

Court File No.: CV-23-00710990-00CL

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

BETWEEN:

**FOREMOST MORTGAGE HOLDING CORPORATION**

Applicant

and

**2521311 ONTARIO INC. O.A. TOWNS OF THORNBURY**

Respondent

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**FACTUM OF THE RECEIVER  
RE: CONSTRUCTION LIEN HOLDBACK FUND**

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**Lawyers for the Receiver**

## PART I – OVERVIEW

1. Pursuant to the Order of the Honourable Justice Cavanagh dated December 19, 2023, KSV Restructuring Inc. (“**KSV**”) was appointed as the interim receiver of the assets, undertakings and properties (together, the “**Property**”) of 2521311 Ontario Inc. o.a. Towns of Thornbury (the “**Company**”), including the real property municipally known as Lot 10 Louisa Street, Thornbury, ON (the “**Real Property**”).
2. Pursuant to a further Order of the Honourable Justice Cavanagh dated February 5, 2024, KSV was appointed as receiver (the “**Receiver**”) of the Property and the Court approved the Receiver’s proposed sale process for the Property (the “**Sale Process**”).
3. On the return of the Receiver’s motion seeking, *inter alia*, approval of an agreement of purchase and sale dated August 8, 2024 (the “**APS**”) in respect of the Real Property between the Receiver and Louisa Street GP Inc., on behalf of Louisa Street Limited Partnership (the “**Purchaser**”), as assignee from Foremost Mortgage Holding Corporation (“**Foremost**”), the Receiver is also seeking the Court’s approval of a holdback fund in the amount of \$66,713.24 (the “**Holdback Fund**”) to be held by the Receiver pending resolution, by agreement or further Order of the Court, of certain lien claims registered against title to the Real Property.

## PART II - FACTS

4. The facts relating to the Sale Process and APS are set out in detail in the First Report of the Receiver dated August 8, 2024 (the “**First Report**”) and will not be reproduced in detail herein. This factum will focus on the Receiver’s request for the establishment of the Holdback Fund and, as such, the facts relevant to that relief set out in the First Report are set out below.
5. The Company is a real estate development company that was developing a 23-unit townhome project known as the Towns of Thornbury. Although closings of the townhome sales were to be completed in January 2022, the project was plagued by construction delays, cost overruns, stop work orders and material deficiencies. As at the date of the Receiver’s appointment, the project remained under construction.<sup>1</sup>
6. Foremost holds a senior ranking mortgage and charge registered on title to the Real Property in the amount of \$9.846 million as well as a general security agreement securing its

<sup>1</sup> First Report of the Receiver dated August 8, 2024, at pg. 3 (the “**First Report**”).

indebtedness. As at the commencement of the Company's insolvency proceedings, Foremost was owed approximately \$8.4 million, plus interest and costs that continue to accrue.<sup>2</sup>

7. Two subordinate mortgages are also registered on title. The first, in the amount of \$1.679 million, is in favour of Berkley Insurance Company ("**Berkley**") and it is the Receiver's understanding that the mortgage relates to deposit insurance and surety provided by Berkley on account of deposits paid by pre-construction purchasers. The second mortgage, in the amount of \$1.0 million, is in favour of Jose Cruz ("**Cruz**"), a business partner of the Company's director and officer, and it is the Receiver's understanding that the mortgage relates to advances made to the Company to assist with the project's construction.<sup>3</sup>
8. As at the date of the First Report, there were three construction liens registered against title to the Real Property by the following parties:
  - (i) Cooper Equipment Rentals Limited ("**Cooper**") - in the amount of \$71,634 registered on December 6, 2023 for amounts claimed as owing under a contract with a total contract price of \$71,634;
  - (ii) Weatherall Enterprises Ltd. ("**Weatherall**") – in the amount of \$224,873 registered on December 18, 2023 for amounts claimed as owing under a contract with a total contract price of \$310,128.04; and
  - (iii) KFA Architects & Planners Inc. ("**KFA**") – in the amount of \$285,369 registered on April 10, 2024 for amounts claimed as owing under a contract with a total contract price of \$285,369.56 (together, the "**Registered Lien Claims**").<sup>4</sup>
9. All advances made by Foremost and secured under the Foremost mortgage were made prior to the registration of the Registered Lien Claims.<sup>5</sup>
10. In addition to the Registered Lien Claims, construction liens claims were also registered against title to the Real Property by: (i) Toromont Industries Ltd. in the amount of \$55,421.93; (ii) Ecostar Insulation in the amount of \$20,822.06; and (iii) Northstar Spray Foam and Insulation Inc. in the amount of \$81,788.74. Each of those liens have been bonded off of title to the Real Property upon the posting of full security.<sup>6</sup>

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, at pg. 4

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, at pg. 5.

11. Since the date of the Receiver's appointment, no further supply of services or materials has taken place at the Real Property and no other parties have asserted construction lien claims.<sup>7</sup>

### **PART III - ISSUES**

12. The issue before the Court is whether the establishment of the Holdback Fund is appropriate on account of the Registered Lien Claims.

### **PART IV – LAW AND ARGUMENT**

13. Pursuant to section 22(1) of the *Construction Act* (Ontario) (the “Act”), each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10% of the price of services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under the Act.<sup>8</sup>
14. In the instant case, each of Cooper, Weatherall and KFA entered into agreements directly with the Company for the supply of services and/or materials relating to the project. The aggregate dollar value of the Cooper, Weatherall and KFA agreements is \$667,131.60.
15. Pursuant to the Act, with the exception of the “notice holdback” obligation arising under section 24(2) which exception does not apply in the instant case, the maximum amount of the Company's holdback obligation under the Cooper, Weatherall and KFA agreements was 10% of the aggregate total of the three contracts or \$66,713.16.<sup>9</sup>
16. Pursuant to section 78(2) of the Act, the Registered Lien Claims have priority over the Foremost mortgage (and the mortgages in favour of Berkley and Cruz) only to the extent of any deficiency in the section 22 holdback.<sup>10</sup>
17. Pursuant to the terms of the APS, as a condition precedent to closing the transaction contemplated therein, the Purchaser will pay to the Receiver a cash amount sufficient to fund the Holdback Fund. As such, the Registered Lien Claims will not enjoy any priority over the Foremost mortgage (and likely the Berkley and Cruz mortgages) as there will be no deficiency in the section 22 holdback under the Act.<sup>11</sup>

<sup>7</sup> *Ibid.*

<sup>8</sup> [\*Construction Act, RSO 1990, c C. 30, at s. 22\(1\).\*](#)

<sup>9</sup> *Ibid.*, at s. [24\(2\).](#)


<sup>10</sup> *Ibid.*, at s. [78\(2\).](#)

<sup>11</sup> *First Report*, at pg. 7.

**PART V - CONCLUSION**

18. For the reasons set forth herein, the Receiver requests that the Court grant the Order, *inter alia*, approving the establishment of the Holdback Fund, substantially in the form of the draft Order attached at Tab 4 of the Receiver's Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of August, 2024.

Signed by:  
  
D736001BF77240B

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**SCHEDULE “B”  
TEXT OF STATUTES**

***Construction Act, RSO 1990, c C.30***

**Holdbacks**

**Basic holdback**

**22** (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (1); 2017, c. 24, s. 17(1), 66.

**Payments that may be made**

**Same**

**24** (2) Where a payer has received written notice of a lien and has retained, in addition to the holdbacks required by this Part, an amount sufficient to satisfy the lien, the payer may, without jeopardy, make payment on a contract or subcontract up to 90 per cent of the price of the services or materials that have been supplied under that contract or subcontract, less the amount retained. R.S.O. 1990, c. C.30, s. 24 (2); 2017, c. 24, s. 19 (2, 3).

**Priority over mortgages, etc.**

**Building Mortgage**

**78** (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. R.S.O. 1990, c. C.30, s. 78 (2).

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PROCEEDINGS COMMENCED AT TORONTO

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