

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

MCAP FINANCIAL CORPORATION

Applicant

- and -

VANDYK-BACKYARD KINGS MILL LIMITED AND VANDYK-BACKYARD
HUMBERSIDE LIMITED

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, C. B-3, AS AMENDED; SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED; AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. C.30

**FACTUM OF THE RECEIVER
(Deposit Return Protocol Approval Order and Claims Process Order)**

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TO: **SERVICE LIST**

PART I - NATURE OF THE MOTION

1. On December 11, 2023, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Receivership Order**”), effective on January 8, 2024, appointing KSV Restructuring Inc. (“**KSV**”) as the receiver and manager and construction lien trustee (the “**VDKM Receiver**”) over all property, assets and undertakings of Vandyk-Backyard Kings Mill Limited (“**Vandyk-Kings Mill**”) acquired for or used in relation to Vandyk-Kings Mill’s business and the Project (as defined below), including the proceeds therefrom (collectively, the “**Property**”). Vandyk-Kings Mill is part of a broader group of real estate development companies known as the “**Vandyk Group**,” a number of which have become subject to receivership proceedings.

2. On July 15, 2024, the Court issued an order (the “**AVO**”) which approved an asset purchase agreement (the “**Transaction**”) whereby certain assets were sold to PAD Investments Ltd., as assigned to 15 Neighbourhood Residences LP (the “**Purchaser**”). As part of the AVO, KSV was appointed as receiver over Vandyk-Backyard Humberside Limited’s (“**Vandyk Humberside**”, and together with Vandyk-Kings Mill, the “**Debtors**”) beneficial interest in certain real property (in such capacity, together with its capacity as VDKM Receiver, the “**Receiver**”), which interest became part of the Property sold to the Purchaser by the Receiver.

3. On July 15, 2024, the Court issued a further order (the “**Distribution Order**”) authorizing the Receiver to, among other things, make distributions from the proceeds of the Transaction to MCAP Financial Corporation (“**MCAP**”), the primary secured creditor of the Debtors. All distributions to MCAP have since been made.

4. The Receiver seeks Court approval of the following orders, each of which is necessary to ultimately concluding these proceedings:

- (a) the Deposit Return Protocol Approval Order (the “**DRP Order**”), which, among other things, approves a proposed Deposit Return Protocol (the “**DRP**”) which will facilitate the return of deposits paid by home buyers pursuant to pre-sale condominium unit purchaser agreements for the Property (the “**Unit APSs**”), which Unit APSs have been terminated pursuant to the AVO; and
- (b) a Claims Process Order (the “**CPO**”), which, among other things, contains a proposed claims process (the “**Claims Process**”) in respect of Holdback Deficiency Priority Claims potentially held by Lien Claimants (each as defined below).

5. The requested orders are necessary steps to ensure that both home buyers and construction lien claimants receive certain funds to which they may be entitled as quickly as possible, and should be approved by the Court.

PART II - SUMMARY OF FACTS

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

A. Background

7. The Vandyk Group is a real estate developer that mainly develops low, mid and high-rise residential projects in the Greater Toronto Area. As part of the Vandyk Group, Vandyk-Kings Mill is a single-purpose real estate development company that prior to the AVO owned real property

¹ Second Report of the Receiver dated October 8, 2024 [Second Report]. Capitalized terms not otherwise defined have the same meaning as in the Second Report. Dollar amounts are given in Canadian dollars unless otherwise specified.

located in Etobicoke, Ontario (the “**Real Property**”), on which it was developing a residential condominium consisting of approximately 234 units (the “**Project**”). Vandyk Humberside is a related entity which prior to the AVO was the beneficial owner of the Real Property.²

8. On August 23, 2024, the Receiver completed the Transaction, pursuant to which substantially all of the Property of Vandyk-Kings Mill, along with the beneficial interest in the Real Property held by Vandyk Humberside, was sold to the Purchaser for aggregate cash proceeds of \$48,000,000.³

B. Deposit Return Protocol

9. Pursuant to the terms of the AVO, the Receiver, upon the closing the Transaction, sent termination letters to all purchasers party to a Unit APS. The termination letters informed the purchasers that any deposits paid pursuant to the Unit APSs are fully insured under a Westmount Guarantee Services Inc. (“**Westmount**”) policy, and that the purchasers would therefore be able to recover the full amount of their deposits.⁴

10. Since that time, the Receiver has been working with Westmount, Aviva Insurance Company of Canada (which is the insurer on risk under the Westmount deposit insurance policy), and Tarion Warranty Corporation, to establish the DRP. The DRP is now complete and, pending the approval of the Court, the Receiver intends to carry out applicable terms of the DRP immediately.⁵

² Second Report at paras. 2.0.1-2.0.3.

³ Second Report at para. 2.0.5.

⁴ Second Report at paras. 3.0.1-3.0.2.

⁵ Second Report at paras. 3.0.3-3.0.4.

C. Construction Lien Claims Process

11. A total of 20 lien claimants (each a “**Lien Claimant**” and collectively, the “**Lien Claimants**”) have registered 21 construction liens on title to the Real Property. As the Lien Claimants potentially have priority claims for a statutory holdback in relation to a valid and properly registered construction lien against the Real Property pursuant to s. 78 of the *Construction Act* (Ontario) (each, a “**Holdback Deficiency Priority Claim**”), the Receiver seeks to administer the proposed Claims Process, which will specifically solicit Holdback Deficiency Priority Claims.⁶

12. Under the terms of the proposed Claims Process, any Lien Claimant who wishes to assert a Holdback Deficiency Priority Claim must deliver a completed proof of claim (“**Proof of Claim**”) to the Receiver on or before the claims bar date or 5:00 p.m. on November 15, 2024 (the “**Claims Bar Date**”). The Receiver will then review the filed Holdback Deficiency Priority Claims, and, to the extent that the Receiver disputes, revises, or disallows any Proof of Claim, will notify the applicable Lien Claimant of its basis for doing so (a “**Notice of Revision or Disallowance**”). A Lien Claimant which wishes to dispute a Notice of Revision or Disallowance must in turn deliver a notice of dispute (“**Notice of Dispute**”) to the Receiver no later than 5:00 p.m. on the business day which is seven days after the delivery of the Notice of Revision or Disallowance, or such later date as the Receiver may agree in writing. Disputes identified in a Notice of Dispute will then be resolved in accordance with the procedures set forth in the CPO.⁷

PART III - THE ISSUES AND THE LAW

13. The issues on this motion are whether this Court should:

⁶ Second Report at paras. 4.1.1-4.2.2.

⁷ Second Report at paras. 4.3.1-4.4.3.

- (a) grant the DRP Order, including the approval of the DRP; and
- (b) grant the CPO, including the approval of the Claims Process.

A. The DRP Should be Approved

14. Protocols to return deposits paid by counterparties to terminated pre-sale purchase agreements are common in real estate insolvencies and are frequently approved by the court.⁸ Such approval allows individual purchasers to obtain their deposits in a “fair and sensible fashion.”⁹

15. The DRP has been designed by the applicable parties to facilitate the return of deposits to pre-sale purchasers, and the terms of the DRP are substantially the same as those found in other deposit return protocols used in similar situations.¹⁰ The approval of the Court will ensure that purchasers receive their deposits as quickly as possible in the circumstances.

B. The Claims Process Should be Approved

16. Claims processes in a receivership are intended to create a “flexible and efficient process” which allows claims to be expeditiously established with a view to distributing assets as quickly as reasonably possible.¹¹ Claims procedures are therefore frequently approved by the court in

⁸ See, i.e., *1473124 Ontario Limited v. LDI Lakeside Developments Inc.*, (December 19, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00694059-00CL ([Discharge and Ancillary Relief Order](#)) at para. 4; *BCIMC Construction Fund Corporation et al. v. 33 Yorkville Residences Inc. et al.*, (April 7, 2021) Ont. S.C.J. [Commercial List] Court File No. CV-20-00637297-00CL ([Deposit Return Procedure Order](#)); *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge et al.*, (February 18, 2021) Ont. S.C.J. [Commercial List] Court File No. CV-20-00637301-00CL ([Deposit Return Procedure Order](#)).

⁹ *Hazelton Development Corporation (Re)*, (February 10, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00679931-00CL ([Endorsement of Justice McEwan](#)) at p. 3.

¹⁰ Second Report at para. 3.0.3.

¹¹ *Computershare Trust Company of Canada v. Cookstown Holdings Ltd.*, [2014 ONSC 685](#) at para. 13.

receivership proceedings, including procedures which have been crafted to respond to the specific nature of the claims in question.¹²

17. The Claims Process is fair and reasonable in the circumstances and should be approved by the Court. The granting of the CPO, and the distribution of any amounts attributable to the Holdback Deficiency Priority Claims, is a necessary step which needs to be taken before these receivership proceedings can be terminated. Further, the procedures set out in the CPO are consistent with those commonly approved by the courts and will allow Lien Claimants the necessary time and opportunity to assert and establish any Holdback Deficiency Priority Claims. In particular, the Claims Bar Date, which is approximately 30 days from the date scheduled for this application, will be sufficient for Lien Claimants to file a Proof of Claim with the Receiver.¹³

PART IV - NATURE OF THE ORDER SOUGHT

18. For the reasons set out above, the Receiver requests that this Court grant the proposed DRP Order and CPO.

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



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¹² See, i.e., *BCIMC Construction Fund Corporation et al. v. 33 Yorkville Residences Inc. et al.*, (April 7, 2021) Ont. S.C.J. [Commercial List] Court File No. CV-20-00637297-00CL ([Priority Claims Procedure Order](#)), which approved a claims process specifically in relation to claims which were in priority to the claims of secured creditors.

¹³ Second Report at para. 4.5.1.

SCHEDULE “A”: LIST OF AUTHORITIES

1. *1473124 Ontario Limited v. LDI Lakeside Developments Inc.*, (December 19, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00694059-00CL ([Discharge and Ancillary Relief Order](#))
2. *BCIMC Construction Fund Corporation et al. v. 33 Yorkville Residences Inc. et al.*, (April 7, 2021) Ont. S.C.J. [Commercial List] Court File No. CV-20-00637297-00CL ([Deposit Return Procedure Order](#))
3. *BCIMC Construction Fund Corporation et al. v. 33 Yorkville Residences Inc. et al.*, (April 7, 2021) Ont. S.C.J. [Commercial List] Court File No. CV-20-00637297-00CL ([Priority Claims Procedure Order](#))
4. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge et al.*, (February 18, 2021) Ont. S.C.J. [Commercial List] Court File No. CV-20-00637301-00CL ([Deposit Return Procedure Order](#))
5. *Computershare Trust Company of Canada v. Cookstown Holdings Ltd.*, [2014 ONSC 685](#)
6. *Hazleton Development Corporation (Re)*, (February 10, 2023) Ont. S.C.J. [Commercial List] Court File No. CV-23-00679931-00CL ([Endorsement of Justice McEwan](#))

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS
BANKRUPTCY AND INSOLVENCY ACT

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

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; SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED; AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. C.30

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HUMBERSIDE LIMITED**
Respondents

Court File No: CV-23-00710267-00CL

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PROCEEDING COMMENCED AT TORONTO

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