

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

1434399 ONTARIO INC.

Respondent

**BOOK OF AUTHORITIES OF THE RECEIVER,
MSI SPERGEL INC.**
(Returnable May 20, 2025)

May 16, 2025

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TO: **THE SERVICE LIST**

Court File No. CV-23-00082432-0000

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1	<i>Rose-Isli Corp. v. Smith</i> , 2023 ONCA 548, CarswellOnt 12803

TAB 1

KeyCite treatment

Most Negative Treatment: Distinguished

Most Recent Distinguished: [First Source Financial Management v. Chacon Strawberry Fields Inc.](#) | 2024 ONSC 7229, 2024 CarswellOnt 20491 | (Ont. S.C.J., Dec 23, 2024)

2023 ONCA 548

Ontario Court of Appeal

Rose-Isli Corp. v. Smith

2023 CarswellOnt 12803, 2023 ONCA 548, 2023 A.C.W.S. 4149, 9 C.B.R. (7th) 53

Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation and 2735440 Ontario Inc. (Applicants / Appellants) and Michael J. Smith, Frank Servello, 2735447 Ontario Inc., Capital Build Construction Management Corp. and Frame-Tech Structures Ltd. (Respondents / Respondents)

C.W. Hourigan, David Brown, P.J. Monahan JJ.A.

Heard: August 14, 2023

Judgment: August 21, 2023

Docket: CA COA-23-CV-0222

Proceedings: affirming *Rose-Isli Corp. v. Frame-Tech Structures Ltd.* (2023), 6 C.B.R. (7th) 129, 2023 CarswellOnt 1532, 2023 ONSC 832, Kimmel J. (Ont. S.C.J. [Commercial List])

Counsel: Jason Wadden, Carlos Sayao, Theodore Milosevic, for Appellants

Mordy Mednick, for Respondents, Frame-Tech Structures Ltd., Frank Servello, Capital Build Construction Management Corp. and 2735447 Ontario Inc.

Sharon Kour, Brendan Bissell, for Receiver, Ernst & Young Inc.

Nathaniel Read-Ellis, for Ora Acquisitions Inc.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

[VII](#) Receivers

[VII.6](#) Conduct and liability of receiver

[VII.6.a](#) General conduct of receiver

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Debtor engaged in joint venture for development of proposed six-story mixed use residential and commercial development — Secured fulcrum creditor held second mortgage on property, and first mortgage was later assigned to secured fulcrum creditor's financier — Receiver was appointed under oppression remedy in [Business Corporations Act](#) — Receiver engaged in sale process, in which secured fulcrum creditor participated but ultimately did not make bid that was accepted — After receiver approved sale to purchaser, secured fulcrum creditor claimed it wished to redeem mortgage on property — Receiver brought motion to approve sale and for related relief; secured fulcrum creditor brought cross-motion to redeem property, resulting in motion being granted and cross-motion being dismissed — Trial judge found secured fulcrum creditor only sought to redeem at end of sale process that it was consulted on and participated in, after it became apparent that it was not able to make competitive bid by time of extended bid deadline — Trial judge found if sale process is sound, it should not be permitted to be interfered with by later attempt to redeem — Trial judge found other stakeholder interests were either neutral or militated in favour of preserving integrity of sale process — Trial judge found order made to approve deemed termination of unit purchaser agreements

in development — Trial judge found principles for approving sales agreement were met — Ancillary orders including sealing order were approved — Secured fulcrum creditor appealed — Appeal dismissed — Exercise of right of redemption had to take into account reality that property remained subject to active receivership, which engaged interests beyond those of second mortgage — Proper principles were considered in determining whether redemption should be allowed — Determination that sales process was fair was reasonable.

Table of Authorities

Cases considered:

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 3659, 2020 CarswellOnt 8665, 81 C.B.R. (6th) 283 (Ont. S.C.J.) — referred to

Ron Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) — considered

Rose-Isli Corp. v. Frame-Tech Structures Ltd. (2022), 2022 ONSC 4135, 2022 CarswellOnt 10439, 100 C.B.R. (6th) 246 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Statutes considered:

Mortgages Act, R.S.O. 1990, c. M.40

s. 2 — referred to

APPEAL by creditor from order approving sale of property reported at *Rose-Isli Corp. v. Frame-Tech Structures Ltd.* (2023), 2023 ONSC 832, 2023 CarswellOnt 1532, 6 C.B.R. (7th) 129 (Ont. S.C.J. [Commercial List]).

Per curiam:

1 The appellants appeal the approval and vesting order issued by the motions judge that authorized the receiver, Ernst & Young Inc., to proceed with a sale of the property in receivership, as well as a related ancillary order.

2 The appellants had sought the appointment of the Receiver over the property. One of the appellants, 2735440 Ontario Inc. ("273 Ontario"), held a second mortgage on the property. The order appointing the Receiver contemplated it would engage in a sales process for the property. The Receiver secured court approval for a sales process, conducted a sales process, and then sought court approval of the successful bid.

3 At this point, the appellants opposed the proposed sale and, instead, sought an order that 273 Ontario could redeem the first mortgage or, alternatively, be recognized as a successful creditor bidder. The motions judge granted the Receiver's approval motion and dismissed the appellants' cross-motion for redemption. The appellants submit the motions judge erred in so doing.

4 As an initial matter, it is worth recalling how the judge who granted the appointment order described the "lay of the land" at the time the appellants requested the appointment of a receiver over the property. At para. 11 of his reasons, *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2022 ONSC 4135, the appointment judge stated:

It is common ground that the relationship between and among the parties has irrevocably broken down... Indeed, the fact that the relationship has broken down is reflected in the relief sought, one way or the other, by all parties today: they all agree that the Rosehill Project should be sold, and that the sale process should be undertaken by a court-appointed officer.

5 The appellants submit the motions judge erred in dismissing their cross-motion because the second mortgagee, 273 Ontario, pursuant to s. 2 of the *Mortgages Act*, R.S.O. 1990, c. M.40, had an absolute right to redeem the first mortgage at any time, even where a court-approved sales process had been undertaken and the receiver was seeking court approval of a bid.

6 We disagree.

7 273 Ontario, as one of the applicants for the appointment of a receiver, consented to the Appointment Order. Section 9 of the Appointment Order qualified any encumbrancer's right to redeem a mortgage on the properties under receivership.

The section states that "all rights and remedies against the Company, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court." See also: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.* 2020 ONSC 3659, at paras. 33 and 41.

8 The motions judge recognized that the issue for determination was not whether 273 Ontario had a right to redeem but the more pragmatic issue of whether it should be permitted to exercise that right once the court-approved sales process had run its course and the Receiver had entered into an agreement with the successful bidder: Reasons, at paras. 73-74. This properly framed the issue: the appellants had sought the appointment of the Receiver; the Receiver had undertaken the sales process approved by the court; and the Receiver had not been discharged. Accordingly, the ability of 273 Ontario to exercise a right of redemption had to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee.

9 We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:

- 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;
- 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
- 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.

10 We adopt the rationale for those guiding principles articulated in *Ron Handelman Investments Ltd. v. Mass Properties Inc.* 200955 C.B.R. (5th) 271 (Ont. S.C.), where the court stated, at para. 22:

A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

11 We see no error in the motions judge's identification of the interests at play in the required balancing exercise: Reasons, at paras. 84-95.

12 The appellants repeat before us the numerous complaints they made below about the lack of fairness in the sales process. The motions judge canvassed those complaints in considerable detail and found no merit in any of them. Her conclusion that the conduct of the sales process met the *Soundair* criteria was reasonable and free of palpable and overriding error, anchored as it was in the specific evidence before her: Reasons, at paras. 97-131.

13 Finally, we see no reversible error in the motions judge's conclusion that the balance favoured protecting the integrity of the sales process over 273 Ontario's request to redeem, including her treatment of the last-second assignment of the first mortgage to 273 Ontario's financier, Toronto Capital.

14 The appeal is dismissed.

15 The appellants shall pay the Receiver its costs of the appeal fixed in the amount of \$35,000.00, inclusive of disbursements and applicable taxes.

Appeal dismissed.

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Respondent

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