

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

BETWEEN

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and -

BUILDING & DEVELOPMENT MORTGAGES CANADA INC.

Respondent

**APPLICATION UNDER SECTION 37 OF THE
MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT, 2006, S.O. 2006, c.
29 and SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C.43**

TWENTY-EIGHTH REPORT OF THE TRUSTEE

March 21, 2022



FAAN Mortgage Administrators Inc.
Court-Appointed Trustee of the Respondent

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TWENTY-EIGHTH REPORT OF THE TRUSTEE

March 21, 2022

INTRODUCTION

1. On April 20, 2018, pursuant to an order (“**Appointment Order**”) of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (“**Court**”), FAAN Mortgage Administrators Inc. (“**FAAN Mortgage**”) was appointed as trustee (“**Trustee**”) over all of the assets, undertakings and properties of Building & Development Mortgages Canada Inc. (“**BDMC**”) including, without limitation, all of the assets in the possession or under the control of BDMC, its counsel, agents and/or assignees but held on behalf of any other party, including, but not limited to, lenders under syndicated mortgage loans (“**Investors**”), brokers, or borrowers, in each case whether or not such property was or is held in trust or was or is required to be held in trust (collectively, the “**Property**”). The Appointment Order was issued following an application made by the Superintendent of Financial Services pursuant to section 37 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (Ontario), as amended (“**MBLAA**”), and section 101 of the *Courts of Justice Act* (Ontario), as amended. A copy of the Appointment Order is attached as **Appendix “1”**.

2. On October 30, 2018, this Court issued an Order (“**Realized Property Order**”) that, among other things,
 - (a) required the Trustee to distribute (when aggregated with previous distributions) 70% of (I) all funds held or received by the Trustee as a result of a repayment (in whole or in part) of principal on any loan or other indebtedness administered by BDMC on behalf of Investors, whether or not (i) secured by any Real Property Charges in the name of BDMC or an RRSP Trustee, (ii) received before or after the date of the Appointment Order, or (iii) paid or payable in trust, plus (II) all interest paid or payable to BDMC or the Trustee at the time such repayment (in whole or in part) of principal is made (collectively, “**Realized Property**”);
 - (b) required the Trustee to retain 30% of all Realized Property; and
 - (c) authorized the Trustee to use the retained Realized Property to aid the Trustee in complying with the Appointment Order and in carrying out its mandate, as the Trustee, in its sole discretion, considered necessary or desirable for the administration of the estate, including in respect of those matters set out in paragraph 17 of the Order made by the Court in these proceedings on June 26, 2018 (“**Interim Stabilization Order**”).
3. The Realized Property Order, as amended, requires the Trustee to distribute (when aggregated with previous distributions) 85% of all Realized Property to Investors.
4. The Trustee has, in total, delivered twenty-seven reports to Court (collectively, the “**Reports**”) detailing the Trustee’s activities during these proceedings, providing updates to stakeholders on various projects and providing information in support of Orders sought by the Trustee. Notably, on January 18, 2022, the Trustee delivered its twenty-seventh report in these proceedings (“**Twenty-Seventh Report**”), which provided, among other things, a comprehensive update on the Trustee’s activities and support for the Trustee’s request for the January 2022 Omnibus Order.
5. Further, as described in the Reports, the Trustee continues to attempt to maximize recoveries for Investors. As part of those efforts and as noted in its Twenty-Seventh Report, the Trustee commenced litigation against Diversified Capital Inc. (“**Diversified**”) seeking to recover certain of the amounts paid to Diversified from the proceeds of the Sale Transaction (defined further herein), in priority to those Investors

that had advanced funds in a real estate development project known as the South Shore Project (“**South Shore Investors**”).

6. Capitalized terms used but not otherwise defined in this twenty-eighth report (“**Report**” or “**Twenty-Eighth Report**”) have meanings ascribed to them in previous Reports. Materials filed with the Court with respect to these proceedings, including the Reports and the various Court orders issued in these proceedings, are accessible on the Trustee’s website at: www.faanmortgageadmin.com (“**Trustee’s Website**”). The Trustee intends to maintain the Trustee’s Website for the duration of these proceedings and will be updating it as appropriate.

PURPOSE OF THE TWENTY-EIGHTH REPORT

7. The Trustee is filing this Twenty-Eighth Report in support of the requested relief set out in the Trustee’s Notice of Motion dated January 10, 2022, for an Order that would, among other things, require:
 - a) the immediate payment by Diversified to the Trustee of the Disputed Amounts (defined below);
 - b) the Trustee’s costs on a partial indemnity basis; and
 - c) such relief or other Orders incidental to or related to the relief requested in this Report (“**Diversified Payment Order**”).
8. All capitalized terms used above and not otherwise defined are defined later in this Report.

SCOPE AND TERMS OF REFERENCE

9. In preparing this Twenty-Eighth Report, the Trustee has relied upon unaudited financial and other information provided by, *inter alia*, BDMC, Olympia Trust Company (“**Olympia**”), Fortress Real Developments Inc. (“**Fortress**”), Canadian Development Capital & Mortgage Services Inc. (“**CDCM**”), the mortgage brokerage who assumed the mortgage brokerage duties of BDMC, Diversified, Robins Appleby LLP (Diversified’s legal counsel) and Colliers Macaulay Nicolls Inc. (“**Colliers**”) and certain other individual borrowers who have borrowed funds from BDMC under various syndicated mortgage loans administered by BDMC. However, the Trustee notes that

it cannot be certain that it is in receipt of all applicable and relevant information with respect to the projects and the administration business of BDMC. While the Trustee reviewed various documents provided by BDMC, CDCM, Fortress, Diversified and applicable borrowers (including, among other things, unaudited internal information, appraisals and financial projections), the Trustee's review does not constitute an audit or verification of such information for accuracy, completeness or compliance with Generally Accepted Assurance Standards ("**GAAS**"), Generally Accepted Accounting Principles ("**GAAP**"), or International Financial Reporting Standards ("**IFRS**"). Accordingly, the Trustee expresses no opinion or other form of assurance pursuant to GAAS, GAAP or IFRS, or any other guidelines, with respect to such information.

10. Some of the information used and relied upon in preparing this Twenty-Eighth Report consists of financial projections and other information received from various third parties, including appraisals and project cost information. The Trustee cautions that the projections and other information used and relied upon are generally based upon assumptions and estimates about future events and/or market conditions that are not ascertainable or that could change. As such, the information presented in this Twenty-Eighth Report may vary from the projections and information used to prepare this Twenty-Eighth Report and the actual results may differ both from the results projected therein and herein. Even if the assumptions relied upon therein or herein materialize, the variations from the projections could be significant. The Trustee's review of the future-oriented information used to prepare this Twenty-Eighth Report did not constitute an audit or review of such information under GAAS, GAAP or IFRS or any other guidelines.
11. This Twenty-Eighth Report has been prepared to assist the Court with respect to the Trustee's request for the proposed Diversified Payment Order. Accordingly, the reader is cautioned that this Twenty-Eighth Report may not be appropriate for any other purpose.
12. All references to dollars are in Canadian currency.

OVERVIEW OF THE SOUTH SHORE PROJECT

13. The South Shore Project was a real estate development project in Keswick, Ontario ("**South Shore Project**" or "**South Shore Property**") with three syndicated mortgage loans, which combined have principal debt outstanding totalling more than \$29 million,

and each is administered by BDMC (collectively the “**South Shore Loans**”). In total there are 638 South Shore Investors.

14. The development plan for the South Shore Project was comprised of two phases. Phase one of the development had foundation permits in place and site work had commenced on the South Shore Property, which the Trustee understands was halted in September 2017 due to financing issues.
15. On January 24, 2019, Diversified issued a Notice of Sale under Mortgage (“**Notice of Sale**”) in respect of its then outstanding first priority debt (“**Diversified Mortgage**”) that was in default. Following a delayed sale process, the South Shore Property was eventually sold on May 13, 2021 (“**Sale Transaction**”). The Sale Transaction completed by Diversified took place almost two and a half years from the date of issuance of the Notice of Sale. A copy of the Notice of Sale is attached as **Appendix “2”**.
16. The Trustee and its counsel have been engaging with Diversified and its counsel since the issuance of the Notice of Sale, throughout the sale process and subsequent to the completion of the Sale Transaction, in an effort to address the Trustee’s concerns regarding the actions and inactions taken by Diversified since the issuance of the Notice of Sale, including as it relates to the amounts paid to Diversified from the Sale Transaction proceeds.
17. On May 27, 2021, the Trustee received a distribution of approximately \$1.8 million, representing the remaining sale proceeds after the payment of commission, legal fees, a lien settlement of \$35,000, approximately \$610,000 that has been paid into Court in respect of an outstanding lien claim and approximately \$9.9 million paid to Diversified.
18. Despite the Trustee’s efforts to engage in productive discussions with Diversified throughout this process, there has been no resolution with Diversified; accordingly, the Trustee is seeking the Diversified Payment Order to recover the Disputed Amounts paid to Diversified, including amounts related to the conduct and length of the power of sale proceeding leading up to the Sale Transaction and the quantum of the fees and interest taken by Diversified as a result of same, each discussed and detailed later in this Report.

THE SOUTH SHORE LOANS

19. Immediately prior to the closing of the Sale Transaction, there were three BDMC loans registered on title to the South Shore Property: (i) the Sorrenti Loan, (ii) the 2014 BDMC Loan, and (iii) the 2016 BDMC Loan (each as defined below). A copy of the parcel register for the South Shore Property as of May 20, 2021 is attached as **Appendix “3”**.¹ The following amounts were owing under each of the three South Shore Loans when the Sale Transaction closed:

	Sorrenti	2014 BDMC	2016 BDMC	Total
Number of Investors	208	202 ²	228	638
Principal Outstanding (\$)	8,600,000	10,073,068 ³	10,528,957	29,202,025
Accrued Interest (\$)	5,202,044	3,876,495	2,833,676	11,912,215
Total Outstanding (\$)	13,802,044	13,949,563	13,362,633	41,114,240

19. Of the 638 South Shore Investors, 392 Investors advanced funds from their retirement accounts through either Olympia Trust, B2B Trust Company (“**B2B**”) or the Bank of Nova Scotia Trust Company (“**BNS**” and collectively the “**RRSP Trustees**”) using registered savings vehicles under the Income Tax Act, representing approximately \$15.9 million or 54.6% of the total principal outstanding under the South Shore Loans. A portion of the charges administered by BDMC and registered on title to the South Shore Property was transferred into the name of one or more RRSP Trustees.
20. The following paragraphs describe each of the loans advanced by the South Shore Investors.

¹ The relevant mortgages had yet to be deleted from title as of this date.

² In the Trustee’s Twenty-Seventh Report the number of Investors reported as having invested in the 2014 BDMC Loan was understated as a result of a clerical error.

³ The outstanding principal was reported as \$10,113,068 in the Notice of Motion, served January 10, 2022. Upon completing its procedures in advance of making the South Shore Distribution (defined below) to the South Shore Investors, this amount was revised to reflect the actual amounts determined to be outstanding.

Sorrenti Loan

21. The Trustee understands that the South Shore Project was originally branded as the Crates Landing Project. Commencing in January 2011, 2221563 Ontario Inc. ("**Borrower**") entered into various loan agreements with Derek Sorrenti ("**Sorrenti**"), Olympia, B2B and/or BNS, in each case, in trust for individual Investors ("**Crates Landing Investors**") with a maximum principal balance of \$8.6 million in aggregate (collectively, the "**Sorrenti Loan**").
22. On February 4, 2011, the Borrower granted a mortgage of \$4.8 million (which amount was subsequently increased to \$8.6 million) on title to the South Shore Property in favour of Sorrenti, in trust (which mortgage was subsequently amended to include Olympia, B2B and BNS as trustees for those Crates Landing Investors who made their investments through registered plans). Attached as **Appendix "4"** is a copy of the Sorrenti mortgage.

2014 BDMC Loan

23. On October 21, 2014, the Borrower entered into a loan agreement with Centro Mortgage Inc. ("**Centro**", the prior operating name for BDMC), in trust for certain individual lenders ("**South Shore 2 Investors**"), that provided for an aggregate syndicated mortgage loan of up to \$20 million ("**2014 BDMC Loan**"). The Trustee understands that the project was rebranded from Crates Landing to the South Shore Project after the registration of the 2014 BDMC mortgage. Attached as **Appendix "5"** is a copy of the 2014 BDMC mortgage.
24. On January 14, 2015, the Borrower granted a mortgage of \$3.2 million (which amount was subsequently increased to \$10.7 million) on the South Shore Property in favour of Centro (which mortgage was subsequently amended to include Olympia).

2016 BDMC Loan

25. On April 21, 2016, the Borrower entered into a loan agreement with BDMC, in trust for certain individual lenders ("**South Shore Hybrid Investors**") that provided for an aggregate loan of up to \$10.5 million ("**2016 BDMC Loan**").
26. On July 22, 2016, the Borrower granted a mortgage of \$5.9 million (which amount was subsequently increased to \$11.175 million) on title to the South Shore Property

in favour of BDMC (which mortgage was subsequently amended to include Olympia). Attached as **Appendix “6”** is a copy of the 2016 BDMC mortgage.

South Shore Distribution

27. On January 31, 2022, the Court granted an order (“**January 2022 Omnibus Order**”) approving, among other things, the *pari-passu* distribution to the South Shore Investors, of 85% of the approximately \$1.8 million payment received by the Trustee from the sale of the South Shore Property (“**South Shore Distribution**”), and any further proceeds to be received in connection with the South Shore Project.
28. The \$1.8 million payment represented a recovery of approximately 6% on the original principal balance of approximately \$29 million advanced pursuant to the South Shore Loans to the Borrower.
29. On March 11, 2022, the Trustee made the South Shore Distribution in accordance with the January 2022 Omnibus Order.

DIVERSIFIED SALE PROCESS

30. As noted above, on January 24, 2019, Diversified issued the Notice of Sale.
31. On February 5, 2019, the Trustee sent a notice to the South Shore Investors advising of the Notice of Sale and that the Borrower was seeking a transaction for the sale of the South Shore Property that may allow BDMC to maintain its mortgages on the South Shore Property. A copy of the South Shore Investor notice is attached as **Appendix “7”**.
32. Prior to the issuance of the Notice of Sale, the Trustee had been in discussions with the Borrower regarding the ongoing development of the South Shore Project and options it was considering and working on including a possible transaction for the South Shore Property. Those discussions with the Borrower continued for a period of time after the issuance of the Notice of Sale; however, consistent with the role that the Trustee takes and has taken in enforcement proceedings commenced in respect of BDMC projects, and in particular those where BDMC is the fulcrum creditor, the Trustee reached out to directly to Diversified, as the enforcing creditor.

33. The Trustee's initial correspondence with Diversified regarding the South Shore Property took place on or about March 25, 2019. At that time, the Trustee sought information regarding Diversified's intentions with respect to the South Shore Property, including the anticipated timing for commencement of a sale process and details related to how the process would be conducted. Limited information was provided.
34. On March 29, 2019, the Trustee spoke with Mr. Russ Giannotta (whom the Trustee understands is the principal of Diversified) who advised that there were a "couple" of people looking at the transaction, it was not yet listed for sale, he had sent documents out to six or seven parties that he thought could do a deal and the timeline to a transaction was likely 30 to 45 days. During the call, the Trustee requested information regarding the parties that Mr. Giannotta had contacted and the information that had been provided to them. Mr. Giannotta advised that he would likely be in a position to share further information with the Trustee within approximately two weeks.
35. On April 25, 2019, the Trustee spoke with Mr. Giannotta to obtain an update on the status of the transaction that was discussed at the end of March. During that call Mr. Giannotta again advised that he was "working with a prospect" and that he thought it may give rise to a sale of the South Shore Property. He advised that he was in the process of providing that prospect with information related to their due diligence requests and that the parties had not yet had a discussion regarding value for the South Shore Property. On that call the Trustee requested details regarding all of the parties that had been contacted through Diversified's marketing efforts. Mr. Giannotta advised that he would prepare a summary for the Trustee. The Trustee was never provided with that information.
36. The Trustee continued to follow up with Diversified on a periodic basis through to October 22, 2019. The correspondence during that period took place by telephone and text messages, which was Mr. Giannotta's preferred way of communication.
37. During the limited discussions that the Trustee had with Diversified over that seven-month period, Diversified continually advised that it was attempting to market the property on an informal basis to mitigate the stigma and possible loss in value that can result when a sale process is conducted through an enforcement proceeding. During those discussions Mr. Giannotta advised that he understood that evidence of

a proper process and extensive canvassing of the marketplace would need to be provided to support any sale transaction that may result from those efforts. Despite that acknowledgement and the Trustee's request for information supporting the informal process that was being conducted, no information was provided.

38. On October 15, 2019, after attempting to reach Diversified and having multiple voicemails and text messages go unanswered, the Trustee followed up by email at the last known email address for Diversified, but the email bounced back. A copy of the October 15, 2019, email and the notice of being undeliverable is attached as **Appendix "8"**.
39. Finally, in late October 2019 the Trustee spoke with Mr. Giannotta, who advised that he was in the process of obtaining appraisals and seeking proposals from commercial real estate agents, and that he intended to list the South Shore Property in the near term with a 45-day deadline for offers. Attached as **Appendix "9"** is the Trustee's internal correspondence regarding the October 2019 call with Diversified.
40. Despite Mr. Giannotta's assertions that a sale process would be commenced in the near term, a process was not commenced at that time.
41. On January 22, 2020, the Trustee was contacted by a commercial real estate agent, acting on behalf of one of the agent's clients, whom the agent described as "a reputable developer". The agent advised that it had been attempting to contact Diversified since December 1, 2019, regarding its client's interest in purchasing the South Shore Property, with no response. The agent reached out to the Trustee looking for assistance with its client's efforts to purchase the South Shore Property. The Trustee attempted to contact Diversified again at that time with no response. A copy of the January 22, 2020 email is attached as **Appendix "10"**.
42. Also in January 2020, the Trustee was contacted by a developer in the BDMC portfolio who expressed an interest in acquiring the South Shore Property. Both the Trustee and the developer attempted to contact Mr. Giannotta on multiple occasions regarding that developer's interest in the South Shore Property. The developer advised that it had also contacted Diversified's legal counsel in March, 2020 and was advised in April, 2020 that Diversified would only consider a repayment in full of all amounts outstanding under its mortgage in exchange for an assignment of the Diversified mortgage.

43. Based on Diversified's response to that developer, it appeared that Diversified had no interest or intention of commencing a sale process nor did it appear that Diversified was carrying out an informal sale and marketing process for the South Shore Property as Mr. Giannotta had previously communicated to the Trustee.
44. On June 5, 2020, the Trustee's counsel wrote to Diversified to formally request an update with respect to the status of Diversified's efforts to sell the South Shore Property, including but not limited to: (i) the details of any sale process conducted for the South Shore Property; (ii) the listing details for the South Shore Property; (iii) the proposed timeline for the sale of the South Shore Property; (iv) a list of potentially interested parties; and (v) details regarding any purchase offers that Diversified has received for the South Shore Property to date. The letter requested that Diversified provide a response as quickly as possible and in any event within 30 days of the letter ("**June 5th Letter**"). A copy of the June 5th Letter is attached as **Appendix "11"**.
45. On June 19, 2020, the Trustee spoke with Jawad Rathore and Vince Petrozza, the principals of Fortress, in their capacity as representatives of the Borrower on the South Shore Project. They advised that they had last spoken to Mr. Giannotta in March 2020 at which time Mr. Giannotta had advised that he would soon be marketing the South Shore Property. According to Mr. Rathore and Mr. Petrozza, after that discussion Mr. Giannotta also stopped responding to their correspondence.
46. Finally, on July 6, 2020, after approximately 8 months of no response or correspondence from Diversified, the Trustee was contacted by Mr. Giannotta to set up a call to discuss the information that had been requested by the Trustee's counsel in the June 5th Letter.
47. The Trustee had four phone calls with Mr. Giannotta between July 7, 2020, and September 17, 2020, requesting the same information that was set out in the June 5th Letter.
48. During each of those calls the information provided was the same. Mr. Giannotta continued to advise that he was finalizing the appraisal and that he was in the process of selecting a real estate agent to formally list the South Shore Property for sale.
49. Around August 2020, the Trustee was advised by a potential purchaser that it was interested in and prepared to submit a formal offer for the South Shore Property;

however, it needed to understand the sale process in order to move forward as the potential purchaser was concerned that it would be wasting its time dealing directly with Diversified. Despite Diversified being aware of such interest in the South Shore Property, no sale process was commenced at that time.

50. On September 18, 2020, the Trustee followed up with Diversified by email⁴ again requesting that information requested in the June 5th Letter be provided to it by September 21, 2020. No response was received. A copy of the September 18th email is attached as **Appendix “12”**.
51. On October 19, 2020, the Trustee followed up with Diversified by email once again looking for an update on the status of the sale process and advising that the Trustee would be instructing its counsel to take next steps given Diversified’s lack of action and responsiveness since the Notice of Sale was issued. A copy of the October 19 email is attached as **Appendix “13”**.
52. On October 21, 2020, the Trustee learned through an unrelated third party that the South Shore Property had been listed for sale by Colliers and offers were due on November 26, 2020. Diversified did not provide the Trustee with a copy of the listing nor any explanation for why such a short timeline was chosen.
53. On November 2, 2020, the Trustee had a very brief call with the Colliers agent managing the listing, who advised that he could not provide the Trustee with any information at that time as he needed to check with Diversified to find out if he could speak to the Trustee about the process. He also stated that it was his understanding that Mr. Giannotta had spoken to the Trustee about the sale process, which the Trustee advised was not the case.
54. Following the call on November 2, the Trustee emailed the Colliers agent to provide a copy of the Appointment Order and requested a response from the agent as soon as possible given the tight timeline for offers. On the same date the Colliers agent responded advising that he would get back to the Trustee. On November 6, 2020, the Trustee followed up with Colliers by email as no response had been received.
55. On November 9, 2020, Osler wrote to Diversified and Schneider Ruggiero Spencer Milburn LLP, whom the Trustee understood was representing Diversified. The letter

⁴ The Trustee now had Diversified’s correct email address.

detailed the history of correspondence between the Trustee and Diversified and requested specific information related to the recently commenced sale process. The letter also stated that the Trustee would be willing to execute a confidentiality agreement and it attached a markup of the Colliers confidentiality agreement to the letter. A copy of the November 9th letter is attached as **Appendix “14”**.

56. On November 13, 2020, Robins Appleby LLP (“**Robins Appleby**”), in its capacity as Diversified’s legal counsel, sent a letter to Osler in response to the November 9 letter advising that given BDMC’s role as a subsequent mortgagee and in accordance with Diversified’s rights under its mortgage to sell the South Shore Property under its power of sale, Diversified was not required to provide any information to the Trustee regarding the sale process. The letter further stated that the Trustee could redeem the Diversified Mortgage should it wish to take over the sale process (which Diversified knew or should have known that given the Trustee’s role in the BDMC proceedings was not a feasible option). A copy of the November 13th letter is attached as **Appendix “15”**.
57. On November 23, 2020, the Trustee emailed Colliers to inquire as to whether the deadline had been extended and was advised that the new deadline for offers was December 16, 2020.
58. On November 26, 2020, the Trustee emailed Colliers requesting high level information regarding the sale process, including the reasons for the extension of the offer deadline, and advising that the Trustee was also working to generate interest in the South Shore Property and was directing interested parties to Colliers.
59. On November 27, 2020, Colliers confirmed that the deadline had been extended to December 16, 2020, because new information had been added to the data room. The Colliers agent also advised that he would be happy to speak with the Trustee regarding the process if Diversified would agree to allow Colliers to release the information to Trustee.
60. On November 30, 2020, the Trustee emailed Colliers to request the form of offer that was provided in the data room and to confirm that the form of offer was in fact available in the data room.

61. Colliers advised that it could not provide any information to the Trustee until the Trustee executed a confidentiality agreement. The Trustee responded advising that it would look into executing a confidentiality agreement. Given that the form of confidentiality agreement previously provided by Diversified was; (i) not consistent with the Trustee's mandate, but rather was geared towards potential purchasers; and (ii) Diversified's prior unwillingness to provide the Trustee with comments on the confidentiality agreement markup previously provided to Diversified by the Trustee, the Trustee was ultimately unable to execute a confidentiality agreement. As a result, Collier's did not provide the Trustee with the requested information.
62. On December 7, 2020, the Trustee followed up with Colliers again regarding the form of offer as one of the interested parties advised the Trustee that it still had not received it and wanted to begin to prepare its offer. The Trustee did not receive a response to this email.
63. On December 16, 2020, being the extended offer deadline, an unrelated third party asked the Trustee to forward an offer to Colliers on its behalf. The request was made because of confidentiality concerns that this prospective purchaser had with other parties potentially knowing that it was submitting an offer to purchase the South Shore Property. It was concerned that Diversified or other parties knowing who the purchaser was might prejudice its offer from being considered. Although the Trustee is unrelated to this party, it had knowledge of the party and its financial ability to complete a transaction which is why the Trustee agreed to simply forward the offer on that party's behalf.
64. On December 18, 2020, the Trustee spoke with the Colliers agent who provided the Trustee with some limited information regarding the sale process. He advised the following:
 - a) seven offers had been received, three of which were received after the offer deadline, and that it was their intention to consider all offers;
 - b) three or four of the offers were financially competitive;
 - c) it was unlikely that there would be a second round, as one of the offers was significantly better than the others; and

- d) Colliers had some concerns regarding the third-party offer forwarded by the Trustee as little was known about that party. The Trustee advised that it could set up a call with the prospective purchaser to have it provide Colliers with additional information.
64. The Trustee asked for information regarding the other offers that had been submitted and attempted to understand why a second round of offers for the three or four financially competitive offers would not be held. It was the Trustee's view that a second round would only further assist to maximize recoveries, of which BDMC would be the sole beneficiary.
65. Given that the Trustee had knowledge of the offer price submitted by the party on behalf of whom the Trustee forwarded the offer, it was clear that BDMC was the fulcrum creditor.
66. Following the Trustee's call with Colliers on December 18, 2020, the Trustee sent a follow up email to Colliers again asking to be involved in the strategy to maximize the value on the sale of the South Shore Property, including the possibility of having a second round of offers given the results to date.
67. Further, on December 18, 2020, the Trustee was made aware that counsel to the third-party purchaser emailed Colliers directly to attempt to provide any additional information that may be required to move forward with its client's offer.
68. On December 23, 2020, Colliers emailed the Trustee to advise that it would not be moving forward with the third-party offer forwarded by the Trustee.
69. On December 23, 2020, the Trustee emailed Diversified and Colliers:
- a) clarifying, again, that the Trustee has no relationship to the party on behalf of whom it forwarded the offer;
 - b) stating that it had attempted to work together with Diversified and Colliers in good faith since the beginning of the sale process in an effort to maximize recoveries;
 - c) noting its surprise that Colliers had not acknowledged or responded to the communications from counsel to the third-party purchaser;
 - d) stating its concerns with the sale process and its disappointment that a second round of bidding was not conducted, in particular because the Trustee was aware

of one offer that would have seen funds being available to satisfy a portion of the amounts owing to BDMC, and the Trustee's belief that a second round of bidding could have resulted in an increased offer from that party;

- e) stating its assumption that that the offer that was being accepted by Diversified had to be superior, to the offer that was forwarded by the Trustee; and
 - f) requesting an update by 5pm (on December 23, 2021), regarding the status of the process, the quantum of each offer received, including the one that Diversified was currently working with, communications with the bidders and anticipated timing for acceptance of an offer.
70. On December 24, 2020, after receiving no response to the December 23, 2020 email, the Trustee again wrote to Diversified and Colliers, and requested a payout statement with respect to Diversified's mortgage. No response was received to that email. A copy of the December 23rd and 24th emails chain is attached as **Appendix "16"**.
71. On December 29, 2020, Osler wrote to Robins Appleby expressing the Trustee's concerns with the sale process and the lack of information that had been provided to the Trustee. Osler requested that Robins Appleby speak with Diversified about providing the requested information to the Trustee, as well as a payout statement so that the Trustee could consider all its options.
72. On December 31, 2020, Robins Appleby responded to Osler's email advising that Diversified had entered into a conditional agreement with a prospective purchaser ("**Conditional Offer**") and restating its position that once the sale was complete it would provide the Trustee with an accounting of the transaction, and again stating that they would not be providing any information at that time. A copy of the December 29 and December 31 email exchange is attached as **Appendix "17"**.
73. On January 6, 2021, Osler sent a letter to Robins Appleby with background regarding the South Shore Loans and the previous correspondence among the parties and again requesting information about the sale and offer acceptance process, and specifically requesting the following information:
- a) copies of all offers received, including the Conditional Offer;
 - b) a copy of the agreement of purchase and sale entered into by Diversified; and

- c) information related to the assessment and selection process undertaken to determine the successful bidder and select the winning bid.
74. The letter also stated that if information was not provided to the Trustee by 5pm on January 8, 2021, the Trustee would be seeking an appointment with the Court to schedule an urgent motion in the BDMC proceedings to compel Diversified to provide the information. A copy of the January 6th letter is attached as **Appendix "18"**.
75. On January 7, 2021, Robins Appleby responded advising that it would not be able to meet the Trustee's deadline but that it would provide a meaningful response the following week.
76. On January 11, 2021, Robins Appleby sent a letter to Osler again stating that the Trustee is not entitled to any information but in any event advising the following:
- a) the Conditional Offer was still in the conditional period and was for an amount that significantly exceeded any other bid received, however, should Diversified be unable to complete a sale it would have to return to market and therefore was unwilling to provide details of the various offers received;
 - b) the Conditional Offer was from an arms-length party with an established reputation. The original conditional period was 30 days from January 4, 2021 (to be extended by agreement of the parties), with the closing to take place 30 days from the expiry of the conditional period;
 - c) the marketing process was run by Colliers from October 21, 2020 to December 16, 2020, and was marketed through Colliers database of over 4,200 parties, MLS, and various social media platforms; and
 - d) upon receipt of bids, each offer was analyzed and on the advice of Colliers the Conditional Offer was entered into by Diversified.
- A copy of the January 11th letter is attached as **Appendix "19"**.
77. On January 14, 2021, Osler sent a letter to Robins Appleby:
- a) clarifying the record again to state that the Trustee is not aligned with any party that participated in the sale process, including the party on behalf of whom it forwarded the offer;

- b) raising concerns over Robins Appleby's comments in the January 11, 2021 letter that Diversified may need to return to market to sell the property should the Conditional Offer not be completed;
- c) disagreeing with the conclusion made by Robins Appleby that the Trustee is not entitled to, nor should it be provided with the information that it has been requesting throughout the sale process; and
- d) asking for confirmation of the following based on information provided in the January 11th letter:
 - i. that the purchase price for the Conditional Offer was significantly greater than the price of the other offer known to the Trustee;
 - ii. a meaningful deposit had been received;
 - iii. the closing date could be extended one time for a further 30-day period upon mutual agreement between the purchaser and the Diversified; and
 - iv. stating that unless it were to hear otherwise the Trustee would assume its understanding on the above points was correct. Osler again requested delivery of the agreement of purchase and sale for the Conditional Offer and the Diversified payout statement that had not yet been provided.

A copy of the January 14th letter is attached as **Appendix "20"**.

78. On January 18, 2021, Robins Appleby sent an email providing the following responses:
- (a) Diversified considered the offer that was forwarded by the Trustee on behalf a purchaser;
 - (b) The Conditional Offer that was accepted provided a meaningful deposit, that would be refundable in the event that the conditions were not waived;
 - (c) Diversified would only provide the Trustee with a copy of the conditional agreement of purchase and sale after conditions were waived and the agreement was firm; and
 - (d) Diversified was unable to prepare a payout statement because information required to do so was at the Diversified office and due to the Covid-19 stay-at-home order that information could not be accessed, and that if the Trustee wanted

the information, it should take the loan information provided in the Notice of Sale and roll forward the interest calculation.

A copy of the January 18th email is attached as **Appendix “21”**.

79. On February 1, 2021, Osler followed up with Robins Appleby regarding the expiration of the due diligence period. Robins Appleby advised that the due diligence period had been extended to March 5, 2021.
80. On March 1, 2021, Osler followed up regarding the expiration of the extended diligence period. On March 3, 2020, Robins Appleby advised that Diversified was working on completing a deal with the prospective purchaser and an update would be provided at the end of the week.
81. On March 5 and 8, 2021, Osler followed up again with Robins Appleby regarding the status of the Conditional Offer and on March 9, 2021, Robins Appleby advised that Diversified and the prospective purchaser who had submitted the Conditional Offer, had not agreed upon terms, therefore Colliers would be going back to the market to have all parties, including the party that had submitted the Conditional Offer, submit final offers for the South Shore Property. A copy of the email chain between Osler and Robins Appleby, including the March 5, 8 and 9 emails, is attached as **Appendix “22”**.
82. The Trustee was advised that on March 9, 2021, Colliers notified parties that had previously participated in the sale process that the conditional offer was not completed, and that Colliers would be accepting best and final offers for the South Shore Property on March 12, 2021 (*just three days later*).
83. On March 13, 2021, Osler emailed Robins Appleby to request that copies of all offers submitted to Colliers on March 12, 2021 be provided to the Trustee immediately. Osler further stated that (i) given the length of time that had passed since Diversified initiated the sale process; (ii) the failure of Diversified to close a transaction that it accepted without consulting with the Trustee, who is clearly the fulcrum creditor; and (iii) combined with the interest that Diversified was continuing to accrue, the Trustee required the ability to review the offers submitted. Osler further advised that should the information not be provided, the Trustee would be in contact with Robins Appleby regarding a potential Court attendance, and in that regard also requested that Robins Appleby advise as to availability

for a 9:30am Court attendance should it be required. A copy of the March 13, 2021 email exchange, is attached as **Appendix “23”**.

84. The 9:30 Court attendance was ultimately scheduled for March 17, 2021.
85. Finally, in the evening of March 16, 2021, after further discussions between Osler and Robins Appleby, Robins Appleby provided the Trustee with copies of the two highest offers (one of which had a 30-day conditional period) received by Diversified on March 12, 2021, both of which were open until the following day, March 17, 2021, at 6pm. In the email Robins Appleby asked if the Trustee had a preference between the two offers, noting however that despite the Trustee’s feedback, Diversified retained the right to select the offer it determined to be most appropriate in the circumstances.
86. Later that evening the Trustee provided its feedback to Robins Appleby, advising that its preference was to proceed with the unconditional offer (*which was the same unconditional offer submitted to Diversified on the offer deadline or approximately three months earlier*). A copy of the March 16 email exchange is attached as **Appendix “24”**.
87. Had the Trustee been consulted by Diversified prior to the acceptance of the Conditional Offer, the Trustee would have recommended that a non-conditional offer be chosen, given the significant closing risks of the Conditional Offer.
88. Ultimately Diversified proceeded with the unconditional offer at a purchase price of \$13 million (“**Sale Proceeds**”) and the March 17, 2021 Court appearance was cancelled as the immediate matter had been resolved.
89. Prior to the closing of the sale transaction, the Trustee and its counsel on numerous occasions requested a copy of the Diversified payout statement, including during a telephone conversation on May 10, 2021. Notwithstanding the numerous requests the payout statement was not provided.
90. The sale transaction closed on May 13, 2021.
91. On May 13, 2021, Osler wrote to Robins Appleby stating, among other things, that the Trustee required that Robins Appleby hold the Sale Proceeds in trust pending the Trustee being provided with Diversified’s payout statement and an opportunity to review same prior to any distribution of the Sale Proceeds. A copy of the May 13, 2021 letter is attached as **Appendix “25”**.

92. On May 17, 2021, Robins Appleby sent an email in response to the May 13 letter, providing among other things, a payout statement as at May 14, 2021, and advising that given there is no obligation for Diversified to obtain the Trustee's consent prior to being paid the funds owing under its mortgage, Diversified had been paid the amounts set out in the payout statement, which totaled approximately \$9.9 million and was comprised of: (i) a return of principal of \$4.5 million; (ii) unpaid interest of \$4.7 million (on \$4.5 million of original principal); and (iii) approximately \$700,000 in renewal fees and other amounts. A copy of the May 17th email and related payout statement is attached as **Appendix "26"**.
93. On May 27, 2021, the Trustee, on behalf of BDMC, received a distribution of \$1,760,479.25 from the Sale Proceeds ("**BDMC Distribution**"), which represents a return on the outstanding principal amount of the aggregate amount of the South Shore Loans of only approximately 6.0% (or approximately 4.3% of outstanding principal together with unpaid interest). The following chart provides a summary of the amounts distributed from the Sale Proceeds:

	Distribution
Sale Proceeds	13,008,416 ⁵
Distribution to Diversified	9,931,694
Distribution to BDMC	1,760,479
Payment into Court for Outstanding Lien Claim	609,983
Settlement of Sunbelt Lien Claim	35,000
Commission, property tax arrears and other closing costs	671,260
Total	\$13,008,416

94. On May 25, 2021, Robins Appleby followed up with a further letter providing additional details and certain supporting documentation regarding the amounts set out in the payout statement previously provided ("**Accounting Letter**"). A copy of the Accounting Letter is attached as **Appendix "27"**.

⁵ Based on the statement of adjustments the total proceeds paid by the Purchaser was \$1,3008,416.35, inclusive of a property tax reimbursement.

95. On July 13, 2021, Osler wrote to Robins Appleby and among other things, again set out the Trustee’s concerns regarding Diversified’s conduct throughout the Notice of Sale proceedings and in particular as it related to significant interest amounts paid to Diversified, which were in the Trustee’s view the result of the unwarranted delays related to the commencement of the sale process and the selection of the Conditional Offer. The letter further set out additional information required by the Trustee to complete its review of the items detailed in the Accounting Letter. A copy of the July 13, 2021, letter is attached as **Appendix “28”**.
96. On August 26, 2021, Robins Appleby sent a letter in response to Osler’s July 13 letter, which denied the allegations made by the Trustee and provided certain of the additional information requested by the Trustee to complete its review of the items detailed in the Accounting Letter. A copy of the August 26, 2021 letter is attached as **Appendix “29”**.
97. On October 18, 2021, Osler sent a letter to Robins Appleby regarding certain amounts paid to Diversified from the Sale Proceeds, and in particular the amounts related to: (i) the calculation of interest and the amount of interest charged as a result of the unwarranted delays related to the commencement of the sale process and completion of a sale transaction; (ii) improperly charged interest due to monthly compounding; (iii) renewal fees; and (iv) certain administrative expense claimed by Diversified, which in aggregate total \$2,872,151 (**“Disputed Amounts”**) and are summarized in the chart below:

	Disputed Amounts
Improperly Charged Interest due to Unwarranted Delay	1,870,000
Improperly Charged Interest due to Monthly Compounding	560,523
Improperly Charged Renewal Fees	409,237
Improperly Charged Administrative Fees	32,391
Total	\$2,872,151

A copy of the October 18th letter is attached as **Appendix “30”**.

97. On November 1, 2021, Robins Appleby sent an e-mail response to Osler’s October 18 letter in which it continued to deny the validity of the Disputed Amounts. Furthermore, Robins Appleby took the position that the proposed motion by the Trustee in respect of the Disputed Amounts is a matter that should be heard on the regular civil list and is not

one that should be before the Commercial List. A copy of the November 1st email is attached as **Appendix “31”**.

98. Given the inability of Trustee and Diversified to come to an agreement with respect to the Disputed Amounts, on January 10, 2022, the Trustee served its 9:30 request form and a Notice of Motion and proposed timetable. A copy of the 9:30 request form and the Notice of Motion is attached as **Appendix “32”**.

DISPUTED AMOUNTS

99. The Trustee’s position is that each of the Disputed Amounts were improperly paid by Diversified to itself from the Sale Proceeds. Each of these amounts is discussed further below.

Improperly Charged Interest Due to Unwarranted Delay

100. As set out in detail above, Diversified’s process to sell the Property was unreasonably lengthy, and as a result, was detrimental to and disregarded the interests of the South Shore Investors.
101. Based on the Trustee’s experience in sale transactions for land similar to the South Shore Property, six months is a more than sufficient period of time to conduct and complete a sale process of this nature. Moreover, Diversified’s own process for the South Shore Project from the listing date through to the completion of the Sale Transaction was approximately six months (inclusive of the additional delay resulting from the acceptance of the Conditional Offer).
102. Diversified claimed (and ultimately paid itself from the Sale Proceeds) interest totaling approximately \$4.7 million, of which at least approximately \$1.87 million resulted from unwarranted delays. These unwarranted delays unnecessarily extended the sale process by an additional 22-months, being the period of time commencing six months after the issuance of the Notice of Sale and ending upon the completion of the Sale Transaction. The additional \$1.87 million of improperly charged interest paid to Diversified was in excess of the total amount paid to the South Shore Investors.

Improperly Charged Interest

103. Based on the commitment letter between the Borrower and Diversified dated October 2, 2014 (“**Commitment Letter**”), the interest on the Diversified loan was to be charged at 12% per annum, paid monthly. There is no provision regarding the method pursuant to which interest would be calculated should it not be paid in accordance with the payment terms set out in the Commitment Letter. A copy of the Commitment Letter is attached as **Appendix “33”**.
104. The charge registered on title as YR2209128 on October 30, 2014 (“**Diversified Registered Charge**”) does not state any interest calculation or compounding period that would apply in the circumstances, as is seen in the following excerpt from that charge, but does state that the interest period is annual, as opposed to monthly.

Provisions			
<i>Principal</i>	\$4,500,000.00	<i>Currency</i>	CDN
<i>Calculation Period</i>			
<i>Balance Due Date</i>	2015/11/01		
<i>Interest Rate</i>	12% pr annum		

A copy of the Diversified Registered Charge is attached as **Appendix “34”**.

105. The Diversified Registered Charge incorporates Standard Charge Terms 200033 (the “**Standard Charge Terms**”). Section 6 of the Standard Charge Terms reads:

In case default shall be made in payment of any sum to become due for interest at the time provided for payment in the Charge, compound interest shall be payable and the sum in arrears for interest from time to time, as well after as before maturity, and both before and after default and judgement, shall bear interest at the rate provided for in the Charge. In case the interest and compound interest are not paid within the interest calculation period provided in the Charge from the time of default a rest shall be made, and compound interest at the rate provided for in the Charge shall be payable on the aggregate amount then due, as well after as before maturity, and so on from time to time, and all such interest and compound interest shall be a charge upon the land.

A copy of the Standard Charge Terms is attached as **Appendix “35”**.

106. A calculation period is not synonymous with a payment period.

107. As set out in the August 26, 2021 letter, Diversified asserts that section 6 of the Standard Charge Terms provides for default interest to be calculated on a monthly compounding basis.
108. It is the Trustee's position that the correct interest calculation or compounding period is the annual period referenced in the interest rate provision of the Diversified Registered Charge.
109. The Trustee has calculated the incremental amount of interest charged by Diversified and improperly deducted from the Sale Proceeds due to the use of an improper compounding period (i.e., monthly vs. annually) to be \$560,523.

Renewal Fees

110. Diversified has claimed and deducted from the Sale Proceeds \$409,237 in respect of renewal fees ("**Renewal Fees**").
111. Diversified claims the Renewal Fees based on a renewal letter dated July 27, 2015 between the Borrower and Diversified ("**Renewal Letter**"). A copy of the Renewal Letter is attached as **Appendix "36"**.
112. The Renewal Letter provides that an automatic renewal of the Diversified Mortgage would occur on the maturity date of the initial term and any renewal term, in exchange for fees equal to 3% of the principal amount of the loan for the first renewal term and 1.5% for each subsequent renewal term thereafter.
113. The Renewal Letter, however, stated that the automatic renewals would only occur "provided the Borrower is then not in default of any of the terms and conditions of the Loan".
114. The Borrower was in default under the Diversified Mortgage as of September 2015, when it missed its scheduled monthly interest payment, and remained in default thereafter. Notwithstanding such default, Diversified renewed the Diversified Mortgage in November 2015, November 2016, November 2017 and November 2018, charging the collective Renewal Fees.
115. It is the Trustee's position that the Renewal Fees were charged when the mortgage was in default and are therefore not properly chargeable under the Renewal Letter. As such it is the Trustee's view that the Renewal Fees, in addition to not being chargeable in the

circumstances, are a disguised penalty, which is a violation of the Interest Act, R.S.C. 1985, c. I 15.

116. Further, the Renewal Letter was not registered on title to the Property, nor is there reference to renewal fees in the Diversified Registered Charge. It is also the Trustee's position that Diversified cannot maintain a priority over a subsequent encumbrancer in connection with amendments to its mortgage where such amendments are not known to the subsequent encumbrancer when making its loan.
117. Accordingly, it is the Trustee's position that the Renewal Fees were improperly deducted by Diversified from the Sale Proceeds.

Improperly Charged Administrative Fees

118. Diversified has claimed and deducted from the Sale Proceeds \$32,391 in respect of certain "Sale Administration and Property Management" charges ("**Management Fees**").
119. The Management Fees are in respect of fees paid to "Diversified Realty Advisors Inc." for "management and administration services" rendered in connection with the Property. The Trustee takes the position that the Management Fees are not commercially reasonable nor were they necessary in the circumstances for the following reasons:
 - a) the Diversified Realty Advisors Inc. invoice ("**Diversified Realty Invoice**") contained inadequate and incomplete particulars regarding the identity of the timekeeper, their hourly rate, and the time spent on any particular task;
 - b) the Diversified Realty Invoice includes, among other things, entries related directly to Diversified's obstruction of the Trustee's efforts to fulfill its Court-ordered mandate and/or to pursuing, against the Trustee's advice, the Conditional Offer that was ultimately not completed; and
 - c) Diversified engaged a "Nick J. Circosta" to perform property management type services, which included, among other things, facilitating due diligence, visiting the site, and attending to repairs at the Property. Mr. Circosta's fees were also paid out of the Sale Proceeds and the fees paid in respect of the Diversified Realty Invoice. are duplicative of the fees paid to Mr. Circosta.

120. It is the Trustee's position that the Administrative Fees were unnecessary and are not commercially reasonable and should not have been paid to Diversified from the Sale Proceeds.

CONCLUSION

121. The Trustee acknowledges that in all circumstances the South Shore Investors would have experienced a catastrophic loss on their investment given the market value of undeveloped South Shore Property. However, had Diversified not acted with a complete disregard for the legitimate interests of BDMC as a subsequent mortgagee, the outcome would have been less severe. Had the Disputed Amounts been paid to the BDMC instead of to Diversified, BDMC, on behalf of the South Shore Investors, would have recovered approximately 15.8% of the outstanding principal of the South Shore Loans compared to the 6% that has been recovered as a result of those amounts having been paid to Diversified. Should the Diversified Payment Order be granted by the Court the total return of principal to the South Shore Investors will more than double.
122. Diversified as a priority mortgagee owed BDMC as a subsequent encumbrancer a fiduciary duty in respect of any surplus obtained following a sale. It is the Trustee's view that the surplus paid thus far to the Trustee has been wrongfully reduced as a result of the breach of duty Diversified owes to BDMC, the wrongfully claimed Renewal Fees, the improper compounding of interest and the improperly charged Management Fees, which together total approximately \$2.87 million. Accordingly, the Trustee requests that the Diversified Payment Order be granted by the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March, 2022

Faan Mortgage Administrators Inc.

**FAAN MORTGAGE ADMINISTRATORS INC.,
SOLELY IN ITS CAPACITY AS
COURT-APPOINTED TRUSTEE OF
BUILDING & DEVELOPMENT MORTGAGES CANADA INC.,
AND NOT IN ITS PERSONAL OR ANY OTHER CAPACITY**