

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

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O 1990 C. C.43 AS AMENDED

B E T W E E N:

GENESIS MORTGAGE INVESTMENT CORPORATION

Applicant

- and -

1776411 ONTARIO LTD. and 1333 WEBER STREET KITCHENER LP

Respondents

**FACTUM OF THE COURT-APPOINTED RECEIVER,
KSV RESTRUCTURING INC.
(Receiver's Motion for Sale Approval and Vesting Order,
Returnable October 8, 2024)**

October 3, 2024

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TO: SERVICE LIST

PART I – OVERVIEW

1. On October 12, 2023, the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) issued an Order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) 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**”).¹

2. The principal asset of the Partnership is the real property located at 1333 Weber Street East, City of Kitchener (the “**Real Property**”), and the intended phased four-tower residential condominium project on the Real Property (the “**Project**”).

3. 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.² The Project was marketed for sale by CBRE in accordance with the Sale Process Order, including CBRE preparing an offering summary (the “**Offering Summary**”).

4. Ultimately, after consideration of multiple offers for the Project, and in consultation with CBRE, the Applicant (and one of the first mortgagees), Genesis Mortgage Investment Corp. (“**GMIC**”), and the two remaining first mortgagees CMLS Financial Ltd. (“**CMLS**”) and Computershare Trust Company of Canada (“**Computershare**”, and together with GMIC and CMLS, the “**First Mortgagees**”), none of those offers was accepted by the Receiver. GMIC then

¹ Motion Record of the Receiver dated September 27, 2024 (“**Receiver’s Record**”), Second Report, Appendix “A”, Appointment Order.

² Receiver’s Record, Second Report, para 3.0.1 and Appendix “D”, Sales Process Order.

advised the Receiver that it would be submitting a bid for the Project.

5. This resulted in a proposed sale transaction for the Project (the “**Transaction**”) between the Receiver as vendor, and GMIC, Elm Acquisitions Corp. (“**Elm Acquisitions**”), and Dorr Capital Corporation (“**Dorr**”), or one of more of their designees or nominees, as purchasers (collectively, the “**Purchasers**”), pursuant to an agreement of purchase and sale dated March 4, 2024, as amended (the “**Elevate APS**”).

6. The purchase price is the full amount owing under the First Mortgage (defined below) on the closing date of the Transaction (“**Closing**”), including without limitation, principal, interest, protective disbursements, legal expenses, and other costs and expenses, as well as 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**”).³

7. The Receiver now seeks Court approval of the Transaction, as well as authorization and approval of the Receiver’s execution of the Elevate APS.

8. 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.

9. The Receiver also seeks to make a distribution (the “**Distribution**”) from the net proceeds of the Transaction (the “**Proceeds**”) to thirteen of the Lien Claimants (defined below), and to the

³ Receiver’s Record, Second Report, Appendix “H”, Elevate APS, Article 4.1. Pursuant to the 8th amendment to the Elevate APS, the Purchase Price is subject to adjustment for any funds that the Receiver may receive from CRA in respect of input tax credits relating to any component of the Purchase Price.

First Mortgagees up to the balance owing to them. There are sufficient Proceeds to pay both the Lien Claimants (in respect of their priority holdback claims) and the First Mortgagees (after the priority payables are paid, or a reserve is maintained for them). The First Mortgagees support the Transaction and the Distribution.

10. The condominium units in Towers A, B and C (defined below) 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**”),⁴ 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.

11. Pursuant to a deposit return protocol recently finalized by the two deposit insurers and for which Court approval is being sought (the “**Deposit Return Protocol**”), Condo Purchasers whose Pre-construction Unit APSs are terminated and disclaimed by the Receiver, will be entitled to make a claim for the return of the deposits they paid under their Pre-construction Unit APSs. The Deposit Return Protocol will be filed with the Court prior to the return of the within motion, and will be posted on the Receiver’s website. The Deposit Return Protocol sets out in detail the steps that the Condo Purchasers will have to take to claim the return of their deposits.

12. 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

⁴ Receiver’s Record, Second Report, Appendix “H”, Elevate APS, Schedule “B”.

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.

13. Finally, 177 Ontario entered into an exclusive listing agreement for the Project's condominium units with Rego Realty Inc. ("**Rego Realty**") dated March 22, 2019 (the "**Rego Listing Agreement**"). The Condo Purchasers are not a party to the Rego Listing Agreement, and the Purchasers are not assuming this contract.

14. The Receiver therefore 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 (defined below) 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 until the Closing of the Transaction, being the summary of the offers for the Project prior to the Elevate APS;
- (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.

PART II – FACTS

Background to the Transaction – the Project and the Mortgage Security

15. When the Receiver was appointed, the Partnership was in the process of developing the Project, which had been marketed as “Elevate”. The first phase of the intended four-phase Project is a 177-unit residential building (“**Tower A**”) that was estimated to be 80% complete at the time the Receivership Order was granted.⁵ The second and third phases of the site consist of a large open pit with a partially completed foundation and underground parking area (“**Tower B**” and “**Tower C**”, respectively, and collectively “**Towers B and C**”). The fourth phase is currently raw land (“**Tower D**”).⁶

16. The Real Property is subject to the following mortgages:

- (a) a first ranking mortgage in favour of the First Mortgagees in the principal amount of \$82,000,000.00 registered on August 17, 2021 (the “**First Mortgage**”). As of October 1, 2024, the First Mortgagees were owed approximately \$67.2 million exclusive of costs, and with interest continuing to accrue (the “**First Mortgagees Indebtedness**”), of which approximately \$43.6 million is owing to CMLS/Computershare, and approximately \$23.6 million is owing to GMIC;⁷
- (b) a second ranking mortgage in favour of Westmount Guarantee Services Inc. (“**Westmount**”) in the principal amount of \$50,000,000.00. The Receiver understands that as of September 20, 2024, Westmount is owed approximately

⁵ That estimate appears to have been optimistic based on reviews completed by a cost consultant engaged by the Receiver and parties who participated in the Sale Process.

⁶ Receiver’s Record Second Report, para 2.1

⁷ Receiver’s Record, Second Report, para 2.1.1(a) and (b).

\$17,000,000 (the “**Westmount Indebtedness**”), representing deposits that were released from escrow;⁸

- (c) a third mortgage in favour of CORFinancial Corp. (“**COR**”) in the principal amount of \$3,500,000, registered on May 8, 2023, in connection with a transaction whereby: (i) the Partnership and COR entered into a Commitment Letter wherein COR agreed to pay certain outstanding construction costs owing by the Partnership to the Partnership’s construction manager on the Project, Gillam Urban Contractor Inc. (“**Gillam**”), and (ii) COR provided Gillam with a promissory note for approximately \$2.9 million regarding certain of Gillam’s outstanding construction costs (the “**COR Third Mortgage**”). While COR received a fee of \$300,000 in respect of the Commitment Letter (paid by CMLS), the Receiver understands that COR did not advance any funds to Gillam related to this transaction.⁹ COR also entered into a Subordination and Standstill Agreement with the First Mortgagees as a condition of the COR Third Mortgage;¹⁰ and,
- (d) in addition to the three mortgages over the Real Property, 15 suppliers and trade contractors have registered 22 separate construction liens against the Real Property totaling approximately \$17,664,878.¹¹

17. In addition to these charges described above, the Partnership also granted the First Mortgagees additional security in the form of a general assignment of rents and leases, and a

⁸ Receiver’s Record, Second Report, para 2.1.1(c) .

⁹ Receiver’s Record, Second Report, para 2.1.1(d).

¹⁰ GMIC Application Record dated October 2, 2023, Affidavit of Michael Yeung sworn October 2, 2023, paragraph 31 and Exhibit “O”.

¹¹ Receiver’s Record, Second Report, para 2.1.1(e).

general security agreement, dated August 17, 2021, and August 13, 2021, respectively.¹²

The Sale Process

18. Pursuant to the Sale Process Order, the Receiver was authorized to market, sell, convey and apply for a vesting order for the Project, and to retain CBRE to act as listing agent.

19. The Project was marketed for sale by CBRE in accordance with the Sale Process Order. CBRE prepared the Offering Summary and distributed it on December 14, 2023, to an extensive list of over 3,000 prospective purchasers, including local and national builders, developers and investors. The Project was also listed on the Multiple Listing Service, and CBRE directly contacted parties that it believed would be interested in the opportunity.¹³

20. Interested parties were required to sign a confidentiality agreement (“**CA**”) to access the virtual data room (“**VDR**”). The VDR included information provided to the Receiver by a representative of the Partnership, by the First Mortgagees, and by certain parties that had provided construction services to the Partnership. The VDR also included a form of asset purchase agreement (the “**Template APS**”).¹⁴

21. A bid deadline of January 30, 2024, was set by CBRE based on market feedback (the “**Deadline**”), by which time 37 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.¹⁵

¹² Receiver’s Record, Second Report, para 2.1.1(b).

¹³ Receiver’s Record, Second Report, paras 3.0.2 and 3.0.3, and Appendix “E”, Offering Summary.

¹⁴ Receiver’s Record, Second Report, para 3.0.4.

¹⁵ Receiver’s Record, Second Report, paras 3.0.6 and 3.0.7, and Confidential Motion Record of the Receiver, Confidential Appendix “1”, Summary of Offers.

22. The Receiver reviewed the offers with CBRE and the First Mortgagees. Following the review of the offers, the First Mortgagees advised the Receiver that they did not support a transaction based on any of the offers, as the values were below the amount owing to the First Mortgagees and, in the view of the First Mortgagees, below the value of the Project.¹⁶

23. GMIC, one of the First Mortgagees, then advised the Receiver that it would be submitting a bid for the Project. GMIC discussed its interest in the Project with builders and developers, which ultimately led to the Purchasers submitting the Elevate APS. The \$5 million deposit was paid, and conditions were waived on September 23, 2024.¹⁷

24. Since the submission of the Elevate APS, no other party has submitted an offer for the Project.¹⁸

The Elevate APS

25. The Purchasers and the Partnership are arms-length parties.¹⁹

26. The Elevate APS provides that Closing will occur by October 30, 2024, or such earlier date as the Receiver and the Purchasers agree. The Receiver and the Purchasers are currently targeting a closing date of October 10, 2024. It is a material condition of the Elevate APS that the Receiver obtain the AVO, and that the AVO not be stayed.²⁰

27. Upon Closing, the Purchasers will be vested with all of the Partnership's right, title and interest in the Project and certain contracts and permits specified in the Elevate APS related to the

¹⁶ Receiver's Record, Second Report, para 3.0.9.

¹⁷ Receiver's Record, Second Report, paras 3.0.9, 3.0.10 and 3.1.1.

¹⁸ Receiver's Record, Second Report, para 3.0.11.

¹⁹ Receiver's Record, Second Report, para 3.1.1(a).

²⁰ Receiver's Record, Second Report, para 3.1.1(g) and (h).

Project, including the Pre-construction Unit APSs for Tower C.²¹

28. The Purchasers are not acquiring assets specifically excluded in the Elevate APS. These excluded assets include, among other things:

- (a) the Pre-Construction Unit APSs for Tower A, and any monies paid to the Partnership or on its behalf as a deposit or on account of a purchase of a condominium unit relating to any such Pre-construction Unit APSs (provided that if a Tower A Condo Purchaser enters into a new agreement of purchase and sale with the Purchasers, the deposit is expected to be assigned to the Purchasers);
- (b) in respect of Tower B, the existing Pre-construction Unit APSs, and any monies paid to the Partnership or on its behalf as a deposit or on account of a purchase of a condominium unit to be constructed in Tower B;
- (c) all cash and equivalents and accounts receivable of the Partnership;
- (d) the benefit of any refundable Taxes payable or paid by any of the two partners in the Partnership or paid by the Receiver in respect of the Purchased Assets and applicable to the period prior to Closing net of any amounts withheld by any taxing authority, and any claim or right of any of the Partnership or the Receiver to any refund, rebate, or credit of Taxes for the period prior to Closing. This does not include input tax credits relating to any component of the Purchase Price paid on Closing, as the Receiver is required to hold any such amount in trust for the Purchasers, endorse such amount (without recourse) in favour of the Purchasers,

²¹ Receiver's Record, Second Report, section 3.1, para 1(b).

and pay any such amount to the Purchasers' counsel (as per an amendment to the Elevate APS); and

- (e) all Contracts identified by the Purchasers and disclosed to the Receiver prior to the Due Diligence Date, as defined in the Elevate APS.²²

Condo Purchasers

29. All 177 units of Tower A, and 325 units of Towers B and C, were sold pursuant to Pre-construction Unit APSs. On October 25, 2023, the Receiver advised the Condo Purchasers of the receivership proceeding and the status of their transactions.²³

30. When it served its Motion Record herein, the Receiver sent a letter by email to the Condo Purchasers in each of Tower A, B and C (based on the email addresses in their respective Pre-construction Unit APSs) advising them of the Purchasers' intentions with respect to the Pre-construction Unit APSs.²⁴

31. For the Tower A Condo Purchasers, the Receiver's letter advised (among other things) that the Purchasers would correspond with them in respect of the Tower A Sales Plan, and that any Tower A Condo Purchasers whose Pre-construction Unit APSs are terminated will be entitled to make a claim under the Deposit Return Protocol.²⁵

²² Receiver's Record, Second Report, para 3.1.1(f).

²³ Receiver's Record, Second Report, para 2.2 and Appendix "C", Letter dated October 25, 2023.

²⁴ Receiver's Record, Second Report, para 3.1.1(e) and Appendix "I", Letters dated September 27, 2024.

²⁵ Receiver's Record, Second Report, Appendix I, Letter dated September 27, 2024, to Tower A Condo Purchasers.

32. For the Tower B Condo Purchasers, the Receiver's letter advised (among other things), that their Pre-construction Unit APSs would be terminated, and that they would be entitled to make a claim under the Deposit Return Protocol.²⁶

33. For the Tower C Condo Purchasers, the Receiver's letter advised them (among other things), that their Pre-construction Unit APSs were to be assumed by the Purchasers.²⁷

34. The emails sent by the Receiver to the Condo Purchasers on September 27, 2024, went to approximately 768 unique email addresses (many Pre-construction Unit APSs had more than one email addresses listed). All but two of the emails appear to have been delivered to the Condo Purchasers. The Receiver's counsel arranged for service by courier to the address for service set out in the Pre-construction Unit APSs for the two Condo Purchasers who may not have received the letter by e-mail.

Deposit Return Protocol

35. The Receiver will file with the Court and post on its website the Deposit Return Protocol that will allow the Condo Purchasers whose Pre-construction Unit APSs are terminated to make claims for the return of the deposits that they paid pursuant to the Pre-construction Unit APSs. 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.²⁸

²⁶ Receiver's Record, Second Report, Appendix I, Letter dated September 27, 2024, to Tower B Condo Purchasers

²⁷ Receiver's Record, Second Report, Appendix I, Letter dated September 27, 2024, to Tower C Condo Purchasers

²⁸ Receiver's Record, Second Report, paras 3.4.1 and 3.4.2.

The Lien Claims

36. As set out in the chart below, there are 15 lien claimants (the “**Lien Claimants**”).

37. Two of the Lien Claimants’ liens are invalid (those of Classic Tile and HGL Electric). Pursuant to section 78 of the *Construction Act*, 13 of the 15 Lien Claimants in the chart below 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*:²⁹

No.	Lien Claimant	Registered Lien Amount(s)	Receiver’s Analysis: Max Holdback/Priority Claim (inclusive of tax)
1.	Classic Tile	\$591,923	\$0
2.	HGL Electrical	\$3,123,088	\$0
3.	ABA Architects	\$432,315	\$43,231.50
4.	Aluminum Window	\$1,662,600	\$245,111.48
5.	Conestoga Roofing	\$311,562	\$60,787.01
6.	Dean Lane	\$2,157,415	\$549,251.98
7.	Gillam	\$5,089,130	\$508,913.14
8.	Matthews Equipment	\$85,018.08	\$0 (\$26,417.63 paid out of Gillam holdback)

²⁹ Receiver’s Record, Second Report, para 3.5.2, and Appendix “H”, Lien Claim Analysis.

9.	Gold Star Drywall	\$787,259	\$165,642.13
10.	Greentech Sealants	\$220,190	\$48,960.02
11.	O'Connor Electric	\$357,510	\$34,495.53
12.	Oxford	\$755,948	\$75,595.93
13.	Pearson Metals	\$647,217	\$103,811.87
14.	Stubbe's Precast	\$1,374,127	\$936,001.85
15.	Troy Life	\$184,715	\$63,919.39
	TOTAL	\$17,780,017	\$2,835,721.83

38. The Lien Claimants' priority claims vis-à-vis the First Mortgage are limited to the deficiency in the holdback that was required to be maintained by the Partnership.³⁰

Invalid Liens

Classic Tile

39. Classic Tile registered its claim for lien in the amount of \$591,923 on July 21, 2023, as instrument no. WR1521825 (the "**Classic Tile Claim for Lien**").³¹

40. Classic Tile registered its claim for lien in the amount of approximately \$591,923 pursuant to a flooring supply contract for Tower A entered on April 28, 2021 (the "**Classic Tile**

³⁰ Receiver's Record, Second Report, para 3.4.3.

³¹ Receiver's Record, Second Report, para 3.5.1.2

Contract”).³²

41. Classic Tile’s lien fails, as it did not supply lienable services or material to the Project. In fact, the material that purports to be the subject of Classic Tile’s lien remains in storage at its facility at 1126 Northside Road, Burlington. Classic Tile therefore does not satisfy the requirement for a lien under the *Construction Act* that a lien claimant must supply services or materials to an improvement.³³

HGL Electrical

42. HGL Electrical registered its claim for lien in the amount of \$3,123,088 on August 9, 2023, as instrument no. WR1525921 (the “**HGL Electrical Claim for Lien**”).³⁴

43. The Partnership retained HGL Electrical pursuant to two CCDC 17 contracts to supply electrical services and material to Tower B and Tower C. HGL Electrical was not retained to supply the electrical scope of work to Tower A.³⁵

44. Based on its billings to date, HGL’s position is that it has performed approximately 55% of each of its contracts for Tower B and for Tower C. This does not accord with the status of Tower B and Tower C (which have not progressed beyond the excavation stage). HGL Electrical has provided no evidence of material supplied to site, nor of the services that are purportedly included in its invoicing.³⁶

³² Receiver’s Record, Second Report, para 3.5.1.3.

³³ Receiver’s Record, Second Report, paras 3.5.1.6 to 3.5.1.8.

³⁴ Receiver’s Record, Second Report, para 3.5.1.2.

³⁵ Receiver’s Record, Second Report, para 3.5.1.3.

³⁶ Receiver’s Record, Second Report, para 3.5.1.7.

Rego Realty

45. 177 Ontario had an exclusive listing arrangement with Rego Realty pursuant to the Rego Listing Agreement. The Condo Purchasers are not parties to the Rego Listing Agreement.³⁷

46. The Purchasers do not intend to assume the Rego Listing Agreement. Accordingly, the Receiver seeks an Order disclaiming the Rego Listing Agreement. Any fees or commissions Rego Realty and any co-operating brokers may be owed in respect of Pre-construction Unit APSs represent an unsecured claim against 177 Ontario, and Rego Realty (and any co-operating brokers) has no recourse against the Purchasers or the Condo Purchasers.³⁸

Proposed Distribution

47. 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 priority claims set out in paragraph 47(a) above and paragraph 48 below.

48. 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;

³⁷ Receiver's Record, Second Report, para 3.7.1 and Appendix "L", Rego Listing Agreement.

³⁸ Receiver's Record, Second Report, para 3.7.2.

- (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.³⁹

PART III – ISSUES

49. The issues on this motion are as follows:

- (a) whether the Court should grant the Approval and Vesting Order, including approving the Elevate APS, disclaiming certain of the Pre-construction Unit APSs and the Rego Listing Agreement, and sealing CBRE's offer summary attached as a confidential appendix to the Second Report;
- (b) whether the Court should declare the liens of Classic Tile and of HGL Electric as invalid; and,
- (c) whether the Court should authorize the Receiver to make the distributions to the above-noted Lien Claimants in full satisfaction of their *Construction Act* priority claims, and to the First Mortgagees, as proposed in its Second Report and Notice of Motion.

³⁹ Receiver's Record, Second Report, section 3.5, paras 1-2.

PART IV – LAW

The Approval and Vesting Order Should Be Granted

(a) The Elevate APS Should be Approved

50. The purpose of a receivership under Section 243 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 as amended, (the “**BIA**”) is to “enhance and facilitate the preservation and realization of the assets for the benefit of creditors”. This purpose is generally achieved through the liquidation of the debtors’ assets.⁴⁰ In *Royal Bank v. Soundiar*, the Court of Appeal stated that the following factors must be considered when considering the approval of a proposed sale:⁴¹

- (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.

51. Each of these factors is satisfied in respect of the Sale Process:

- (a) **Fairness, Transparency and Integrity:** The Court-approved Sale Process was conducted in a fair and transparent manner that maintained the appropriate levels of integrity. All potential purchasers were treated fairly and equally,

⁴⁰ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) (Ont. CA) at [para. 73](#)

⁴¹ *Royal Bank of Canada v. Soundair Corp.* (“*Soundair*”), [1991 CanLII 2727 \(Ont CA\)](#), at [para. 16](#).

with interested parties being provided financial and other information to engage in due diligence, and with such interested parties being granted access to the VDR upon the signing of a CA;⁴²

- (b) **Commercial Efficacy:** The Sale Process was conducted by CBRE, which has extensive experience selling development properties in and around the Kitchener area. The Sale Process occurred over approximately a two-month period, during which time prospective purchasers were able to perform due diligence, as facilitated by CBRE. No other offers for the Project have been submitted since the Bid Deadline; and
- (c) **Process Designed to Obtain Best Possible Price:** The market was widely canvassed, with 3,000 interested parties being provided the Offering Summary, and further marketing occurring by way of MLS.⁴³ The Elevate APS provides for the highest net proceeds among all offers submitted, and is supported by the First Mortgagees. Accordingly, the Transaction provides for the most certain and highest recovery available for the benefit of the stakeholders of the Purchasers in the circumstances.

52. The First Mortgagees support the Transaction, and to date, no parties have objected to the Approval and Vesting Order being sought. The commercial decisions of a receiver regarding a sale process are afforded broad deference by the courts. The business judgment of a receiver is accepted by the court absent exceptional circumstances,⁴⁴ and courts have stated that where a

⁴² Receiver's Record, Second Report, section 3.0, para 4.

⁴³ Receiver's Record, Second Report, section 3.0, para 3.

⁴⁴ *Soundair*, at [para 21](#), [58](#).

receiver has acted reasonably, prudently and not arbitrarily, that the court should not sit in appeal from the receiver's decision by conducting a detailed review of every element of the procedure by which a receiver's decision was made.⁴⁵

53. The Receiver submits that the Transaction should be approved for the reasons outlined above. The Sale Process was carried out fairly, transparently and with all due integrity and efficacy, and was a commercially reasonable process which obtained the highest recovery available in the circumstances.

(b) The Court Should Authorize and Direct the Receiver to Terminate and Disclaim Pre-construction Unit APSs and the Rego Listing Agreement

Pre-Construction Unit APSs

54. The Court's jurisdiction to direct a receiver to disclaim pre-sale purchase agreements in the context of receivership sales of real property developments is well established.⁴⁶ Disclaimers are a valuable tool by which a receiver can maximize the value of the assets of the estate for the benefit of stakeholders.⁴⁷

⁴⁵ *Bank of Montreal v. Dedicated National Pharmacies Inc. et al*, [2011 ONSC 4634](#) (Ont. S.C.J. - Commercial List), at [para 43](#).

⁴⁶ *Forjay Management Ltd v 0981478 BC Ltd*, [2018 BCSC 527](#) (B.C. S.C.J.) at paras [131-132](#) ("**Forjay Management**"); *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#) (B.C. S.C.J.) at [para 57](#) ("**Peoples Trust**"); *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd*, [2012 ONSC 4816](#) (Ont. S.C.J. – Commercial List), at [paras 31- 38](#) ("**Firm Capital Mortgage Fund**"); *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, [2020 ONSC 5071](#) (Ont. S.C.J. – Commercial List), at [paras 47-51](#); *bcIMC Construction Fund Corporation et al v The Clover on Yonge Inc. et al*, (September 15, 2020), ONSC (Commercial List) Court File No. CV-20- 00637301-00CL ([Approval and Vesting Order](#)) at para 8; see also, *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#), s [243\(1\)\(c\)](#).

⁴⁷ *Forjay Management* at [para 36](#); *Peoples Trust* at [para 25](#).

55. The considerations for determining whether a Court should authorize a receiver to disclaim pre-sale purchase agreements were set out as follows by Justice Fitzpatrick of the Supreme Court of British Columbia in *Forjay Management*:

- (a) the respective legal priority positions as between the competing interests;
- (b) whether a disclaimer would enhance the value of the assets, and if so, whether a failure to disclaim would amount to a preference in favour of one party; and
- (c) if a preference would arise, whether the party seeking to avoid a disclaimer has established that equities support the result.⁴⁸

56. The Pre-construction Unit APSs 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.

57. The Elevate APS only contemplates an assumption of the Pre-construction Unit APSs for Tower C. The Pre-construction Unit APSs for Tower B will be disclaimed and terminated, and certain of the Pre-construction Unit APSs for Tower A may or may not be disclaimed and terminated following the results (post-Closing) of the Tower A Sales Plan.

⁴⁸ *Forjay Management*, at [paras 41-44](#).

58. As a result, it is submitted that authorizing the Receiver to terminate and disclaim Pre-construction Unit APSs, as applicable, is necessary to facilitate the completion of the Elevate APS.

Rego Realty Listing Agreement

59. The Receivership Order authorizes the Receiver to cease to perform or disclaim any contracts of the Partnership, which includes the Rego Listing Agreement.⁴⁹

60. 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.⁵⁰

(c) The Sealing Order Should be Granted

61. Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, the Receiver requests that the unredacted Elevate APS and the other confidential exhibits 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.

62. The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:⁵¹

- (a) Court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identifiable interest because reasonable alternative measures will not prevent this risk; and,

⁴⁹ Receiver's Record, Second Report, Appendix A, Receivership Order, para 3(c).

⁵⁰ Receiver's Record, Second Report, para 3.7.2 and Appendix "L", Rego Listing Agreement

⁵¹ *Sherman Estate v. Donovan*, [2021 SCC 25](#), at [para. 38](#).

- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

63. Each of these considerations support the proposed sealing order:

- (a) **Public Interest:** The maximization of recovery in insolvency has been found to constitute an important public interest for the purpose of obtaining a sealing order. The granting of a sealing order in respect of commercially sensitive information is therefore “standard practice” in insolvency proceedings,⁵² and courts have approved sealing orders where they are required to protect commercially sensitive information, including the ultimate purchase price.⁵³ As 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, the sealing of this information is necessary to ensure that recoveries in these receivership proceedings are maximized.
- (b) **Lack of a Reasonable Alternative:** Courts in insolvency proceedings have found that there is no reasonable alternative to a sealing order in circumstances where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders.⁵⁴ In the present case, there are no reasonable alternatives to a sealing order which would

⁵² *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#) (YT. S.C.), at [para. 39](#).

⁵³ *Danier Leather Inc., Re*, [2016 ONSC 1044](#) (Ont. S.C.J. – Commercial List), at [para. 84](#); *Elleway Acquisitions Limited v. 4358376 Canada Inc. (“Elleway Acquisitions”)*, [2013 ONSC 7009](#) (Ont. S.C.J. – Commercial List), at [para 48](#).

⁵⁴ *Original Traders Energy Ltd. (Re)*, (“*Original Traders*”), [2023 ONSC 753](#) (Ont. S.C.J. – Commercial List), at [paras. 60-62](#).

prevent the risks to the stakeholders outlined above.

- (c) **Proportionality:** The benefits of the proposed sealing order greatly exceed any disadvantages. No party will be prejudiced by the temporary sealing of the commercially sensitive information, and no public interest will be served if it is made public prior to closing, prejudicing stakeholder recoveries in the process.⁵⁵

The Classic Tile and HGL Electric Liens are Invalid

64. Neither Classic Tile's nor HGL Electric's purported "supply" of material to the Project satisfies the test for supply under s.1(2) of the *Construction Act*, which states that materials are supplied to an improvement when they are: (a) placed on the land on which the improvement is being made; (b) placed upon land designated by the owner or an agent of the owner that is in the immediate vicinity of the premises, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or (c) in any event, incorporated into or used in making or facilitating directly the making of the improvement.⁵⁶

65. Classic Tile's purported supply of supply and services was to an offsite storage facility.⁵⁷ HGL Electric did not actually supply material or services (Tower B and Tower C construction had not yet advanced to the stage of supply of electrical), and its lien is in respect of up-front payments for services and materials to suppliers.⁵⁸

⁵⁵ See *Elleway Acquisitions*, at [para. 48](#), in which the court held that the beneficial effects of maximizing recoveries in insolvency greatly outweigh any deleterious effects which could result for sealing an APA pending a transaction closing.

⁵⁶ *Construction Act*, [s.1\(2\)](#).

⁵⁷ Receiver's Record, Second Report, para 3.5.1.7.

⁵⁸ Receiver's Record, Second Report, para 3.5.1.7.

66. Caselaw interpreting s.1(2) of the *Construction Act*, including *Melloul-Blamey v Schleiss Development* (“*Melloul-Blamey*”),⁵⁹ and *1508270 Ontario Ltd. v. Laudervest Developments* (“*Laudervest*”),⁶⁰ confirms that material that is not supplied to an improvement does not entitle the purported supplier to a lien for the material. This includes material stored at a suppliers’ warehouse, even if done at the direction of the owner.⁶¹

The Distribution Order Should be Granted

67. If the Transaction is approved by the Court, the Receiver seeks authorization and direction to distribute proceeds to the thirteen Lien Claimants and the First Mortgagees.

68. Courts commonly grant such orders as part of sale approvals in a receivership.⁶² In *AbitibiBowater*, the court approved the distribution of proceeds from sale proceeds from a CCAA sale process on amongst other grounds: (i) the distributions were made in accordance with a valid and enforceable security interest; and (ii) the distributions would leave the debtor with sufficient liquidity.⁶³

69. The proposed Distribution complies with the *AbitibiBowater* criteria. 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

⁵⁹ (2001) 15 C.L.R. (3d) 10 (Ont. S.C.J.).

⁶⁰ [2007 CanLII 79364 \(Ont. S.C.J.\)](#).

⁶¹ *Melloul-Blamey*, at paras 55 and 56, and *Laudervest* at paras 24 and 25.

⁶² See, i.e., *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#) (Ont. S.C.J. – Commercial List) at [para. 53](#); *Dorr Capital Corporation v. Highview Building Corp Inc.*, (September 29, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00698632-00CL ([Endorsement of Justice Conway](#)) at para. 4; *Farm Credit Canada v. Whyte’s Foods Inc./Les Ailments et. al.*, (November 6, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00707205-00CL ([Endorsement of Justice Steele](#)) at paras. 19-21.

⁶³ *AbitibiBowater inc.* (“*AbitibiBowater*”), [2009 QCCS 6461](#) (Que. S.C.) at [para. 75](#). While *AbitibiBowater* was a CCAA proceeding, it has been cited by courts in the context of distributions under a receivership: see *Whyte’s Food*, at paras. 19-21.

and enforceable charge.

70. 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).

71. Finally, the Transaction is structured to ensure that the Receiver retains sufficient liquidity. 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).

PART V – ORDER REQUESTED

72. For the reasons set out above, the Receiver requests that this Court grant the relief sought in paragraph 14 above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,



Eric Golden/Chad Kopach
BLANEY McMURTRY LLP
Lawyers for the Receiver
KSV Restructuring Inc.

Schedule “A”: List of Authorities

Cases

1. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) (Ont. CA)
2. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#) (ON CA)
3. *Bank of Montreal v. Dedicated National Pharmacies Inc. et al*, [2011 ONSC 4634](#) (Ont. S.C.J. – Commercial List)
4. *Forjay Management Ltd v 0981478 BC Ltd*, [2018 BCSC 527](#) (B.C. S.C.)
5. *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#) (B.C. S.C.)
6. *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd*, [2012 ONSC 4816](#) (Ont. S.C.J. – Commercial List)
7. *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, [2020 ONSC 5071](#) (Ont. S.C.J. – Commercial List)
8. *bcIMC Construction Fund Corporation et al v The Clover on Yonge Inc. et al*, (September 15, 2020), ONSC (Commercial List) Court File No. CV-20- 00637301-00CL
9. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
10. *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#) (YT S.C.)
11. *Danier Leather Inc., Re*, [2016 ONSC 1044](#) (Ont. S.C.J – Commercial List)
12. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, [2013 ONSC 7009](#) (Ont. S.C.J. – Commercial List)
13. *Original Traders Energy Ltd. (Re)*, [2023 ONSC 753](#) (Ont. S.C.J. – Commercial List)
14. *Melloul-Blamey v Schleiss Development*, (2001) 15 C.L.R. (3d) 10 (Ont. S.C.J.)
15. *1508270 Ontario Ltd. v. Laudervest Developments*, 2007 CanLII 79364 (Ont. S.C.J.)
16. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#) (Ont. S.C.J. – Commercial List)
17. *Dorr Capital Corporation v. Highview Building Corp Inc.*, (September 29, 2023) Ont. S.C.J. (Commercial List) Court File No. CV-23-00698632-00CL ([Endorsement of Justice Conway](#))
18. *Farm Credit Canada v. Whyte’s Foods Inc./Les Ailments et. al.*, (November 6, 2023) Ont. S.C.J. (Commercial List) Court File No. CV-23-00707205-00CL ([Endorsement of Justice Steele](#))
19. *AbitibiBowater Inc.*, [2009 QCCS 6461](#) (Que. S.C.)

Schedule “B”: Text of Statutes, Regulations & By-Laws

BANKRUPTCY AND INSOLVENCY ACT

R.S.C., 1985, c. B-3, as amended

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt

CONSTRUCTION ACT RSO 1990, c C.30

Interpretation

When Materials Supplied

1(2) For the purposes of this Act, materials are supplied to an improvement when they are,

- (a) placed on the land on which the improvement is being made;
- (b) placed upon land designated by the owner or an agent of the owner that is in the immediate vicinity of the premises, but placing materials on the land so designated does not, of itself, make that land subject to a lien; or
- (c) in any event, incorporated into or used in making or facilitating directly the making of the improvement. R.S.O. 1990, c. C.30, s. 1 (2); 2017, c. 24, s. 71.

GENESIS MORTGAGE INVESTMENT CORPORATION
Applicant

and

1776411 ONTARIO LTD. et al.
Respondents

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

Proceeding commenced at Toronto

**FACTUM OF THE COURT-APPOINTED RECEIVER,
KSV RESTRUCTURING INC.
(Receiver's Motion for Sale Approval and Vesting Order,
returnable October 8, 2024)**

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