

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION and DORR CAPITAL CORPORATION

Applicants

- and -

VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE LIMITED, 2402871
ONTARIO INC., VANDYK – THE RAVINE LIMITED VANDYK – LAKEVIEW-
DXE-WEST LIMITED, and VANDYK – LAKEVIEW-DXE-EAST LIMITED

Respondents

IN THE MATTER OF AN 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 RECEIVER

**(MOTION FOR RELIEF REGARDING DEVELOPMENT OF DEBTOR PROJECTS,
RETURNABLE OCTOBER 15, 2024)**

October 10, 2024

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PART I - NATURE OF THE APPLICATION

1. On November 14, 2023, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as the receiver and manager (the “**Receiver**”) of certain real property (the “**Real Property**”) and all present and future assets, undertakings and personal property belonging to, among other entities, Vandyk – Uptowns Limited (“**Uptowns**”), Vandyk – Lakeview-DXE-West Limited (“**Lakeview**”), and Vandyk – Heart Lake Limited (“**Heart Lake**,” and collectively with Uptowns and Lakeview, the “**Debtors**” and each a “**Debtor**”) located at, related to, used in connection with or arising from or out of the Real Property (collectively, the “**Property**”). On June 13, 2024, Vandyk – Lakeview-DXE-East Limited was added as a respondent in these proceedings.

2. The Debtors are part of a broader group of development companies known as the “**Vandyk Group**,” a real estate developer that mainly developed low, mid and high-rise residential projects in the Greater Toronto Area. Each of the Debtors is a single-purpose real estate development company that owns Real Property, and which prior to these receivership proceedings were engaged in the following residential real estate development projects, among others:

- (a) Uptowns was engaged in developing a residential development project on certain of the Real Property located in Brampton, Ontario (the “**Uptowns Project**”);
- (b) Heart Lake was engaged in developing a residential development project on certain of the Real Property located in Brampton, Ontario (the “**Heart Lake Project**”); and
- (c) Lakeview was engaged in in developing a residential condominium project on certain of the Real Property located in Mississauga, Ontario (the “**Lakeview Project**”, and together with the Uptowns Project and the Heart Lake Project, the “**Projects**”).

3. The Receiver, after discussions with key stakeholders, has determined that the Projects should be completed during these receivership proceedings in order to maximize the potential benefits to the respective stakeholders, and accordingly seeks the orders set out below.

4. In order to facilitate the completion of the Uptown Project, the Receiver seeks an Ancillary Matters Order (the “**Ancillary Matters Order**”) which will, among other things:

- (a) authorize the Receiver to negotiate and enter into an amendment (each an “**APS Amendment**” and collectively, the “**APS Amendments**”) with respect to each Uptowns Project pre-sale purchase agreement executed prior to the date of the Receivership Order (each a “**Pre-Sale APS**” and collectively, the “**Pre-Sale APSs**”), and to terminate and disclaim the Pre-Sale APSs with Uptowns Project home buyers that do not to enter into an APS Amendment by the APS Amendment Deadline (as defined below); and
- (b) seal the Uptowns Project Pro-Forma and the APS Amendment Schedule (each as defined below) until the earlier of: (i) the completion of the Uptowns Project; or (ii) further Order of this Court.

5. In order to facilitate the completion of the Heart Lake Project, the Receiver seeks an Amended and Restated Receivership Order (the “**Third Amended and Restated Receivership Order**”) which will, among other things:

- (a) approve the Heart Lake CM Contract (as defined below) entered into between the Receiver and O&L LP by its general partner O&L GP Inc., doing business as ELM Forward (“**Elm**”), pursuant to which Elm will act as construction manager in respect of the Heart Lake Project; and

(b) authorize the Receiver to borrow up to \$120,325,000 pursuant to the Heart Lake Commitment Letter (as defined below) in order to fund the completion of the Heart Lake Project and grant a charge to secure the amounts borrowed.

6. Finally, in order to facilitate the completion of the Lakeview Project, the Receiver seeks an order (the “**Conveyance & Easement Order**”) which will convey certain property to the Corporation of the City of Mississauga (the “**City**”) and the Regional Municipality of Peel (the “**Region**”) and provide an easement on certain Lakeview Real Property.

PART II - SUMMARY OF FACTS

7. The facts are more fully set out in the Fifth Report of the Receiver.¹

A. The Uptowns Project

8. The Uptowns Project is a residential development located in Brampton, Ontario, which consists of approximately 342 stacked townhomes. Construction in respect of the Uptowns Project had been halted for several months prior to the commencement of this receivership.²

9. Of the approximately 342 units in the Uptowns Project, 329 have been pre-sold and are subject to Pre-Sale APSs.³ The Pre-Sale APSs have near-term termination dates (the “**Termination Dates**”), with the majority expiring in April 2025 and a smaller subset in March 2026, after which counterparties may have the ability to terminate these agreements. Of the 329 Pre-Sale APSs, 287 contemplate a purchase price that is significantly below current market prices.⁴

¹ Fifth Report of the Receiver dated October 7, 2024 [Fifth Report]. Capitalized terms not otherwise defined have the same meaning as in the Fifth Report. Dollar amounts are given in Canadian dollars unless otherwise specified.

² Fifth Report at para. 2.2.1.

³ Fifth Report at para. 2.2.1.

⁴ Fifth Report at para. 4.0.1.

10. On September 25, 2024, the Court issued the Second Amended and Restated Receivership Order, which provided the Receiver with the necessary approvals to commence construction of the Uptowns Project, authorized the retention of Elm as construction manager, and approved a commitment letter pursuant to which KingSett agreed to provide financing to the Uptowns Project (the “**Uptowns Commitment Letter**”). Construction in respect of the Uptowns Project has now commenced.⁵ The Uptowns Commitment Letter contained, as a condition for subsequent advances, the requirement that the Receiver obtain an order from the Court, in form and substance satisfactory to the Receiver and KingSett, authorizing the Receiver to negotiate amendments to the Pre-Sale APSs determined to be reasonably necessary to obtain financing for the completion of the Uptowns Project.⁶

B. The Heart Lake Project

(a) Background and Current Status

11. The Heart Lake Project a residential development located in Brampton, Ontario, which consists of 200 stacked townhomes, of which 109 have been pre-sold. Construction of the Heart Lake Project has not yet begun.⁷

12. In accordance with the terms of the Sales Process Approval Order issued by the Court on March 8, 2024, the Receiver commenced a sales process in respect of the Property owned by Heart Lake, which resulted in two bids. Following a review of the bids received, the Receiver, in consultation with KingSett Mortgage Corporation (“**KingSett**”), determined that the offers

⁵ Fifth Report at para. 2.2.2.

⁶ See Fourth Report of the Receiver dated September 18, 2024 [Fourth Report], at para. 6.3.5.

⁷ Fifth Report at para. 2.3.1.

received were unsatisfactory, primarily due to the contemplated purchase prices being insufficient to repay KingSett's loans to Heart Lake, or any other debt subordinated to the KingSett loans.⁸

13. The Receiver therefore engaged Elm to evaluate the feasibility of completing the Heart Lake Project. The Receiver, in consultation with KingSett, ultimately determined that the Heart Lake Project should be completed during these receivership proceedings in order to maximize the benefits to stakeholders, including secured lenders and pre-sale homebuyers.⁹

(b) The Heart Lake CM Contract

14. Following Elm's assessment of the Heart Lake Project, the Receiver and Elm entered into a Memorandum of Understanding regarding the selection of Elm as the construction manager and development manager of the Heart Lake Project.¹⁰

15. Following further negotiations, on October 7, 2024, the Receiver and Elm executed a CCDC 5A Construction Management Contract – for Services contract (the “**Heart Lake CM Contract**”). Under the terms of the Heart Lake CM Contract, Elm will act as construction manager and will provide services relating to the pre-construction, construction, and post-construction phases of the Heart Lake Project. The Heart Lake CM Contract includes a revised estimate of the hard costs required to complete the Heart Lake Project, which is currently anticipated to cost \$63 million (exclusive of soft costs, financing costs and contingencies) and has a target completion date of 26 months. Elm will be paid a fixed construction management fee of \$1.5 million, along a

⁸ Fifth Report at para. 2.3.2-2.3.4.

⁹ Fifth Report at para. 2.3.5.

¹⁰ Fifth Report at paras. 2.3.5, 5.0.1-5.0.2.

reimbursement for the actual expenses that it incurs performing the Services (as defined in the Heart Lake CM Contract).¹¹

(c) The Heart Lake Construction Facility

16. In order to finance the Heart Lake Project, KingSett has committed to providing a construction financing facility (the “**Heart Lake Construction Facility**”) pursuant to a commitment letter dated October 7, 2024 (the “**Heart Lake Commitment Letter**”). Under the terms of the Heart Lake Commitment Letter, the Heart Lake Construction Facility consists of a \$120,325,000 loan at an interest rate equal to the prime rate plus 5% per annum. The Heart Lake Construction Facility matures 24 months after the first calendar day of the month following the date of the initial advance on the loan, which can be extended for two three month periods on the request of the Receiver, with the consent of KingSett.¹²

17. Advances under the Heart Lake Construction Facility are subject to various conditions, including that the Third Amended and Restated Receivership Order be granted.¹³

C. The Lakeview Project

18. The Lakeview Project is a residential condominium project located in Mississauga, Ontario, which consists of two mid-rise condo towers with a combined 478 residential units, and commercial space with two levels of underground parking. In accordance with the terms of the First Amended and Restated Receivership Order granted by this Court on June 13, 2024, the Lakeview Project has commenced construction.¹⁴

¹¹ See Fifth Report at para. 5.1.1 for a full summary of the terms of the Heart Lake CM Contract.

¹² Fifth Report at paras. 6.2.1(a)-(e). See Fifth Report at para. 6.2.1 for a full summary of the terms of the Heart Lake Construction Facility.

¹³ Fifth Report at para. 6.2.1(j).

¹⁴ Fifth Report at para. 2.4.1.

PART III - THE ISSUES AND THE LAW

19. This Factum addresses the following issues:
- (a) The Ancillary Matters Order should be approved, including:
 - (i) the receiver should be authorized to negotiate and enter into APS Amendments in respect of Pre-Sale APSs, and authorized and directed to terminate and disclaim Pre-Sale APSs with purchasers that do not enter into APS Amendments; and
 - (ii) the Uptowns Pro-Forma and APS Amendment Schedule should be sealed;
 - (b) The Third Amended and Restated Receivership Order should be approved, including:
 - (i) the Heart Lake CM Contract should be approved; and
 - (ii) the Heart Lake Construction Facility and the Receiver's Heart Lake Borrowings Charge should be approved;
 - (c) The Conveyance & Easement Order should be approved, including that the Subject Property (as defined below) be conveyed to the City and the Region free and clear of all encumbrances, or be subject to an easement in favour of the Region

A. The Ancillary Matters Order Should be Approved

- (a) **The Provisions Regarding the Pre-Sale APSs and the APS Amendments Should be Approved**

20. As part of the Ancillary Matters Order, the Receiver seeks the authority to negotiate and enter into APS Amendments with Pre-Sale APS counterparties, and the authorization and direction to terminate and disclaim Pre-Sale APSs with purchasers that do not enter into APS Amendments.

21. Such authorization is needed in order to finance the completion of the Uptowns Project, which will in turn maximize the potential benefits and returns to stakeholders.¹⁵ At present, the total amount of financing available from KingSett under the Uptowns Commitment Letter (as defined in the Fifth Report) is limited to \$60 million, with KingSett only being required to up to \$6 million prior to the Receiver obtaining an order from the court authorizing the Receiver to negotiate amendments to the Pre-Sale APSs that the parties may determine are reasonably necessary to obtain financing for the completion of the Uptowns Project. Such amounts will be insufficient, as an additional \$120,550,000 of construction financing is estimated to be required to complete the Uptown Project.¹⁶

22. Potential third-party lenders are unlikely to provide the required financing in the present circumstances, as such financing is generally not available unless a developer has pre-sold 60-75% of units at market price. As discussed above, at present 287 of the 342 total units are subject to a Pre-Sale APS at significantly below market price and have Termination Dates which trigger prior to the estimated completion time of the Uptowns Project, the result of which is that the Uptowns Project is not currently financeable. Further, based on a project pro-forma prepared by Elm (the “**Uptowns Project Pro-Forma**”), which factors in projected revenue from existing purchase prices under the Pre-Sale APSs and a construction budget prepared by a third-party cost consultant, the Uptowns Project is projected to have a deficit of approximately \$57.3 million. Given the

¹⁵ Fourth Report at para. 2.2.2.

¹⁶ Fifth Report at paras. 4.0.1-4.0.3.

significant financial shortfall, KingSett is not prepared to advance additional financing without an adequate increase to the purchase prices.¹⁷

23. In order to address the Termination Dates and below-market pricing of the Pre-Sale APS, the Receiver therefore seeks to enter into in APS Amendments with each Pre-Sale APS counterparty, which would: (i) extend to the Termination Dates to October 1, 2027; and (ii) increase the purchase price for the 287 Pre-Sale APSs currently under market value to a maximum price (the “**Amended Prices**”) as set out in the “**APS Amendment Schedule**,” which sets out the Amended Prices in respect of each unit based on unit-specific factors such as overall floorplan and square footage. The new Termination Date will provide an adequate timeframe to complete the Uptowns Project, while the Amended Prices will bring the Uptowns Project out of its projected deficit, make the Uptowns Project financeable, and allow the homebuyers to retain value as the Amended Prices remain on average 13% below current market rates.¹⁸

24. The requested relief is required to finance and complete the Uptowns Project and should be approved. It is well-established that the court may direct a receiver to disclaim pre-sale homebuyer agreements in the context of real property receiverships.¹⁹ This authority derives from the receiver’s duty to maximize the recovery of assets under its jurisdiction, in service of which the receiver may affirm or disclaim contracts.²⁰

¹⁷ Fifth Report at paras. 4.0.1-4.0.3.

¹⁸ Fifth Report at paras. 4.1.1-4.1.5.

¹⁹ See, i.e., *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#)) at para. 16 [*Stateview Homes*]; *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#)) at p. 1 [*On the Mark Endorsement*]; *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#)) at para. 6 [*Hampton Heights*]; *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#) at paras. 131-132 [*Forjay Management*].

²⁰ *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#) at para. 25 [*Peoples Trust Company*].

25. The criteria to be considered by a court in determining whether to authorize such disclaimers were set out in *Forjay Management*: (i) the respective legal priorities of the competing interests; (ii) whether the disclaimer would enhance the value of the assets, and if so would failure to disclaim amount to a preference in favour of a particular party; and (iii) whether, if a preference would arise, the party which is seeking to avoid the disclaimer has established that the equities support such a preference.²¹

26. The proposed disclaimers, which would only occur in relation to Pre-Sale APSs for which an APS Amendment is not executed by within 30 days after a draft APS Amendment is sent to the Pre-Sale APS counterparty, or such later date as determined by the Receiver (the “**APS Amendment Deadline**”), satisfy the criteria identified in *Forjay Management*:

- (a) **Respective Legal Priorities:** The mortgages registered against the Uptowns Real Property constitute senior charges and rank in priority over the Pre-Sale APSs, none of which have been registered on title.²² Further, each of the Pre-Sale APSs expressly provides that: (i) the purchaser subordinates and postpones their agreement to any mortgages arranged by Uptowns and to any advances under such mortgages; (ii) the purchaser covenants not to register the agreement or notice thereof on title to the Real Property; and (iii) the agreement does not confer on the purchaser any legal, equitable, or proprietary interest in the Real Property or any portion thereof.²³ Such provisions have been repeatedly found to effectively

²¹ *Forjay Management*, at para. 44. See also *Stateview Homes*, at para. 17, in which the Ontario court approved the *Forjay Management* criteria.

²² Fifth Report at para. 4.2.4. See Fifth Report, at para. 3.1.1, for a list of the mortgages registered against the Uptowns Real Property.

²³ Fifth Report at para. 4.2.3.

subordinate purchasers to mortgagees, and to eliminate any equitable or proprietary interest in the property.²⁴

- (b) **Value Maximization:** The authorization of the Receiver to terminate and disclaim the Pre-Sale APSs is required to avoid the projected deficit, obtain financing, and complete the Uptowns Project. Should the Court not grant the requested relief, the Receiver anticipates the need to conduct a sales process, which would likely lead to substantially lower recovery. Further, granting the requested relief would help prevent construction delays which could further erode stakeholder value.²⁵ Courts have held that a failure to authorize the disclaimer of purchase agreements in such circumstances would amount to a preference in favour of homebuyers.²⁶
- (c) **Equitable Considerations:** Equitable considerations do not support departing from the existing priorities and granting a preference to the homebuyers. The Receiver has served each homebuyer with notice of this motion, and deposits made by homebuyers under the Pre-Sale APSs are covered by a Trisura surety policy, ensuring that any counterparties to disclaimed Pre-Sale APSs will receive a refund of their deposits.²⁷ Further, the interests of the homebuyers have been protected by way of the Amended Prices, which are fair and appropriate in the circumstances and represent an average discount of 13% below current market prices, having been determined by reference to recent comparable developments in the Greater Toronto

²⁴ See, i.e., *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#), at para. 24 [*Firm Capital Mortgages*]; *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, [2014 BCCA 113](#) at paras. 45-46; *Forjay Management*, at paras. 67-69; *Stateview Homes*, at para. 18.

²⁵ Fifth Report at para. 4.3.1(a)-(b), (e).

²⁶ *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, [2008 BCSC 897](#) at para. 96; *Forjay Management*, at para. 93; *Peoples Trust Company*, at para. 57.

²⁷ Fifth Report at paras. 4.2.1-4.2.2.

Area.²⁸ In contrast, a sales process would almost certainly result in the termination of all the Pre-Sale APSs, depriving the homebuyers of all value.²⁹

27. In light of the considerations above, the Receiver submits the relief related to the Pre-Sale APSs is necessary to complete the Uptowns Project, thereby maximizing recovery for stakeholders, and should be approved on that basis.

(b) The Uptowns Project Pro-Forma and APS Amendment Schedule Should be Sealed

28. Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, the Receiver requests that the Uptowns Project Pro-Forma and the APS Amendment Schedule be filed with the Court on a confidential basis and remain sealed pending the completion of the Uptowns Project.

29. The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:³⁰

- (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 reasonable alternative measure will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

30. Each of these considerations supports the proposed sealing order:

²⁸ Fifth Report at paras. 4.1.4-4.1.5, 4.3.1(c).

²⁹ Fifth Report at para. 4.1.7.

³⁰ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para. 38.

- (a) **Public Interest:** The maximization of recovery in insolvency has been found to constitute an important public interest for the purpose of obtaining a sealing order. The granting of a sealing order in respect of commercially sensitive information is therefore “standard practice” in insolvency proceedings,³¹ and courts have approved sealing orders where they are required to protect commercially sensitive information, including where the disclosure would jeopardize “value-maximizing dealings” with third parties moving forward.³² The Uptowns Project Pro-Forma contains sensitive financial information which could negatively impact ongoing negotiations, thereby posing a significant risk to the successful completion of the Uptowns Project. Similarly, the APS Amendment Schedule contains the Amended Prices, which could create an artificial ceiling for new sale prices which would not account for the need to recover the additional marketing and selling costs that would be incurred should a unit need to be resold. The sealing of these documents is therefore vital for safeguarding the Uptown Project’s integrity and financial viability.³³
- (b) **Lack of a Reasonable Alternative:** Courts in insolvency proceedings have found that no reasonable alternative to a sealing order exists where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders.³⁴ In the present case, there are no reasonable alternatives to

³¹ *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#) at para. 39.

³² *Danier Leather Inc., Re*, [2016 ONSC 1044](#) at para. 84. See also *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, [2013 ONSC 7009](#) at para. 48 [*Elleway Acquisitions*].

³³ Fifth Report at paras. 4.4.2-4.4.4.

³⁴ *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#)), at para. 62.

a sealing order which would prevent the risks to the Debtors' stakeholders outlined above.

- (c) **Proportionality:** The benefits of the proposed sealing order greatly exceed any negatives. No party will be prejudiced by the temporary sealing of the commercially sensitive information, and no public interest will be served if they are made public prior to closing, prejudicing stakeholder recoveries in the process.³⁵

B. The Third Amended and Restated Receivership Order Should be Approved

(a) The Heart Lake CM Contract Should be Approved

31. The broad discretion contained in s. 243(1)(c) of the BIA permits the court to authorize a receiver to “take any other action that the court considers advisable,” which has been held to include entering into key contracts to facilitate the receivership.³⁶ The courts have approved the retention of a construction manager on a number of occasions.³⁷

32. The Receiver has determined that retaining Elm as construction manager is in the best interest of the Heart Lake Project going forward. The Receiver submits that the Uptowns CM Contract should be approved for the following reasons:

- (a) **Experience:** Elm is an experienced and reputable construction manager that has experience building similar townhome projects. In particular, Elm has been

³⁵ Fifth Report at para. 4.4.5. See *Elleway Acquisitions*, at para. 48, in which the court held that the beneficial effects of maximizing recoveries in insolvency greatly outweigh any deleterious effects which could result for sealing documents containing highly sensitive commercial information.

³⁶ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 85.

³⁷ See, e.g., *KingSett Mortgage Corporation et al. v. Vandyk – Uptowns Limited et al.*, (June 13, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-709180-00CL ([Endorsement of Justice Black](#)) at paras. 6-7; *Keb Hana Bank as Trustee v. Mizrahi Commercial (The One) LP et al.*, (March 7, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#)) at para. 20.

involved in the Heart Lake Project since June 2024, during which time Elm has become intimately familiar with the Heart Lake Project.³⁸

- (b) **Avoiding Unnecessary Cost and Delay:** If the Heart Lake CM Contract is not approved, the Receiver would be required to negotiate a new construction management contract with another party, which the Receiver anticipates would be on less favourable terms and cause further delay.³⁹
 - (c) **Fees:** The fees provided for the Heart Lake CM are below market pricing.⁴⁰
 - (d) **Stakeholder Benefits:** The retention of Elm as construction manager will assist in the completion of the Heart Lake Project, which will in turn create significant value for Heart Lake's stakeholders.⁴¹
 - (e) **Stakeholder Support:** The engagement of Elm and the terms of the Heart Lake CM Contract are supported by KingSett, who is a primary economic stakeholder and will be funding construction costs incurred during these receivership proceedings. Further, the support provided by KingSett under the Heart Lake Construction facility is predicated on the approval of the Third Amended and Restated Receivership Order, including the approval of the Heart Lake CM Contract.⁴²
- (b) **The Heart Lake Construction Facility and the Receiver's Heart Lake Borrowings Charge Should be Approved**

³⁸ Fifth Report at paras. 5.0.3(a), 5.2.1(a), (c).

³⁹ Fifth Report at paras. 5.0.3(c), 5.2.1(b).

⁴⁰ Fifth Report at para. 5.0.3(b).

⁴¹ Fifth Report at para. 5.2.1(d).

⁴² Fifth Report at paras. 5.0.3(d), 5.2.1(e)-(f).

33. The obligations of the Receiver under the Heart Lake Construction Facility are to be secured by a priority charge on all the Property of Uptowns (the “**Receiver’s Heart Lake Borrowings Charge**”), which will rank subordinate to the Receiver’s Charge and *pari passu* with the Receiver’s General Borrowings Charge, the Receiver’s Lakeview Borrowings Charge, and the Receiver’s Uptowns Borrowings Charge (each as defined in the proposed Third Amended and Restated Receivership Order).⁴³ Advances will not be available under the Heart Lake Construction Facility if the Receiver’s Heart Lake Borrowings Charge is not approved.

34. Section 31(1) of the BIA authorizes a receiver to borrow in order to fund the duties of the receiver, and further permits a receiver to give security on the debtor’s property in any amount, on any terms and on any property that may be authorized by the court. The advances obtained must be repaid out of the debtor’s property in priority to creditors’ claims.⁴⁴ The jurisdiction to authorize such borrowing also arises from the Court’s powers under s. 243(1)(c) of the BIA to “take any other action that the court considers advisable.”⁴⁵

35. This Court therefore has the jurisdiction and the discretion to approve the Heart Lake Construction Facility and the Receiver’s Heart Lake Borrowings Charge, which are essential to the Receiver’s ability to fulfill its mandate to maximize value of the Heart Lake Project for the benefit of all stakeholders. The Receiver submits that the Heart Lake Construction Facility and the Receiver’s Heart Lake Borrowings Charge should be approved for the following reasons:

⁴³ Fifth Report at para. 1.1.1(h).

⁴⁴ BIA, s. 31(1): “With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor’s property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor’s property in priority to the creditors’ claims.”

⁴⁵ See, i.e., *Keb Hana Bank as Trustee v. Misrahi Commercial (The One) LP et al.*, (October 18, 2023), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#)) at paras. 53-55, in which the court cited both ss. 31(1) and 243(1)(c) of the BIA for this principle; see also *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#) at para. 20.

- (a) **Reasonable Terms:** In the business judgment of the Receiver, the terms of the Heart Lake Construction Facility are reasonable, and the effective annualized interest rate of the loans (estimated to be currently 11.45%) is consistent with or lower than market for a loan of this nature.⁴⁶
- (b) **Stakeholder Value:** The Heart Lake Construction Facility is required to restart the Heart Lake Project and thereby maximize recoveries for all stakeholders. If the Receiver does not receive this funding, it will be unable to complete construction, which will impair value and may result in the termination of the existing agreements of purchase and sale.⁴⁷
- (c) **Stakeholder Support:** The Heart Lake Construction Facility is to be provided by KingSett, who is the primary economic stakeholder in these proceedings. KingSett requires the Receiver's Heart Lake Borrowings Charge in order to provide the funding under the Heart Lake Construction Facility.⁴⁸

C. The Conveyance & Easement Order Should be Approved and the Receiver Should be Authorized to Convey the Subject Lands to the City and the Region

36. Lakeview is party to a Development Agreement dated August, 2024, with the City and the Region (the "**Development Agreement**"). Under the terms of Development Agreement, the City and the Region provided approvals for certain developments in relation to the Lakeview Project. These approvals are required for the completion of the Lakeview Project.⁴⁹

⁴⁶ Fifth Report at para. 6.3.1(a)-(b).

⁴⁷ Fifth Report at para. 6.3.1(c), (f).

⁴⁸ Fifth Report at para. 6.3.1(d)-(e).

⁴⁹ Fifth Report at para. 7.0.1.

37. The approvals granted by the City and Region were subject to certain terms and conditions, including that certain property (the “**Subject Property**”) be transferred to the City and the Region free and clear of all encumbrances, or be subject to an easement in favour of the Region.⁵⁰

38. The satisfaction of this condition is a necessary pre-condition to the development of the Lakeview Project, which will maximize recoveries for stakeholders generally. Municipalities have the jurisdiction under s. 41 of the *Planning Act* to require the conveyance of lands that are, among other things: (i) undevelopable because of environmental protection policies; (ii) are required road widenings or traffic safety purposes; or (iii) constitute a 0.3m strip of land along certain municipally owned property. No prejudice will be suffered by any stakeholders as a result of the conveyance or the granting of the easement, as given the nature of the Subject Property, the lands are of limited to no value.⁵¹

39. The Court has the power to authorize relief sought under s.243(1) of the BIA, which grants the Court the power to authorize a receiver to “exercise any control that the court considers advisable” over the property of a debtor, and to further “take any other action that the court considers advisable.”⁵² The relief sought is strongly in the interest of stakeholders, given that is it required for development, and is supported by KingSett, which is a primary economic stakeholder in these proceedings. All parties who have an interest in the Subject Property or who may be affected by the relief sought have been served with the Receiver’s motion materials.⁵³

PART IV - NATURE OF THE ORDER SOUGHT

⁵⁰ See Fifth Report at para. 7.0.3, for a detailed description of the Subject Property.

⁵¹ Fifth Report at para. 7.0.2.

⁵² See *KingSett Mortgage Corporation et al. v. Vandyk Uptowns Limited et al.*, (September 25, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23- 00709180-00CL ([Endorsement of Justice Osborne](#)) at paras. 12-14, in which similar relief was granted in respect of the Uptowns Project in these proceedings.

⁵³ Fifth Report at paras. 7.0.4, 7.0.6.

40. For the reasons set out above, the Receiver requests that this Court grant the proposed Ancillary Matters Order, Third Amended and Restated Receivership Order and Conveyance & Easement Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of October, 2024:



OSLER, HOSKIN & HARCOURT, LLP per Sierra Farr
P.O. Box 50, 1 First Canadian Place
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Lawyers for the Applicants

TO: THE ATTACHED SERVICE LIST

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, [2008 BCSC 897](#)
2. *Danier Leather Inc., Re*, [2016 ONSC 1044](#)
3. *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#)
4. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, [2013 ONSC 7009](#)
5. *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL ([Endorsement of Justice Conway](#))
6. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012 ONSC 4816](#)
7. *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, [2018 BCSC 527](#)
8. *Keb Hana Bank as Trustee v. Misrahi Commercial (The One) LP et al.*, (October 18, 2023), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#))
9. *Keb Hana Bank as Trustee v. Misrahi Commercial (The One) LP et al.*, (March 7, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#))
10. *KingSett Mortgage Corporation et al. v. Vandyk – Uptowns Limited et al.*, (June 13, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-709180-00CL ([Endorsement of Justice Black](#))
11. *KingSett Mortgage Corporation et al. v. Vandyk Uptowns Limited et al.*, (September 25, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23- 00709180-00CL ([Endorsement of Justice Osborne](#))
12. *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Osborne](#))
13. *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576-00CL ([Endorsement of Justice Cavanaugh](#))
14. *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#))
15. *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, [2014 BCCA 113](#)

16. *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#)
17. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
18. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)
19. *Yukon (Government of) v. Yukon Zinc Corporation*, [2022 YKSC 2](#)

**SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

BANKRUPTCY AND INSOLVENCY ACT

R.S.C., 1985, c. B-3, as amended

Borrowing powers with permission of court

31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor’s property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor’s property in priority to the creditors’ claims.

Security under Bank Act

(2) For the purpose of giving security under section 427 of the Bank Act, the interim receiver, receiver or trustee, when carrying on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

Limit of obligations and carrying on of business

(3) The creditors or inspectors may by resolution limit the amount of the obligations that may be incurred, the advances that may be made or moneys that may be borrowed by the trustee and may limit the period of time during which the business of the bankrupt may be carried on by the trustee.

Debts deemed to be debts of estate

(4) All debts incurred and credit received in carrying on the business of a bankrupt are deemed to be debts incurred and credit received by the estate of the bankrupt.

[...]

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.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(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.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

COURTS OF JUSTICE ACT

R.S.O. 1990, c. C.43, as amended

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.

**IN THE MATTER OF AN 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**

**KINGSETT MORTGAGE CORPORATION and
DORR CAPITAL CORPORATION**

**and VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE
LIMITED, 2402871 ONTARIO INC., VANDYK – THE RAVINE
LIMITED, VANDYK – LAKEVIEW-DXE-WEST LIMITED and VANDYK –
LAKEVIEW-DXE-EAST LIMITED**

Applicants

Respondents

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

PROCEEDING COMMENCED AT TORONTO

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