

**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 and VANDYK – LAKEVIEW-
DXE-WEST 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 SEEKING APPROVAL OF A FINANCING AND OTHER RELIEF
RELATED TO THE CONSTRUCTION OF THE UPTOWNS PROJECT)**

September 20, 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 Vandyk – Uptowns Limited (“**Uptowns**”), Vandyk – Lakeview-DXE-West Limited (“**Lakeview**”), Vandyk – Heart Lake Limited (“**Heart Lake**”), 2402871 Ontario Inc. (“**240**”) and Vandyk – The Ravine Limited (“**Ravine**” and collectively with Uptowns, Lakeview, Heart Lake and 240, 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**”).

2. Prior to these receivership proceedings, Uptowns was engaged in developing a residential condominium complex on certain of the Real Property located in Brampton, Ontario (the “**Uptowns Project**”). The Receiver, after discussions with key stakeholders, has determined that the Uptowns Project should be completed during these receivership proceedings in order to maximize the potential benefits to stakeholders.

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

- (a) authorize the Receiver to borrow up to \$60,000,000 pursuant to the Commitment Letter (as defined below) in order to fund the completion of the Uptown Project, and grant a charge to secure amounts borrowed under the Commitment Letter; and

(b) approve the Uptowns CM Contract (as defined below) entered into between the Receiver and O&L LP, d/b/a ELM Forward, (“**Elm**”) pursuant to which Elm will act as construction manager in respect of the Uptowns Project.

4. The Receiver further seeks an order (the “**Ancillary Matters Order**”) which will, among other things, convey certain property to the Corporation of the City of Brampton (the “**City**”) in order to facilitate the completion of the Uptowns Project.

5. The requested relief is required for the Receiver to be able to complete the Uptowns Project and maximize benefits to stakeholders and should be approved by the Court.

PART II - SUMMARY OF FACTS

6. The facts are more fully set out in the Fourth Report of the Receiver.¹

A. The Uptowns Project

7. 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 a specific project that it was developing on its respective Real Property.²

8. As part of the Vandyk Group, Uptowns owns real property located in Brampton, Ontario on which it is developing the Uptowns Project, a residential development which consists of

¹ Fourth Report of the Receiver dated September 18, 2024 [Fourth Report]. Capitalized terms not otherwise defined have the same meaning as in the Fourth Report. Dollar amounts are given in Canadian dollars unless otherwise specified.

² Fourth Report at paras. 2.1.1, 2.1.4.

approximately 342 stacked townhomes. Construction in respect of the Uptowns Project had been halted for several months prior to the commencement of this receivership.³

B. The Engagement of Elm as Construction Manager

9. On December 8, 2023, the Receiver sent a Request for Proposal (the “**RFP**”) to nine potential construction managers (collectively, the “**Proponents**”) for the purpose of facilitating the completion of the Uptowns Project. The Receiver requested that each Proponent provide, among other things, an overview of its qualifications, a work plan, a construction schedule, and a fee structure for completing the Uptowns Project.⁴

10. Based on the evaluation criteria established in the RFP, the Receiver, in consultation with KingSett Mortgage Corporation (“**KingSett**”), the primary financial stakeholder of the Debtors, initially selected Unified Project and Construction Management (“**Unified**”) as the successful Proponent. However, subsequent to the selection of Unified, the Receiver and Unified became aware of certain design-related complexities resulting from significant groundwater dewatering requirements (the “**Dewatering Requirements**”). Unified advised the Receiver that the Dewatering Requirements materially changed its determination of how the Uptowns Project should be constructed, as well as its estimated costs and timelines. As a result of these unanticipated challenges, the Receiver and Unified mutually agreed to terminate any future discussions.⁵

11. The Receiver, in consultation with KingSett, subsequently enlisted Elm’s assistance in resolving the Dewatering Requirements and evaluating the feasibility of the Uptowns Project.

³ Fourth Report at para. 2.2.1.

⁴ Fourth Report at paras. 4.1.1-4.1.2

⁵ Fourth Report at paras. 4.1.3-4.1.5.

Following Elm’s assessment of the Uptowns Project, which included extensive engagement with the Uptowns Project’s engineers and consultants, on August 23, 2024, the Receiver and Elm entered in a Memorandum of Understanding regarding the selection of Elm as the construction manager and development manager for the Uptowns Project.⁶

12. Following further negotiations, on August 27, 2024, the Receiver and Elm executed a CCDC 5A Construction Management Contract – for Services (2010) contract (the “**Uptowns CM Contract**”). Under the terms of the Uptowns CM Contract, Elm will act as construction manager and will provide services relating to the construction and post-construction phases of the Uptowns Project. The Uptowns CM Contract includes a revised estimate of the cost and schedule required to complete the Uptowns Project, which is currently anticipated to cost \$111 million (exclusive of soft costs, financing costs and contingencies) and has a target completion date of 24 months. Elm will be paid a fixed construction management fee of \$3.4 million, along a reimbursement for the actual expenses that it incurs performing the Services (as defined in the Uptowns CM Contract).⁷

C. The Funding of the Uptowns Project

13. In order to finance the Uptowns Project, KingSett has committed to providing a construction financing facility (the “**Uptowns Construction Facility**”) pursuant to a commitment letter dated September 18, 2024 (the “**Commitment Letter**”). Under the terms of the Commitment Letter, the Uptowns Construction Facility consists of a \$60,000,000 loan, at an interest rate equal to the prime rate plus 5% per annum. The Uptowns 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

⁶ Fourth Report at paras. 4.2.1-4.2.2.

⁷ See Fourth Report at para. 5.0.1 for a full summary of the terms of the Uptowns CM Contract,

be extended for two three month periods on the request of the Receiver, with the consent of KingSett.⁸

14. Advances under the Uptowns Construction Facility are subject to various conditions, including that the Amended and Restated Receivership Order be granted.⁹

PART III - THE ISSUES AND THE LAW

15. This Factum addresses the following issues:

- (a) The Uptowns Construction Facility and the Receiver's Uptowns Borrowings Charge should be approved;
- (b) The Uptowns CM Contract should be approved; and
- (c) The Receiver should be authorized to convey the Subject Property (as defined below) to the City.

A. The Uptowns Construction Facility and the Receiver's Uptowns Borrowing Charge Should be Approved

16. The obligations of the Receiver under the Commitment Letter are to be secured by a priority charge on all the Property of Uptowns (the "**Receiver's Uptown Borrowings Charge**"), which will rank subordinate to the Receiver's Charge and *pari passu* with the Receiver's General Borrowings Charge and the Receiver's Lakeview Borrowings Charge (each as defined in the proposed Second Amended and Restated Receivership Order).¹⁰ Advances will not be available under the Commitment Letter if the Receiver's Uptowns Borrowings Charge is not approved.

⁸ Fourth Report at paras. 6.2.1(a)-(e). See Fourth Report at para. 6.2.1 for a full summary of the terms of the Commitment Letter.

⁹ Fourth Report at para. 6.2.1(i)-(j).

¹⁰ Fourth Report at para. 1.1.1(f).

17. 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 the creditors' claims.¹¹ 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."¹²

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

- (a) **Reasonable Terms:** In the business judgment of the Receiver, the terms of the Uptowns 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.¹³
- (b) **Stakeholder Value:** The Uptowns Construction Facility is required to complete the Uptowns Project and thereby maximize recoveries for all stakeholders. If the Receiver does not receive this funding, it will be unable to restart construction the

¹¹ 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."

¹² 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 [*The One Initial Order Endorsement*], 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.

¹³ Fourth Report at para. 6.4.1(a)-(b).

Uptowns Project, which may impair value significantly and will cause further delays to the project completion timelines. Further, approximately \$20 million of the Uptowns Construction Facility will be used to fund the payment of development charges which, if unpaid, are projected to increase by approximately \$2.88 million by January 2025.¹⁴

- (c) **Stakeholder Support:** The Uptowns Construction Facility is to be provided by KingSett, who is the primary economic stakeholder in these proceedings. KingSett requires the Receiver's Uptowns Borrowings Charge in order to provide the funding under the Commitment Letter.¹⁵

B. The Uptowns CM Contract Should be Approved

19. 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.¹⁶ The courts have approved the retention of a construction manager on a number of occasions, including earlier in these proceedings,¹⁷ as well as in the receivership over the construction project known as “The One.”¹⁸

20. On the basis of its prior experiences with Elm, the Receiver has determined that retaining Elm as construction manager is in the best interest of the Uptowns Project going forward. The Receiver submits that the Uptowns CM Contract should be approved for the following reasons:

¹⁴ Fourth Report, at para. 6.4.1(c)-(d), (g).

¹⁵ Fourth Report, at para. 6.4.1(e)-(f).

¹⁶ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 85.

¹⁷ *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.

¹⁸ *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.

- (a) **Experience:** Elm is an experienced and reputable construction manager that has experience building similar townhome projects. In particular, Elm has been involved in the Uptowns Project since July 2024, during which time Elm has become intimately familiar with the Dewatering Requirements and the Uptowns Project more generally.¹⁹
- (b) **Superior Proposal:** Elm's fees and timelines to complete the Uptowns Project are superior to the responses received during the RFP.²⁰
- (c) **Avoiding Unnecessary Cost and Delay:** If the Uptowns 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.²¹
- (d) **Stakeholder Benefits:** The retention of Elm as construction manager is essential to the completion of the Uptowns Project, which will in turn create significant value for Uptown's stakeholders.²²
- (e) **Stakeholder Support:** The engagement of Elm and the terms of the Uptowns 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 Commitment Letter is

¹⁹ Fourth Report, at paras. 4.2.4(a), 5.1.1(a), (c).

²⁰ Fourth Report, at para. 4.2.4(b).

²¹ Fourth Report, at para. 5.1.1(b).

²² Fourth Report, at para. 5.1.1(d).

predicated on the approval of the Second Amended and Restated Receivership Order, including the Uptowns CM Contract.²³

C. The Receiver Should be Authorized to Convey the Subject Lands to the City

21. Uptowns is party to a Memorandum of Agreement dated February 14, 2022 with the City and the Regional Municipality of Peel (the “**Site Plan Agreement**”). Under the terms of the Site Plan Agreement, the City provided approvals for certain developments in relation to the Uptowns Project. These approvals are required for the completion of the Uptown Project.²⁴

22. The approvals granted by the City were subject to certain terms and conditions, including that certain property (the “**Subject Property**”) be transferred to the City free and clear of all encumbrances (the “**Conveyance Condition**”). The Subject Properties represent narrow, 0.3 metre strips of lands which abut certain municipal roads.²⁵ Municipalities generally require a conveyance of such lands in order to, among other things, ensure landowners can only access municipal rights of way if they have permission from the municipality.²⁶

23. The satisfaction of the Conveyance Condition is a necessary pre-condition to the development of the Uptowns Project, which will maximize recoveries for stakeholders generally. No prejudice will be suffered by any stakeholders as a result of the conveyance, as given the nature of the Subject Property, the lands to be conveyed are of limited to no value.²⁷ The Ancillary Matters Order therefore contemplates the conveyance of the Subject Property to the City on a free and clear basis.

²³ Fourth Report, at paras. 4.2.4(c), 5.1.1(f)

²⁴ Fourth Report, at para. 7.1.

²⁵ See Fourth Report, at para. 7.3, for a detailed description of the Subject Property.

²⁶ Fourth Report, at para. 7.2.

²⁷ Fourth Report at paras. 7.2. 7.5.

24. The conveyance of the Subject Property is strongly in the interest of stakeholders, given that it is required for development, and should be authorized by the Court pursuant to 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.” The conveyance of the Subject Property 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.²⁸

PART IV - NATURE OF THE ORDER SOUGHT

25. For the reasons set out above, the Receiver requests that this Court grant the proposed Second Amended and Restated Receivership Order and the proposed Ancillary Matters Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2024:



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Lawyers for the Applicants

TO: THE ATTACHED SERVICE LIST

²⁸ Fourth Report at paras. 7.0.4, 7.0.6.

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#)
2. *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](#))
3. *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](#))
4. *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](#))
5. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)

**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
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**ONTARIO
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PROCEEDING COMMENCED AT TORONTO

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