

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

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

- and -

LA PUE INTERNATIONAL INC.

Respondent

FACTUM OF THE RESPONDENT

DATE: February 19, 2025

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TO: SERVICE LIST

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PART I- OVERVIEW

1. By order of the Honourable Justice Cavanagh of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated October 19, 2023 (the “**Receivership Order**”), KSV Restructuring Inc. (“**KSV**”) was appointed as receiver (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of La Pue International Inc. (the “**Company**”), including the real property municipally known as 5528 Ferry Street, Niagara Falls (the “**Property**”).
2. On December 20, 2023, the Court issued an order (the “**Sale Process Order**”) approving a sale process for the Property and certain related assets (the “**Sale Process**”).
3. On January 6, 2025, the Receiver brought a motion seeking to approve (the “**AVO Motion**”) an asset purchase agreement dated April 4, 2024 (the “**APA**”) (as amended by three Reinstatement and Amending Agreements dated July 12, 2024, October 8, 2024 and November 18, 2024), between Lakeshore Luxe Design & Build Group (“**Lakeshore**”) and the Receiver, and vesting in 100835091 Ontario Inc. (the “**Purchaser**”), as assignee of Lakeshore, the Company’s rights, title and interest in and to the purchased assets, including the Property.

4. The Company opposed the relief sought by the Receiver on the basis that: the Receiver had failed to deal with the Company fairly and reasonably; the Receiver was seeking to approve an APA with a Purchaser that had failed to pay deposits on three separate occasions; the Purchaser was not currently registered with the Home Construction Regulatory Authority (the “HCRA”), thereby precluding it from assuming approximately 350 pre-sale unit contracts entered into by the Company and various purchasers; and despite the Company submitting two offers, the Receiver chose to enter into a third Reinstatement and Amending Agreement with the Purchaser.
5. The Company further opposed the relief sought on the basis that the Receiver had failed to satisfy the principles set out in *Royal Bank v. Soundair* and alternatively, the Company requested an opportunity to payout the indebtedness owed to the Applicant before the approval and vesting order sought by the Receiver takes effect.
6. On January 7, 2025, the Honourable Madam Justice Dietrich granted the Receiver’s AVO Motion, approving the APA and vesting title to the Property in the Purchaser (the “**Approval and Vesting Order**”).
7. On January 23, 2025, the Receiver served a motion record seeking an order authorizing an amendment to the Approval and Vesting Order for the purposes of assigning the APA from the Purchaser to 1001082540 Ontario Inc.
8. On January 27, 2025, the Company served a cross-motion record opposing the Receiver’s motion to amend the Approval and Vesting Order and seeking an order granting the Company leave to redeem the mortgage indebtedness owed to the Applicant.

PART II- THE FACTS

Background

9. On or about April 4, 2024, the Receiver and Lakeshore entered into an Asset Purchase Agreement (the “**Original APA**”) for, among other things, the sale of the Property and the assumption of 359 pre-sale agreements entered into with homebuyers (the “**Original Transaction**”).

Reference: Affidavit of Pawel Fugiel, sworn January 27, 2025 (the “**Fugiel Affidavit**”), Respondent’s Cross-Motion Record dated January 27, 2025, Tab 2, at para 6.

10. On June 11, 2024, Lakeshore assigned its right, title and interest in the Original APA to the Purchaser pursuant to an Assignment of Agreement of Purchase and Sale dated June 11, 2024 (the “**Assignment Agreement**”).

Reference: Fugiel Affidavit, Respondent’s Cross-Motion Record dated January 27, 2025, Tab 2, at para 7.

11. On October 8, 2024, the Receiver entered into a Second Reinstatement and Amending Agreement with the Purchaser. This transaction was terminated on or about October 24, 2024, once again as a result of the Purchaser’s failure to pay deposits when due. The Property was subsequently relisted for sale.

Reference: Fugiel Affidavit, Respondent’s Cross-Motion Record dated January 27, 2025, Tab 2, at para 12.

12. Notwithstanding the Purchaser’s inability to close the transaction on three separate prior occasions, the Receiver entered into a Third Reinstatement and Amending Agreement with the Purchaser on or about November 18, 2024.

Reference: Fugiel Affidavit, Respondent’s Cross-Motion Record dated January 27, 2025, Tab 2, at para 13.

Approval and Vesting Order Motion

13. On January 6, 2025, the Receiver brought a motion seeking to approve the APA, as

assigned from Lakeshore to the Purchaser, and subsequently amended by: (1) the Reinstatement and Amending Agreement dated July 12, 2024; (2) the Second Reinstatement and Amending Agreement dated October 8, 2024; and (3) the Third Reinstatement and Amending Agreement dated November 18, 2024.

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at para 14.

14. The Company unsuccessfully opposed the Receiver's motion, which was granted on January 7, 2025.

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at paras 15-16.

15. On January 9, 2025, counsel for the Receiver sent an email to the Court advising that: "We have since been advised by the purchaser that an amendment to the order is required, as the sale agreement has been assigned to another party".

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at para 17, Exhibit B.

16. On January 23, 2025, the Receiver brought a motion in writing to amend the AVO. In of the Receiver's Sixth Report, dated January 22, 2025 (the "**Sixth Report**"), it states at paragraph 2.9 "Since the issuance of the AVO, a request was made to the Receiver that the AVO be amended to reflect the fact that the APA has been assigned by 1000835091 Ontario to 1001082540 Ontario Inc.".

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at para 18.

17. However, the Notice of Assignment of Asset Purchase found at Appendix B of the Receiver's Sixth Report shows that the Purchaser had executed same in favour of 1001082540 Ontario Inc. ("**1001**") on December 5, 2024, more than one month before the Receiver's motion to approve the AVO was heard.

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at para 19.

18. The Purchaser and 1001 had agreed to assign the APA well in advance of the Receiver's January 6, 2025, AVO motion. This was not disclosed to the Court, despite being known to the Receiver as early as December 19, 2024 when the Receiver's representative sent an email stating: "Thank you for your email. Can we arrange one more call. I'm copying the prospective purchaser which intends to undertake much of this work".

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at para 23, Exhibit C.

19. The Company opposed the Receiver's motion to amend the AVO, which was ultimately withdrawn.

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at para 36.

The Company has a Cheque in Hand

20. The Company has secured the necessary funding to redeem the mortgage indebtedness owed to the Applicant. On January 27, 2025, Francois Landry of KRB Lawyers confirmed that his firm was holding funds in trust in the sum of \$19,255,160.00 on behalf of CDS Financial Group and would be receiving an additional \$2,500,000.00 shortly. An additional \$1,455,654.28 was being held in trust by Schneider Ruggiero Spencer Milburn LLP.

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at paras 40-41, Exhibit G, H.

21. On January 28, 2025, the Receiver provided a payout estimate requiring \$22,738,016, which included: the indebtedness owed to the Applicant and per diem interest accrued to January 31, 2025; professional fees; shoring remediation costs; other receivership costs; a refund of part of the first deposit; and a redemption fee owing to Colliers. Per-diem interest is accruing at a rate of \$14,425.21 per day.

22. On February 18, 2025, CDS Financial Group and Fiducia confirmed that the amount of \$23,600,000.00 was being held on behalf of the Company to complete the redemption.

23. There are sufficient funds available to allow the Company to payout the amounts owing to the Receiver in accordance with the payout estimate of January 28, 2025 and the Purchaser's reasonable costs incurred. The Company is ready, willing and able to exercise its right of redemption forthwith and ensure every relevant stakeholder is made whole.

PART III: THE ISSUES

24. The issue to be determined by this Honourable Court is whether the Company should be granted leave to exercise its right of redemption?

PART IV: LAW & ARGUMENT

The Company should be granted leave to exercise its right of redemption

25. The Supreme Court of Canada has held that a mortgagor retains the right of redemption until the court renders final judgment. In *Petranik*, Chief Justice Laskin stated that “the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside.”

Reference: *Petranik v Dale* (1976), [1977] 2 SCR 959, [1976 CanLII 34](#) at 971 (“*Petranik*”).

26. A key consideration and distinguishing factor when seeking to exercise the right to redeem is that the redeeming party shows up at the critical juncture ready and able to pay the relevant debt.

Reference: *Vector Financial Services v. 33 Hawarden Crescent*, [2024 ONSC 1635](#) at [para 83](#) (“*Vector Financial*”).

27. In *Vector Financial*, the Honourable Justice Black of this Court recognized that “in general, a mortgage debtor possesses an important right to redeem, and that right should not be set aside lightly” but that the “the question of the wherewithal of the debtor to cover all

outstanding obligations by the time of the motion to approve a sale of the property has been a critical consideration.”.

Reference: *Vector Financial* [2024 ONSC 1635](#) at [paras 96, 97](#).

28. In *Vector Financial*, the Honourable Justice Black recognized that where a debtor attends a receiver’s motion for the approval of a sale with a cheque in hand and after the receiver had run a lengthy, comprehensive sale process, there would be an “interesting dilemma between the important equitable right to redeem and the policy considerations about protecting the integrity and predictability of the receivership sale process”.

Reference: *Vector Financial* [2024 ONSC 1635](#) at [paras 100-102](#).

29. That dilemma was not before the Court in *Vector Financial*, but the circumstances noted by Justice Black are analogous to the facts present in this case. While the integrity and predictability of the receivership process must be protected, the best way to do so is to ensure that every stakeholder’s made whole through the Company’s redemption.

Reference: *Vector Financial* [2024 ONSC 1635](#) at [paras 100-102](#).

30. In *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, the Honourable Justice Koehnen considered a debtor’s right to redeem, which His Honour stated, “remains the core principle of real estate law”.

Reference: *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, [2020 ONSC 3659](#) (“*BCIMC*”), [at para 40](#).

31. In *BCIMC*, the Honourable Justice Koehnen considered the prejudice to different stakeholders, the lack of clean hands on the part of the debtor and concluded that:

“In the circumstances of this case, those factors do not outweigh the debtor’s equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself

available for a speedy determination of what those costs should be in the event the parties disagree.”

Reference: *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, [2020 ONSC 3659](#), at [para 52](#).

32. Deference must be afforded to a debtor who wishes to redeem. In circumstances such as these, every interested stakeholder is made whole, which ultimately would represent the perfect ideal result in a receivership.

Reference: *Kruger v Wild Goose Vintners Inc.*, [2021 BCSC 1406](#), at [para 73](#).

33. In considering whether a debtor should be able to exercise its right to redeem, a balancing analysis is required, whereby the Court balances the guiding principles of the sanctity of the receivership sales process with that of the right of the debtor to redeem.

Reference: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, [2024 ONSC 4000](#) (“*Peakhill*”), at para 21.

34. The Court of Appeal in *Rose-Isli Corp v. Smith* set out principles to guide consideration of whether in specific circumstances one should be granted leave to redeem and found:

- a. “In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- b. “Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court’s process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and”
- c. “In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.”

Reference: *Rose-Isli Corp v. Smith* [2023 ONCA 548](#) (“*Rose-Isli*”), at [para 9](#).

35. In *Peakhill*, the Honourable Justice Sutherland referenced the findings in both *BCIMC* and *Rose-Isli*, and held that:

- a. “Allowing the respondent in these circumstances would not have a significant impact on the integrity of the system. There was only one bidder whose bid was significantly less than the First Agreement. All creditors are being paid in full. KSV is being paid in full. The Break Fee and legals costs are being paid into Court for security for 255. The purpose of the receivership is being fulfilled.”
- b. “All affected interests have been taken into consideration and all but one, 255, agree with the granting the respondent the right to redeem. Though usually the Court approved system that is in compliance should not be disturbed, the factual situation falls, in my view, to outside what is usual. In that vein, I agree with the respondent, the applicant, KSV, the second mortgagee, the guarantors and the tenants that this circumstances here are unusual and exceptional.”
- c. “Balancing all the interests, it appears to this Court that the factors favour the granting of the respondent’s right to redeem”

Reference: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, [2024 ONSC 4000](#), at para 35.

36. Justice Sutherland’s findings in *Peakhill* were affirmed by Justice Brown of the Court of Appeal.

Reference: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, [2024 ONCA 558](#).

37. The Honourable Madam Justice Steele of this Court recently held that:

“The jurisprudence provides for a balancing act that the court must engage in when faced with a debtor who wants to redeem. After a receiver has gone through an exhaustive bidding process, including the costs associated therewith, to find a purchaser, the court may still permit a last-minute redemption where the debtor comes with a cheque in hand: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 4000 at para. 7-9.”

Reference: *First Source Financial Management v. Chacon Strawberry Fields Inc.*, [2024 ONSC 7229](#), at [para 25](#).

38. The Company has secured the funds necessary to repay the indebtedness owed to the Applicant and all associated costs of the receivership proceeding, proof of which has been provided to the Receiver and its counsel. Similar to the *Peakhill* decision, the Company

has agreed to pay the Purchaser's reasonable costs incurred to ensure that it is made whole and no prejudice is suffered.

Reference: Fugiel Affidavit, Respondent's Cross-Motion Record dated January 27, 2025, Tab 2, at paras 40-41, Exhibit G, H.

39. Allowing the Company to redeem its mortgage would not significantly impact the system's integrity as the purpose of the receivership proceeding would be fulfilled and all relevant stakeholders would be made whole. In balancing the interests of the parties, there is no dispute that the Company's redemption will result in a better financial recovery for all stakeholders involved.

Reference: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, [2024 ONSC 4000](#), at para 35.

PART V: ORDERS REQUESTED

40. The Company respectfully requests an Order granting the Company leave to exercise its right of redemption.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED, this 19th day of February, 2025.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Petranik v Dale* (1976), [1977] 2 SCR 959, 1976 CanLII 34
2. *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635
3. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 4000
4. *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 558
5. *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, 2020 ONSC 3659
6. *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA)
7. *Rose-Isli Corp v. Smith* 2023 ONCA 548

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Courts of Justice Act, R.S.O. 1990, c. C.43

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100

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