1

Barbara Green LSUC No.: 44140P
bgreen@robapp.com
Tel: (416) 360-3379

Dominique Michaud LSUC No.: 56871V
dmichaud@robapp.com
Tel: (416) 360-3795
Fax: (416) 868-0306

Lawyers for Fortress Sheppard (2016) Inc.,
Fortress Real Developments and Derek
Sorrenti

TO: SERVICE LIST

Service List

BLANEY MCMURTRY LLP

Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto, ON M5C 3G5

Davit T. Ullmann LSUC No.: 42357I

Email: dullmann@blaney.com

Tel: (416) 596-4289

Fax: (416) 594-2437

Alexandra Teodorescu

Email: ateodorescu@blaney.com

Tel: (416) 596-4279

Fax: (416) 594-2506

Lawyers for Downing Street Financial Inc. in Trust

DICKINSON WRIGHT LLP

199 Bay Street, Suite 2200
Toronto, ON M5L 1G4

David P. Preger LSUC No. 36870L

Email: dpreger@dickinsonwright.com

Tel: (416) 646-4606

Lisa S. Corne LSUC No. 27974M

Email: lcorne@dickinsonwright.com

Tel: (416) 646-4608

Lawyers for the Receiver, Rosen Goldberg Inc.

TORYS LLP

79 Wellington Street West
30th Floor
Toronto, ON M5K 1N2

Adam Slavens

Email: aslavens@torys.com

Tel: (416) 865-7333

Fax: (416) 865-7380

Lawyers for Tarion Warranty Corporation

MINDEN GROSS LLP

145 King Street West, Suite 2200
Toronto, ON M5H 4G2

Timothy Dunn

Email: tdunn@mindengross.com
Tel: (416) 369-4335
Fax: (416) 864-9223

Raymond M. Slattery

Email: rslattery@mindengross.com
Tel: (416) 369-4149
Fax: (416) 864-9223

Representative Counsel to Purchasers

BENNETT JONES LLP

3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig

Email: zweigs@bennettjones.com
Tel: (416) 777-6254
Fax: (416) 863-1716

Leonard Gangbar

Email: gangbarl@bennettjones.com
Tel: (416) 777-7478
Fax: (416) 863-1716

Counsel to the Successful Bidders

ROSEN GOLDBERG INC.

5255 Yonge Street
North York, ON M2N 5P8

Brahm Rosen

Email: brosen@rosengoldberg.com
Tel: (416) 224-4210
Fax: (416) 224-4330

CITY CORE DEVELOPMENTS INC.

c/o William (Jack) Pong
2250 Bovaird Dr. E. Ste 114
Brampton, ON L6R OW3

E-mail: bill@citycoredevelopments.com

HARMONY VILLAGE SHEPPARD INC.

c/o William (Jack) Pong
2250 Bovaird Dr. E. Ste 114
Brampton, ON L6R OW3

Email: bill@citycoredevelopments.com

STEPHEN M. TURK

Barristers and Solicitors
23 Lesmill Road, Suite 300
Toronto, ON M3B 3P6

Email: sturk@stephenturklaw.com
Tel: (416) 630-5511
Fax: (647) 317-6076

Lawyers for Marc Silbert Construction

CANADA REVENUE AGENCY

c/o Department of Justice
Ontario Regional Office
The Exchange Tower, Box 36
130 King Street West
Suite 3400
Toronto, ON M5X 1K6

Diane Winters

Email: dianewinters@iustice.gc.ca

MINISTRY OF FINANCE (ONTARIO)

Legal Services Branch
33 King Street West
6th Floor
Oshawa, ON L1H 8H5

Kevin J. O'Hare

Email: kevin.ohare@fin.gov.on.ca

INSOLVENCY UNIT

Province of Ontario

E-mail: insolvency.unit@ontario.ca

DEREK SORRENTI

3800 Steeles Avenue West

Suite 400

Vaughan, ON L4L 4G9

Email: derek.sorrenti@dslaw.com

JYR REAL CAPITAL MORTGAGE

Investment Corporation

7100 Woodbine Avenue

Suite 112

Markham, ON L3R 5J2

William Chen

Email: williamchen58@yahoo.com

OLYMPIA TRUST COMPANY

125 9th Avenue SE

Suite 2200

Calgary, AB T2G 0P6

Email: rrspinfo@olympiatruster.com

AVIVA INSURANCE COMPANY OF CANADA

2200 Eglinton Avenue East

Toronto, ON M1L 4S8

RICHARDSON LAW

PROFESSIONAL CORPORATION

2 St. Clair Avenue West, Suite 1800

Toronto, ON M4V 1L5

Jeremy Richardson

Email: jrichardson@jsrlaw.ca

Lawyers for JYR Real Capital Mortgage Investment Corporation Li
Ruixia

LOOPSTRA NIXON LLP

135 Queens Plate Drive
Suite 600
Toronto, ON M9W 6V7

R. Graham Phoenix

Email: gphoenix@loonix.com
Tel: (416) 748-4776

HARRIS SHEAFFER LLP

4100 Yonge Street
Suite 610
Toronto, ON M2P 2B5

Stephen M. Karr

Email: skarr@harris-sheaffer.com
Tel: (416) 250-3690

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF
JUSTICE ACT, R.S.O. 1990 C. c.43, AS AMENDED**

BETWEEN:

DOWNING STREET FINANCIAL INC., IN TRUST

Applicants

-and-

**HARMONY VILLAGE-SHEPPARD INC., AS GENERAL PARTNER OF HARMONY
VILLAGE-SHEPPARD LP and CITY CORE DEVELOPMENTS INC.**

Respondents

**FACTUM OF THE APPELLANTS FORTRESS SHEPARD (2016) INC.,
FORTRESS REAL DEVELOPMENTS AND DEREK SORRENTI**

PART I - INTRODUCTION

1. Fortress Sheppard (2016) Inc. ("**Fortress**"), Fortress Real Developments Inc. ("**FRD**"), and Derek Sorrenti appeal the decision of Justice Hailey dated June 19, 2017, approving the sale of the property at issue in these proceedings to Pinnacle International One Lands Inc. ("**Pinnacle**") and rejecting a competing credit bid from Fortress (the "**Sale Approval Order**").

2. Rosen Goldberg Inc., the appointed receiver in these proceedings, (the "**Receiver**") has brought this motion for a declaration that: the Appellants do not have a right of appeal under

section 193(c) of the *Bankruptcy and Insolvency Act*¹; that the Sale Approval Order is not stayed pursuant to section 195 of the *BIA*; or, in the alternative, that the stay should be canceled to allow the sale to Pinnacle to proceed.

3. The Appellants strongly oppose this motion for the reasons set out herein.

PART II - SUMMARY OF FACTS

The Appellants

4. FRD and Fortress are principally in the business of real estate development consulting and arranging financing for real estate development projects. FRD, and its related companies, partner with real estate builders and developers. One of FRD's roles is to locate sources of funding which it does through its relationship with mortgage brokers and investment dealers who bring investors' funds to these projects in the form of syndicated mortgages, bonds and promissory notes that are loaned to real estate developers. Following the closing of project sales, the loans are repaid to the investors. FRD's various projects are all stand-alone deals.²

5. A syndicated mortgage (the "**Syndicated Mortgage**") was arranged by Fortress to finance the property municipally known as 3260 Sheppard Ave, East, Toronto (the "**Property**") that is owned by Harmony Village-Sheppard Inc., as general partner of Harmony Village-Sheppard, (the "**Debtor**"). This syndicated mortgage is held in trust by Derek Sorrenti and Olympia Trust Company (collectively, "**Sorrenti**") for 542 investors.³

6. FRD, Fortress and Sorrenti are collectively referred to herein as the "**Appellants**"

¹ RSC, 1985, c. B-3 [*BIA*].

² Affidavit of Vince Petrozza, sworn June 16, 2017 at para 2.

³ *Ibid.*

The Mortgages Registered on The Property

7. In total, there are three registered mortgages on the Property:
 - (a) the first mortgage, which is held by Downing Street Financial Inc., in Trust;
 - (b) the second mortgage, which is held by JYR Real Capital Mortgage Investment Corporation and Li Ruixia, as Tenants in Common; and
 - (c) the third mortgage, which is the Syndicated Mortgage.⁴

8. According to the Receiver's Fourth Report dated June 9, 2017, the Property is subject to the following encumbrances:
 - (a) approximately \$20,000,000 is secured by the first mortgage;
 - (b) approximately \$1,395,000 is secured by the second mortgage; and
 - (c) approximately \$ 31,000,000 is secured by the Syndicated Mortgage.⁵

The Receivership and The Stalking Horse Bid

9. Pursuant to the Order of Justice Hainey dated January 20, 2017, Rosen Goldberg Inc. was appointed as Receiver of all the assets, undertakings and properties of the Debtor and City Core Developments Inc. (the "**Guarantor**"), including the Property. The Court also approved a sale procedure to be conducted by the Receiver with respect to the Property, and authorized the Receiver to enter into an agreement of purchase and sale with Fortress in respect of the Property (the "**Stalking Horse Bid**") which was entered into in January 2017.⁶

⁴ *Ibid* at para 4.

⁵ *Ibid* at para 7.

⁶ *Ibid* at paras 6 and 9.

10. The Stalking Horse Bid established a baseline minimum purchase price for the Property, and the Receiver was directed to canvass the market and invite prospective purchasers to submit competing bids for the Property prior to the deadline of March 21, 2017. The Stalking Horse Bid was effectively a credit bid by Fortress which would ensure a sale price that would be equal to the amounts owing under all three mortgages.⁷

11. Fortress always intended to find a developer to build out the project on the Property and ultimately negotiated the sale of the Property with Pinnacle, pursuant to an Agreement of Purchase and Sale with Pinnacle dated January 4, 2017, (the "**Pinnacle APS**"). The Pinnacle APS required Pinnacle to assume the terms of the Stalking Horse Bid and provided that the parties would readjust amounts of the mortgages to JYR and Sorrenti, post-closing, to mirror financial terms of the Pinnacle APS which were less onerous than the Stalking Horse Bid.⁸

12. Counsel for Fortress advised the Receiver that Fortress intended to assign its agreement of purchase and sale for the Property to Pinnacle and would seek a vesting order in favour of Pinnacle. The Receiver advised that it would not object to this assignment provided the sale price under the Pinnacle APS did not exceed the sale price under the Stalking Horse Bid.⁹

13. No competing bids were submitted to the Receiver for the purchase of the Property prior to the deadline of March 21, 2017.¹⁰

The Termination of the Stalking Horse Bid

14. The Receiver's motion to approve the a sale of the Property under the terms of the

⁷ *Ibid* at para 9.

⁸ *Ibid* at para 11.

⁹ *Ibid* at para 12.

¹⁰ *Ibid* at para 13.

Staking Horse Bid was scheduled for April 7, 2017. Prior to that hearing date, Fortress and Pinnacle attempted to reach an agreement on a replacement purchase agreement to incorporate certain changes that had been discussed by the parties and allow Fortress to complete the purchase of the Property under the terms of the Stalking Horse Bid.¹¹

15. On April 4, 2017, Pinnacle informed Fortress that it would not agree to the Pinnacle APS if Pinnacle was required to assume the agreements of purchase and sale that had previously been entered into by the Debtor (the "**Purchase Agreements**"). Pinnacle advised that selling at the prices stipulated in the Purchase Agreements made the proposed project less financially attractive.¹²

16. After learning of Pinnacle's position with respect to the Purchase Agreements, Fortress sought the Receiver's agreement to amend the Stalking Horse Bid to exclude the requirement that Fortress assume the Purchase Agreements. The Receiver refused to agree to this amendment in the absence of a court order on the basis that to do so would potentially prejudice the purchasers. The Receiver further advised that it was not prepared to seek court approval of an amendment to the Stalking Horse Bid and that Fortress should submit a new bid with new terms.¹³

17. On the basis of Pinnacle's position on the Purchasers' APS, Fortress terminated the Stalking Horse Bid on April 6, 2017, and in so doing forfeited its deposit of \$300,000.00. The Stalking Horse Bid was formally terminated by the Court on April 7, 2017.¹⁴

¹¹ *Ibid* at para 15.

¹² *Ibid* at para 16.

¹³ *Ibid* at para 17.

¹⁴ *Ibid* at para 18 and 22.

Subsequent Offers of Purchase and Sale

18. On April 13, 2017, Fortress submitted a new offer to purchase the Property from the Receiver at the same price as the Stalking Horse Bid but with a higher deposit and without the condition that Fortress assume the Purchasers' APS.¹⁵

19. Concurrent with its submission of this offer, Fortress prepared and forwarded a new offer to Pinnacle dated April 18, 2017. Pinnacle did not respond to this offer and thereafter ceased all communication with Fortress.¹⁶

20. Sometime after the termination of the Stalking Horse Bid, Pinnacle began negotiating a purchase agreement for the Property directly with the Receiver.¹⁷

21. On April 28, 2017, counsel for Fortress advised the Receiver that Fortress would oppose the sale of the Property to Pinnacle on the basis that a sale to Pinnacle would be improper. On April 28, 2017, counsel for Fortress also demanded that Pinnacle refrain from all further communications with the Receiver with respect to its acquisition of the Property.¹⁸

22. By email dated May 3, 2017, the Receiver advised counsel for Fortress that it had accepted an offer to purchase the Property on May 2, 2017, subject to court approval (the "**Pinnacle Offer**").¹⁹

23. Pinnacle used its negotiations with Fortress to induce the termination of the Stalking Horse Bid and acquire confidential information to create the opportunity for it to purchase the

¹⁵ *Ibid* at para 23.

¹⁶ *Ibid* at para 24.

¹⁷ *Ibid* at para 30.

¹⁸ *Ibid* at paras 32 and 34.

¹⁹ *Ibid* at para 35.

Property at a far lower amount, to the prejudice of investors in the Syndicated Mortgage. The details of this conduct is set out in more detail in the Affidavit of Vince Petrozza sworn June 16, 2017 that was filed on the Sale Approval Motion.²⁰

24. Fortress was transparent with the Receiver and Pinnacle in advance of terminating the Stalking Horse Bid and engaged in discussions with the Receiver with respect to its need to terminate the Purchase Agreements. The result is that Pinnacle was able to use confidential information acquired from Fortress to exclude Fortress from the sale process to the detriment of the of the investors in the Syndicated Mortgage.²¹

The Third Offer

25. Fortress remains committed to purchase the Property. Fortress submitted a third offer to purchase the Property on June 16, 2017 (the "**Third Offer**").²²

26. To support the Third Offer, Fortress secured a financing commitment from MarshallZehr which will generate loan proceeds sufficient to pay the cash component of the Third Offer, all closing costs and the costs of the MarshallZehr financing. Fortress provided the Receiver proof of the MarshallZehr financing on a confidential basis.²³

27. Fortress has also entered into a Joint Venture Agreement with an affiliate of the Cortel Group ("**Cortel**"). It is anticipated that the anticipated profits from the new project will result in the second mortgage (JYR) and Syndicatd Mortgage being fully repaid. This will protect the

²⁰ *Ibid* at para 38.

²¹ *Ibid* at para 39.

²² *Ibid* at para 41.

²³ *Ibid* at para 43.

investors in the Syndicated Mortgage.²⁴

28. The Third Offer is substantially on the same terms as Fortress's previous offer save for that the Third Offer provides, amongst other things, that Fortress will provide a "friends and family VIP" event for the individuals who had previously purchased units in the project. Through this event, Fortress will offer these individuals first access to units at the lowest pricing available which is generally 4% less than normal retail pricing and other benefits normally available to a friends and family VIP event.²⁵

29. The Third Offer is for a purchase price materially greater than the Pinnacle Offer. The Third Offer is superior for the following reasons:

- (a) there is more money available for all of the stakeholders, including the Sorrenti investors, the Debtor and the Guarantor. If the Third Offer is accepted, the Sorrenti investors will retain the mortgage on the Property and have the opportunity to recover their debt in full. Otherwise, there will be a shortfall causing a major loss to the Sorrenti investors; and
- (b) the Third Offer provides significant benefits to the Purchasers, as set out above, if Purchasers wish to stay in the Project going forward.²⁶

Fortress Agreed to Indemnify Pinnacle For Its Reasonable Costs

30. Notwithstanding Pinnacle's improper conduct described above, Fortress agreed to indemnify Pinnacle for its reasonable costs incurred in respect of the submission of its offer to purchase the Property from the Receiver. As a result Pinnacle would not be prejudiced had the Third Offer been approved by the Court.²⁷

²⁴ *Ibid* at para 44.

²⁵ *Ibid* at para 41.

²⁶ *Ibid* at para 42.

²⁷ *Ibid* at para 46.

The Sale Approval Motion

31. On June 19, 2017, the Receiver brought a motion seeking the approval of the Pinnacle Offer (the "**Sale Approval Motion**").

32. In response, Sorrenti brought a cross-motion (the "**Sorrenti Motion**") seeking an Order:

- (a) directing the Receiver to accept the Third Offer;
- (b) approving the sale of the Property under the terms of the Third Offer; and
- (c) on closing, vesting title to the Property in Fortress free and clear from all claims, including the claims of purchasers of the condominium units on the Property.

33. The Sale Approval Motion and Sorrenti Motion were both heard on June 19, 2017. At this hearing, Justice Hainey granted the Receiver's request to approve its proposed sale to Pinnacle and dismissed the Sorrenti Motion.

34. In his brief endorsement dated June 19, 2017 (the "**Hainey Endorsement**"), Justice Hainey stated:

"I am satisfied that this motion should be granted. I accept that the Receiver's recommendation in its Fourth Report that the Pinnacle offer to purchase should be approved by the Court as it is the best offer to purchase the Property from the point of view of the majority of stakeholders. I am not persuaded that the Fortress Offer is preferable to the Pinnacle Offer and therefore Fortress' Motion is dismissed. [...]"

35. The terms of the approval of the sale to Pinnacle are set out in the Sale Approval Order. The Order in respect of the dismissal of the Sorrenti Motion has not been issued and entered as of today's date.

36. The result of the Sale Approval Order and the dismissal of the Sorrenti Motion is that the

investors in the Syndicated Mortgage will incur a multi-million dollar loss. If, on the other hand, the Sorrenti Motion had been granted and the Fortress's Third Offer was accepted, the investors in the Syndicated Mortgage would not incur a loss on the sale of the Property.

The Appeal

37. On June 21, 2017, the Appellants filed a Notice of Appeal in respect of the Sale Approval Order and the dismissal of the the Sorrenti Motion (the "**Appeal**"). The grounds of appeal are:

- (a) Justice Hainey made palpable and overriding errors of fact and law resulting in the occurrence of a substantial wrong or miscarriage of justice;
- (b) Justice Hainey erred in accepting the Receiver's recommendation that the Pinnacle Offer be approved as it was the best offer from the point of view of the majority of stakeholders;
- (c) Justice Hainey erred in holding that Fortress's Third Offer was not preferable to the Pinnacle Offer;
- (d) Justice Hainey erred in applying the proper legal test when approving the Pinnacle Offer and dismissing Fortress's motion;
- (e) the investors in the Syndicated Mortgage will incur a loss in excess of \$10,000 should the Property be sold to Pinnacle pursuant to the Sale Approval Order whereas had the Sorrenti Motion been granted and the Third Offer accepted, the investors would not incur a loss on the sale of the Property.

38. The Appellants rely on section 193(c) of the *BIA* as the basis for the Appeal.

The Receiver's Motion For Directions

39. The Receiver has brought the herein motion for, inter alia:

- (a) a declaration that the Appeal is not subject to an automatic right of appeal to the Court of Appeal under section 193(c) of the *BIA*;

- (b) a declaration that the Sale Approval order is not stayed pursuant to section 195 of the *BIA*;
- (c) in the alternative, an Order cancelling the stay in order to permit sale contemplated in the Sale Approval Motion.

PART III – STATEMENT OF ISSUES

40. The issues on this motion are:

- (a) whether the Appeal falls into the category of cases in which an appeal lies to the Court of Appeal as of right pursuant to section 193(c) of the *BIA* or whether the Appellants must obtain leave pursuant to section 193 (e) of the *BIA*; and
- (b) whether there is a stay in respect of the Sale Approval Order pursuant to section 195 of the *BIA*, and if so, whether that stay should be lifted.

PART III – LAW AND ARGUMENT

A. The Appellants have a Right of Appeal under Section 193(c)

41. Section 193(c) of the *BIA* provides for a right of appeal to the Court of Appeal provided the property involved in the appeal exceeds \$10,000.00 in value:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

42. There is no dispute that the value of the Property exceeds \$10,000.00. As such, according to a plain reading of section 193(c) of the *BIA*, the Appellants have a right to appeal to the Court of Appeal.

43. The Ontario Court of Appeal has held that section 193(c) should be narrowly construed such that this section does not apply to the following types of orders:

- (a) orders that are procedural in nature;

- (b) orders that do not bring into play the value of the debtor's property; and
- (c) orders that do not result in a loss.²⁸

44. Justice Hainey's decision on the Sale Approval Motion and the Sorrenti Motion does not fall into any of the above categories. As such, the Appellants submit that, even when narrowly construed, this Appeal falls squarely within section 193(c) of the *BIA*.

The Sale Approval Order was not Procedural in Nature

45. The case law confirms that section 193(c) of the *BIA* does not apply to decisions that are procedural in nature including orders concerning the methods by which receivers or trustees realize an estate's assets.²⁹

46. Examples of decisions which have found to be "procedural in nature" and therefore are not captured by section 193(c) include the following:

- (a) a decision rejecting a party's request to adjourn a motion to approve an proposal under the *BIA*;³⁰
- (b) a decision refusing to allow a party to proceed with a certification application and an unfair labour practice complaint during bankruptcy proceedings;³¹
- (c) a decision approving the auction process to be followed in bankruptcy proceedings;³²
- (d) a decision refusing to set aside the sale of assets by a trustee on the grounds that the *methods by which the trustee disposed of the assets* was improper;³³ and
- (e) a decision directing the trustee on how to proceed with a tender process which

²⁸ 2403177 *Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 53 [*Bending Lake*].

²⁹ *Ibid* at para 54.

³⁰ *Enroute Imports, Re.*, 2016 ONCA 247 at para 5.

³¹ *Romspen Corp. v Courtice Auto Wreckers Ltd.*, 2017 ONCA 301 at paras 21-22.

³² *IceGen Inc., Re*, 2016 ONCA 902 at paras 3-4.

³³ *Re Dominion Foundry Co.*, 1965 CarswellMan 7 at para 18.

was being appealed based on the method by which property was sold.³⁴

47. Justice Hainey's decision on the Sale Approval Motion and the Sorrenti Motion is not analogous to these cases and cannot be considered procedural in nature. Unlike the above noted cases which related to the conduct of bankruptcy proceedings, Justice Hainey's decision dealt directly with the disposition of the Property at issue on this Appeal.

48. In *Bending Lake*, the Court of Appeal held that section 193(c) did not apply to a decision granting a vesting order and refusing a cross-motion to postpone the sale of a property. However, the court reached this decision on the basis that the grounds of the intended appeal were "process-related" in that they related to, *inter alia*, the dealings between the debtor and the purchaser, the disclosure of information by the trustee, and the negotiations between the trustee and the purchaser.³⁵

49. In contrast to the decision in *Bending Lake*, this Appeal deals specifically with the legal principles that were followed by Justice Hainey in reaching his decision on the disposition of the Property. In particular, this Appeal is ground in the issue of whether Justice Hainey followed the proper test when approving the Pinnacle Offer as set out in the Sale Approval Order and rejecting Fortress's Third Offer when he dismissed the Sorrenti Motion.

The Sale Approval Order Brings Into Play the Value of the Debtor's Property

50. The second limitation to section 193(c) is that this section does not apply to decisions which do not call into play the value of the debtor's property.³⁶

³⁴ *Alternative Fuel Systems Inc. v Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 at para 12.

³⁵ *Bending Lake*, *supra* at para 58.

³⁶ *Ibid* at para 59.

51. In *Business Development Bank of Canada v Pine Tree Resorts Inc.*, the Court of Appeal for Ontario held that an order appointing a receiver over assets of a debtor corporation which exceeded \$10,000.00 was not captured by section 193(c) of the *BIA*.³⁷ The court held that "an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets."³⁸

52. Similarly, in *Bending Lake*, the Court of Appeal held that the grounds of debtor's appeal related to postponing the sale did not bring the value of the debtor's property into question and, therefore, did not engage section 193(c).³⁹

53. Unlike the decisions in *Pine Tree Resorts* and *Bending Lake*, Justice Hainey's decision clearly brings into play the value of the Property. By granting the Sale Approval Motion and dismissing the Sorrenti Motion, Justice Hainey approved the sale of the Property and, in so doing, set the value of the Property.

The Sale Approval Order Will Result in a Loss

54. Finally, section 193(c) does not apply to decisions which do not result in a loss. In other words, in order for section 193(c) to apply, the decision in question must contain some element of a final determination of the economic interest of the claimant in the debtor.⁴⁰ In *Trimor Mortgage Investment Corp. v Fox*, the Alberta Court of Appeal articulated this requirement as follows:

"The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and

³⁷ *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 17 [Pine Tree Resorts].

³⁸ *Ibid.*

³⁹ *Bending Lake*, *supra* at para 58.

⁴⁰ *Ibid* at para 61.

confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail."⁴¹

55. In *Bending Lake*, the Court of Appeal held that a decision granting a vesting order did not result in a loss on the basis that, *inter alia*, there was no competing bid on the property and there was no evidence that a valuation was performed on the property. As such, there was no basis on which to conclude that the appellant debtor or any other interested party actually incurred a loss as a result of this decision.

56. In contrast, this Appeal pertains to two competing bids which contained significantly different purchase prices. The sale price contained in the Pinnacle Offer is subject to a sealing order, however the evidentiary record makes clear that sale price of the Pinnacle Offer is many millions of dollars lower than that of the Third Offer. As such, it is clear that if the property is sold Pinnacle as contemplated in the Sale Approval Order, the Debtor's secured creditors – including the investors of the Syndicated Mortgage – will incur a significant loss.

B. Leave to Appeal Should be Granted

57. In the alternative, if this court finds that the Appellants are not entitled to an appeal as a right under section 193(c) of the *BIA*, the Appellants submit that they should be granted leave to appeal under section 193(e) of the *BIA*, which provides:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(e) in any other case by leave of a judge of the Court of Appeal.

58. In considering whether to grant leave to appeal under section 193(e), the court must

⁴¹ 2015 ABCA 44 at para 8, cited with approval in *Bending Lake*, *supra* at para 61.

determine whether the proposed appeal:

- (a) raises an issue that is of general importance to the practice of bankruptcy law or the administration of justice as a whole;
- (b) is *prima facie* meritorious; and
- (c) would unduly hinder the progress of the bankruptcy proceedings.⁴²

59. The test for leave to appeal is not purely merits based. Rather, the court's inquiry must take into consideration all of the above factors.⁴³

The Appeal is Prima Facie Meritorious

60. In order to grant leave under section 193(e) of the *BIA*, the party seeking leave must demonstrate that the appeal is *prima facie* meritorious. In order to meet this criteria, it is not necessary nor proper for the court to assess or decide the ultimate merits of the proposed appeal.⁴⁴ The Appellants respectfully submit that the Appeal is *prima facie* meritorious.

61. As discussed above, the central grounds for this Appeal are that Justice Hainey erred:

- (a) in accepting the Receiver's recommendation that the Pinnacle Offer be approved as it was the best offer from the point of view of the majority of stakeholders;
- (b) in holding that Fortress's Third Offer was not preferable to the Pinnacle Offer; and
- (c) in applying the proper legal test when approving the Pinnacle Offer and dismissing Fortress's motion;

62. As such, this Appeal deals directly with whether Justice Hainey followed the proper principals when deciding to approve the Pinnacle Offer and reject Fortress's Third Offer. The

⁴² *Pine Tree Resorts, supra* at para 29.

⁴³ *Ibid* at para 32.

⁴⁴ *Ravelston Corp., Re*, [2005] OJ No 5351 at para 29 (CA).

duties that the court must perform when deciding whether a receiver who has sold a property acted properly have been articulated as follows:

- (a) the court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improperly;
- (b) the court should consider the interests of all parties;
- (c) the court should consider the efficacy and integrity of the process by which offers are obtained; and
- (d) the court should consider whether there has been unfairness in the working out of the process.⁴⁵

63. Justice Hainey failed to adequately consider these principals in granting the Sale Approval Motion and dismissing the Sorrenti Motion. In particular, Justice Hainey failed to take into consideration the interests of *all stakeholders* but focused instead on which offer was preferable "from the perspective of the *majority of stakeholders*". Based on Justice Hainey's brief endorsement, it is not clear which stakeholders Justice Hainey considered when reaching his determination but what is patently obvious is that Justice Hainey ignored the interests of Sorrenti and the hundreds of investors which funded the Syndicated Mortgage. Put simply, it cannot be said that Justice Hainey applied the proper principals in making his determination and adequately considered the interests of *all stakeholders*.

The Appeal Raises Issues of General Importance to Bankruptcy Law

64. Although the concept of credit bidding has been discussed in U.S. jurisprudence, there are relatively few Canadian decisions which focus on the role of credit bidding in bankruptcy proceedings. Moreover, credit bidding has no statutory basis in Canada as neither the *BIA* nor

⁴⁵ *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205 at para 16 (CA) [*Soundair Corp.*].

the CCAA⁴⁶ Act contain provisions dealing specifically with credits bidding. As a result, there remains some uncertainty as to the proper principals to be applied by the courts when assessing credit bids in the bankruptcy context. This Appeal may provide guidance on this issue and, as such, is of general importance to bankruptcy law in Canada.

65. Moreover, Justice Hainey's decision to accept the Pinnacle Offer on the basis that this offer is in the best interests of the "majority of stakeholders" is inconsistent with the principles set out in *Soundair Corp* and the need to balance the interests of all stakeholders. There is little doubt that the sound application of those principals is of great importance to bankruptcy law in Canada.

The Appeal Will Not Unduly Hinder the Bankruptcy Proceedings

66. In this case, there is no indication that this Appeal will unduly hinder the bankruptcy proceedings. The Appellants filed their Notice of Appeal two days after Justice Hainey reached his decision on the Sale Approval Motion and the Sorrenti Motion. The Appeal can be heard expeditiously.

C. The Sale Should Not be Stayed Pending the Appeal

67. Section 195 of the *BIA* provides for an automatic stay of proceedings upon the filing of an appeal until the court has disposed of the Appeal. This section also allows the Court to cancel or vary a stay if it appears that the Appeal is not being prosecuted diligently, or for such other reasons as the Court deems proper.

⁴⁶ *Companies' Creditors Arrangement, RSC, 1985, c. C-36.*

Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

68. As the party seeking to cancel the stay imposed by section 195 of the *BIA*, the Receiver bears the burden of establishing compelling reasons supporting a cancellation.⁴⁷

69. There is no suggestion that the appeal is not being diligently prosecuted. Rather, the Receiver relies on the Court's more general discretion to cancel a stay "for such other reason as the Court of Appeal or a judge thereof may deem proper".

70. Ontario courts have adopted a variation of the test for granting interlocutory injunctions set out in *RJR-MacDonald Inc. v Canada (AG)* determining whether to exercise their discretion to cancel a stay under section 195 of the *BIA*.⁴⁸ The relevant criteria for determining whether to cancel a stay under section 195 of the *BIA* are as follows:

- (a) whether there is a serious issue to be appealed;
- (b) whether the moving party would suffer irreparable harm if the stay is not lifted; and
- (c) whether the moving party would suffer greater harm than the respondent if the stay is not lifted.⁴⁹

71. However, the Courts have recognized that given that broad discretionary power afforded by section 195 of the *BIA*, a contextual approach which takes into consideration all of the

⁴⁷ *After Eight Interiors Inc. v Glenwood Homes Inc.* 2006 ABCA 121 at para 5 [*After Eight*].

⁴⁸ *Computershare Trust Co. of Canada v Beachfront Developments Inc.* 2010 ONSC 4833 at para 9 citing *RJR-MacDonald Inc. v Canada (AG)*, [1994] 1 SCR 311 [*RJR-MacDonald*].

⁴⁹ *Ibid.*

relevant facts in a case is required.⁵⁰ Consistent with this approach, courts have tended to focus on "the relative prejudice to the parties and the interest of justice generally" when determining whether to cancel a stay under section 195.⁵¹

There is a Serious Issue to be Determined on Appeal

72. Under this first criteria, courts must determine whether the Appeal raises a serious issue. This threshold consideration has been characterized as being exceedingly low and will be met provided the grounds for appeal are not frivolous or vexatious.⁵²

73. As discussed above, the issues raised on this Appeal relate to whether Justice Hainey failed to apply the appropriate test when reaching his decision. It is clear from Justice Hainey's brief endorsement that he based his decision not on the interests of *all stakeholders* but on what was "preferable from the perspective of the *majority of all stakeholders*". This marks a clear departure from the test set out in *Royal Bank v Soundair Corp.* and the well-established duties of the principles to be addressed in deciding whether a receiver has acted properly in agreeing to sell a property.⁵³

Neither The Receiver Nor Any Other Stakeholder Will Suffer Irreparable Harm

74. The second criteria requires the court to consider whether or not the moving party will suffer irreparable harm if the stay is not lifted under section 195. The term "irreparable harm" refers to the nature of the harm rather than its magnitude.⁵⁴ In order to satisfy this criteria, the Receiver must provide evidence that the Receiver or the stakeholders will suffer harm which

⁵⁰ *After Eight, supra* at paras 5-6.

⁵¹ *Ibid.*

⁵² *Matco Capital Ltd. v Interex Oilfield Services Ltd.* 2007 ABCA 317 at para 8.

⁵³ *Soundair Corp., supra* at para 16.

⁵⁴ *RJR-MacDonald, supra* at para 64.

"cannot be quantified in monetary terms or which cannot be cured."⁵⁵ The evidence of irreparable harm must be clear and not speculative.⁵⁶ If the nature of the alleged harm can be calculated in monetary terms, the stay cannot be lifted.⁵⁷

75. In this case, there is no evidence that the Receiver or any other stakeholder will suffer irreparable harm if the stay is not lifted. Contrary to Receiver's claims, a stay of this Court's approved sale to Pinnacle pending a final determination of the Appeal will have no impact on the stakeholders rights or the Receiver's ability to proceed with this approved sale in the event that this Appeal is dismissed. Put differently, it is not clear that any stakeholders will suffer any losses through the delayed completion of the approved sale.

The Balance of Convenience Favours the Stay

76. The final criteria for determining whether this Court should exercise its discretion to cancel a stay requires this Court to balance the potential harm that will be suffered by the moving party in the event that the stay is not canceled against the potential harm that will be suffered by the Appellant if the stay is cancelled.

77. In this case, the balance of convenience clearly favours the preservation of the stay pending the outcome of the Appeal. If the stay is cancelled, the Receiver will by all indications proceed to complete the approved sale to Pinnacle without delay. This would, in effect, finally dispose of the issues in dispute on this Appeal as the Appellants' ability to challenge the approved sale to Pinnacle and gain court approval of its own offer will become moot. Further, given that the substantial difference between the Pinnacle Offer and Fortress's Third Offer, a

⁵⁵ *Ibid.*

⁵⁶ *Barton-Reid Canada Ltd. v Alfresh Beverages Canada Corp.* 2002 CarswellOnt 3653 at para 18.

⁵⁷ *Ibid.*

lifting of the stay would result in a significant financial loss to the 542 parties who invested in the Syndicated Mortgage.

78. On the other hand, if the Receiver is successful on the appeal, the preservation of the stay pending the hearing of the Appeal would do no more than delay Pinnacle's completion of this transaction. In this scenario, the position of the first and second mortgagee would not be prejudiced since the approved sale price exceeds the amount owing on these mortgages.

79. In consideration of the foregoing, it is respectfully submitted that the balance of convenience favours maintaining the stay.

PART IV - ORDER REQUESTED

80. The Appellants request a declaration that:

- (a) the Appellants have a right of appeal under section 193(c);
- (b) in the alternative, the Appellants are granted leave to appeal under section 193(e);
and
- (c) that the approved sale to Pinnacle is stayed pending the hearing of this appeal pursuant to section 195.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: June 29, 2017



Barbara Green

SCHEDULE 'A'
LIST OF AUTHORITIES

1. *2403177 Ontario Inc. v Bending Lake Iron Group Limited*, 2016 ONCA 225
2. *Enroute Imports, Re.*, 2016 ONCA 247
3. *Romspen Corp. v Courtice Auto Wreckers Ltd.*, 2017 ONCA 301
4. *IceGen Inc., Re*, 2016 ONCA 902
5. *Re Dominion Foundry Co.*, 1965 CarswellMan 7 (CA)
6. *Alternative Fuel Systems Inc. v Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273
7. *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282
8. *Trimor Mortgage Investment Corp. v Fox*, 2015 ABCA 44
9. *Ravelston Corp., Re*, [2005] OJ No 5351 (CA)
10. *Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205 (CA)
11. *After Eight Interiors Inc. v Glenwood Homes Inc.*, 2006 ABCA 121
12. *Computershare Trust Co. of Canada v Beachfront Developments Inc.*, 2010 ONSC 4833
13. *RJR-MacDonald Inc. v Canada (AG)*, [1994] 1 SCR 311
14. *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, 2007 ABCA 317
15. *Barton-Reid Canada Ltd. v Alfresh Beverages Canada Corp.*, 2002 CarswellOnt 3653 (Ont. S.C.J.)

SCHEDULE 'B'
TEXT OF STATUTES, REGULATIONS & BY – LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal

Stay of Proceedings on Filing of Appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

**DOWNING STREET FINANCIAL
INC., IN TRUST**

- and-

**HARMONY VILLAGE-SHEPPARD INC., AS GENERAL PARTNER OF
HARMONY VILLAGE-SHEPPARD LP, ET AL.**

Applicant

Respondents

Court File No.: CV-17-11669-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPELLANTS FORTRESS
SHEPARD (2016) INC., FORTRESS REAL
DEVELOPMENTS AND DEREK SORRENTI**

ROBINS APPLEBY LLP

Barristers + Solicitors
2600 - 120 Adelaide Street West
Toronto, ON M5H 1T1

Barbara Green LSUC No.: 44140P
bgreen@robapp.com
Tel: (416) 360-3379

Dominique Michaud LSUC No.: 56871V
dmichaud@robapp.com
Tel: (416) 360-3795
Fax: (416) 868-0306

Lawyers for Fortress Sheppard (2016) Inc., Fortress Real
Developments and Derek Sorrenti