

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MCAP FINANCIAL CORPORATION

Applicant

and

VANDYK-THE BUCKINGHAM NORTH - GRAND CENTRAL LIMITED
and JOHN VANDYK

Respondents

**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 APPLICANT
(Hearing January 18, 2024)

January 11, 2024

GARFINKLE BIDERMAN LLP
Barristers & Solicitors
1 Adelaide Street East, Suite 801
Toronto, Ontario
M5C 2V9

Wendy Greenspoon-Soer – LSO#: 34698L
Tel: 416-869-1234
Email: wgreenspoon@garfinkle.com

Lawyers for the Applicant,
MCAP Financial Corporation

PART I - OVERVIEW

1. This Application was issued by MCAP Financial Corporation (“**MCAP**”) for an Order under subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (“**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario) (“**CJA**”) to appoint KSV Restructuring Inc. (“**KSV**”), as the Receiver and Manager (in such capacity, the “**Receiver**”), without security, of the real property legally described in Schedule "A" to the proposed Receivership Order (collectively, the "**Real Property**") and all of the present and future assets, undertakings and personal property of Vandyk – The Buckingham North – Grand Central Limited ("**Vandyk**") and John Vandyk (the “**Guarantor**”) (collectively referred to as the “**Debtors**”) located at, related to, used in connection with or arising from or out of the Real Property or which is necessary to the use and operation of the Real Property, including all of the proceeds therefrom and more particularly described as:

PIN 07617 – 0035 LT PCL 237-1, SEC M68; LT 237, PL M68; ETOBICOKE, CITY OF TORONTO to PIN 07617 – 0045 LT PCL 238-1, SEC M68; LTS 238, PL M68; & LTS 9, 10, 11,16, 17 & 18, PL M177; ETOBICOKE, CITY OF TORONTO;

known municipally as 23 Buckingham Street, Etobicoke, Ontario, (the “**Buckingham Lands**”), pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario) (the “**Application**”).

2. To date the Application remains unopposed as the Respondents have not filed any materials.

PART II – FACTS

3. MCAP is incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, with a registered head office located at 200 King Street West, Suite 400, Toronto, Ontario, M5H 3T4.

4. Vandyk is a privately held real estate development company incorporated under the *Ontario Business Corporation Act*, with a registered head office located at 1944 Fowler Drive, Mississauga, Ontario, L5K 0A1.¹

5. Vandyk is the registered owner of the Buckingham Lands which consist of a 2.11 acre high-rise development site with Official Plan Amendment (“**OPA**”) and Zoning By-law Amendment (“**ZBA**”) approval (Site Plan Control application under review), situated at the northeast corner of Newcastle Street and Buckingham Street in Etobicoke. The project is to consist of three towers on one podium with five levels of underground parking, with the three towers combining for 749 residential units, 393 parking stalls and 761 lockers. Additionally, the buildings were to include 66,193 sq. ft. of commercial space (the “**Buckingham Project**”).²

THE LOAN AND SECURITY DOCUMENTS

6. In connection with the Debtors’ refinancing of the Buckingham Project, MCAP provided a non-revolving land loan facility for the principal sum of \$37,500,000.00 (the “**Loan Facility**”)³, under which the principal amount of \$37,500,000.00 remains outstanding, together with all interest, fees and costs thereunder (the “**Indebtedness**”). The Debtors granted various security and collateral security (collectively with all commitment letters related thereto, the “**Loan and Security Documents**”) to secure the payment and performance of the Indebtedness.

7. Pursuant to a Commitment Letter dated August 18th, 2020 (the “**Buckingham Commitment Letter**”) between MCAP, as lender, and Vandyk – The Buckingham North- Grand Central Limited, as borrower, MCAP agreed to provide a first mortgage land loan in the principal

¹ Exhibit A, Affidavit of Michael Misener, Application Record, Tab 2 (“**Misener Affidavit**”)

² Paragraph 5, Misener Affidavit

³ Paragraph 6, Misener Affidavit

amount of \$37,500,000.00, to enable Vandyk to refinance its existing 1st, 2nd and 3rd mortgages against the Buckingham Lands.⁴

8. As of November 29, 2023, the total Indebtedness under the Buckingham Commitment Letter was \$38,442,267.69 plus legal costs.⁵

9. The payment and performance of the Indebtedness, and the obligations under, among other things, the Buckingham Commitment Letter, was unconditionally, absolutely and irrevocably guaranteed by John Vandyk.⁶

10. As general and continuing security for the payment and performance of the Indebtedness and obligations under, among other things, the Buckingham Commitment Letter and the Guarantees, MCAP was granted various security by Vandyk and the Guarantor (collectively the “**Security**”).⁷

11. The Security includes, without limitation:

- i. A First Mortgage charge over the Buckingham Lands, registered in the amount of \$46,875,000.00 on December 9th, 2020, as Instrument No. AT5593769;⁸
- ii. a General Assignment of Rents (“**GAR**”) registered December 9th, 2020, as Instrument No. AT5593770;⁹
- iii. a General Security Agreement (“**GSA**”) registered September 21st, 2020, by Financing Statement No. 20200921 1401 1462 8820;¹⁰

⁴ Exhibit “B” to the Misener Affidavit

⁵ Exhibit “C” to the Misener Affidavit

⁶ Exhibit “D” to the Misener Affidavit

⁷ Paragraph 11 to the Misener Affidavit

⁸ Exhibit “E” to the Misener Affidavit

⁹ Exhibit “F” to the Misener Affidavit

¹⁰ Exhibit “G” to the Misener Affidavit

- iv. a Guarantee and Postponement of Claim from the Guarantor (the “**Guarantee**”) registered under the *PPSA* on September 21st, 2020, under Registration No. 20200921 1401 1462 8823;¹¹ and
- v. a Guarantee and Postponement of Claim from Vandyk Properties Limited including a Pledge of the Shares of Vandyk, registered September 21st, 2020, under *PPSA* Registration No. 20200921 1401 1462 8824;¹²

THE DEFAULT

12. Several events of default under the Loan and Security Documents have occurred and are continuing. Among other things, such events of default include,

- (a) Vandyk’s failure to honor the terms and conditions of the loan renewal resulted in their failure to repay the loan in full at maturity;
- (b) Vandyk’s failure to make its monthly interest payments under the Buckingham Commitment Letter on October 1st and November 1st, 2023;
- (c) Vandyk's failure to pay the renewal fee due to MCAP on July 1st, 2023;
- (d) Vandyk’s failure to discharge Construction Liens registered on title to the Buckingham Lands totaling \$2,558,943.00 as of November 29, 2023. As of November 29, 2023, there were a combined total of 7 Construction Liens registered on the Buckingham Lands.
- (e) The registration of a subsequent mortgage in favour of Maxims Holdings Inc. on November 10, 2023, for the principal sum of \$800,000.00.
- (f) Vandyk's failure to pay any and all property taxes in respect of the Buckingham

¹¹ Exhibit “H” to the Misener Affidavit

¹² Exhibit “I” to the Misener Affidavit

Property.

- (g) Several other Vandyk development corporations, operated by the Guarantor had enforcement actions commenced, constituting a material change to the financial position of Vandyk and the Guarantor.¹³

13. Given the foregoing events of default, MCAP issued a demand letter on October 10th, 2023, to Vandyk and to the Guarantor (the "**MCAP Demand Letters**") for the repayment of all of the Buckingham Indebtedness to MCAP.

14. The MCAP Demand Letters were delivered to Vandyk and the Guarantor, contemporaneously with Notices of Intention to Enforce Security, in accordance with section 244 of the BIA (collectively the "**NITES**").¹⁴

15. The ten-day period afforded to Vandyk and the Guarantor under the Demand Letters and NITES to repay all of the Indebtedness prior to any enforcement action being taken has expired.¹⁵

16. Notwithstanding the issuance of the Demand Letters and NITES, the entirety of the Indebtedness remains outstanding, together with all additional interest, fees and legal costs accrued from October 6th, 2023.¹⁶

PART III - ISSUES

17. This Application requires a resolution of the following issues:

- (a) Should this Court make an Order pursuant to subsection 243(1) of the BIA and section 101 of the CJA appointing KSV as the Receiver over the Vandyk Debtors?

¹³ Paragraph 13 a-g to the Misener Affidavit

¹⁴ Exhibit "O" to the Misener Affidavit

¹⁵ Paragraph 16 to the Misener Affidavit

¹⁶ Paragraph 17 to the Misener Affidavit

- (b) Should this Court make an Order pursuant to subsection 243(6) of the BIA granting the Receiver's Charge?

PART IV - LAW AND ARGUMENT

THE TEST FOR THE APPOINTMENT OF A RECEIVER

18. This Court has the power to appoint a Receiver or a Receiver and Manager under subsection 243(1) of the BIA and section 101 of the CJA.¹⁷

19. Pursuant to subsection 243(1) of the BIA, the court may appoint a Receiver where it considers it to be just or convenient to do so. Subsection 243(1) provides¹⁸:

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.

20. As a threshold issue, where an appointment is to be made under section 243 of the BIA, the court must be satisfied that either: (i) the insolvent person received ten days' notice under section 244 of the BIA of the moving party's intention to enforce its security; (ii) the insolvent person consented to the appointment of a receiver prior to the expiry of the ten day period; or (iii)

¹⁷ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended [BIA], subsection 243(1), Schedule B to this Factum; *Court of Justice Acts*, R.S.O. 1990, c. C.43, as amended [CJA], section 101, Schedule B to this Factum

¹⁸ BIA, subsection 243(1), Schedule B to this Factum.

it is otherwise appropriate to order the appointment prior to the expiry of the ten day notice period.¹⁹

21. Similarly, the test for the appointment of a receiver under section 101 of the CJA is also whether such appointment would be just or convenient. Subsection 101(1) of the CJA provides as follows²⁰:

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.

22. In determining whether it would be just, appropriate or convenient to appoint a receiver, Canadian courts have historically considered a number of factors, including, but not limited to, whether²¹:

- (i) the applicant has the power to appoint a receiver under its security instrument;
- (ii) the security held by the applicant is or may become insufficient to secure the indebtedness;
- (iii) the debtor has broken or otherwise failed to carry out its obligations;
- (iv) an appointment is necessary to protect the security from existing or realistically perceived jeopardy or danger;
- (v) the debtor has failed to account;
- (vi) the applicant will suffer irreparable harm or injury if a receiver is not appointed;
- (vii) there is demonstrated urgency for the appointment of a receiver;
- (viii) the cost to the parties of making the appointment is justified relative to the expected realization to be achieved from the appointment;
- (ix) the balance of convenience favours the appointment; and

¹⁹ BIA, sections 243(1.1) and 244, Schedule B to this Factum.

²⁰ CJA, subsection 101(1), Schedule B to this Factum.

²¹ [*Standard Trust Co. v Pendency Holdings Ltd.*](#), 1988 CarswellSask 27 (Sask. Q.B.) at para 10.

- (x) the proposed appointee is capable of carrying out the purpose for which the appointment is sought.

23. In deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular to the nature of the property and the rights and interests of all parties in relation thereto. Typically, the issues for a court to determine on a receivership application include the following²²:

- (a) the existence of a debt and default;
- (b) the quality of the security; and
- (c) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return to the parties, the costs associated with the appointment, and any need to preserve the property pending realization.

24. Additionally, the fact that the moving party has a right under its security documentation to appoint a receiver is an important factor to be considered. While the appointment of a receiver is generally viewed as an extraordinary remedy, in cases where the security documentation of the moving party provides for a private or court-appointed receiver, the issue is reduced to a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. This involves an examination of, *inter alia*, (i) the potential cost of the receivership, (ii) the relationship between the debtor and the creditors, (iii) the likelihood of maximizing the return on

²² [*Bank of Montreal v. Carnival National Leasing Ltd.*](#), 2011 CarswellOnt 896 (Ont. S.C.J.) [Carnival Leasing] at para 24.
[*Bank of Nova Scotia v. Freure Village on Clair Creek*](#), 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) [Freure Village] at para 10.
[*Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*](#), 2011 CarswellOnt 11979 (Commercial List) [UM Financial] at para 22.

and preserving the subject property, and (iv) the best way of facilitating the work and duties of the receiver.²³

25. In deciding whether it is just or convenient to appoint a Receiver, the court will consider matters including the preservation and protection of the property and the balance of convenience.²⁴

26. It is not necessary for a creditor, whose security documentation provides for the appointment of a receiver, to demonstrate that it will suffer irreparable harm if the appointment of a receiver is not granted by the court.²⁵

27. The appointment of a Receiver is just and convenient in this case. The security is at risk of deteriorating if the Receiver is unable to take control of the Property to determine the best means to maximize its value for the creditors. There is no prospect of the Debtors obtaining the requisite financing to complete it. Further, the GSA and Standard Charge Terms granted by the Debtors provide MCAP with the contractual right to appoint a Receiver.²⁶

28. KSV is familiar with the Vandyk entities, having been appointed as Receiver over a Vandyk affiliate's construction project on November 14, 2023, in Court File No. CV-23-00909180-CL.²⁷ A further appointment Order was also made against an affiliate's project on December 11th, 2023, which Order went into effect as of January 8th, 2024, in Court File No. CV-23-00710267-CL.

²³ [Carnival Leasing](#), *supra* at para 27.

²⁴ [Citibank Canada v. Calgary Auto Centre](#), 1989 CarswellAlta 343 at para 31 (Alta. Q.B.), Applicant's Book of Authorities, Tab 7.

²⁵ [Carnival Leasing](#), *supra* at para 28.

[Swiss Bank Corp \(Canada\) v Odyssey Industries Inc.pdf](#), 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]), 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) at para 28.

²⁶ MCAP General Security Agreement, paragraph 11(a), Exhibit G Misener Affidavit

²⁷ Paragraph 20 to the Misener Affidavit

29. A court-appointed Receiver is an officer of the court and acts in a fiduciary capacity with respect to all interested parties.²⁸

THE TERMS OF THE REQUESTED ORDER ARE APPROPRIATE

30. Subsection 243(6) of the BIA provides as follows with respect to granting a Receiver's charge²⁹:

(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.

31. In this case, it is appropriate for the Court to grant the Receiver's Charge over the Buckingham Lands to ensure that KSV and its counsel are able to recover any fees and disbursements owed to them. As previously stated, MCAP is the first ranking creditor of the Buckingham Lands. The Receiver's Charge is reasonable, and MCAP is agreeable to the Receiver's Charge being granted. Furthermore, all secured creditors have been given reasonable notice of this Application and have been provided with an opportunity to make representations.

PART V - CONCLUSION

32. For the foregoing reasons, it is respectfully submitted that the relief requested should be granted and KSV ought to be appointed as Receiver of the Vandyk Debtors and the Receiver's Charge ought to be granted, on the terms of the Order sought.

²⁸ [*Ostrander v. Niagara Helicopters Ltd.*](#) (1973), 1 O.R. (2d) 281 at para 6 (Ont. H.C.)

²⁹ BIA, section 243(6), Schedule B to this Factum.

PART VI - ORDER REQUESTED

33. The Applicant requests that this Court issue an Order substantially in the form attached at Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



January 11, 2024

Wendy Greenspoon-Soer
Lawyers for the Applicant

SCHEDULE “A” – AUTHORITIES CITED

1. [Standard Trust Co. v Pendency Holdings Ltd.pdf](#), 1988 CarswellSask 27 (Sask. Q.B.)
2. [Bank of Montreal v. Carnival National Leasing Ltd.](#), 2011 CarswellOnt 896 (Ont. S.C.J.)
3. [Bank of Nova Scotia v. Freure Village on Clair Creek](#), [1996] OJ No 5088 (Gen. Div.)
4. [Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.](#), 2011 CarswellOnt 11979 (Commercial List)
5. [Swiss Bank Corp \(Canada\) v Odyssey Industries Inc.pdf](#), 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List])
6. [Citibank Canada v. Calgary Auto Centre](#), 1989 CarswellAlta 343 (Alta. Q.B.)
7. [Ostrander v. Niagara Helicopters Ltd.](#) (1973), 1 O.R. (2d) 281 at 286 (Ont. H.C.)
8. [Mangoni BK-22-00208590-OT31 Commercial.pdf](#)
9. [Chitel v Rothbart.pdf](#), 1984 CarswellOnt 358, [1984] O.J. No. 2238, 25 A.C.W.S. (2d) 215, 42 C.P.C. 217

SCHEDULE “B” – LEGISLATION CITED

Bankruptcy and Insolvency Act, R.S.C., 1985, C. B-3, as amended

Section 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.

Section 243(1.1)

(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.

Section 243(6)

(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.

Section 244

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a Receiver in respect of the insolvent person.

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

Section 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.

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

MCAP FINANCIAL CORPORATION
Applicant

and VANDYK – THE BUCKINGHAM
NORTH – GRAND CENTRAL
LIMITED and JOHN VANDYK
Respondent

Court File No. CV-23-00710573-0CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
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
Proceeding commenced at Toronto

FACTUM OF THE APPLICANT

GARFINKLE BIDERMAN LLP
Barristers & Solicitors
1 Adelaide Street East, Suite 801
Toronto, Ontario
M5C 2V9

Wendy Greenspoon-Soer – LSO#: 34698L
Tel: 416-869-1234
wgreenspoon@garfinkle.com

Lawyer for the Applicant,
MCAP Financial Corporation

File Number: 9150-087