

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

THE HONOURABLE MR.)

THURSDAY, THE 25th

JUSTICE HAINEY)

DAY OF FEBRUARY, 2021

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF FORME DEVELOPMENT GROUP INC.
AND THE OTHER COMPANIES LISTED ON SCHEDULE "A"
HERETO (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

**ORDER
(Birchmount Cash Collateral Order)**

THIS MOTION, made by KSV Restructuring Inc.¹ ("KSV"), in its capacity as Court-appointed monitor (in such capacity, the "**Monitor**") of the Applicants in their proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended, for an order approving the Tarion Cash Collateral Procedure (as defined herein) was heard this day via Zoom because of the COVID-19 pandemic.

ON READING the Notice of Motion dated February 18, 2021, and the Sixteenth Report of the Monitor and the Twelfth Report of the Proposal Trustee dated February 18, 2021, and on hearing the submissions of counsel for the Monitor, for Tarion Warranty Corporation ("**Tarion**"), for Trisura Guarantee Insurance Company ("**Trisura**") and for such other parties as

¹ Effective August 31, 2020, KSV Kofman Inc. changed its name to KSV Restructuring Inc.

were present, no one appearing for any other person on the service list, although properly served with the Motion Record as appears from the affidavit of service of Aiden Nelms, sworn,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

INTERPRETATION

2. **THIS COURT ORDERS** that, for the purposes of this Order, the following terms shall have the following meanings:

- (a) **“Applicable Notice Period”** has the meaning ascribed thereto in paragraph 9;
- (b) **“Business Day”** means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;
- (c) **“CCAA”** has the meaning ascribed thereto in the preamble to this Order;
- (d) **“Claimant”** means a Person asserting a Tarion Claim;
- (e) **“Court”** means the Ontario Superior Court of Justice (Commercial List);
- (f) **“Deposit Trust Account Agent”** means Goldman, Spring, Kichler & Sanders LLP;
- (g) **“Encumbrances”** has the meaning ascribed thereto in paragraph 6(b);
- (h) **“KSV”** has the meaning ascribed thereto in the preamble to this Order;
- (i) **“Monitor”** has the meaning ascribed thereto in the preamble to this Order;
- (j) **“ONHWPA”** means the *Ontario New Home Warranties Plan Act* (Ontario), R.S.O. 1990, c. O.31, as amended, and the regulations promulgated thereunder;
- (k) **“Order”** means this Order;
- (l) **“Outside Date”** means November 15, 2025;

- (m) “**Person**” means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;
- (n) “**Project**” means all phases and parts of the residential condominium development known as “*Birchmount Gardens*”;
- (o) “**Tarion**” has the meaning ascribed thereto in the preamble to this Order;
- (p) “**Tarion Bond**” means bond no. TDS0990110 issued by Trisura in favour of Tarion;
- (q) “**Tarion Cash Collateral**” has the meaning ascribed thereto in paragraph 4;
- (r) “**Tarion Cash Collateral Balance**” has the meaning ascribed thereto in paragraph 6(c);
- (s) “**Tarion Cash Collateral Charge**” has the meaning ascribed thereto in paragraph 14;
- (t) “**Tarion Cash Collateral Claims**” means accepted Tarion Claims, administration fees, legal fees, interest and other fees and costs paid or incurred by Tarion in connection with such Tarion Claims and the administration of the Tarion Cash Collateral Procedure;
- (u) “**Tarion Cash Collateral Procedure**” means the procedures outlined in this Order, including, without limitation, in connection with the payment, holding, administration, and release of the Tarion Cash Collateral;
- (v) “**Tarion Claim**” means any right or claim of any Person against Tarion under the ONHWPA in respect of the Project;
- (w) “**Trisura**” has the meaning ascribed thereto in the preamble to this Order; and
- (x) “**Trisura Distribution**” has the meaning ascribed thereto in paragraph 7.

3. **THIS COURT ORDERS** that all references to the word “including” shall mean “including without limitation”, all references to the singular herein include the plural, the plural include the singular, and any gender includes all genders.

TARION CASH COLLATERAL

4. **THIS COURT ORDERS** that Trisura shall, within five (5) Business Days of the granting of this Order, direct the Deposit Trust Account Agent to pay the amount of \$700,000 to Tarion (the “Tarion Cash Collateral”), against which amount Tarion may make, and process payments in respect of, Tarion Cash Collateral Claims in accordance with this Order.

5. **THIS COURT ORDERS** that:

- (a) Upon receipt by Tarion of the Tarion Cash Collateral, the Tarion Bond shall be void and cancelled and neither Tarion nor Trisura shall have any further obligations or liability whatsoever in respect of the Tarion Bond, the Applicants or the Project (in the case of Tarion, subject only to any Tarion Claims that are to be dealt with pursuant to paragraph 6); and
- (b) Tarion shall deliver the Tarion Bond to the lawyers for Trisura, Borden Ladner Gervais LLP, within five (5) Business Days of Tarion's offices reopening (following their closure as a result of the COVID-19 pandemic) and it being practicable to do so.

TARION CLAIMS

6. **THIS COURT ORDERS** that:

- (a) Tarion shall:
 - (i) review any Tarion Claim filed prior to the Outside Date and not already satisfied as of the date hereof, and accept, revise or reject them in accordance with Tarion's ordinary claims review procedures provided, however, that Tarion shall have the right, but not the obligation, to consult with the Monitor during its review of a Tarion Claim; and
 - (ii) provide a report to the Monitor as to the Tarion Claims received, Tarion Claims and Tarion Cash Collateral Claims paid and the amount of Tarion Cash Collateral remaining as at the date of such report, with such reports due on November 15, 2021, November 15, 2022, November 15, 2023, November 15, 2024, and November 15, 2025;

- (b) Tarion shall be entitled to utilize the Tarion Cash Collateral and process payments therefrom on account of accepted Tarion Claims and Tarion Cash Collateral Claims free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts, or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, rights of distraint, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, “**Encumbrances**”), and without further authorization from any Person or this Court;

- (c) the balance of the Tarion Cash Collateral (the “**Tarion Cash Collateral Balance**”), if any, shall be paid by Tarion to the Monitor, within ten (10) Business Days following the later of:
 - (i) the Outside Date;

 - (ii) the completion of the review by Tarion of all Tarion Claims filed prior to the Outside Date;

 - (iii) in the event that Tarion revises or rejects any Tarion Claim, the resolution of such Tarion Claim in accordance with the procedures provided for in the ONHWPA and/or any applicable litigation or dispute resolution processes; and

 - (iv) the processing and payment by Tarion of any Tarion Claims and Tarion Cash Collateral Claims from the Tarion Cash Collateral; and

- (d) Tarion shall have no further obligations or liability whatsoever in respect of the Tarion Cash Collateral Balance following Tarion’s payment of the Tarion Cash Collateral Balance to the Monitor.

TRISURA DISTRIBUTION

7. **THIS COURT ORDERS** that within forty-five (45) Business Days of Tarion's receipt of the Tarion Cash Collateral, Trisura shall:

- (a) register a discharge of its mortgage registered against Project;
- (b) register a discharge of its PPSA registration related to the Project; and
- (c) direct the Deposit Trust Account Agent to pay to the Monitor any amount remaining in the deposit trust account related to the Project after all reasonable and documented expenses of Trisura (including but not limited to premiums, legal and adjusting expense) and any outstanding Deposit Trust Account Agent legal accounts have been paid from the deposit trust account. (such distribution, the "**Trisura Distribution**").

8. **THIS COURT ORDERS** that upon payment of the Trisura Distribution, Trisura and its successors, assigns and agents shall not have any:

- (a) further right whatsoever to claim any further amount derived from or related to the Project;
- (b) remaining interest whatsoever in the property of the Applicants;
- (c) further liability to any party in respect of the Tarion Bond or to the Applicants.

WAIVER OF NOTICE OF ONHWPA NOTICE AND TARION AUTHORIZATION

9. **THIS COURT ORDERS** that the Monitor is hereby authorized but not required to waive all applicable statutory notice and vendor repair periods, if any, to which it or the Applicants, or any of them, may be entitled under the ONHWPA in respect of any warranty claims made in respect of the Project (each, an "**Applicable Notice Period**").

10. **THIS COURT ORDERS** that in the event that the Monitor waives an Applicable Notice Period, Tarion is thereby entitled, in its discretion, to take action and remediate any defects at the Project that are warrantied under the ONHWPA immediately upon receipt of confirmation of waiver of any such Applicable Notice Period, notwithstanding any

applicable notice or vendor repair periods in favour of a vendor prescribed by the ONHWPA, provided that (i) the ONHWPA and the regulations promulgated thereunder shall otherwise apply to all such remedial action taken by Tarion and (ii) nothing in this Order shall affect Tarion's determination of whether or not a defect is covered by the ONHWPA.

TRISURA, TARION AND THE MONITOR

11. **THIS COURT ORDERS** that none of Trisura, Tarion, the Deposit Trust Account Agent or the Monitor shall incur any liability or obligation as a result of the carrying out of the provisions of this Order, other than in respect of any gross negligence or wilful misconduct on their respective parts, and that no proceeding or process in any court or tribunal shall be commenced or continued against any of Trisura, Tarion, the Deposit Trust Account Agent or the Monitor in connection with the carrying out of the provisions of this Order except with the written consent of Trisura, Tarion, the Deposit Trust Account Agent or the Monitor, as applicable, or with leave of this Court on seven (7) Business Days' notice to Trisura, Tarion, the Deposit Trust Account Agent or the Monitor, as applicable. This Order is without prejudice to any other limitation of liability or protection afforded to Trisura, Tarion, the Deposit Trust Account Agent or the Monitor by order of the Court or otherwise.

12. **THIS COURT ORDERS** that, subject to paragraphs 14 - 16 of this Order, and in connection with the payment or receipt of any funds described herein, the Person receiving such funds shall do so free and clear of and from any and all Encumbrances.

13. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings; and
- (b) any assignment in bankruptcy made in respect of the Applicants, or any of them, or their property or the Project,

the Tarion Cash Collateral Procedure and its implementation pursuant to this Order shall be binding on any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Applicants, or any of them, their property or the Project and shall not be void or voidable by

creditors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended, or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

TARION CASH COLLATERAL CHARGE

14. **THIS COURT ORDERS** that Tarion shall be entitled to the benefit of, and is hereby granted, a fixed and specific charge and security interest (the “**Tarion Cash Collateral Charge**”) in the Tarion Cash Collateral.

15. **THIS COURT ORDERS** that the Tarion Cash Collateral Charge shall rank in priority to all Encumbrances against the Tarion Cash Collateral from time to time.

16. **THIS COURT ORDERS** that the filing, registration, recording or perfection of the Tarion Cash Collateral Charge shall not be required and that the Tarion Cash Collateral Charge shall be valid and enforceable for all purposes including, without limitation, as against any Encumbrances filed, registered, recorded or perfected subsequent to the Tarion Cash Collateral Charge coming into existence notwithstanding any failure to file, register, record or perfect the Tarion Cash Collateral Charge. The Tarion Cash Collateral Charge may be enforced by Tarion upon the terms and conditions as may be agreed to between the Monitor and Tarion.

MISCELLANEOUS

17. **THIS COURT ORDERS** that each of Tarion and the Monitor may from time to time apply to this Court for advice and directions in respect of the terms of this Order and in carrying out the terms of this Order.

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States to give effect to this Order and to assist Tarion, the Monitor and their respective agents, in carrying out the terms of this Order. All courts, tribunals regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to Tarion, the Monitor

and their respective agents, as may be necessary or desirable to give effect to this Order or to assist Tarion, the Monitor and their respective agents, in carrying out the terms of this Order.

A handwritten signature in blue ink, appearing to read "Hainey J", is written over a horizontal line. The signature is cursive and stylized.

SCHEDULE "A"
APPLICANTS

3310 Kingston Development Inc.

1296 Kennedy Development Inc.

1326 Wilson Development Inc.

5507 River Development Inc.

4439 John Development Inc.

2358825 Ontario Ltd.

250 Danforth Development Inc.

159 Carrville Development Inc.

169 Carrville Development Inc.

189 Carrville Development Inc.

27 Anglin Development Inc.

29 Anglin Development Inc.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER
COMPANIES LISTED ON SCHEDULE "A" HERETO (the "Applicants")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BIRCHMOUNT CASH COLLATERAL ORDER

BENNETT JONES LLP

3400 First Canadian Place

P.O. Box 130

Toronto, Ontario M5X 1A4

Sean H. Zweig (LSO #573071)

Tel: (416) 777-6253

Fax: (416) 863-1716

Aiden Nelms (LSO#74170S)

Tel:(416) 777-4642

Fax: (416) 863-1716

Counsel to KSV Restructuring Inc., solely in its capacity as
Court-appointed monitor and Proposal Trustee and not in its
personal capacity