

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

BETWEEN:

FOREMOST MORTGAGE HOLDING CORPORATION

Applicant

and

2521311 ONTARIO INC. O.A. TOWNS OF THORNBURY

Respondent

**FACTUM OF THE RECEIVER
RE: AUTHORIZATION TO TERMINATE AND DISCLAIM AGREEMENTS OF
PURCHASE AND SALE**

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Lawyers for the Receiver

PART I – OVERVIEW

1. On the return of the motion herein, KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver (the “**Receiver**”) of the assets, undertakings and properties (collectively, the “**Property**”) of 2521311 Ontario Inc. o.a. Towns of Thornbury (the “**Company**”), is seeking, *inter alia*, the termination of these receivership proceedings and the Receiver’s discharge.
2. Further in that regard, the Receiver is also seeking the authority to terminate and disclaim, on behalf of the Company, all agreements of purchase and sale (the “**APs**”) entered into between the Company and the purchasers (the “**Home Buyers**”) of townhome units to be constructed on the Real Property (as defined herein) as part of the Towns of Thornbury development.
3. The facts supporting the Receiver’s request for the termination of these receivership proceedings and the Receiver’s discharge are set out in detail in the Receiver’s Second Report dated November 14, 2024, including the fee affidavits of the Receiver and its counsel, DLA Piper (Canada) LLP (“**DLA**”), in support of the Receiver’s request for the approval of the fees and disbursements of the Receiver and DLA.
4. This factum will focus on the Receiver’s request for the authority to terminate and disclaim the APs and, as such, the facts relevant to that relief are set out herein.

PART II – FACTS

5. Pursuant to the Order of the Honourable Justice Cavanagh dated December 19, 2023, KSV was appointed as the interim receiver of the Property, including the real property municipally known as Lot 10 Louisa Street, Thornbury, ON (the “**Real Property**”).¹
6. Pursuant to a further Order of the Honourable Justice Cavanagh dated February 5, 2024, KSV was appointed as Receiver of the Property and the Court approved the Receiver’s proposed sale process for the Property (the “**Sale Process**”).²
7. The Receiver conducted the Sale Process and pursuant to the approval and vesting Order of the Honourable Madam Justice Conway dated August 15, 2024 (the “**AVO**”), an agreement

¹ Second Report of the Receiver dated November 14, 2024 at pg. 1.

² *Ibid.*

of purchase and sale between the Receiver and Louisa Street GP Inc., on behalf of Louisa Street Limited Partnership, as assignee from Foremost Mortgage Holding Corporation (“**Foremost**”), was approved. The transaction approved pursuant to the AVO closed on August 23, 2024.³

8. In addition to the AVO, an ancillary relief Order dated August 15, 2024 was granted by the Honourable Madam Justice Conway, *inter alia*, approving the establishment of a holdback fund in the amount of \$66,713.24 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.⁴
9. 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.⁵
10. The Company pre-sold 21 townhomes and received deposits from Home Buyers totaling approximately \$1.64 million (the “**Deposits**”). The Receiver understands that all but approximately \$53,000 of the Deposits were spent by the Company prior to the commencement of the receivership proceedings. The Deposits were insured by Berkley Insurance Company (“**Berkley**”). Further in that regard, Berkley had registered a mortgage on title to the Real Property in the amount of \$1.679 million related to the deposit insurance.⁶
11. Tarion Warranty Corporation (“**Tarion**”) provides deposit protection coverage for the Deposits. The extent of Tarion’s coverage depends on whether Home Buyers executed APSs before or after January 1, 2018. If executed after January 1, 2018, the extent of Tarion’s coverage further depends upon the purchase price paid by the Home Buyer. It is the Receiver’s understanding that the Home Buyers may be covered by Berkley for amounts in excess of the portion of their Deposits covered by Tarion.⁷

³ *Ibid*, pgs. 1 and 4.

⁴ *Ibid*.

⁵ *Ibid*, at pg. 3.

⁶ *Ibid*.

⁷ *Ibid*, at pg. 5.

12. However, Tarion’s policy is that deposit return claims will not be processed until a Home Buyer’s APS has been terminated. Tarion has advised the Receiver that it is following the aforementioned policy in the instant case.⁸

PART III - ISSUE

13. The issue before the Court is whether the Receiver should be granted the authority to terminate and disclaim the APS.

PART IV – LAW AND ARGUMENT

14. The Court has ruled in numerous instances that it has the jurisdiction to direct a receiver to disclaim presale buyer agreements in receivership proceedings.⁹
15. The receiver has a duty to maximize the recovery from the sale or disposition of the assets over which it has been appointed and in doing so, the receiver may exercise its authority to affirm or disclaim contracts.¹⁰
16. Courts have held that the criteria to be considered in determining whether to authorize the disclaimer of a contract by a receiver are as follows:
- (a) the respective legal priorities of the competing interests;
 - (b) whether the disclaimer would enhance the value of the assets, and if so, would a failure to disclaim amount to a preference in favour of a particular party; and
 - (c) whether, if a preference would arise, the party seeking to avoid the disclaimer has established that the equities support such a preference.¹¹
17. Whereas ordinarily the Court is tasked with weighing the competing interests of purchasers and other stakeholders against the backdrop of enhancing recovery from the sale of a debtor company’s assets when determining whether to authorize a receiver to terminate or disclaim purchase agreements, in the instant case, the Receiver has already maximized recovery through the sale of the Real Property.

⁸ *Ibid.*

⁹ [*KingSett Mortgage Corporation et al. v. Vandyk-Uptowns limited et al.*](#), 2024 ONSC 6205 [Ont. S.C.J. Comm. List], at para. 24 (“*KingSett*”). See also [*Forjay Management Ltd. v. 0981478 B.C. Ltd.*](#), 2018 BCSC 527 [B.C. S.C.] (“*Forjay*”)

¹⁰ [*KingSett*](#) at para. 25. See also [*Peoples Trust Company v. Censorio Group \(Hastings & Carleton\) Holdings Ltd.*](#), 2020 BCSC 1013 [B.C.S.C.] at para. 25.

¹¹ [*KingSett*](#), at para. 26. See also [*Forjay*](#) at para. 44.

18. However, absent the termination and disclaimer of the APSs, the Home Buyers will be unable to make claims under Tarion's deposit protection program and potentially the Deposit insurance provided by Berkley.
19. Authorizing the Receiver to terminate and disclaim the APSs will facilitate the Home Buyers in making claims for the repayment of the Deposits which is ultimately to the benefit of the Home Buyers and does not prejudice the interests of any other stakeholders.

PART V - CONCLUSION

20. For the reasons set forth herein, the Receiver requests that the Court grant the Order, *inter alia*, authorizing the Receiver to terminate and disclaim the APSs, substantially in the form of the draft Order attached at Tab 3 of the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of November, 2024.

per: Signed by:
Danny Nunes
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**SCHEDULE “A”
CASES CITED**

1. [*KingSett Mortgage Corporation et al. v. Vandyk-Uptowns limited et al.*](#), 2024 ONSC 6205 [Ont. S.C.J. Comm. List]
2. [*Forjay Management Ltd. v. 0981478 B.C. Ltd.*](#), 2018 BCSC 527 [B.C. S.C.]
3. [*Peoples Trust Company v. Censorio Group \(Hastings & Carleton\) Holdings Ltd.*](#), 2020 BCSC 1013 [B.C.S.C.]

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PROCEEDING COMMENCED AT
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