



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

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TITLE OF PROCEEDING: GENESIS MORTGAGE INVESTMENT CORPORATION v. 1176411
ONTARIO LTD

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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118 observers/ purchasers		

ENDORSEMENT OF JUSTICE KIMMEL:

Background

- [1] KSV Restructuring Inc. ("KSV") was appointed as the receiver and manager (the "Receiver"), without security, of all of the property, assets and undertaking (the "Property") of the Respondents, 1333 Weber Street Kitchener LP ("1333 Weber LP") and its general partner, 1776411 Ontario Limited ("177 Ontario", and with 1333 Weber LP, the "Partnership") by an order dated October 12, 2023 (the "Receivership Order"). The principal asset of the Partnership is an intended phased four-tower residential condominium project on the Real Property (the "Project").
- [2] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Receiver's factum for this motion.
- [3] The Project is not complete. Tower A is partially complete, and Towers B and C are at the foundation stage. There are approximately 500 purchasers who have entered into agreements of purchase and sale in respect of condominium units in all three Towers.
- [4] Pursuant to an Order dated December 12, 2023 (the "Sale Process Order"), the Court approved a sale process for the Project, including the retention of CBRE Limited ("CBRE") as listing agent. By the January 31, 2024 Bid Deadline thirty-seven interested parties had signed CAs and were given access to the VDR, nine interested parties attended a site tour, and seven interest parties submitted offers for the Project. The Sale Process was carried out in accordance with the Sale Process Order, but despite multiple offers being received there were none that the Receiver was prepared to accept.
- [5] The Applicant in this proceeding, Genesis Mortgage Investment Corporation ("GMIC") is the junior secured creditor among three First Mortgagees who together hold the first mortgage. Over \$67 million is owing under the first mortgage of which approximate \$23 million is owed to the GMIC.
- [6] There are second and third mortgages ranking behind the First Mortgage. In addition to the three mortgages over the Real Property, fifteen suppliers and trade contractors have registered twenty-two separate construction liens against the Real Property totaling approximately \$17,664,878.11

- [7] When the Sale Process failed to produce any acceptable bids, GMIC put together a group (the "Purchasers") comprised of itself, Elm Acquisitions Corp. ("Elm Acquisitions"), and Dorr Capital Corporation ("Dorr") to make a bid for the Project that was ultimately accepted by the Receiver, resulting in a proposed sale transaction for the Project (the "Transaction") under an agreement of purchase and sale dated March 4, 2024, as amended (the "Elevate APS").
- [8] The Purchase Price under the APS covers the amount owing to the First Mortgages (totaling approximately \$65 million in the aggregate, including without limitation, principal, interest, protective disbursements, legal expenses, and other costs and expenses), and priority payables as set out in paragraph 4.5 of the Elevate APS, as amended by the Waiver and Eighth Amendment to the Elevate APS dated September 23, 2024 (the "Purchase Price"). The priority payables include approximately \$2.8 million to be paid to priority lien holders, the amount of the Receiver's borrowing (to date and estimated going forward, for a total of approximately \$2.5 million), municipal property taxes, commissions owing to CBRE and a reserve for professional fees and expenses incurred after October 1, 2024. The total estimated Purchase Price is \$73 million.
- [9] The Transaction is the best transaction to have emerged following a thorough canvassing of the market pursuant to the terms of the Sale Process Order. The Transaction also represents the most certain and highest recovery available to stakeholders in the circumstances, and the Receiver recommends that it be approved by the Court.
- [10] There will be sufficient net proceeds from the Transaction ("Proceeds") to make pay the thirteen Lien Claimants whose claims have been validated by the Receiver (in respect of their priority holdback claims) and the First Mortgagees (after the identified priority payables are paid, or a reserve is maintained for them). There will be no funds available for distribution to the Second and Third Mortgagees or to any other secured or unsecured creditors of the Partnership.
- [11] The Elevate APS and the Transaction are conditional upon court approval. The Elevate APS and the Transaction require the disclaimer of some agreements of purchase and sale with individual condominium purchasers.
- [12] The condominium units in Towers A, B and C were pre-sold to condominium unit purchasers ("Condo Purchasers"). Pursuant to the Elevate APS, the existing pre-construction agreements of purchase and sale (the "Pre-construction Unit APSs") for Tower C will be assumed by the Purchasers, and the Pre-construction Unit APSs for Tower B will be disclaimed and terminated. For the Tower A Condo Purchasers, following the results of the Tower A sales plan set out in Schedule "B" to the Elevate APS (the "Tower A Sales Plan"), the Tower A Condo Purchasers will either have entered into new agreements of purchase and sale with the Purchasers, or their Pre-construction Units APSs will be disclaimed and terminated.

[13] Condo Purchasers whose Pre-construction Units APSs are disclaimed and terminated will have the opportunity to participate in a Deposit Return Protocol intended to streamline the process for those Condo Purchasers to recover their deposits and any interest that they are entitled to under the provisions of the Condominium Act and calculated in accordance with the statutory requirements.

[14] Since the submission of the Elevate APS, no other party has submitted an offer for the Project.

This Motion

[15] In anticipation of a planned closing date of October 10, 2024 for the Transaction and the Elevate APS, the Receiver seeks the following Orders:

- a. an Approval and Vesting Order in respect of the Elevate APS;
- b. an Order authorizing and directing the Receiver (i) to terminate and disclaim the Pre-construction Unit APSs related to Tower B of the Project, and, (ii) to terminate and disclaim the Pre-construction Unit APSs related to Tower A that are not being assumed by the Purchasers, with notice to be provided by the Purchasers to the Receiver within 120 days of Closing of the Transaction;
- c. an Order approving the Deposit Return Protocol for deposits paid by the Condo Purchasers who have their Pre-Construction Unit APSs disclaimed and terminated;
- d. an Order authorizing and directing the Receiver to disclaim and terminate the Rego Listing Agreement;
- e. an Order declaring that the liens of Classic Tile Contractors Limited ("Classic Tile") and of 2866791 Ontario Corp o/a HGL Electrical ("HGL Electrical") are invalid;
- f. a Distribution Order authorizing and directing the Receiver to make distributions to thirteen of the Lien Claimants in full satisfaction of their priority claims made pursuant to section 78 of the *Construction Act* R.S.O. 1990, c. C.30 (the "Construction Act"), and to the First Mortgagees, in each case as set out in the Receiver's Second Report dated September 27, 2024 (the "Second Report"), and as set out below under the heading "Proposed Distribution";
- g. an Order sealing the confidential appendix attached to the Second Report, being the summary of the offers for the Project prior to the Elevate APS, until the Closing of the Transaction;

- h. an Order amending the Receivership Order by increasing to \$2.5 million the amount the Receiver is authorized to borrow under the Receivership Order; and
- i. an Order approving the activities described in the Receiver's Second Report, accepting the Receiver's Interim Statement of Receipts and Disbursements for the period from October 12, 2023, to September 12, 2024, and approving the fees and disbursements of the Receiver and of its counsel for the period from October 12, 2023 to August 31, 2024.

[16] There is no opposition to the relief sought by the Receiver on this motion.

Approval and Vesting Order (AVO)

[17] There are various components of the AVO for the court to consider, beyond the standard model order language that it contains.

The Approval of the Transaction and the Elevate APS

[18] In *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (Ont CA), at para. 16, the Court of Appeal for Ontario stated that the following factors must be considered when considering the approval of a proposed sale:

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

[19] The Sale Process was approved with these factors in mind and was carried out in accordance with the Sale Process Order. Each of these factors is satisfied in respect of the Sale Process for the reasons outlined in the Receiver's factum at paragraph 51.

[20] The Receiver recommends that the court approve the Transaction and the Elevate APS. The First Mortgagees support the Transaction, and to date, no parties have objected to the requested order, despite an earlier indication that there would be opposition from some stakeholders. I am satisfied that the Transaction and the Elevate APS should be approved. The vesting of the purchased assets provided for in the AVO is required to give full effect to the Transaction.

Authorization for the Receiver to Disclaim and Terminate Pre-construction Unit APSs and the Rego Listing Agreement

- [21] The Receiver seeks court authorization to disclaim and terminate certain contracts that the Purchasers are not prepared to assume.
- [22] Disclaimers are a valuable tool by which a receiver can maximize the value of the assets of the estate for the benefit of stakeholders in the context of a receivership sale of real property. *Forjay Management Ltd. v. 0981478 BC Ltd.*, 2018 BCSC 527 (B.C. S.C.J.), at paras. 25, and 131-132. See also, *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243(1) (c).
- [23] The Pre-construction Unit APSs of the Condo Purchasers contain express acknowledgements that (i) they confer a personal right only and not an interest in the Real Property or the Project and (ii) the Condo Purchasers subordinate and postpone their Pre-construction Unit APSs to any mortgages, including the First Mortgage, as applicable, and any advances under such mortgage. In addition, none of the Pre-construction Unit APSs are registered on title to the Real Property. For these reasons, the holders of proprietary and/or priority interests in the Real Property, including the First Mortgagees, have priority over the Condo Purchasers' rights pursuant to the Pre-construction Unit APSs.
- [24] The disclaimer and termination of the Pre-construction Unit APSs that the Purchasers are not prepared to assume (in Tower B and those in Tower A that do not agree upon satisfactory terms for them to be assumed by the Purchasers) is necessary to facilitate the completion of the Elevate APS.
- [25] Pursuant to the Endorsement of Justice Osborne made September 25, 2024, the Condo Purchasers for each of Towers A, B and C were served by email on September 27, 2024, with the Receiver's motion record for the motion herein, along with an explanatory letter advising them of, among other things, the Purchasers' intentions with respect to their respective Pre-construction Unit APSs.
- [26] Over 100 observers attended the zoom hearing for this motion, many of whom are Condo Purchasers. A random selection of those who indicated they wished to speak at the hearing were given the opportunity to do so, as time permitted. Various questions were asked and answered, primarily about the calculation and timing of the return of deposits under the Deposit Return Protocol for those whose Pre-Construction Unit APSs are being disclaimed and terminated.
- [27] Some Condo Purchasers expressed frustration with the delays and loss of their units while others expressed concerns about their lack of options (for those in Tower B whose Pre-Construction Unit APSs will all be disclaimed and terminated and for those in Tower C whose Pre-Construction Unit APSs are not being disclaimed). Purchasers in Tower A had

different concerns, about being required to agreed to an increased purchase price to avoid having the Pre-Construction Unit APSs disclaimed or terminated. Questions raised were addressed by counsel best situated to do so. Condo Purchasers were encouraged to contact the Receiver to address any remaining questions they had about the process and anticipated timelines.

- [28] The concerns expressed by Condo Purchasers were heard by the court. Their concerns are a function of the financial circumstances of the Partnership and market forces that led to this receivership. The Receiver is trying to make the best of a bad situation by maximizing value for creditors who are in a position of priority and who are exposed to the risk of significant financial loss.
- [29] The relative priority position of the First Mortgagees ahead of the Condo Purchasers, and the value maximization that is being achieved through the Elevate APA in contrast with the other (unacceptable) bids that were received in the Sale Process, are relevant considerations in the court's determination that the Receiver should be authorized to disclaim and terminate the Pre-construction Unit APSs in Tower B and those in Tower A that the Purchaser are not prepared to assume. See *Forjay* at paras. 41-44. Those Condo Purchasers whose Pre-Construction Unit APSs are being disclaimed are expected to receive their full deposits plus the interest that they are entitled to under the applicable statutes. Those Condo Purchasers whose Pre-Construction Unit APSs are not being disclaimed will continue to have their contractual and statutory rights and remedies available to them.
- [30] Paragraph 3(c) of the Receivership Order authorizes the Receiver to cease to perform or disclaim any contracts of the Partnership, which includes the Rego Listing Agreement. There is no provision in the Rego Listing Agreement that it creates a right or claim against the Real Property or the Project. The agreement is with the 177 Ontario, not with the Condo Purchasers, and the Elevate APS Purchasers are not taking an assignment of the Rego Listing Agreement.
- [31] While there had been some earlier communications with Rego, it did not appear to raise any opposition to this relief at the hearing. It is appropriate for the Receiver to be authorized to disclaim and terminate the Rego Listing Agreement as well. This disclaimer is addressed in the Ancillary Order.

The Deposit Return Protocol

- [32] The Deposit Return Protocol sets out in detail the steps that the Condo Purchasers will have to take in order to claim the return of their deposits if their Pre-construction Unit APSs are terminated, and is substantially the same as other protocols used in similar situations.

- [33] The Deposit Return Protocol was contemplated by the court's previous orders and directions. It will be administered by the insurers with responsibility for payment of the deposits to Condo Purchasers whose Pre-construction Unit APSs are being disclaimed and terminated, with interest that will be calculated in accordance with the applicable statutory regime.
- [34] Counsel for Aviva Insurance Canada and Tarion Warranty Corporation advised the court that this protocol is similar to protocols that have been used with success in other similar situations and that it is designed to make the process easier and more streamlined for the affected Condo Purchasers.

Sealing Order

- [35] The Receiver requests that the summary offers received in the Sale Process contained in Confidential Appendix "1" to the Second Report be temporarily treated as confidential and sealed, and not form part of the public record, pending the Closing of the Transaction.
- [36] The publication of the offers that were submitted for the Project prior to the Elevate APS could adversely impact the future marketability of the Project should the Transaction not close. It is in the public interest and necessary to seal this information to ensure that recoveries in these receivership proceedings are maximized. In contrast, disclosing this information before the Transaction closes could materially impair the maximization of asset value for the benefit of stakeholders. The proposed partial and temporary sealing order mitigates this risk.
- [37] There is no apparent prejudice to any party from the temporary sealing of the commercially sensitive information, and no public interest will be served if it is made public prior to closing, that could prejudice stakeholder recoveries in the process.
- [38] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Preservation of the confidentiality of information inherent in a sale process is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 85 when limited to only that material that contains the confidential and sensitive information and only for as long as may be necessary, as has been proposed in this case. The sealing order will terminate upon the Closing of the Transaction, or upon further order of the Court.
- [39] In the insolvency context, courts have applied the *Sierra Club* test, including as recast in *Sherman Estate*, and granted sealing orders over confidential or commercially sensitive documents to protect the commercial interests of debtors and other stakeholders. See for example, *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009, at paras. 47-48; *GE Canada Real Estate Financing Business Property Company v. 1262354*

Ontario Inc., 2014 ONSC 1173, at para. 32; *Stelco Inc, Re*, 2006 CanLII 1772 (ONSC), at paras. 2-5; *Re Canwest Publishing Inc.*, 2010 ONSC 222, at paras. 63-65; and *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347, at paras. 23-27.

- [40] Counsel is directed to ensure that the sealed Confidential Appendix 1 is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can physically sealed. Counsel is further directed to apply, at the appropriate time, for an unsealing order.

Distribution and Ancillary Relief Order

- [41] The Ancillary Order deals with the validity of certain liens, distributions to valid lien claimants, the disclaimer of the Rego Listing Agreement (discussed earlier in this endorsement) and the approval of the Receiver's activities, statement of receipts and disbursements and its fees and the fees of its counsel.

Validity of Liens

- [42] There were fifteen lien claimants (the "Lien Claimants"). The Receiver has determined that two of the Lien Claimants' liens are invalid (those of Classic Tile and HGL Electric) as no services or materials were provided by them to the Project. One Lien Claimant's lien amount was reduced by the Receiver to reflect the services and materials it provided to the Project.
- [43] Pursuant to section 78 of the *Construction Act*, the remaining thirteen Lien Claimants have priority over the First Mortgage to the extent of any deficiency in the holdbacks required to be retained by the Partnership under the *Construction Act*.
- [44] None of the Lien Claimants appeared at the hearing to raise any concerns or objection to the proposed order regarding their claims.

Proposed Distributions

- [45] Upon Closing the Transaction, the Receiver recommends that it be authorized and directed to make the following distributions from the Transaction sale proceeds:
- a. up to \$2,835,721.83 to the thirteen Lien Claimants; and
 - b. up to the balance owing to the First Mortgagees, though only after payment of the identified priority claims.

[46] The Receiver is not aware of any other secured creditors or any other claims that rank, or may rank, in priority to the claims of the First Mortgagees, other than: (a) property taxes of approximately \$227,826.00, which will be satisfied on Closing of the Transaction; (b) a commission of \$250,000 plus HST payable to CBRE pursuant to its listing agreement; and (c) the Receiver's borrowings of approximately \$2,000,000 (sought to be increased to \$2.5 million), and a reserve for the Receiver's present and future fees and expenses, and those of the Receiver's legal counsel.

[47] The proposed distributions are appropriate in that:

- a. The thirteen Lien Claimants have liens registered in priority to any other charge on the Real Property or security related to the Project. It is the Receiver's opinion that these thirteen Lien Claimants have a valid and enforceable charge.
- b. The First Mortgage is in first position and constitutes a valid and enforceable charge. The Receiver is not aware of any secured creditor that has an outstanding priority claim ranking ahead of the First Mortgagee (other than Lien Claimants).
- c. The Transaction is structured to ensure that the Receiver retains sufficient liquidity (with the benefit of the increased borrowing authorization which is supported by all affected parties). The proposed distributions account for various expenses, including property taxes and utilities, and a portion of the proceeds will be retained by the Receiver in order to pay closing costs (such as broker commissions) and the costs of these proceedings (including as the fees and costs of the Receiver and its counsel).

See, for example, *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173, at para. 53.

Approval of the Receiver's Activities and Reports, and the Fees of the Receiver and its Counsel

[48] This court has inherent jurisdiction to approve a court-appointed receiver's reports and present and past activities. See s. 183(l) of the BIA and *Confederationally Yours Inc.*, (2002) OJ No 3569 at para. 36, citing F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 459-460.

[49] The court encourages interim approval of the activities of court officers: see *Re Target Canada Co.*, 2015 ONSC 7574, at paras. 2, 22-23; *Laurentian University of Sudbury*, 2022 ONSC 2927, at paras. 13-14; and 41 *Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161 at para 15. This enhances and encourages transparency.

[50] The activities of the Receiver as described in the Second Report appear to have been carried out in good faith, in a manner consistent with the provisions of the BIA and in

accordance with the provisions of the Orders made in this proceeding with a view to maximizing recoveries for stakeholders.

- [51] The proposed form of order contains the appropriate qualification regarding the approval of the Receiver's activities detailed in its Second Report, in accordance with the court's practice.
- [52] With respect to the fees of the Receiver and its counsel for which approval is sought, the guiding principle is whether the fees are fair, reasonable and proportionate. The fees and disbursements of the Receiver and its counsel for which approval is sought are supported by invoices for time and hourly rates that are well documented. The amounts for which approval is sought are supported by fee affidavits.
- [53] The fees and disbursements for which approval is sought appear to be fair and reasonable and to have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market. *See Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at paras. 33 and 44-45.

Order

- [54] The AVO and Distribution and Ancillary Relief Order may issue in the revised forms signed by me today.

A handwritten signature in dark ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.

October 9, 2024