

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

BETWEEN

DORR CAPITAL CORPORATION

Applicant

- and -

HIGHVIEW BUILDING CORP INC.

Respondent

**IN THE MATTER OF AN APPLICATION PURSUANT TO 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

(HIGHVIEW SALE APPROVAL, INITIAL DISTRIBUTION AND ANCILLARY RELIEF)

September 26, 2023

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TO: THE SERVICE LIST

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PART I. NATURE OF THIS MOTION

1. On May 2, 2023, this Court made an Order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager (the “**Receiver**”) of the property, assets and undertakings of Highview Building Corp Inc. (“**Highview**”).¹
2. At the same time, this Court made separate orders appointing KSV as receiver and manager of other entities in the Stateview Group of Companies (the “**Stateview Group**”).²

¹ Fourth Report of KSV Restructuring Inc. dated September 22, 2023 (the “**Fourth Report**”).

² Fourth Report at section 1.

3. Highview is a single-purpose real estate development company that owns raw land municipally known as 89 and 99 Nashville Road, Kleinberg, Ontario (the “**Highview Real Property**”).³
4. On June 5, 2023, this Court made an order (the “**Sale Process Order**”) to, among other things: (i) approve a sale process in respect of the property of the Stateview Group companies in receivership, including Highview (the “**Sale Process**”), and (ii) authorize the Receiver to conduct the Sale Process.⁴
5. After marketing the Highview Real Property for sale, the Receiver selected the offer from 2133904 Ontario Inc. (the “**Purchaser**”) as the successful bidder.⁵
6. The Receiver and the Purchaser entered into an Agreement of Purchase and Sale as of August 10, 2023, which was subsequently amended on August 24, 2023 (the “**APS**”).⁶
7. The Receiver now seeks the following orders from this Court:
 - (a) an approval and vesting order (“**AVO**”):
 - (i) approving the transaction for the sale of the Purchased Assets (as defined in the APS) to the Purchaser (the “**Transaction**”); and

³ Fourth Report at section 2.0(2).

⁴ Fourth Report at section 1.0(4).

⁵ Fourth Report at section 6.0.

⁶ Fourth Report at Appendix G (redacted) and Confidential Appendix 2.

- (ii) following the Receiver's delivery of the Receiver's Certificate substantially in the form attached as Schedule "A" to the proposed AVO, transferring and vesting all of Highview's right, title and interest in and to the Purchased Assets in the Purchaser, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances; and
- (b) an ancillary relief order (the "**Ancillary Relief Order**"):
- (i) authorizing the Receiver to make certain payments and distributions and maintain certain reserves from the proceeds from the Transaction (the "**Highview Purchase Proceeds**");
 - (ii) approving the Fourth Report;
 - (iii) approving the fees and disbursements of the Receiver and its counsel (the "**Professional Fees**"), as detailed in the Fourth Report and, respectively, the Affidavit of Robert Kofman sworn September 22, 2023 and the Affidavit of Beatrice Loschiavo sworn September 22, 2023 (the "**Fee Affidavits**"); and
 - (iv) sealing the Confidential Appendices to the Fourth Report pending the completion of the Transaction.

PART II. SUMMARY OF FACTS

A. *Highview Sale Process*

8. The Receiver retained Colliers International (“**Colliers**”) to list the Highview Real Property for sale.⁷
9. Colliers canvassed the market broadly for the Highview Real Property. Among other things, on June 15, 2023, Colliers distributed an interest solicitation letter detailing the acquisition opportunity to 6,200 potential purchasers and directly solicited specific parties that it believed would have an interest in the development potential of the Highview Real Property.⁸
10. In total, 39 parties executed a non-disclosure agreement to perform due diligence, including access to a virtual data room containing information about the Highview Real Property.⁹
11. On July 27, 2023, the Receiver set a bid deadline of August 10, 2023. After the bid deadline, the Receiver reviewed the bids with Colliers and the Applicant, Dorr Capital Corporation (“**Dorr**”) and, together with Colliers, engaged in discussions with the leading bidders to better understand and evaluate their bids.¹⁰
12. Colliers summarized its activities to market the Highview Real Property in its report to the Receiver dated September 6, 2023 (the “**Colliers Report**”).¹¹

⁷ Fourth Report at section 5.0(1)(2).

⁸ Fourth Report at sections 5.0(3), 5.1(2).

⁹ Fourth Report at section 5.0(3), 5.1(2).

¹⁰ Fourth Report at section 5.1(3).

¹¹ Fourth Report at section 5.1(1).

13. The Receiver ultimately determined that the APS was the best offer received and provides the best recovery available for the stakeholders of Highview.¹²

B. Secured creditors

1. Dorr

14. Dorr has the first mortgage registered on title to the Highview Real Property (the “**Dorr Mortgage**”) on March 9, 2022 and a general security agreement dated March 8, 2022 and registered under the Ontario *Personal Property Security Act* (with the Dorr Mortgage, the “**Dorr Security**”). As at September 22, 2023, Dorr was owed approximately \$9.9 million from Highview.¹³

15. Receiver’s counsel provided an opinion that, subject to the standard assumptions and qualifications contained therein, the Dorr Security creates valid and enforceable charges on the Highview Real Property and Highview’s personal property.¹⁴

2. Marzanos¹⁵

16. Highview acquired the Highview Real Property from Domenic Marzano and Anna Marzano (collectively, the “**Marzanos**”) on December 18, 2017.
17. Pursuant to an agreement dated December 15, 2017 between the Marzanos and Highview (the “**2017 Agreement**”), the Marzanos were granted a “first opportunity

¹² Fourth Report at section 6.2.

¹³ Fourth Report at section 3.0(2).

¹⁴ Fourth Report at section 3.0(3).

¹⁵ Fourth Report at section 3.1.

and right” to acquire one residential unit in the development project being proposed for the Highview Real Property at that time (the “**Residence**”).¹⁶

18. The 2017 Agreement provided that Highview would pay the Marzanos \$1.5 million if the unit was not built by December 15, 2022.¹⁷
19. On July 4, 2019, the Marzanos and Highview entered into a further agreement (the “**2019 Agreement**”) which, among other things: (i) confirmed that the Marzanos would pay Highview a deposit of \$200,000 towards the purchase price of the Residence; and (ii) amended the 2017 Agreement to provide that in the event that the Residence was not built by Highview and title to the Residence transferred to the Marzanos on or prior to February 24, 2023, Highview would pay \$1.7 million to the Marzanos.¹⁸
20. The 2019 Agreement further provided that the obligations of Highview therein and under the 2017 Agreement “shall form a charge and encumbrance on the [Highview Real] Property”.¹⁹
21. Notices regarding the 2017 Agreement and the 2019 Agreement were registered on title to the Highview Real Property on December 18, 2017 and July 8, 2019, respectively (collectively, the “**Marzanos’ Notices**”).²⁰

¹⁶ Fourth Report at section 3.1(2).

¹⁷ Fourth Report at section 3.1(3).

¹⁸ Fourth Report at section 3.1(4).

¹⁹ Fourth Report at section 3.1(5).

²⁰ Fourth Report at section 3.1(6).

22. The Highview Real Property is currently raw land and, accordingly, the Residence was not built by February 24, 2023 (as was required under the 2019 Agreement).²¹ It is the Receiver's understanding that the Marzanos take the position that they have a claim (the "**Marzanos' Claim**") against Highview for \$1.7 million, plus \$3,500 for costs, which ranks in priority to the Dorr Mortgage given that the Marzanos' Notices were registered on title in advance of the registration of the Dorr Mortgage.²²

3. Other Secured Creditors

23. MCO Management Inc. ("**MCO**") registered a \$5.3 million charge against the Highview Real Property on December 22, 2022 and 2515792 Ontario Inc. and Kleinville Developments LP registered a \$1.945 million charge against the Highview Real Property on April 18, 2023.²³ The Receiver continues to make inquiries into these charges and will report to the Court in future, if necessary.
24. MCO and Bergo Investment Limited ("**Bergo**") have PPSA registrations against Highview which, according to Dorr's counsel, Blaney McMurtry LLP ("**Blaney**"), were to have been discharged upon the advance of Dorr's loan in March 9, 2022. The Receiver understands that Blaney has requested that MCO and Bergo's counsel remove the PPSA registration and that Blaney is taking steps to register a postponement in favour of Dorr.²⁴

²¹ Fourth Report at section 3.1(7).

²² Fourth Report at section 3.1(7).

²³ Fourth Report at section 3.0(4).

²⁴ Fourth Report at section 3.0(4).

C. Payments, distributions and reserves

25. Dorr is the principal secured creditor of Highview. The Receiver seeks authorization to distribute to Dorr the balance of the Highview Purchase Proceeds after:
- (a) reserving the amount of \$1.7 million, plus \$3,500 for costs, on account of the Marzanos' Claim (the "**Marzanos Holdback**");
 - (b) reserving an amount of \$150,000 on account of potential additional professional costs of the Receiver and its counsel required to complete the administration of the Highview receivership proceedings (the "**Professional Fee Holdback**"); and
 - (c) paying all of the Professional Fees as described in the Fourth Report and particularized in the Fee Affidavits.²⁵
26. The Receiver is also seeking the Court's authority to make one or more subsequent distributions to Dorr of any amounts from the Marzanos Holdback (upon resolution of the Marzanos' Claim) and the Professional Fee Holdback, up to the amount of Highview's indebtedness to Dorr.²⁶

²⁵ Fourth Report at section 9.0.

²⁶ Fourth Report at section 7.0(2).

D. *The Confidential Appendices*

27. On this motion, the Receiver seeks an order sealing the unredacted copies of the Colliers Report and the APS (Confidential Appendices 1 and 2, respectively, to the Fourth Report) pending the closing of the Transaction.
28. The Confidential Appendices contain sensitive information that could impact the marketability of the Purchased Assets if the Transaction does not close.²⁷

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

29. The issues on this motion are:
- (a) whether this Court should grant the AVO; and
 - (b) whether this Court should grant the Ancillary Relief Order.

A. *The AVO should be granted*

1. The APS and the Transaction should be approved

30. It is well established that Courts in Ontario consider the following criteria set out in *Soundair* when assessing whether to approve a transaction in the context of a receivership:
- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
 - (b) the interests of all parties;

²⁷ Fourth Report at section 6.3.

(c) the efficacy and integrity of the process by which offers have been obtained;
and

(d) whether there has been unfairness in the working out of the process.²⁸

31. The *Soundair* test is met in this case. The Receiver has acted in a fair and reasonable manner and has appropriately conducted the Sale Process in accordance with its terms.²⁹ The Receiver broadly canvassed the market and undertook significant efforts to obtain the highest and best offer for the Highview Real Property.³⁰ There is no reason to believe that any better price or result could have been obtained for the benefit of the stakeholders.³¹ In addition, the interests of all parties have been considered and furthered in the context of the Transaction, including the interests of Dorr as primary secured creditor.³²

32. The Court should accept the Receiver's recommendation and approve the APS and the proposed Transaction.

B. *The Ancillary Relief Order should be granted*

1. The Receiver should be authorized and directed to make the proposed payments and distributions and establish and maintain the proposed reserves

33. The Receiver is seeking authorization and direction to make the proposed payments and distributions and to establish and maintain the proposed reserves

²⁸ *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA) at [para 16](#) [*Soundair*].

²⁹ Fourth Report at section 6.2(a).

³⁰ Fourth Report at section 6.2(b).

³¹ Fourth Report at section 6.2(c)(d).

³² Fourth Report at section 6.2(d)(f).

from the Highview Purchase Proceeds described in the Fourth Report and set out above in paragraph 25.

34. This Court routinely authorizes distributions with a reserve in insolvency proceedings, including receiverships.³³ For example, in *GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc.*, this Court approved an interim distribution by a receiver, subject to the receiver maintaining sufficient reserves to complete the administration of the receivership, to maximize efficiency and avoid the need for further appearances.³⁴
35. Similarly, in *Abitibowater* the Court considered several factors in determining whether an interim distribution should be permitted including, among other things, (i) whether the payee's security was valid and enforceable; (ii) whether the distribution would leave the estate with sufficient liquidity; and (iii) whether the amounts owed to the beneficiary of the distribution far exceed the amount of the proposed distribution.³⁵
36. In this case, the proposed reserves are necessary to ensure the Receiver will, among other things, have sufficient liquidity to fund the remainder of the Highview receivership proceedings and pay out the Marzanos' Claim (if it is determined to be valid and in priority).³⁶ The reserves are fair and reasonable because they

³³ *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772 (ONSC) at [paras 8, 13](#); *Abitibowater Inc. (Re)*, 2009 QCCS 6461 at [paras 70-75](#) [*Abitibowater*].

³⁴ 2014 ONSC 1173 at [para 53](#) [*GE Canada Real Estate*].

³⁵ *Abitibowater* at [para 75](#); see also *GE Canada Real Estate* at [para 53](#).

³⁶ Fourth Report at section 7.0.

reflect an estimate of the maximum amounts that may be owed or become owing in priority to the security interest held by Dorr.

2. The Court should approve the Fourth Report and the Receiver's activities described therein

37. The activities of the Receiver described in the Fourth Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order and Sale Process Order and were, in each case, in the best interest of Highview's stakeholders generally.³⁷
38. The Receiver therefore respectfully submits that the Fourth Report and the activities described therein should be approved.

3. The Court should approve the fees and disbursements of the Receiver and its Counsel

39. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel from April 21, 2023 to and including August 31, 2023 as described in the Fee Affidavits attached to the Fourth Report.
40. The Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.³⁸
41. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account (a) the nature, extent and value of the assets, (b) the complications encountered,

³⁷ Fourth Report at section 8.0.

³⁸ Receivership Order, Fourth Report, Appendix A at para 19.

(c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver's knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the receiver's efforts and (i) the cost of comparable services when performed in a prudent and economical manner.³⁹

42. The fees and disbursements are fair and reasonable and have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market.⁴⁰
43. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

4. This Court should Seal the Confidential Appendices

44. As noted above, the Receiver seeks an Order sealing the Confidential Appendices pending the closing of the Transaction.
45. The limited circumstances in which this Court should seal part of a record before it were described by the Supreme Court of Canada in the case of *Sierra Club of Canada v. Canada (Minister of Finance)*.⁴¹
46. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

³⁹ *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at [paras 33](#) and [44-45](#).

⁴⁰ Fourth Report at section 9.0(7).

⁴¹ [2002 SCC 41](#) [*Sierra Club*].

- (a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.⁴²

47. In the context of court-supervised sale proceedings, this Court has routinely applied *Sierra Club* and held that it is appropriate to seal information and documentation filed in support of a motion to approve a sale where the materials “disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought”.⁴³
48. Sealing these materials is necessary to ensure that the Receiver can maximize value for the Purchased Assets if the contemplated Transaction does not close and the Receiver (or someone else) has to market the Purchased Assets for sale again.⁴⁴

⁴² *Sierra Club* at [para. 45](#).

⁴³ *GE Canada Real Estate* at [para. 32](#).

⁴⁴ *GE Canada Real Estate* at [paras. 32-34](#).

PART IV. ORDER REQUESTED

49. For the reasons stated herein, the Receiver respectfully requests that the Court grant: the (i) AVO and (ii) Ancillary Relief Order, and approve the relief set out herein.



Jeffrey Larry / Daniel Rosenbluth
Paliare Roland Rosenberg Rothstein LLP
Lawyers for the Receiver and Manager,
KSV Restructuring Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *Re Windsor Machine & Stamping Ltd.*, [2009 CanLII 39772 \(ONSC\)](#)
3. *AbitibiBowater inc. (Arrangement relatif à)*, [2009 QCCS 6461](#)
4. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)
5. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
6. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c C-36

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.

...

Courts of Justice Act, R.S.O. 1990, c. C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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