

CITATION: Sandpiper Real Estate Fund 4 Limited Partnership v. First Capital
Real Estate Investment Trust, 2023 ONSC 794
COURT FILE NO.: CV-23-00692618-00CL
DATE: 20230201

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: SANDPIPER REAL ESTATE FUND 4 LIMITED PARTNERSHIP, SANDPIPER OPPORTUNITY FUND 6 LIMITED PARTNERSHIP, SANDPIPER OPPORTUNITY FUND 8 LIMITED PARTNERSHIP, SANDPIPER GP 4 INC., SANDPIPER GP 5 INC., SANDPIPER GP 8 INC., AND ARTIS REAL ESTATE INVESTMENT TRUST, Applicants

AND:

FIRST CAPITAL REAL ESTATE INVESTMENT TRUST and BERNARD MCDONELL, ADAM E. PAUL, LEONARD ABRAMSKY, SHEILA BOTTING, IAN CLARKE, PAUL C. DOUGLAS, ANNALISA KING, ALADIN W. MAWANI, and ANDREA STEPHEN, in their capacities as Trustees of First Capital Real Estate Investment Trust, Respondents

APPLICATION UNDER Rule 14.05(3)(a), (b), (d) and (h) of the
Rules of Civil Procedure, R.R.O. 1990, Reg. 194

BEFORE: Kimmel J.

COUNSEL: *Orestes Pasparakis and Stephen Taylor*, for the Applicants

Eliot Kolers and Muzhgan Wahaj, for the Respondents

HEARD: January 27, 2023

ENDORSEMENT

(APPLICATION FOR SPECIAL MEETING OF UNITHOLDERS OF FIRST CAPITAL)

The Application

[1] On December 12, 2022, the applicants requisitioned a special meeting of the unitholders of First Capital Real Estate Investment Trust (“First Capital” or the “Trust”). The special meeting was to be held no later than March 1, 2023 to allow the unitholders of the Trust (the “Unitholders”) to consider and vote on two resolutions: The first is to remove four of the current members of the board of trustees of First Capital (the “Removal Resolution”), and the second is to fill those vacancies with the applicants’ proposed slate (the “Appointment Resolution”).

[2] These resolutions will determine the composition of the board of trustees that will oversee and supervise the implementation, or revisions to, an enhanced capital allocation and portfolio optimization plan that First Capital announced on September 22, 2022 (the “Optimization Plan”).

The Optimization Plan sought to rebalance the Trust's portfolio and enhance future development and monetization opportunities over a two-year period.

[3] The applicants collectively beneficially own 19,277,681 units of the Trust (the "Units"), representing approximately nine percent of all issued and outstanding units.

[4] On December 30, 2022, First Capital issued a press release advising that its board of trustees (the "Board") had called a combined annual general meeting ("AGM") and special meeting of its Unitholders to be held on May 16, 2023. The applicants do not consider the more than five-month delay in calling the special meeting that they requisitioned to be reasonable. As such, they seek an order from the court to compel the Trust to call the special meeting that they requisitioned earlier, on March 1, 2023, or as soon as practical thereafter.

[5] This application was briefed, scheduled and heard on an urgent basis because it is recognized that there are required steps and timelines that must be followed to call a special meeting of First Capital's Unitholders that will take a minimum of thirty-five days to implement upon any order being made.

Summary of the Outcome

[6] For the reasons that follow, the relief sought in the application is granted. First Capital is ordered to call and hold the special meeting of its Unitholders requisitioned by the applicants to consider the Removal Resolution and the Appointment Resolution as soon as practicable after March 1, 2023.

[7] The information provided to Unitholders should include the 2022 year-end financial statements for the Trust. The court expects that the meeting will be called in late March or early April 2023, having regard to the requirements for calling this special meeting, the compilation of material to be provided to the Unitholders in advance and the deadlines by which that material is required to be disseminated before the special meeting.

[8] Since the special meeting will no longer be held jointly with the AGM on May 16, 2023, the Board may wish to consider whether the AGM will still proceed on that date or some other date.

The Legal Framework

[9] The parties generally rely upon the same cases and the same basic legal framework to guide the court's analysis and decision.

[10] The Trust was established pursuant to a declaration of trust dated October 16, 2019 (the "Declaration of Trust"). The Declaration of Trust establishes and governs the rights of the Unitholders and the duties of the Board. Article 13.2 of the Declaration of Trust provides that:

[U]nitholders holding in the aggregate not less than 5% of the votes attaching to all units then outstanding may requisition the Trustees to call a special meeting of the Unitholders for the purposes stated in the requisition. [...] Upon receiving the

requisition, the Trustees shall call a meeting of the Unitholders to transact the business referred to in the requisition.

[11] Pursuant to the Declaration of Trust, a requisitioned meeting must be called within 21 days after receiving the requisition.

[12] The right to requisition a meeting is a fundamental right of Unitholders and an important protection against the conduct of the Board in this case. Courts look to both the provisions of a trust declaration granting unitholders' requisition rights as well as principles of corporate law that help define those rights in exercising its supervisory function over unitholder meetings: see *RioCan Real Estate Investment Trust v. RealFund* (1999), 95 O.T.C. 269 (Ont. S.C.), at para. 16. See also *Orange Capital, LLC v. Partners Real Estate Investment Trust*, 2014 ONSC 3793, at paras. 40-42.

[13] Although there is no specific timeframe within which a requisitioned meeting must be held,

There is no question the shareholders who have delivered the requisition have the fundamental right to have their requisition dealt with expeditiously. The board must act reasonably in all the circumstances, or as the court put it in *Peoples*, with an appropriate degree of prudence and diligence. This involves a good hard look at the board's actions in the context of this particular corporation.

Marks v. Intrinsic Software International Inc., 2013 ONSC 727, 10 B.L.R. (5th) 133, at para. 26.

[14] It is the Board's responsibility to determine when to hold a requisitioned meeting, but it must be held expeditiously and within a reasonable time. In these circumstances, "expeditiously" does not mean at the soonest available date; it means "without unreasonable or unjustifiable delays": *H & S Holdings Inc. v. Noon*, 2011 SKQB 217, 376 Sask. R. 228, at para. 14.

[15] The Unitholders do not determine the timing of the meeting. The scheduling of a requisitioned meeting is "left to the business judgment of the directors to be determined by them acting honestly, in good faith and with a view to the best interests of the corporation": *Marks*, at para. 7.

[16] Where the business judgment of the Board is at issue, the role of the court is to determine "whether the board applied the appropriate degree of prudence and diligence in coming to its decision on the timing of the special meeting": *Marks*, at paras. 7, 25.

[17] In determining whether the Board has properly exercised its business judgment, the court can consider the process of the Board's decision making as well as the grounds upon which the decision was made and the factors taken into consideration: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.), at para. 156.

[18] Courts must defer to the business judgment of the Board provided that its decision falls "within a range of reasonableness" and will not interfere with the Board's decision unless the

Board is shown to have acted for an improper purpose or unreasonably: see *Paulson & Co. v. Algoma Steel Inc.* (2006), 79 O.R. (3d) 191 (Ont. S.C.), at para. 43; *Marks*, at para. 7.

[19] As described by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 84, “[e]verything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.”

Issues to be Decided

[20] The special meeting of the Unitholders was called by the Board on December 30, 2022, within 21 days after the Requisition (as hereinafter defined). The first issue that the court must determine on this application is whether the procedure followed and factors considered by the Board in selecting the May 16, 2023 date for a joint AGM and special meeting of the Unitholders are such that the court should defer to the Board’s decision to call the meeting on May 16, 2023.

[21] If the Board’s decision to hold the special meeting on May 16, 2023 is determined not to be deserving of deference, the court then must decide whether the delay in waiting to hold the special meeting until May 16, 2023 is unreasonable or unjustified and whether First Capital should be compelled to hold the special meeting on an earlier date on or after March 1, 2023 that the court determines to be expeditious.

Factual Context

[22] Each side has challenged the other’s motives and sincerity. They accuse each other of being strategic and tactical, while claiming to themselves be acting in the best interests of the Trust and its Unitholders.

[23] For example, the applicants accuse the incumbent directors, including the four who are proposed to be replaced, of acting in their own interests to preserve their positions and to buy themselves more time to present the historic performance of the Trust and the implementation of the Optimization Plan in a better light.

[24] The Board minutes describe the applicants as “aggressive”, “activist” investors who are opportunistic and strategic. Artis Real Estate Investment Trust (“Artis”), one of the applicants, is a competitor of First Capital.

[25] These types of accusations have become commonplace in corporate skirmishes, but are largely irrelevant to the issues that the court must decide on this application. The facts relevant to the court’s determination of this application are, for the most part, uncontroverted and chronological. Relevant points of controversy are addressed in the analysis.

Chronology of Events Leading up to the Requisition

[26] On September 18, 2022, First Capital reinstated its regular monthly distribution to Unitholders (which had been temporarily reduced to mitigate the impacts of the pandemic).

[27] On September 22, 2022, First Capital announced that its Board had approved the Optimization Plan.

[28] The applicants were Unitholders when the Optimization Plan was announced and they purchased more units after it was announced.

[29] On September 28, 2022, First Capital announced the first transaction under the Optimization Plan, detailing the disposition of its remaining non-managing interest in the residential component of a property located at 1100 King Street West in Toronto (“King High Line”). This disposition grossed \$149 million in proceeds for the Trust.

[30] Between October 6 and October 13, 2022, Mr. Manji engaged (on behalf of the applicants) in discussions with representatives of First Capital about potential Board representation for the applicants. In that context, they also discussed allowing the Optimization Plan to unfold through the summer of 2023, under the oversight and supervision of a newly constituted Board on which they had appointed nominees.

[31] These discussions were terminated by Mr. Manji on October 13, 2022 after the Board raised concerns about the independence of the applicants’ proposed nominees, two of whom were on the board of First Capital’s competitor, Artis.

[32] On December 12, 2022, the applicants delivered a requisition (the “Requisition”) for a special meeting of Unitholders for the purposes of replacing four independent trustees, including the chair of the Board, the chair of the Corporate Governance Committee and the chair of the Compensation Committee, to be held no later than March 1, 2023.

[33] The Requisition was accompanied by a presentation outlining, among other things, the applicants’ positions and criticisms of the performance of First Capital (the “Presentation”). The Requisition and the Presentation were forwarded to all Board members on December 12, 2022.

Chronology of Events After the Requisition

[34] On December 14, 2022, the Board convened a joint meeting of the Board and the Corporate Governance Committee to consider the Requisition. This meeting was attended by the full Board, members of senior management, internal and external legal counsel and other professional advisors. The joint meeting lasted over two hours, although the Requisition was not the only agenda item.

[35] On December 30, 2022 – 18 days following receipt of the Requisition – First Capital announced that it had called a combined AGM and special meeting to be held on May 16, 2023 to address normal course matters and those raised in the Requisition.

[36] On January 3, 2023, the applicants informed the Board that they would agree to the May 16, 2023 meeting date in exchange for an undertaking from First Capital that it would not proceed with any further dispositions under the Optimization Plan in the interim (the “Undertaking”).

[37] On January 5, 2023 First Capital advised the applicants that it was not prepared to provide the Undertaking.

The Board's Consideration of the Requisition – Factors Considered

[38] The Requisition was for a meeting to be held on or before March 1, 2023.

[39] In the normal course of business and in accordance with past practice, First Capital's AGM would have been held before the end of June 2023.

[40] According to Adam Paul (the First Capital affiant) and the meeting minutes, the following points were discussed at the December 14 meeting:

- a. The Board's duty to hold the meeting transacting the business referred to in the Requisition diligently and expeditiously;
- b. The fact that the Board could not hold the AGM until after the delivery of certain information (including annual financial disclosures);
- c. That requisitions received late in the fourth quarter raise unique considerations regarding the availability of overlapping year-end and quarterly financial reporting, coordinating the timing of special meetings with regularly scheduled AGMs and the added cost and effort of holding two meetings as opposed to one combined meeting;
- d. If the special meeting was to be held at the same time as the AGM, whether there was a reasonable way to hold a joint meeting earlier than mid to late June, which is when First Capital's AGMs are typically held and would otherwise have been held in 2023;
- e. Holding the special meeting after the release of First Capital's first quarter report would provide Unitholders with more information and visibility into First Capital's financial and operating performance in the first quarter;
- f. Proxy advisory firms such as Institutional Shareholder Services (ISS) and Glass, Lewis & Co. would require a reasonable period of time following disclosure of First Capital's first quarter performance to consider such performance prior to making recommendations to Unitholders with respect to the election of trustees to the Board at a special meeting.

[41] On cross-examination, Mr. Paul confirmed that, "the Board wanted to wait until after the first quarter for the special meeting so that the Trust could show some results under the plan before the meeting."

[42] But Mr. Paul emphasized that this was only one of the factors considered, stating that:

"[T]he [Board's] assessment was based on all factors that were relevant that were provided by advisors and board members and each of them was weighed. The pros and cons of an earlier or later date and the balancing act of weighing those in the context of what was in the best interest of all unitholders is what resulted in the outcome of the May 16 date being determined."

[43] The Board decided to hold the requisitioned special meeting at the same time as the AGM of Unitholders on May 16, 2023. The Board articulated three principal reasons for setting this meeting date: (a) the costs and distraction of holding two meetings; (b) the desire to give the Optimization Plan a chance to unfold; and (c) the desire for Unitholders to have more time to consider the issues to be addressed at the special meeting and to enhance Unitholder engagement.

[44] According to Mr. Paul, First Capital was not prepared to provide the Undertaking because it did not believe that it could reasonably refrain from acting in furtherance of the Optimization Plan, which the Board had approved on the basis that it was believed to be in the best interests of the Unitholders, based on the applicants' demand for a standstill.

The January 5, 2023 Board Meeting and Minutes – Disputed Evidence

[45] In addition to meeting jointly with the Board on December 14, 2022, the Corporate Governance Committee also met on January 5, 2023, after the decision had been made to hold the special meeting on May 16, 2023 and was announced on December 30, 2022. There is no express reference to this Corporate Governance Committee meeting in the evidence filed by First Capital. The minutes of the January 5, 2023 Corporate Governance Committee meeting were provided to the applicants after the affidavits on this application had been exchanged, on the day before the scheduled cross-examinations. They were provided together with the minutes of the December 14, 2022 joint Board and Corporate Governance Committee meeting, in response to a request by the applicants for all minutes.

[46] At the January 5, 2023 meeting, the Corporate Governance Committee appears from these minutes to be considering the applicants' proposal that the dispositions under the Optimization Plan be stayed pending the May 16, 2023 meeting. In that respect, I consider the minutes to address relevant evidence because First Capital's refusal to provide the Undertaking is relied upon and these minutes provide the context for that decision.

[47] First Capital seeks leave under r. 39.02(2) to file an affidavit sworn January 19, 2023 appending the January 5, 2023 governance committee minutes that was delivered after the cross-examinations were completed.

[48] The applicants oppose this motion on the basis of the following factors that the court should consider, as set out in *First Capital Realty Inc. v. Centrecorp Management Services Limited* (2009), 258 O.A.C. 76 (Div. Ct.), at para. 9.

- a. The January 5, 2023 meeting minutes (and what was discussed at this meeting) are not responsive to anything that arose on the cross-examination of Mr. Paul, First Capital's witness;
- b. The January 5, 2023 meeting minutes are prejudicial because they have not been cross-examined upon; and
- c. No reasonable or adequate explanation was provided for why First Capital did not tender any evidence about the January 5, 2023 meeting, even if the minutes were not available when Mr. Paul's affidavit was sworn, such as was done in respect of the December 14, 2022 meeting.

[49] The applicants rely on *2386240 Ontario Inc. v. The City of Mississauga*, 2018 ONSC 3992, at para. 29 in which the jurisprudence on this rule was reviewed and concluded that: “leave should be only granted sparingly after the moving party meets a very high threshold and the limits on the introduction of such post-cross-examination evidence are designed to provide closure to the evidentiary record for motions and applications.” The longstanding admonition is that “the rule about the delivery of subsequent affidavits should not be used as ‘a mechanism for correcting deficiencies in the motion materials’”: *2386240 Ontario*, at paras. 27-28, citing *Shah v. LG Chem Ltd.*, 2015 ONSC 776, 124 O.R. (3d) 570, at para. 23.

[50] The applicants invited First Capital to point to where the January 5, 2023 meeting was referred to in their affidavit. In response, paragraph 43 was identified. Paragraph 43 explains the Board’s rationale for not accepting the proposed Undertaking (contained in a letter dated January 3, 2023), but makes no mention of a Corporate Governance Committee meeting at which the proposed Undertaking was discussed or the date of the meeting. The January 5, 2023 Corporate Governance Committee minutes describe the same reasoning and views (in more detail) for not granting the proposed Undertaking as are discussed in paragraph 43 of Mr. Paul’s affidavit.

[51] The minutes of both the December 14, 2022 and January 5, 2023 were produced in advance of the cross-examinations, the applicants were offered time to review the minutes before conducting their cross-examination and were given a further opportunity to cross-examine on those minutes after the cross-examinations.

[52] Rule 39.02 is not absolute. The court has discretion to grant leave for evidence to be filed after cross-examinations have been completed. The January 5, 2023 minutes simply corroborate and expand upon the Board’s decision not to provide the Undertaking. I am not persuaded that there is any prejudice to the applicants in granting leave for the affidavit attaching the January 5, 2023 Corporate Governance Committee minutes to be filed on this application, but if there was it could have been avoided by cross-examination. This is real time high-stakes litigation. A technical position about the timing of the introduction of meeting minutes that deal with matters of substance at issue, where an opportunity to cross-examine was afforded, is not a compelling reason to deny leave.

[53] Leave is granted for the admission of the supplementary affidavit of Mr. Paul affirmed January 19, 2023 into evidence on this application.

Analysis

[54] The court must decide whether to defer to the Board’s decision to hold the AGM and special meeting together on May 16, 2023, or override that decision and compel First Capital to hold the special meeting on March 1, 2023 or as soon thereafter as reasonably practicable.

The Degree of Deference to be Afforded to the Board’s Business Judgment

[55] The court must determine whether the Board applied the appropriate degree of prudence and diligence in coming to its decision on the timing of the special meeting.

[56] There is no requirement for a special committee of the Board with special advisors to be convened to consider a requisition for a special meeting of Unitholders. Nor is there a

requirement that there be multiple meetings. However, these are features that have contributed to the level of deference afforded by the court to a Board in some cases: see *Marks*, at paras. 11-14, 39; *Wells v. Bioniche Life Sciences Inc.*, 2013 ONSC 4871, at paras. 20-22, 41-45, 68.

[57] In this case:

- a. The Board only held one meeting on December 14, 2022 to discuss the Requisition, at which the decision was made to hold the special meeting at the same time as the AGM five months later, on May 16, 2023.
- b. That entire meeting lasted only approximately two hours and other agenda items were discussed, so it is reasonable to infer that the total amount of time spent discussing the Requisition and when to call the special meeting was less than two hours.
- c. The directors that the requisitioning Unitholders are seeking to replace were present and voted on the resolution passed at that Board meeting when the Board decided to set the special meeting date on May 16, 2023. They actively participated and expressed their views about the motives of the requisitioning Unitholders and about the reasons why they did not think there was any compelling reason to hold a meeting earlier than May 16, 2023. It is reasonable to infer that those directors would prefer that the Removal and Appointment Resolutions be defeated. Thus, their views lack independence and objectivity.

A relatively short single meeting at which the potential for a conflict does not appear to have been acknowledged or considered does not reflect a robust, independent and objective process of deliberation.

[58] In terms of the factors considered, views were expressed by some Board members about the motives and tactics of the applicants, who were described as “activist” Unitholders, which is not relevant. The Board was in favour of delaying the special meeting until after another quarter of activity and financial results occurred (allowing the Optimization Plan to continue to unfold), a factor that raises some concerns having regard to the purpose of the requisitioned meeting, as detailed in the Presentation Materials and press release that accompanied the Requisition. This is discussed in more detail in the next section of this endorsement.

[59] The Board identified the factors that the court considered to be sufficient to justify a five month delay in the *Marks* case (such as the cost and distraction of two meetings) without regard to First Capital’s much greater financial resources, the relative cost of the extra meeting in this case and the different historical experience that First Capital has had with successive meetings. The cost and distraction factors served as the premise for establishing a single date for a combined meeting that was after the first quarter financial results would be released.

[60] The principle of deference in this context is dependent upon directors engaging in scrupulous deliberations and demonstrating diligence in their arrival at decisions: see *UPM-Kymmene*, at para. 156. That has not been demonstrated here. In these circumstances, the procedure followed and factors considered by the Board in reaching its decision about when to

call the special meeting do not warrant a high level of deference from the court with respect to the decision that was the product of those deliberations.

Was the Special Meeting Called Expeditiously and Within a Reasonable Time?

[61] The Declaration of Trust and governing statutes in cases involving corporations specify the time within which a special meeting must be called after a requisition is received by the Board. The additional requirement that the special meeting be called expeditiously and within a reasonable time (without unreasonable or unjustifiable delays) must be considered with reference to the time between the Requisition and the meeting date.

[62] I turn now to consider whether a delay until May 16, 2023 to hold the special meeting is justified or reasonable. This involves the consideration of the factors that the Board considered and any other factors identified that may be relevant.

[63] As a starting point, I observe that a delay of five months to hold a special meeting requisitioned by Unitholders appears, in the abstract, appears to be an unreasonably long time to wait. However, the particular circumstances must be examined, including the justifications given by the Board for setting this meeting date:

- a. the costs and distraction of holding two meetings;
- b. the desire to give the Optimization Plan a chance to unfold (and for another quarter of financial results to be available); and
- c. the desire for Unitholders to have more time to consider the issues to be addressed at the special meeting, namely the applicants' criticisms of the current Board's supervision and oversight in respect of the Optimization Plan and to enhance Unitholder engagement.

[64] The Board's stated reasons for waiting until May 16, 2023 to hold the special meeting are not particularly compelling when scrutinized, as the court must do when considering the reasonableness of a business judgment and whether it was exercised responsibly.

A) First Justification: The added cost and distraction of two meetings

[65] The cost and distraction of two meetings was held in *Marks* to be a reasonable justification for roughly the same delay (between a requisition made in mid-December and a special meeting called in mid-May the following year). However, that company was a much smaller company in which the cost (ten percent of declining revenues) and distraction (to beleaguered shareholders) were of immediate and historic concern to the board.

[66] Unquestionably, there would be a cost associated with having two, rather than one, meetings in the first half of 2023; however, the estimated cost savings for combining the meetings was only about 0.1 percent of First Capital's revenues. Further, First Capital has a good track record for Unitholder turn out and engagement at past meetings held in close succession with each other. The cost and distraction of two meetings, while in theory something to avoid, was not considered by the Board in this case beyond the obvious streamlining and efficiencies that would

always exist. This cannot in every case justify deferring a requisitioned special meeting to the next AGM or other already planned meeting. I do not find these factors to be a particularly compelling justification in this case.

B) Second Justification: Allowing the Optimization Plan to further unfold

[67] The Board's desire to ensure that information is put before the Unitholders about how the Optimization Plan had unfolded up to when the special meeting was called on December 30, 2022 is reasonable and supports a decision to defer the special meeting until at least after the 2022 annual financial statements will be available for Unitholders. This would allow Unitholders to consider that information at the time of the special meeting. The expectation was, and remains, that the Trust's year-end financial statements will be available on or about February 8, 2023.

[68] However, the Board's desire to allow for the Optimization Plan to further unfold after the special meeting was requisitioned and to await a further full quarter of financial performance, not to mention the time for those results to be compiled, reported and sent to Unitholders, is an additional and distinct factor that the Board considered in this case. The following is an excerpt from the December 14, 2022 minutes of the joint Board and Corporate Governance Committee Meeting Minutes about this:

Members of the Board shared their view that holding the special meeting after the release of the REIT's Q1 financial results would be beneficial insofar as it would provide unitholders with visibility into the performance of the REIT through Q1 as well as provide the REIT with additional time to execute and demonstrate the merits of the REIT's Optimization Plan thereby providing unitholders with an opportunity to assess the REIT's performance under the Optimization Plan. Mr. Robertson noted that it would be important to ensure there was sufficient time between the release of Q1 financial results in early-May and the special meeting to ensure that proxy advisory firms such as ISS and Glass Lewis were able to consider the Q1 performance of the REIT prior to making their recommendation to unitholders with respect to voting on the election of trustees. It appears that the desire to have this further financial information drove the timing for the special meeting. The Minutes explain that Q1 results would only be available in early May and that the proxy advisors ISS and Glass Lewis required some time to digest those results. This resulted in the May 16, 2023 meeting date, being the earliest date that the meeting could be held that would allow for the inclusion of the Q1 financial results in the information provided to Unitholders.

[69] First Capital has not identified any particular upcoming event or transaction targeted to take place during the period of delay for first quarter financial reporting. The Board did not identify specific future steps that may "unfold" that could better assist the Unitholders in their deliberations. Absent some identified event or external factor that could better inform Unitholders' decision making, simply waiting to see if something might happen, or that financial results might improve in the first quarter of 2023 is not a reasonable justification to delay the special meeting to await those results. This is contrasted with, for example, *Paulson*, where a CRA ruling on a tax structure had been requested but not yet received: at paras. 45-52. Awaiting

the expected receipt of the CRA's advance tax ruling was considered to be a reasonable justification for delaying the special meeting to vote on the tax structure.

[70] In the context of a requisition, the business that the Unitholders are being asked to consider at the special meeting, which in this case is the composition of the Board that will oversee and supervise the implementation of the Optimization Plan, cannot be made by default through the Board's decision about the meeting date. Blair J. expressed this concern in *RioCan*, at paras. 16, citing *Wight Railway Co. v. Tabourdin* (1883), 25 Ch. D. 320, at p. 329, and 23, noting that:

It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not for the benefit of the company.

...

[I]t is for the Unitholders in the context of that meeting to express their views for and against the proposal and to vote according to their persuasion at that time. It is not open for the Trustees to make that decision for them, in effect, by postponing the meeting until after the opportunity which is to be considered may have become moot.

[71] The Board wants to continue with the Optimization Plan in the meantime, despite the concerns articulated in the press release issued by the applicants when they requisitioned the meeting about the manner in which it was being implemented under the supervision and oversight of the current Board. Here, the objective of introducing new Board members to check the Board's oversight and supervision of the Optimization Plan is at the very least being diminished, even if not rendered moot, by allowing the existing Board to continue with its implementation for any longer than is justifiably necessary until the special meeting is held.

[72] If, as in *Bioniche*, at paras. 86-89, the Board had agreed to mitigate the impacts of the delay by giving the Undertaking proposed by the applicants to maintain the *status quo* and not to further implement the Optimization Plan until after May 16, 2023, the applicants would have been content to have the meeting delayed by five months. However, the Board stated, to the contrary, that one of the reasons it was delaying the date of the special meeting was so that the Optimization Plan could continue to unfold and determined that it could not fetter its discretion in that regard by providing the proposed Undertaking. Postponing the special meeting for five months to allow this to unfold prejudices the requisitioning Unitholders and those who support their proposals. The Board minutes do not indicate that this particular prejudice was identified or considered, as it ought to have been: see *Bioniche*, at para. 89; *Marks*, at paras. 37-38.

[73] In all of the circumstances, I find that the desire to delay the date of the special meeting to allow the Optimization Plan to further unfold was not a reasonable factor to take into consideration in determining the meeting date. If that had been simply a by-product of other reasonable justifications but it appears to have been an independent consideration and justification.

C) The Third Justification: More time for Unitholders to consider the issues and engage

[74] The logic of the Board's third justification, to allow the Unitholders more time to consider the information and engage with the Board before the special meeting, is not particularly compelling. The further information that the Board intends to provide are the first quarter of 2023 financial statements, which will not be available until early May and therefore could not be included in the meeting materials for the May 16, 2023 meeting date since they would have to be provided to the Unitholders by no later than April 25, 2023 (21 days before the meeting date, pursuant to s. 13.3 of the Trust Declaration). Thus, the Unitholders may not even have the additional financial and performance information that the Board suggests would enhance and inform their decision-making and allow for engagement very much in advance of the special meeting to be held on May 16.

[75] In the meantime, First Capital advised the Unitholders in its December 30, 2022 press release that there is "no need for them to take any action in respect of the Meeting." Therefore, they are not gaining any additional time for consideration of the materials for the meeting. Rather, the materials are simply being delayed so that another quarter of financial information can be provided, the justification for which is discussed in the previous section of this endorsement.

D) The five month delay from December 12, 2022 to May 16, 2023 is not reasonable or justified

[76] The difficulty in this case is that two of the three principal reasons given by the Board for the selection of the May 16, 2023 date for the special meeting are not compelling (the cost and distraction of two meetings and the additional time to consider further financial results and engage with the Board). The third factor that the Board took into consideration (unspecified steps or events that might transpire and would be reflected in the first quarter financial results) is too vague and speculative to be meaningful. Inversely, the prejudice in the potential for the delay to diminish the objective underlying the Requisition (to change the Board oversight and supervision of the Optimization Plan) has not been mitigated. Yet, it is this third factor that appears to have driven the selection of the May 16, 2023 meeting date: working forward from the date on which it was expected the first quarter of 2023 financial statements would be available and selecting the earliest date on which the special meeting could occur after that.

[77] In an effort to counter the prejudice that the applicants claim will flow from the continued unfolding of the Optimization Plan pending a May 16, 2023 meeting, First Capital asserts that the claimed prejudice is contrived because the requisitioning Unitholders had been prepared, in the context of the negotiations in October 2022 (that would have allowed them to nominate some directors), to publicly support allowing the Optimization Plan to unfold through the summer of 2023. The requisitioning Unitholders say that this is not contrary to their position but rather consistent with it, as having their nominated Board members would have given them the very oversight and supervision over the Optimization Plan that they seek to achieve through the Removal and Appointment Resolutions.

[78] First Capital also asserts that the urgency with which the applicants seek a special meeting is also contrived, having waited until December 12, 2022 to deliver their Requisition. The applicants have explained that the delay in the delivery of the Requisition from October 13, 2022,

when their discussions broke down, and December 12, 2022 was due to their efforts to hire a proxy solicitor and identify a slate of qualified and independent persons willing to be nominated (whose names and CV's had to be included with the Appointment Resolution). I accept this explanation for the timing of the resolution.

[79] It is unfortunate that this resulted in the Requisition being delivered in December and close to the holidays. In recognition of this timing, the applicants offered to extend the 21 days in which the meeting was to be called to afford the Board the time to meet and take advice, but the Board chose not to avail itself of this offer and instead held a single Board meeting on December 14, 2022 at which it decided to hold the special meeting on May 16, 2023 and announced this within the 21 days, on December 30, 2022.

[80] Having carefully scrutinized the Board's decision making process and the range of possible reasonable outcomes, I find that the Board did not call the special meeting expeditiously and within a reasonable time. Rather, the Board's decision to hold the special meeting five months after it was requisitioned, in conjunction with an early AGM, resulted in an "unreasonable or unjustifiable" delay.

[81] Mr. Paul's affidavit and the January 5, 2023 Corporate Governance Committee minutes indicate that the Board did not want to fetter its discretion with respect to the ongoing supervision and oversight of the Optimization Plan and any opportunities that might arise by providing the proposed Undertaking. That is the Board's prerogative, but absent the ability of the Board to offer that standstill protection to justify a later meeting date, the special meeting date should be set as soon as practically possible after the Requisition was delivered.

[82] What is reasonably and practically possible can be influenced by the availability of historic information and reasonably anticipated future steps or occurrences. In this case, that decision would need to take into account when the information and material to be put before the Unitholders, including information about the Optimization Plan and the steps taken in furtherance of it up to the date of the Requisition, and the 2022 year-end financial statements, will be available, how long it is expected to take to compile the requisite material for the meeting and the notice and meeting date requirements set out in the Trust Declaration and applicable statutes.

[83] Back in December 2022, when the Requisition was received, it might have been possible, having regard to these factors, for the special meeting to be held on March 1, 2023. However, taking these factors into account now, applicants' counsel acknowledged at the hearing that it might not be possible to have the meeting on March 1, 2023 and that they are asking for the court to order that the meeting take place on March 1, 2023 or as soon thereafter as it can be held with materials distributed 21 days in advance, including the 2022 year-end financial statements for the Trust. Counsel are confident that they can figure out the timing with this direction.

Final Disposition and Costs

[84] For the reasons indicated above, the application is granted, with the necessary modifications as to the date of the special meeting to consider the Removal Resolution and the Appointment Resolution, which shall take place on March 1, 2023 or as soon thereafter as it can

be held with materials distributed 21 days in advance, including the 2022 year-end financial statements for the Trust.

[85] Counsel indicated that they were confident they could work out an agreement regarding the costs of this application once they have the court's decision. Given the limited time available for the hearing, there were no submissions made on costs. The court encourages the parties to come to some agreement on costs in light of this decision. If further assistance and directions are needed, a scheduling appointment can be arranged with me through the Commercial List scheduling office.

[86] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out. Any party may take out a formal order by following the procedure under r. 59.



Kimmel J.

Date: February 1, 2023