

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

MAPLEVIEW DEVELOPMENTS LTD., PACE MAPLEVIEW LTD and 2552741
ONTARIO INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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

**FACTUM OF THE RECEIVER
(Approval and Vesting Order and Distribution Order)**

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TO: **SERVICE LIST**

PART I - NATURE OF THE MOTION

1. On March 21 , 2024, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as the receiver and manager (the “**Receiver**”) of certain real property (the “**Real Property**”), and all present and future assets, undertakings and personal property belonging to Maplevue Developments Ltd. (“**Maplevue**”), Pace Maplevue Ltd. (“**Pace**”) and 2552741 Ontario Inc. (“**255 Ontario**” and together with Maplevue and Pace, the “**Debtors**” and each a “**Debtor**”), located at, related to, used in connection with or arising from or out of the Real Property (collectively, the “**Property**”), with the exception of certain deposits.

2. Maplevue is a real estate development company which, prior to this receivership, was engaged in the development of a residential townhome project on the Real Property. On May 30, 2024, the Court issued an order (the “**Sale Process Order**”) approving both a sale process (the “**Sale Process**”) in respect of the Property, as well as a Stalking Horse Agreement of Purchase and Sale (the “**APS**”) between the Receiver and Dunsire Homes Inc. (the “**Purchaser**”), pursuant to which the Purchaser would act as stalking horse bidder as part of the Sale Process. The APS contemplated a transaction whereby the Purchaser would acquire substantially all of the Property (the “**Transaction**”).

3. Following the granting of the Sale Process Order, the Receiver worked diligently to implement the Sale Process and solicit interest in the Property. However, ultimately the Sale Process did not result in any qualified letters of interest being submitted by the LOI Deadline (as defined below). As a result, and in accordance with the terms of the Sale Process Order, the Purchaser’s stalking horse bid was determined to be the successful bid and the Receiver is seeking to implement the Transaction. A distribution (the “**Distribution**”) from the proceeds of the

Transaction (the “**Proceeds**”) is proposed to be made to KingSett Mortgage Corporation (“**KingSett**”), Mapleview’s senior secured creditor.

4. The Receiver therefore seeks the following orders:

- (a) an Approval and Vesting Order (the “**AVO**”), which will, among other things: (i) approve the Transaction; (ii) authorize the Receiver to terminate and disclaim any agreements of purchase and sale for the purchase of any or all of the Real Property (the “**Buyer Agreements**”); (iii) authorize the Receiver to hold certain amounts of the purchase price payable under the Transaction in two reserves, pending the resolution of certain disputes; and (iv) authorize the Receiver to make distributions from such reserves, subject to the terms set forth in the proposed AVO; and
- (b) an Ancillary Matters and Distribution Order (the “**Distribution Order**”) which will, among other things: (i) authorize and direct the Receiver to make the Distribution to KingSett; (ii) approve the fees and disbursements of the Receiver and its counsel (“**Osler**”); and (iii) approve the reports and activities of the Receiver.

5. The Transaction is the best and only qualified transaction to have emerged following a thorough canvassing of the market pursuant to the terms of the court-approved Sale Process. The Transaction represents the highest recovery available to stakeholders in the circumstances and should be approved by the Court.

PART II - SUMMARY OF FACTS

6. The facts are more fully set out in the Second Report of the Receiver.¹

A. Background to the Transaction

7. Maplevue is a single purpose entity that owns the Real Property on which the Project (as defined below) is being developed. Pace is an affiliate of the Pace group of companies, a residential real estate developer that was leading the development of the Project. Maplevue holds the Real Property for the mutual benefit of Pace and 255 Ontario.²

8. Prior to the commencement of these receivership proceedings, the Debtors were collectively engaged in developing the Urban North Townhomes project (the “**Project**”), a residential townhome project which was being developed on the Real Property in Barrie, Ontario. Construction of the Project has been halted due to the commencement of these receivership proceedings.³

9. The Project is being conducted through multiple phases. Construction of Phases I and II is significantly advanced, with sales transactions having closed in respect of approximately 265 of 311 units, while the remaining 46 units are partially constructed. Construction has not yet commenced on Phases III, IV, V, and VI. There are approximately 576 pre-sale homebuyers for the remaining units in Phases I and II, along with certain units in Phases III and IV.⁴

10. There are approximately 494 homebuyers of pre-sale units which have not yet closed. Of these, 173 are homebuyers of freehold units who paid deposits directly to Maplevue, which

¹ Second Report of the Receiver dated July 26, 2024 [Second Report]. Capitalized terms not otherwise defined have the same meaning as in the Second Report. Dollar amounts are given in Canadian dollars unless otherwise specified.

² Second Report at paras. 2.1.1-2.1.2.

³ Second Report at para. 2.2.1.

⁴ Second Report at paras. 2.2.2-2.2.3.

deposits were subsequently spent. The remaining 321 are homebuyers of condo-townhouse units, in respect of which deposits were paid into a trust account with Devry Smith Frank LLP (“**DSF LLP**”) (the “**Deposit Monies**”). While certain of the deposits in respect of the condo-townhouse units were subsequently released, the deposits are fully insured by an excess condominium deposit insurance provided by Westmount Guarantee Insurance Company (“**Westmount**”).⁵

11. The Real Property is subject to the following secured charges:⁶

- (a) KingSett Mortgage Corporation (“**KingSett**”) is the principal secured creditor of the Debtors pursuant to various mortgages registered on title to the Real Property. As of July 26, 2024, KingSett was owed approximately \$50.3 million, in respect of which interests and costs continue to accrue (the “**KingSett Indebtedness**”).
- (b) Aggregated Investments Inc. (“**AI**”), through MarshallZehr Group Inc. (“**MarshallZehr**”) as the bare trustee of its rights under the charges, is the sole beneficial owner of the second-ranking mortgage charge (behind KingSett) registered on title to certain of the Real Property (the “**AI Mortgage**”). MarshallZehr also holds the third and fourth-ranking mortgages (together with the AI Mortgage, the “**MarshallZehr Mortgages**”). As at the date of the Receivership Order, MarshallZehr was owed approximately \$99 million on the MarshallZehr Mortgages, in respect of which interests and costs continue to accrue.
- (c) Prior to the date of the Receivership Order, Vector Financial Services Limited had a first-priority charge on PIN 58091-4802, which is included in the Real Property,

⁵ Second Report at paras. 2.3.1-2.3.3.

⁶ Second Report at para. 3.1.1.

in the principal amount of \$3,285,000. This charge has since been transferred to AI (the “**Transferred Vector Charge**”).

- (d) Westmount has made available to Maplevue certain surety facilities in respect of the Deposit Monies. Westmount’s security charge is subordinate to KingSett and MarshallZehr (and is not registered on title to certain portions of the Real Property, including the Real Property that is subject to the Transferred Vector Charge), except as against the Deposit Monies held in trust at DSF LLP, on which it has a first ranking charge. As provided in the Receivership Order, the Deposit Monies are excluded from the definition of “Property” over which the Receiver has been appointed. As of the date of this Factum, Westmount’s exposure is approximately \$6,380,000, which represents the Deposit Monies previously released to Maplevue.

12. The Receiver also understands that approximately \$7.3 million of the HST that Maplevue collected on the sales of the 266 closed townhomes was not remitted to the Canada Revenue Agency.⁷

13. As of the date of the Receivership Order, the Debtors’ pre-filing obligations, other than the obligations described above, totaled approximately \$91.7 million. These amounts include a number of parties who provided services to the Project, and have registered construction liens on the Real Property, as is discussed in greater detail below.⁸

⁷ Second Report at para. 3.2.1.

⁸ Second Report at paras. 3.3.1-3.3.2.

B. The Sale Process

14. The Receiver launched the Sale Process on June 3, 2024. The Receiver distributed an investment summary (the “**Teaser**”) to 277 parties, to which was attached a bid process letter and form of non-disclosure (“**NDA**”). Interested parties that signed the NDA were given access to a virtual data room (the “**VDR**”) which contained information regarding the Project, including financial information, contracts, permits, designs, drawings and other diligence information.⁹

15. The Court-approved bid deadline for submission of letters of intent which reflected a reasonable prospect of culminating in a Qualified Bid (a “**Qualified LOI**”) was July 3, 2024, 30 days after the commencement of the Sale Process (the “**LOI Deadline**”). Five parties executed the NDA and were provided with access to the VDR; however, no Qualified LOIs were received by the LOI Deadline.¹⁰

16. As no Qualified LOI was received, the APS was deemed to be the successful bid pursuant to the terms of the Sale Process Order.¹¹

C. The Transaction

17. Under the terms of the APS, the Purchaser will purchase all of the Debtors’ right, title, and interest in certain Property, including: (i) the Real Property; (ii) the Buildings; (iii) the Inventory and Securities; (iv) the Development Approvals; (v) such other Property as the Purchaser may advise the Receiver of prior to Closing; and (vi) certain Books and Records (each term as defined

⁹ Second Report at paras. 4.1.1, 4.2.1(a).

¹⁰ Second Report at paras. 4.1.2, 4.2.1(b)-(c).

¹¹ Second Report at para. 4.2.2.

in the APS, and together the “**Purchased Assets**”). All property, and assets of the Debtors, other than the Purchased Assets, are excluded from the scope of the Transaction.¹²

18. The purchase price to be paid by the purchaser (the “**Purchase Price**”) is equal to the sum of: (i) the amount outstanding under the Receiver’s Charge and the Receiver’s Borrowing Charge (each as defined in the Receivership Order); (ii) the amount owing in respect of the KingSett Indebtedness; (iii) the amount payable in respect of any Priority Payables (as defined below); (iv) \$400,000 to be used by the Receiver to fund costs incurred in post-Closing matters, with any unused portion being returned to the Purchaser; and (v) the amounts outstanding under the AI Mortgage and the Transferred Vector Charge (together, the “**Assumed Mortgages**”).¹³

19. The APS contemplates that the Buyer Agreements will not be assumed by the Purchaser. The proposed AVO therefore contains a term authorizing and directing the Receiver to terminate and disclaim the Purchase Agreements prior to closing. The issuance of the AVO in a form containing this term is a condition precedent to the Closing of the Transaction.¹⁴

D. Activities of the Receiver

20. Since its appointment, the Receiver, in addition to the activities outlined above, has, with the assistance of counsel, engaged in the following activities in furtherance of its mandate:¹⁵

- (a) corresponding with the Debtors’ Management regarding the Debtors’ affairs and these proceedings;

¹² See Second Report at para. 5.1.2 for a full summary description of the APS.

¹³ Second Report at para. 5.1.2.

¹⁴ Second Report at paras. 5.1.2, 5.2.1.

¹⁵ Second Report at para. 9.0.1.

- (b) corresponding with KingSett regarding all aspects of this mandate, including providing periodic status updates;
- (c) reviewing information provided by the Debtors and KingSett relating to the Project, including its development status;
- (d) corresponding with the Purchaser and its counsel regarding the APS and the Transaction, including extensive negotiations;
- (e) developing and carrying out the Court-approved Sale Process for the Property;
- (f) drafting all Sale Process related materials, including the Teaser and NDA;
- (g) compiling information in the VDR;
- (h) facilitating due diligence requests submitted by prospective purchasers throughout the Sale Process;
- (i) corresponding with representatives of the City of Barrie regarding the status of the Project and the Transaction;
- (j) corresponding with representatives of Tarion regarding the status of the Project and the Transaction;
- (k) arranging for the maintenance, security and general upkeep of the Property;
- (l) corresponding with Westmount and its counsel regarding the Property and the status of the Sale Process;
- (m) corresponding with Masters Insurance, the Debtors' insurance broker;

- (n) corresponding with the Debtors' creditors;
- (o) assessing various claims that may have priority over the security held by the Debtors' mortgagees;
- (p) corresponding with the lienholders in respect of their potential priority claims;
- (q) corresponding with the pre-sale homebuyers of the Project;
- (r) corresponding with CRA regarding the Debtors' HST accounts; and
- (s) preparing the First Report (as defined below) and the Second Report and reviewing the motion materials in respect of same.

PART III - THE ISSUES AND THE LAW

21. The issues on this motion are whether this Court should:

- (a) grant the AVO; including:
 - (i) authorizing the Receiver to enter into the Transaction; and
 - (ii) authorizing and directing the Receiver to terminate and disclaim the Buyer Agreements.
- (b) grant the Distribution Order, including
 - (i) approving the Distribution;
 - (ii) approving the fees and disbursements of the Receiver and Osler; and
 - (iii) approving the reports and activities of the Receiver.

A. The AVO Should be Granted

(a) The Transaction Should be Approved

22. The purpose of a receivership under section 243 of the *Bankruptcy and Insolvency Act* (the “BIA”) is to “enhance and facilitate the preservation and realization of the assets for the benefit of creditors,” a purpose which is generally achieved through the liquidation of the debtors’ assets.¹⁶ In *Royal Bank v. Soundair*, the Court of Appeal stated that the following factors must be considered when considering the approval of a proposed sale:¹⁷

- (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.

23. Each of these factors are satisfied in respect of the Sale Process:

- (a) **Fairness, Transparency, and Integrity:** The Sale Process was conducted in accordance with the terms of the Sale Process Order.¹⁸ All potential purchasers were treated fairly and equally, and all potential purchasers that executed the NDA

¹⁶ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 73.

¹⁷ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) at para. 16 [*Soundair*].

¹⁸ Second Report at para. 5.3.1(a).

were given access to the VDR.¹⁹ Further, the Receiver facilitated due diligence requests submitted by prospective purchasers throughout the Sale Process.²⁰

- (b) **Commercial Efficacy:** The Sale Process was commercially reasonable and occurred over the course of over four weeks, during which times prospective purchasers were able to perform any required due diligence, facilitated by the Receiver.²¹
- (c) **Process Designed to Obtain Best Possible Price:** The market was widely canvassed for potential purchasers, with 277 potential purchasers being sent the Teaser and the NDA.²² The Receiver is of the view that exposing the Property to the market for additional time would not result in a superior transaction, and that the Transaction provides for the highest recovery available for the benefit of the Debtors' stakeholders in the circumstances.²³

24. The Receiver and KingSett both support the Transaction, and as of the date of the Second Report no parties have objected to any of the relief being sought pursuant to the proposed AVO.²⁴ 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,²⁵ and courts have stated that where a receiver has acted reasonably, prudently and

¹⁹ Second Report at para. 4.2.1(b).

²⁰ Second Report at para. 9.0.1(h).

²¹ Second Report at para. 5.3.1(a).

²² Second Report at para. 4.2.1(a).

²³ Second Report at paras. 5.3.1(b)-(c).

²⁴ Second Report at paras. 5.3.1(d)-(e).

²⁵ *Soundair*, at paras. 21, 58.

not arbitrarily, that the court should not sit in appeal from the receiver's decision or conduct a detailed review of every element of the procedure by which a receiver's decision was made.²⁶

25. The Receiver submits that the Transaction should be approved for the reasons outlined above. The Sale Process was carried out in accordance with the Sale Process Order, and was a fair, open, transparent, and commercially reasonable process which obtained the highest recovery available in the circumstances.

(b) The Receiver Should be Authorized and Directed to Terminate and Disclaim the Purchase Agreements

26. It is well-established that the court may direct a receiver to disclaim pre-sale homebuyer agreements in the context of real property receiverships.²⁷ This authority derives from the receiver's duty to maximize the recovery of assets under its jurisdiction, in service of which the receiver may affirm or disclaim contracts.²⁸

27. The criteria to be considered by a court in determining whether to authorize such disclaimers were set out in *Forjay Management*: (i) the respective legal priorities of the competing interests; (ii) whether the disclaimer would enhance the value of the assets, and if so would failure to disclaim amount to a preference in favour of a particular party; and (iii) whether, if a preference

²⁶ *Bank of Montreal v. Dedicated National Pharmacies Inc. et al.*, [2011 ONSC 4634](#) at para. 43.

²⁷ See, i.e., *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#)) at para. 16 [*Stateview Homes*]; *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#)) at p. 1 [*On the Mark Endorsement*]; *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#)) at para. 6 [*Hampton Heights*]; *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#) at paras. 131-132 [*Forjay Management*].

²⁸ *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#) at para. 25 [*Peoples Trust Company*].

would arise, the party which is seeking to avoid the disclaimer has established that the equities support such a preference.²⁹

28. The proposed disclaimers satisfy the criteria identified in *Forjay Management*:

- (a) **Respective Legal Priorities:** The KingSett mortgages and the Assumed Mortgages constitute senior charges on the Property and rank in priority over the Buyer Agreements, none of which have been registered on title.³⁰ Further, each of the Buyer Agreements expressly provides that: (i) the homebuyer subordinates and postpones their agreements to any current or subsequent mortgages on the applicable Real Property, and any advancers under such mortgages; and (ii) the agreement does not confer an interest in the applicable Property and/or the homebuyer will not register the agreement on title the Real Property. Such provisions have been repeatedly found to effectively subordinate purchasers to mortgagees, and to eliminate any equitable or proprietary interest in the property.³¹
- (b) **Value Maximization:** The authorization of the Receiver to terminate and disclaim the Buyer Agreements is a condition precedent to the closing of the APS, which represents the highest recovery available to the Debtors' stakeholders in the circumstances.³² Courts have authorized disclaimer in similar circumstances;³³ and

²⁹ *Forjay Management*, at para. 44. See also *Stateview Homes*, at para. 17, in which the Ontario court approved the *Forjay Management* criteria.

³⁰ Second Report at para. 5.2.4.

³¹ See, i.e., *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#), at para. 24 [*Firm Capital Mortgages*]; *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, [2014 BCCA 113](#) at paras. 45-46; *Forjay Management*, at paras. 67-69; *Stateview Homes*, at para. 18. Note that even where a purchase agreement might arguably create an equitable or proprietary interest, a subordination clause means that such an interest cannot take priority over a mortgage: *Firm Capital*, at paras. 22-25.

³² Second Report at para. 5.3.1(c).

³³ See *Stateview Homes*, at para. 19, and *Hampton Heights*, at para. 6, in which similar circumstances supported authorizing the receiver to disclaim pre-sale purchase agreements.

have held that a failure to do so would amount to a preference in favour of homebuyers.³⁴

- (c) **Equitable Considerations:** Equitable considerations do not support departing from the existing priorities and granting a preference to the homebuyers. The deposits paid by certain homebuyers under the Buyer Agreements are guaranteed by the Westmount surety policy; further, purchasers who do not get the benefit of the Westmount surety policy will be able to avail themselves of deposit protection provided by Tarion Warranty Corporation.³⁵ The Receiver intends to work with Tarion to assist with the deposit claims of those homebuyers, and the homebuyers have been provided notice of this motion.³⁶

29. In light of the considerations above, the Receiver submits the termination and disclaimer of the Buyer Agreements is necessary to maximize recovery for stakeholders and should be approved. The failure to do so would effectively amount to a reordering of the existing priorities in favour of the homebuyers in a manner not supported by the equities.

³⁴ *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, [2008 BCSC 897](#) at para. 96; *Forjay Management*, at para. 93; *Peoples Trust Company*, at para. 57.

³⁵ Second Report at paras. 5.2.6-5.2.8. See Second Report, at para. 5.2.7, for an outline of the deposit protection provided by Tarion. Note that the fact that some deposits may be uninsured does not mean that the equities favour re-ordering existing priorities: see *Firm Capital Mortgage*, at paras. 35 and 38, in which the court refused to grant special priority to pre-sale purchasers, notwithstanding the fact that some purchasers' deposits were not protected.

³⁶ Second Report at paras. 5.2.5, 5.2.8.

B. The Distribution Order Should be Granted

(a) The Distribution Should be Approved

30. Should the Transaction be approved by the Court, the Receiver seeks authorization and direction to distribute Proceeds in order to repay: (i) any amount owing under the Receiver's Borrowings Charge (which is currently nil); and (ii) the KingSett Indebtedness.³⁷

31. Courts commonly grant such orders as part of sale approvals in a receivership.³⁸ 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.³⁹

32. The proposed Distribution complies with the *AbitibiBowater* criteria. The security interests granted in favour of KingSett created valid security interests against the Property.⁴⁰ Further, the Transaction has been structured so as to ensure that the Receiver retains sufficient liquidity to pay any outstanding priority amounts. Under the terms of the APS, a portion of the purchase will be dedicated to the payment of "**Priority Payables.**"⁴¹ As is discussed below, the Receiver intends

³⁷ Second Report at para. 7.0.1.

³⁸ See, i.e., *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#) 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 [*Whyte's Food*].

³⁹ *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#) at para. 75 [*AbitibiBowater*]. 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.

⁴⁰ Second Report at paras. 3.1.1(a), 7.0.3.

⁴¹ Second Report at para. 7.1.1. "Priority Payables" is defined in the APS as "... any payables that have priority over the Assumed Mortgages, excluding any HST owing by the Debtors, but including amounts that have priority pursuant to s.78 of the *Construction Act*, RSO 1990, c C30, as determined by the Receiver in consultation with the Purchaser, both acting reasonably, or as determined by the Court, after application of any amount of cash on hand of the Debtors, excluding the Deposit, immediately prior to Closing."

to retain certain amounts from the cash proceeds of the Transaction, pending the resolution of certain disputes, in order to ensure that it retains sufficient liquidity to pay the Priority Payables.

(i) **Holdback Reserve in Respect of Construction Lien Claimants**

33. A total of 21 construction liens have been registered on title to the Real Property, with the first lien arising on December 5, 2106, prior to the subsequent registration of both the KingSett mortgages and the MarshallZehr Mortgages.⁴² Under s. 78(6) of the *Construction Act*, a mortgage that is registered after the time when the first lien arose in respect of an improvement has priority over the liens arising from the improvement in respect of any advances made under the mortgage, unless: (i) at the time of the advance, there was a preserved or perfected lien against the premises; or (ii) prior to the advance, the mortgagee had received written notice of the lien. This priority is qualified by s. 78(5), which holds that a mortgage registered after the time the first lien arose is subordinated to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV of the *Construction Act*.

34. All advances made under the KingSett mortgages and MarshallZehr Mortgages (the “**Advances**”) were made prior to the date that the first construction lien was registered on title, and the Receiver has received no evidence that any written notice was provided prior to any of the Advances. As a result, the KingSett and MarshallZehr mortgages enjoy priority over the lien claimants in respect of the Advances, subject to any claim relating to a deficiency in the 10% holdback from payments to parties that supplied services or materials to the Project that was required to be retained by the owner under the *Construction Act* (the “**Statutory Holdback**” and, to the extent of any deficiency, the “**Holdback Deficiency**”).⁴³

⁴² Second Report at para. 7.1.3.

⁴³ Second Report at paras. 7.1.3-7.1.6.

35. Maplevue is not holding any funds in respect of the Statutory Holdback, and the Holdback Deficiency is therefore equal to the Statutory Holdback. The Receiver and Osler have conducted an extensive review of the Priority Payables that may be owed to construction lien holders (the “**Construction Lien Claimants**”) given this shortfall (the “**Holdback Claims**”), including by (i) reviewing the Debtors’ books and records in order to determine the total good and services provided by the Construction Lien Claimants and the outstanding indebtedness thereto; (ii) emailing the Construction Lien Claimants to request any relevant documentation; and (iii) conducting searches of publicly available records.⁴⁴

36. On the basis of this review, the Receiver and Osler have calculated the maximum potential Priority Payable owing to each Construction Lien Claimant (collectively, the “**Holdback Reserve**”).⁴⁵ The Holdback Reserve will be held by the Receiver from the cash proceeds of the Transaction, pending a determination of the Holdback Claims, and will protect the interests of the Construction Lien Claimants while simultaneously permitting this receivership to move forward and a distribution to be made. Similar arrangements, in which the Receiver held portions of a purchase price in reserve pending the determination of the quantum of construction lien claims, have been approved by this Court.⁴⁶

(ii) **Portland Reserve**

37. The Receiver has been advised by Portland Private Income Fund and Portland Investment Counsel Inc. (collectively, “**Portland**”) that Portland has a 100% interest in the third-ranking

⁴⁴ Second Report at para. 7.1.9.

⁴⁵ Second Report at para. 7.1.10. For a table listing the maximum potential Priority Payables, and the basis for the calculating same, see Second Report, Appendix “G.”

⁴⁶ See, i.e., *On the Mark Endorsement*, at pp. 1-2, approving the provisions found in *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Distribution Order \(On the Mark\)](#)) at para. 9, in which the court approved a reserve fund, the size of which was calculated on the basis of the estimated maximum amount of construction lien claims.

mortgage on the Property (the “**Portland Mortgage**”), which Portland believes should rank ahead of the second-ranking AI Mortgage. Portland had advised the Receiver that, as of July 9, 2024, \$2,212,498 was owing and secured by the Portland Mortgage.⁴⁷

38. The Purchaser disputes Portland’s position with respect to the ranking of the Portland Mortgage. The Purchaser has confirmed to the Receiver that it will provide \$2.3 million to the Receiver to be held in reserve pending the resolution of this dispute.⁴⁸

(b) The Fees and Disbursements of the Receiver and Osler Should be Approved

39. The Receiver seeks the approval of the following fees and disbursements of itself and its counsel, Osler:⁴⁹

(a) fees of the Receiver from the commencement of these receivership proceedings to July 22, 2024, totalling \$297,447.25, charged at an average billing rate of \$535.17 per hour; and

(b) fees of Osler from the commencement of these receivership proceedings to July 26, 2024, totalling \$648,938.50, charged at an average billing rate of \$742.24 per hour.

40. The role of the court in approving the fees of a receiver and its counsel is to ensure that the fees are “fair and reasonable” in the circumstances, with a focus on the value provided.⁵⁰ The Receiver is of the view that Osler’s fees are consistent with the rates charged by similar firms and are reasonable and appropriate in the circumstances.⁵¹

⁴⁷ Second Report, at para. 8.0.1.

⁴⁸ Second Report at para. 8.0.2.

⁴⁹ Second Report at paras. 10.0.1-10.0.2.

⁵⁰ *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at paras. 44-45.

⁵¹ Second Report at para. 10.0.4.

(c) The Reports and the Activities of the Receiver Should be Approved

41. The Receiver also seeks the approval of the First Report of the Receiver dated May 21, 2024 (the “**First Report**”) and the Second Report, along with the actions, conduct and activities of the Receiver referred to therein.

42. It is well established that the court has inherent jurisdiction to review and approve the activities of a court appointed receiver where the receiver demonstrates that it has acted reasonably, prudently and not arbitrarily.⁵² As has been noted by the court in the CCAA context, requests to approve a monitor’s report and activities are not unusual, and there are good policy and practical reasons for the court to do so, including:⁵³

- (a) allowing the monitor to move forward with the next steps;
- (b) allowing the monitor to bring its activities before the Court;
- (c) enabling the Court to satisfy itself that a monitor’s activities have been conducted in prudent and diligent manners;
- (d) providing protection for a monitor not otherwise provided by the CCAA; and
- (e) protecting creditors from delay that may be caused by re-litigation of steps.

⁵² *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at para. 54.

⁵³ *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at para. 23.

43. Subsequent case law has confirmed that these considerations apply equally to the reports and activities of a receiver,⁵⁴ and such approval is commonly granted as part of orders in receivership proceedings.⁵⁵

44. The Receiver submits that the First Report and Second Report, along with the applicable activities described therein, should be approved. The activities of the Receiver were carried out in accordance with the Receivership Order, and the Receiver has acted reasonably and in good faith throughout.

PART IV - NATURE OF THE ORDER SOUGHT

45. For the reasons set out above, the Receiver requests that this Court grant the proposed AVO and Distribution Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2024.



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⁵⁴ *Hanfeng Evergreen Inc., (Re)*, [2017 ONSC 7161](#) at para. 15.

⁵⁵ See, i.e., *Stateview Homes* at para. 24.

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#)
2. *Bank of Montreal v. Dedicated National Pharmacies Inc. et al*, [2011 ONSC 4634](#)
3. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)
4. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, [2008 BCSC 897](#)
5. *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](#))
6. *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](#))
7. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#)
8. *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#))
9. *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#)
10. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)
11. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#)
12. *Hanfeng Evergreen Inc., (Re)*, [2017 ONSC 7161](#)
13. *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#))
14. *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Distribution Order \(On the Mark\)](#))
15. *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#))
16. *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, [2014 BCCA 113](#)

17. *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#)
18. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
19. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
20. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)

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

R.S.O. 1990, c C.30, as amended

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect of the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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

KINGSETT MORTGAGE CORPORATION

and MAPLEVIEW DEVELOPMENTS LTD., PACE MAPLEVIEW LTD. and 2552741 ONTARIO INC.

Applicant

Respondents

Court File No.: CV-24-00716511-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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