

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

**PEOPLES TRUST COMPANY and
FIRM CAPITAL MORTGAGE FUND INC.**

Applicants

- and -

**VANDYK-BACKYARD QUEENSVIEW LIMITED and
VANDYK-BACKYARD HUMBERSIDE LIMITED**

Respondents

FACTUM OF THE RECEIVER

April 25, 2024

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**TO: THIS HONOURABLE COURT
AND TO: THE SERVICE LIST**

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PART I - NATURE OF THE MOTION

1. TDB Restructuring Limited in its capacity as Court-appointed receiver (in such capacity, the “**Receiver**”) without security, of the unsold condominium units, parking units, and storage lockers (collectively, the “**Unsold Units**”) constituting property of Vandyk-Backyard Queensview Limited and Vandyk-Backyard Humberside Limited (together, the “**Debtors**”), seeks the following relief:

- (a) an “**Approval and Vesting Order**” in respect of Unit 311, authorizing and directing the Receiver to enter into and carry out the terms of the Unit 311 agreement of purchase and sale (the “**Unit 311 APS**”), with such minor further amendments thereto deemed necessary by the Receiver, and vesting title to the Purchased Assets (as defined in the Unit 311 APS) in the purchaser upon the closing of the purchase and sale transaction contemplated thereby; and
- (b) an order for ancillary relief (the “**Ancillary Order**”), *inter alia*:
 - (i) approving the Second Report of the Receiver dated April 22, 2024 (the “**Second Report**”) and the Receiver’s activities set out therein;
 - (ii) releasing the \$4,000 in net sale proceeds previously set aside by the Receiver in respect of the priority claim dispute with the judgment creditor, TA Appliances Inc. (“**TA**”);
 - (iii) authorizing the Receiver to engage a rental management company and lease certain of the vacant Unsold Units to residential tenants on an interim basis, on such market terms and for such duration up to one year or on a month-to-month basis as the Receiver may determine; and

- (iv) approving the Receiver’s interim statement of receipts and disbursements for the period February 6, 2024, to April 15, 2024 (the “**Interim SR&D**”).

PART II - THE FACTS

Background

- 2. Capitalized terms not expressly defined herein are as defined in the Second Report.
- 3. Pursuant to an Order of the Court granted on February 6, 2024 (the “**Appointment Order**”), RSM Canada Limited (now known as TDB Restructuring Limited) was appointed Receiver of the Unsold Units of the Debtors and the proceeds therefrom (collectively, the “**Property**”) under section 243(1) of the *Bankruptcy and Insolvency Act* (Canada) and section 101 of the *Courts of Justice Act* (Ontario).¹
- 4. On March 6, 2024, the Court further granted the following three Orders:
 - (a) an Approval and Vesting Order in respect of Unit 302;²
 - (b) an Ancillary Order (the “**March 6 Ancillary Order**”), among other things, approving the Receiver’s First Report, and directing the Receiver to set aside \$4,000 of the net proceeds from the sale of Unit 302, pending determination of a priority claim dispute with TA;³ and

¹ Motion Record, Tab 2: Second Report of the Receiver dated April 22, 2024 [Second Report], at para 1.

² Second Report at para 3(a).

³ Second Report at para 3(b).

- (c) a Lien Claims Process Order, (i) requiring any lien claimant who has registered a lien against the Unsold Units as of the date of the Appointment Order to deliver to the Receiver a completed proof of lien claim and support documentation by May 1, 2024, and (ii) directing the Receiver to make a recommendation to the Court at a future date and on notice to all interested parties, as to the most efficient and cost-effective process for having the claims determined.⁴
5. Following the First Report, the Receiver has, among other things, continued to fulfill its mandate to realize on the Property for the benefit of all stakeholders, which has included the following:⁵
- (a) responding to inquiries from stakeholders;
 - (b) corresponding with Canada Revenue Agency in respect of the administration of this proceeding;
 - (c) communicating with Trisura Guarantee Insurance Company in respect of the status of any deposits with respect to the Unsold Units, and with Tarion Warranty Corporation (“**Tarion**”) regarding available deposit insurance and pre-delivery inspections (“**PDIs**”);

⁴ Second Report at para 3(c).

⁵ Second Report at para 8.

- (d) reviewing the OREA condominium sale agreement in respect of the prospective sale of Unit 311 with the Receiver's real estate counsel and amending same to conform to the context of a receivership proceeding;
- (e) considering the impact of any registrations made pursuant to the *Personal Property Security Act* (Ontario) (the "PPSA") in respect of any personal property of the Debtors that may be relevant to a sale of the Unsold Units;
- (f) attending to the marketing and sale of the remaining Unsold Units;
- (g) engaging with Tarion in order to permit purchasers of the Unsold Units to benefit from a Tarion warranty, which has included arranging for PDIs to be conducted;
and
- (h) receiving, reviewing and considering the validity, scope and priority of property tax arrears and condominium liens in respect of the Unsold Units, with input from the Receiver's real estate counsel.

Closing the Sale of Unit 311

6. On February 20, 2024, the Receiver executed the Unit 311 APS, subject to Court approval.⁶

⁶ Second Report at para 17.

7. All due diligence and conditions relating to the Unit 311 APS have been satisfied or expired, other than the obtaining of the Approval and Vesting Order. The Unit 311 APS contemplates that Unit 311 would be sold, together with a parking space and a locker.⁷
8. The Receiver recommends that this Court approve the Unit 311 APS and authorize the Receiver to carry out the terms thereof and grant the Approval and Vesting Order vesting title to Unit 311 in the purchaser thereof upon the closing of the transaction.⁸

Approval of the Receiver's Activities

9. The Receiver's activities since the First Report, are set out in greater detail in the Second Report.
10. The Receiver has acted in good faith and due diligence in carrying out all such activities and seeks the approval of the Second Report and the activities described therein.

Releasing the \$4,000 Set Aside

11. TA had asserted a claim against the appliances located in each of the Unsold Units. The validity of each claim by TA was disputed by the Receiver. Based on PPSA searches conducted, TA did not have a perfected security interest in the appliances in question.⁹

⁷ Second Report at para 17.

⁸ Second Report at para 20.

⁹ Second Report at para 29.

12. As proposed by the Receiver and agreed by TA, the March 6 Ancillary Order directed the Receiver to set aside \$4,000 of net proceeds in respect of the sale of each Unsold Unit, pending determination of the priority dispute relating to TA's interest in certain appliances.¹⁰ Pursuant to the Endorsement of the Honourable Justice Cavanagh dated March 6, 2024, TA was to file materials with the Court to formally assert its position with respect to its claim.¹¹
13. On April 9, 2024, counsel to TA wrote to the Receiver and its counsel to advise that TA will no longer be pursuing a claim in respect of the appliances.¹² Thus, the aforementioned priority dispute has now been resolved or abandoned, and there is no longer any need for the Receiver to set aside any funds for the benefit of TA pending such determination.¹³
14. The Receiver therefore seeks an Order confirming that the Receiver may treat the \$4,000 that had been set aside in the same manner as all other net proceeds of sale of the Unsold Units.

¹⁰ Second Report at para 32.

¹¹ Second Report at para 30.

¹² Second Report at para 31.

¹³ Second Report at para 33.

Approval to Lease Units

15. Since the date of the First Report, several of the Unsold Units have been actively listed for sale on MLS. Other than with respect to Unit 311 however, there have been no offers on any of the other Unsold Units that have resulted in concluded agreements.¹⁴
16. VKP Real Estate Limited (“VKP”), the Debtors’ listing agent, has advised the Receiver that viewings and activity with respect to the Unsold Units currently listed for sale is lower than expected based on prior years.¹⁵
17. The Receiver is unsure when the condominium property market will rebound, and interest will be renewed. In the meantime, there are significant carrying costs associated with the Unsold Units that are not currently listed for sale. These costs are directly impacting any potential recoveries to the Debtors’ estate and stakeholders.¹⁶
18. The Appointment Order empowers and authorizes the Receiver to lease the Unsold Units outside of the ordinary course of business without approval of the Court, provided that the aggregate consideration for all such transactions does not exceed \$500,000.¹⁷
19. The Receiver intends to utilize the authorization granted under the Appointment Order to enter into residential lease agreements for the Unsold Units with lease terms up to and

¹⁴ Second Report at para 12.

¹⁵ Second Report at para 13.

¹⁶ Second Report at para 21.

¹⁷ Second Report at para 23.

including one year, or on a month-to-month or other short term basis, in each case at market rates, on an informed and reasonable basis.¹⁸

20. In consultation with VKP, the Receiver intends to offer approximately ten (10) of the remaining dwelling units for lease. The Receiver does not expect the payments collected pursuant to such lease arrangements to exceed \$500,000 in the aggregate, but has sought authorization in the draft Ancillary Order in any event, and will report to the Court in future reports and in filing further statements of receipts and disbursements for the benefit of all stakeholders.¹⁹

Approval of Interim SR&D

21. The Receiver is seeking approval of its Interim SR&D as described in the Second Report.²⁰

PART III - ISSUES

22. The issues before the Court are:
- (a) whether the Court should grant the proposed Approval and Vesting Order; and
 - (b) whether the Court should grant the proposed Ancillary Order.

¹⁸ Second Report at para 28.

¹⁹ Second Report at para 25.

²⁰ Second Report at para 43.

PART IV - LAW & ARGUMENT

ISSUE 1: The Court Should Grant the Approval and Vesting Order

23. In assessing whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently applied the criteria identified by the Ontario Court of Appeal in *Royal Bank v Soundair Corp*,²¹ encompassing:
- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - (b) the efficacy and integrity of the process by which offers are obtained;
 - (c) whether there has been unfairness in the working out of the process; and
 - (d) the interests of all parties.²²
24. In making this assessment, the court must also uphold the business judgment of the receiver and should be “loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court.”²³
25. The *Soundair* test has been met. Listing the Unsold Units on MLS, as set out in the First Report, has been accepted by this Court as an appropriate process for marketing. There is

²¹ [1991 CanLII 2727 \(ONCA\)](#) [*Soundair*].

²² *Ibid* at para 16.

²³ *Eddie Bauer of Canada, Inc (Re)*, 2009 CanLII 48527 at para [22](#) (ONSC); *Morganite Canada Corp v Wolfhollow Properties Inc*, 2003 CanLII 7759 (ONSC) at para [7](#).

no basis to impugn the efficacy, integrity, or fairness of the sale process chosen by the Receiver or the related steps taken by the Receiver. Courts have held that sale processes in the context of receiverships are not to be held to a standard of perfection. Rather, a receiver will be found to be acting properly and making an appropriate effort to get the best price if the receiver carefully considers the available information and uses its expertise to determine how best to maximize value in the particular circumstances.²⁴

26. Upon its appointment, the Receiver had engaged in substantive discussions with VKP regarding the Debtors' marketing efforts to date, including the efforts leading to the Unit 311 APS.²⁵ The Receiver has satisfied itself as to the appropriate range of value for a sale of each unit based on a price per square foot, with adjustments for specific location and other similar factors.²⁶
27. The Receiver is satisfied that: (i) sufficient efforts were made to obtain the highest and best price for the unit; (ii) the length of the marketing process was appropriate; (iii) the marketing process was conducted fairly and with integrity; and (iv) the Unit 311 APS represents the highest and best offer in the circumstances.²⁷
28. For all of the foregoing reasons, the Receiver respectfully recommends to the Court that the Unit 311 APS and the transaction contemplated thereby be approved.²⁸

²⁴ *National Trust Co v 1117387 Ontario Inc*, 2010 ONCA 340 at paras [44](#) and [50](#).

²⁵ Second Report at para 9.

²⁶ Second Report at para 11.

²⁷ Second Report at para 19.

²⁸ Second Report at para 20.

ISSUE 2: The Court Should Grant the Ancillary Order

(a) Approval of the Receiver's Activities

29. There are good policy and practical reasons for the Court to approve the activities of a Receiver.²⁹ Requests to approve a Court officer's reports and the activities described therein are "not unusual" within insolvency proceedings, and such relief is routinely granted.³⁰ Among other benefits, Court approval presents an opportunity to address the concerns of stakeholders, while enabling the Court to satisfy itself that the Receiver is acting prudently, diligently and in accordance with its powers.³¹
30. The Receiver's activities as described in the Second Report are consistent with its duties under the Appointment Order and are therefore prudent in the circumstances. It is appropriate to approve the activities of the Receiver as described in the Second Report.

(b) Releasing the \$4,000 Set Aside

31. Pursuant to paragraph 7 of the March 6 Ancillary Order, the Court, among other things, ordered the Receiver to set aside \$4,000 in respect of the sale of each Unsold Unit:

7. THIS COURT ORDERS that the Receiver shall set aside \$4,000 of the Net Proceeds of Sale, after adjusting for the Holdback Requirement, pending determination of that certain priority dispute relating to TA Appliances Inc.'s interest in certain appliances.³²

²⁹ *Target Canada Co. (Re)*, 2015 ONSC 7574 [*Target Canada*] at [para 2](#); *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 [*Triple-I Capital*] at [paras 65-66](#).

³⁰ *Ibid.*

³¹ *Target Canada* at [para 23](#); *Triple-I Capital* at [paras 65-66](#).

³² Second Report at para 32 and Appendix F.

32. Given that the priority dispute contemplated by the March 6 Ancillary Order has been resolved or abandoned,³³ there is no longer any need for the Receiver to set aside any funds for the benefit of TA.

(c) Approval to Lease the Unsold Units

33. The lack of sales with respect to the remaining Unsold Units will have a detrimental effect on the Debtors' stakeholders and estate if it continues for a prolonged period, as costs (including taxes, interest, utilities, and maintenance) continue to accrue in respect of each of the remaining Unsold Units, reducing the potential pool of recoveries available for stakeholders.³⁴

34. In the Receiver's view, the prudent course of action in the circumstances is to lease certain of the vacant Unsold Units to residential tenants on an interim basis. The lease payments received by the Receiver from such tenants would alleviate the carrying costs in respect of the remaining Unsold Units.³⁵

35. Pursuant to section 3(i)(i) of the Appointment Order, the Court, among other things, ordered that the Receiver is empowered and authorized to lease the Property or any part or parts thereof out of the ordinary course of business:

³³ Second Report at para 33 and Appendix E.

³⁴ Second Report at para 15.

³⁵ Second Report at para 22.

(i) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$500,000;³⁶

36. In the event the aggregate consideration for all such leasing transactions does exceed \$500,000, the Receiver seeks an Order confirming that the Receiver may lease certain of the vacant Unsold Units to residential tenants on an interim basis.³⁷
37. While the Receiver does not expect the payments collected pursuant to such lease arrangements to exceed \$500,000 in the aggregate,³⁸ the Receiver has sought authorization in the draft Ancillary Order in any event. The Receiver is of the view that any income it will receive from leasing certain of the Unsold Units will offset the carrying costs of the remaining Unsold Units, while the Receiver continues its marketing and sale process. The Receiver therefore intends to lease certain of the vacant Unsold Units to residential tenants on an interim basis, for such durations and on such terms as the Receiver determines in its discretion.³⁹

³⁶ Second Report at para 23.

³⁷ Second Report at para 24.

³⁸ Second Report at para 25.

³⁹ Second Report at para 28.

PART V - RELIEF REQUESTED

38. The Receiver seeks two Orders:
- (a) an Approval and Vesting Order substantially in the form attached at Tab 3 of the Receiver's Motion Record; and
 - (b) an Ancillary Order substantially in the form attached at Tab 5 of the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of April, 2024.

Rudrakshi Chakrabarti

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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Eddie Bauer of Canada, Inc. (Re)*, 2009 CanLII 48527 (ONSC).
2. *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, 2003 CanLII 7759 (ONSC).
3. *National Trust Co v. 1117387 Ontario Inc.*, 2010 ONCA 340.
4. *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, [1991] O.J. No. 1137 (ONCA).
5. *Target Canada Co. (Re)*, 2015 ONSC 7574.
6. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400.

SCHEDULE “B” STAUTORY REFERENCES

Courts of Justice Act, R.S.O. 1990, c. C.43.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Rules of Civil Procedure (Ontario), R.R.O. 1990, Reg. 194.

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

Orders on Terms

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Extension or Abridgment

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

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