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JUDICIAL CENTRE

EDMONTON

PLAINTIFF(S)

FORTIS LGS STRUCTURES INC.

DEFENDANT(S)

STATION POINT DEVELOPMENTS LTD.  
and BCM DEVELOPMENTS LTD.

DOCUMENT

**BRIEF OF LAW AND ARGUMENT OF  
THE RECEIVER**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS  
DOCUMENT

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## I. INTRODUCTION

1. KSV Restructuring Inc. (formerly KSV Kofman Inc.) was appointed as trustee and receiver and manager (in such capacities, the "**Receiver**") of certain properties of Station Point Developments Ltd. (the "**Company**") pursuant to an Order (Appointing Builders' Lien Trustee and Receiver Manager) of this Honourable Court dated June 18, 2019 (the "**Receivership Order**").
2. In or around 2012, BCM Developments Ltd. ("**BCM**") entered into negotiations and subsequently an agreement of purchase and sale (the "**Agreement**") to purchase the real property municipally described as 403 Belvedere Gate NW Edmonton (the "**Real Property**") from the City of Edmonton. Prior to closing, the Agreement was assigned by BCM to the Company. The City provided the Company with a vendor-take-back mortgage.
3. In 2016, the Company obtained a construction loan from KingSett Mortgage Corporation ("**KingSett**") to develop and construct on the Real Property a 112 unit residential apartment building, together with a ground floor retail space (the "**Project**"). Construction of the Project commenced in 2016 and was expected to be completed by the Company in 2018.
4. The issues that gave rise to the receivership proceedings included significant cost overruns on the construction of the Project, the registration of builders' liens against title to the Real Property, and a dispute between the Company and Fortis LGS Structures Inc., the Project's prior general contractor.
5. The principal purpose of the receivership proceedings was to complete the Project in order to maximize recovery for the Company's stakeholders. The Project has now been completed, the residential space is substantially leased and the commercial space is partially leased.
6. The Company originally intended to build five apartment buildings on the Real Property; however, only two buildings have been constructed and the balance of the Real Property remains undeveloped (the "**Vacant Lands**"). In an effort to increase the value of the Vacant Lands, the Receiver sought and received approval to subdivide and rezone the Vacant Lands.
7. The Receiver requests the following relief:
  - (a) approval of an offer to purchase the Purchased Assets, as outlined in the Offer to Purchase dated September 24, 2021 (as amended from time to time) (the "**Sale Agreement**") and vesting out all Claims other than Permitted Encumbrances; and
  - (b) temporary sealing of the confidential appendices to the Receiver's Fourth Report dated December 6, 2021 (collectively, the "**Confidential Appendices**"), unless and until the proposed sale of the Purchased Assets (the "**Transaction**") is closed or upon further order of the Court.

## II. ISSUES

8. The following issues are addressed herein:
- (a) Should the Approval and Vesting Order be granted?
  - (b) Should a temporary sealing of the Confidential Appendices be granted?

## III. LAW AND ARGUMENT

### A. Approving Sale And Vesting Order

9. When reviewing a proposed sale of assets by a receiver, the following criteria are to be considered:
- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
  - (b) the interests of all the parties;
  - (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.

*Royal Bank v Soundair Corp.* (1991), 7 CBR (3d) 1 (Ont CA) ("*Soundair*") at para 16 [TAB 1]

10. The criteria and principles set out in *Soundair* have been adopted and applied by the Court of Appeal of Alberta.

*Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd.*, 2019 ABCA 433 ("*Pricewaterhousecoopers*") at paras 10-12 [TAB 2]

11. A receiver, in carrying out its duties and exercising its powers, is obligated to deal with the debtor's property in a commercially reasonable manner. A court-appointed receiver is to be afforded deference. In particular, it is assumed that the receiver's course of action and recommendation are appropriate unless the contrary is clearly shown.

*Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 247  
*Soundair, supra* at paras 46-48 [TAB 1]

12. The Receiver submits that the proposed sale of the Purchased Assets satisfies the *Soundair* test and principles.

(i) ***The Receiver acted Providently and made Sufficient Efforts to Receive the Best Price***

13. In determining whether a receiver has acted providently, the Court is to examine the

conduct of a receiver in light of the information the receiver had when it agreed to accept an offer. The recommendation of the receiver should be rejected in only the most exceptional circumstances.

*Soundair, supra* at para 21 [TAB 1]  
*Pricewaterhousecoopers, supra* at para 14 [TAB 2]

14. The Receiver submits that this factor is satisfied in this case.
15. The Receiver used significant efforts in marketing the Purchased Assets for sale (the "**Sale Process**"). In June 2020, the Receiver engaged Jones Lang LaSalle ("**JLL**"), a well recognized realtor, well to list the Purchased Assets for sale. The Purchased Assets have been marketed for sale since that time.
16. JLL and the Receiver worked together to prepare:
  - (a) an investment summary detailing the opportunity (the "**Investment Summary**");
  - (b) a confidentiality agreement (the "**CA**");
  - (c) a data room, which contained, *inter alia*, reports concerning the development (such as environmental reports), the commercial tenancy leases and budgets to complete construction of the Purchased Assets;
  - (d) a Confidential Information Memorandum ("**CIM**"), which included a summary of the Purchased Assets, its projected financial performance and details concerning the Sale Process; and
  - (e) a form of asset purchase agreement which the Receiver recommended interested parties should use to submit an offer.
17. On June 23 2020, JLL sent on two occasions the Investment Summary to over 3,000 parties in its database, including apartment owners across Canada, developers in Alberta and parties that had contacted the Receiver prior to the commencement of the Sale Process.
18. The CA was attached to the Investment Summary. Interested parties were required to sign the CA to obtain a copy of the CIM and access to the data room.
19. The Project was also advertised on:
  - (a) Realtor.ca;
  - (b) the JLL Canada website;
  - (c) LoopNet, an online marketplace for commercial real estate in Canada and the US;

- (d) Gettel Network listings, a City of Edmonton commercial real estate website; and
  - (e) LinkedIn, where it obtained 2,115 unique views.
20. Additional procedures to market the Real Property included:
- (a) the Receiver and JLL engaged in discussions with a government related entity that specialized in low-income housing for the City, but were unable to come to terms on agreement;
  - (b) JLL directly contacted at least approximately 50 parties, including numerous developers.
21. The Sale Process did not have an offer deadline; however, the marketing materials advised interested parties that offers would not be considered prior to July 8, 2020.
22. The results of the Sale Process were as follows:
- (a) 46 parties executed the CA, were provided a copy of the CIM and given access to the data room;
  - (b) six parties toured the Project; and
  - (c) two parties submitted offers, including the Purchaser.
23. After consulting with KingSett, the Receiver rejected one offer, as the consideration offered was inadequate.
24. The second offer was submitted by the Purchaser. The Purchaser has expressed an interest in purchasing the Purchased Assets since the commencement of the receivership proceedings. The Receiver and the Purchaser entered into the Sale Agreement.
25. The Sale Agreement is subject to three conditions:
- (a) the Court issuing an Approval and Vesting Order;
  - (b) the Purchaser arranging financing to purchase the Purchased Assets by December 31, 2021, subject to the Receiver's unilateral option to extend such date in accordance with the Sale Agreement;
  - (c) the Transaction closing on or before December 31, 2021, subject to the Receiver's unilateral option to extend such date in accordance with the Sale Agreement.
26. Based on the extensive marketing efforts undertaken to date and the valuation analyses performed by the Receiver, KingSett, which is the senior ranking creditor of the Company, is the only party with an economic interest in the Transaction. KingSett has requested that the Receiver seek Court approval of the Transaction, notwithstanding that all conditions

have not yet been satisfied and that KingSett will realize a loss if the Transaction closes.

27. It is the Receiver's opinion that further marketing of the Purchased Assets would not likely result in a better offer being obtained and would result in erosion of value due to further professional fees and interest which continues to accrue.

**(ii) *The Proposed Sale is in the Interests of the Parties***

28. The primary concern in reviewing the interests of the parties is the interests of the creditors of the debtor. The receiver must consider the interests of all creditors and act for the benefit of the general body of creditors.

*Soundair, supra* at paras 39-40 [**TAB 1**]  
*Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB 350  
("Elaborate Homes") at para 61 [**TAB 3**]

29. The Receiver is of the opinion that approval of the Transaction is in the best interests of all creditors. In particular:
- (a) the market has been widely canvassed by JLL since June 2020, a significant and reputable realtor, using several customary marketing techniques for real estate developments;
  - (b) 46 parties signed CAs; however, only two offers have been submitted;
  - (c) the Transaction provides for the greatest recovery available in the circumstances;
  - (d) JLL is familiar with the local real estate market and is of the view that the Transaction is the best one available at this time;
  - (e) KingSett, the only creditor with an economic interest in the Transaction, consents to the relief in this motion and supports completion of the Transaction, notwithstanding that it will incur a shortfall on its loans to the Company;
  - (f) absent the Transaction, further marketing efforts will be required. The ongoing professional fees and interest will erode the recoveries to KingSett with no certainty that a superior transaction could be completed;
  - (g) the receivership commenced in June 2019. There have been significant cost-overruns on the construction of the Project that KingSett has funded. The receivership has lasted longer and cost more than originally contemplated;
  - (h) KingSett has requested that the Receiver seek Court approval at this time so that the Transaction can be expediently closed if all conditions are waived or satisfied, including most materially, the financing condition. In the circumstances, the Receiver believes that it is appropriate that Court approval be sought at this time so that the Transaction can close immediately following the waiver or satisfaction of all conditions; and

- (i) if the Transaction does not close, the Purchased Assets will continue to be marketed for sale. If the relief sought is granted, the Receiver will file an update report with the Court by no later than March 31, 2022 advising of the status of the Transaction. The Report will be served on the Service List and made available on the Receiver's case website at that time.

**(iii) *There was Efficacy and Integrity to the Receiver's Process***

30. It is not necessary to scrutinize every element of the receiver's process in coming to the decision to accept an offer.

*Crown Trust Co. v Rosenberg*, 1986 CarswellOnt 235 (HC) ("*Crown Trust*") at paras 65-66 [**TAB 4**]

31. Courts are to exercise caution before interfering with the process adopted by a receiver. It is integral to the receivership process that prospective purchasers know, if they have acted in good faith, bargained seriously and entered into an agreement with a receiver, that the Court will not lightly interfere with the commercial judgment of the receiver regarding a sale.

*Soundair*, *supra* at para 46 [**TAB 1**]  
*Pricewaterhousecoopers*, *supra* at para 14 [**TAB 2**]

32. Courts are to assume that a receiver has acted properly in dealing with the property of a debtor, unless the contrary is clearly demonstrated.

*Soundair*, *supra* at para 14 [**TAB 1**]

33. The Sale Process, which is consistent with other insolvency sale processes involving real estate, was undertaken by the Receiver in good faith and in a commercially reasonable manner, and all interested parties were treated with integrity.

**(iv) *There was no Unfairness in the Receiver's Process***

34. It is only in exceptional circumstances that a court is to find a sale process unfair and proceed contrary to the recommendation of the Receiver.

*Crown Trust*, *supra* at paras 67 and 77 [**TAB 4**]

35. There was no unfairness in the Sale Process undertaken by the Receiver. The Receiver has acted reasonably, prudently, fairly, and not arbitrarily.

36. The Receiver recommends that this Honourable Court approve the Sale Agreement and grant the Approval and Vesting Order in respect of the Purchased Assets.



**B. Sealing of the Confidential Appendices**

37. The Court has broad discretion to grant a sealing order, notwithstanding the provisions of Division 4 of Part 6 of the *Rules of Court*.

*Alberta Rules of Court*, Alta Reg 124/2010, r 6.28

38. A temporary sealing order may be granted when:

- (a) an order is required to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [TAB 5]

39. The Supreme Court of Canada recently restated the test an applicant must satisfy in seeking a temporary sealing order. An applicant must demonstrate:

- (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 identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects

*Sherman Estate v Donovan*, 2021 SCC 25 at para 38 [TAB 6]

40. Where information is commercially sensitive and assets are being sold pursuant to a Court process, it is common to seal commercially sensitive information. Such step is necessary in the event a further bidding or sale process is required, should the transaction being considered fail to close, and ensures fair play so that competitors and potential purchasers do not obtain an unfair advantage by obtaining such information.

*Elaborate Homes, supra* at para 54 [TAB 3]  
*Look Communications Inc. v Look Mobile Corp.*, 2009 CarswellOnt 7952 (SCJ)  
 ("*Look Communications*") at para 17 [TAB 7]  
*Nortel Networks Corp. (Re)*, 2009 CarswellOnt 4838 at para 39 [TAB 8]  
*Maxtech Manufacturing Inc. (Re)*, 2010 ONSC 1161 at para 30 [TAB 9]  
*887574 Ontario Inc v Pizza Pizza Ltd.*, 1994 CarswellOnt 1214 at para 6 [TAB 10]

41. It is rare that an interested party will request that a sealing order be set aside, as typically all of the assets that are bid on during the court sale process are sold and approved by Court

order. No further interest in the confidential information arises once the transaction has closed.

*Look Communications supra* at para 17 [**TAB 7**]  
*Elaborate Homes, supra* at para 54 [**TAB 3**]

42. The Confidential Appendices contain significant commercial information regarding the value of the Purchased Assets and the purchase price contemplated by the Transaction. Therefore, the Receiver submits that the Confidential Appendices, if not temporarily sealed, pose a serious risk to the commercial interests at issue in these proceedings.
43. In the event the Receiver's application for approval of the Sale Agreement is dismissed, or the transaction contemplated by the Sale Agreement does not close, the Receiver may be required to again market the Purchased Assets for sale and negotiate with potential purchasers. If the information in the Confidential Appendices is made public and placed on the Court record, it may prejudice the Receiver's ability to obtain the best offers possible for the Purchased Assets and to negotiate with third parties to obtain the best realization for the Purchased Assets.
44. It is also respectfully submitted that the public has an interest in the fairness and efficacy of Court-supervised liquidations, and the publication of this information prior to the Purchased Assets being sold could undermine public confidence of sales processes administered by the Receiver.
45. The Receiver further respectfully submits that the salutary effects of sealing of the Confidential Appendices outweigh any deleterious effects that may be caused by the temporary sealing.
46. The Receiver submits that in these circumstances it is necessary to seal the Confidential Appendices to prevent a real and substantial risk of harm to commercial interests of the stakeholders of the Company.

#### **IV. RELIEF SOUGHT**

47. The Receiver respectfully requests that this Honourable Court grant the following relief:
  - (a) approval of the offer to purchase of the Purchased Assets by Arris Homes Ltd. and vesting out all Claims other than Permitted Encumbrances; and
  - (b) temporarily sealing the Confidential Appendices, or otherwise directing its delayed filing.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6<sup>th</sup> DAY of DECEMBER, 2021.**

**BENNETT JONES LLP**

Per: *Katherine Fisher*  
Katherine J. Fisher and Sean Zweig  
Counsel for KSV Restructuring Inc.

**V. TABLE OF AUTHORITIES**

1. *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)
2. *Pricewaterhousecoopers Inc. v. 1905393 Alberta Ltd.*, 2019 ABCA 433
3. *Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB 350
4. *Crown Trust Co. v. Rosenberg*, 1986 CarswellOnt 235 (Ont. H.C.)
5. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
6. *Sherman Estate v Donovan*, 2021 SCC 25
7. *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List])
8. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List])
9. *Maxtech Manufacturing Inc. (Re)*, 2010 ONSC 1161
10. *887574 Ontario Inc v. Pizza Pizza Ltd.*, 1994 CarswellOnt 1214