

**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

March 4, 2024

THORNTON GROUT FINNIGAN LLP
3200 – 100 Wellington Street West,
Toronto, ON M5K 1K7
Tel: 416-304-1616 / Fax: 416-304-1313

D.J. Miller (LSO# 34393P)
Email: djmiller@tgf.ca

Puya Fesharaki (LSO# 70588L)
Email: pfesharaki@tgf.ca

Rudrakshi Chakrabarti (LSO# 86868U)
Email: rchakrabarti@tgf.ca

Lawyers for the Court-appointed Receiver, RSM
Canada Limited (now known as TDB
Restructuring Limited)

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

Table of Contents

NATURE OF THE MOTION	1
PART II - THE FACTS	2
Background to the Receivership Proceedings.....	2
Closing the Sale of Unit 302.....	4
Proposed Lien Claims Process.....	5
Approval of Receiver’s Activities	6
Termination of Unit 211 APS.....	7
Lien Holdback Amount and Proposed Interim Distribution.....	8
Appliance Supplier’s Asserted Claim.....	9
Other Claims Asserted	12
PART III - ISSUES.....	12
PART IV - LAW & ARGUMENT.....	13
ISSUE 1: The Court Should Grant the Approval and Vesting Order	13
ISSUE 2: The Court Should Grant the Ancillary Order	14
(a) Approval of the Receiver’s Activities.....	14
(b) Ratification of the Receiver’s Termination of the Unit 211 APS.....	15
(c) Establish Cap at the Maximum Holdback Amount	16
(d) Holdback Amount for Lien Claimants.....	19
ISSUE 3: The Court Should Grant the Lien Claims Process Order.....	21
ISSUE 4: Priority Claim of TA Appliances	23
PART V - RELIEF REQUESTED	23
SCHEDULE “A” LIST OF AUTHORITIES	25
SCHEDULE “B” STAUTORY REFERENCES	26

NATURE OF THE MOTION

1. RSM Canada Limited (now known as TDB Restructuring Limited) in its capacity as Court-appointed receiver and manager (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 (“**Backyard**”) and Vandyk-Backyard Humberside Limited (together with Backyard, the “**Debtors**”) seeks the following relief:

- (a) an “**Approval and Vesting Order**” in respect of Unit 302, authorizing and directing the Receiver to enter into and carry out the terms of the Unit 302 agreement of purchase and sale (the “**Unit 302 APS**”), with such minor further amendments thereto deemed necessary by the Receiver, and vesting title to the Purchased Assets (as defined in the Unit 302 APS) in the purchasers upon the closing of the purchase and sale transaction contemplated thereby;
- (b) an order for ancillary relief (the “**Ancillary Order**”), *inter alia*:
 - (i) approving the First Report of the Receiver dated February 27, 2024 (the “**First Report**”) and the Supplementary Report of the Receiver dated March 4, 2024 (the “**Supplemental Report**”) and the Receiver’s activities set out herein;
 - (ii) ratifying the Receiver’s termination of the agreement of purchase and sale in respect of Unit 211 (the “**Unit 211 APS**”);
 - (iii) establishing the maximum holdback amount that may be applicable in respect of any lien claims against the Unsold Units that may subsequently

be determined to be valid and in priority to the first mortgage registered in favour of the Applicants (the “**First Mortgage**”);

- (iv) approving the distribution of the proceeds of sale of the Unsold Units to the First Mortgagee, after paying applicable commissions, amounts payable on closing and related closing costs (the “**Net Proceeds**”), subject to the Receiver first retaining and holding 15% of the Net Proceeds in trust for any lien claims that may subsequently be determined to be valid and in priority to the First Mortgage; and
- (c) an Order (the “**Lien Claims Process Order**”) requiring the delivery of information from lien claimants to allow an assessment to be made as to the validity and priority of any construction lien claims that may be in priority to the First Mortgage.

PART II - THE FACTS

Background to the Receivership Proceedings

- 2. Capitalized terms not expressly defined herein are as defined in the First Report.
- 3. The Debtors constructed a condominium building situated at 25 Neighbourhood Lane, Toronto, Ontario (the “**Condominium Building**”), which consists of 134 residential units, five underground parking levels and storage lockers. The Condominium Building is fully constructed and occupied, other than the Unsold Units.

4. The Applicants, Peoples Trust Company (“**Peoples**”) and Firm Capital Mortgage Fund Inc., made available to the Debtors a condominium inventory term loan in the principal amount of \$12,700,000, secured, *inter alia*, by the First Mortgage, and a general security agreement (the “**Loan**”).¹
5. The Loan was fully advanced to the Debtors by way of a one-time advance on August 24, 2023, following the construction of the Condominium Building, and after the vast majority of Condominium Building units had been transferred to purchasers. The condominium building’s condominium plan, marking its official formation after construction completion was registered on July 7, 2023. No amount was advanced by the Lenders prior to completion of the condominium building.²
6. At the time of the Loan advance on August 24, 2023: (i) no liens were registered on title; and (ii) no written notice of any liens had been received.³
7. As at January 23, 2024, the Debtors were indebted to the Applicants under the Loan in the amount of \$12,000,201.89, together with accruing interest thereon and all costs and fees, including legal fees and disbursements incurred by the Applicants until the indebtedness is

¹ First Report, at para 8.

² Application Record, Affidavit of Michael Lombard sworn February 1, 2024 at para 15 [Affidavit of Michael Lombard].

³ Affidavit of Michael Lombard at paras 23, 34-35.

paid in full. Interest on the Loan accrues at a rate of approximately \$95,000 per month, or \$3,050 per diem until repaid in full with a discharge of the First Mortgage.⁴

8. The registration of any lien against the Unsold Units constituted an “Event of Default” pursuant to the Loan. Various construction liens have been registered against the Unsold Units in an aggregate amount exceeding \$8 million,⁵ constituting multiple events of default, which led the Applicants to bring a receivership application under section 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario) (the “**CJA**”) pursuant to which the Receiver was appointed by Order of the Court dated February 6, 2024 (the “**Appointment Order**”).⁶

Closing the Sale of Unit 302

9. The Debtors had entered into an agreement of purchase and sale with respect to Unit 302 prior to the Receiver’s appointment, with a closing date of February 21, 2024. The agreement was incapable of being completed due to, among other things, the construction liens registered against the property and the commencement of these receivership proceedings.⁷
10. Following its appointment, the Receiver reviewed the Unit 302 APS and determined that, subject to certain amendments thereto and further to its discussions with VKP Real Estate

⁴ First Report, at para 8.

⁵ First Report, at paras 11 and 12.

⁶ First Report, at para 1.

⁷ First Report, at para 17.

Limited (“**VKP**”), a qualified broker engaged to market the Unsold Units for sale,⁸ the price and terms of sale were acceptable to the Receiver. The Receiver has accepted the Unit 302 APS, as amended and subject to Court approval, and wishes to complete the transaction by seeking an order vesting the property in the purchasers.⁹

Proposed Lien Claims Process

11. On February 22, 2024, the Receiver’s real estate counsel, Fogler, wrote to counsel to each of the construction lien claimants (the “**Lien Claimants**”) to request that they provide proof of their claims (the “**Lien Claims**”), with supporting documentation, to the Receiver. Fogler requested such information on behalf of the Receiver pursuant to the authority granted to the Receiver under the Appointment Order.¹⁰

12. The Receiver is requesting that the Court approve the Lien Claims Process Order, simply to facilitate the delivery of information that would allow an assessment to be made as to the validity and priority of any Lien Claims that may be in priority to the First Mortgage.¹¹ Court approval for the actual process to be undertaken to determine the Lien Claims is not sought at this time. Rather, in consultation with the Lien Claimants, at the appropriate time following repayment of the First Mortgage, the Receiver will make a recommendation to the Court as to the process to be undertaken.

⁸ First Report, at para 7(e).

⁹ First Report, at para 18.

¹⁰ First Report, at para 34.

¹¹ First Report, at para 35.

13. The timing of this determination is proposed to occur after amounts outstanding under the First Mortgage have been repaid, such that interest no longer continues to accrue at the current rate of approximately \$95,000 per month. All parties would receive notice of a future motion with the Receiver's recommendation for any proposed process for the determination of construction liens.¹²
14. Following service of its First Report and based on requests made by certain Lien Claimants, the Receiver proposes to extend the Claims Bar Date that was in the original draft Lien Claims Process Order by one month, so that it would be May 1, 2024.
15. Based on discussions held with counsel for certain Lien Claimants in respect of the proposed Lien Claims Process Order following service of its First Report, and the Receiver's consideration of the issues, the Receiver proposes certain amendments to the form of draft Lien Claims Process Order that is sought on this motion. Attached as Appendix "I" to the Supplemental Report is a copy of a revised version of the Lien Claims Process Order that the Receiver proposes to present to the Court at the motion on March 6, 2024, redlined to the draft included in the original Motion Record.

Approval of Receiver's Activities

16. The Receiver's activities since its appointment, set out in greater detail in the First Report.

¹² First Report, at para 33.

17. The Receiver has acted in good faith and due diligence in carrying out all such activities and seeks the approval of the First Report and the Supplemental Report and the activities described therein.

Termination of Unit 211 APS

18. The Debtors had entered into the Unit 211 APS on November 28, 2018.¹³ The Unit 211 APS never closed for reasons that are not certain to the Receiver.¹⁴ Following its appointment, and further to the Receiver's discussions with VKP, the Receiver determined that the amount was materially lower than the current fair market value of the unit.¹⁵
19. Accordingly, the Receiver determined that it is beneficial for the Receiver to terminate and re-list for sale Unit 211. By letter dated February 24, 2024, the Receiver terminated the Unit 211 APS pursuant to the authority granted to it under the Appointment Order and advised the purchaser to seek any recourse with respect to its deposit for the property that may be available from Tarion Warranty Corporation ("**Tarion**"). The Receiver seeks the Court's ratification of its termination of the Unit 211 APS.¹⁶

¹³ First Report, at para 22.

¹⁴ First Report, at para 23.

¹⁵ First Report, at para 22.

¹⁶ First Report at paras 23 and 24.

20. The Receiver understands that the purchaser of Unit 211 does not object to the Receiver's termination of the Unit 211 APS and, following termination, intends to seek a refund of its deposit from Tarion.¹⁷

Lien Holdback Amount and Proposed Interim Distribution

21. Following the closing of the sale for Unit 302 and receipt by the Receiver of the Net Proceeds therefrom, funds will be available to the Receiver for distribution.¹⁸
22. The Receiver has not yet determined the validity or priority of any Lien Claims in relation to the First Mortgage.¹⁹
23. The Receiver has determined that the total amount that the Lien Claimants may be entitled to recover pursuant to the *Construction Act* ("CA") in priority to the First Mortgage, if all construction liens were determined to be valid and in priority to the First Mortgage, is no more than \$1,979,540.34 (the "**Maximum Holdback Amount**"). The Maximum Holdback Amount represents 10% of the aggregate contract value for each Lien Claimant who had a direct contract with the Debtors.²⁰
24. The Receiver is proposing to hold back an amount equal to fifteen percent (15%) of the Net Proceeds from each of the units sold (the "**Lien Holdback**"). The Lien Holdback is to

¹⁷ First Report, at para 23.

¹⁸ First Report, at para 36.

¹⁹ First Report, at para 37.

²⁰ First Report, at para 42.

be held in trust for the benefit of the Lien Claimants that may be determined at a future date to have a valid Lien Claim in priority to the First Mortgage, and the balance of the Net Proceeds is to be paid to the Applicants, up to the total indebtedness owing on the Loan secured by the First Mortgage.²¹

Appliance Supplier's Asserted Claim

25. Counsel to TA Appliances Inc. (“TA”), a judgment creditor, has written to the Monitor’s counsel, including most recently on February 29, 2024. The Receiver understands that TA supplied and installed certain appliances (the “**Appliances**”) to the Condominium Building where the Unsold Units are located, and is asserting a priority right thereto, including the right to repossess the Appliances. TA further claims it is the true owner of the Appliances.²²
26. Based on PPSA searches conducted by the Receiver’s counsel, TA does not have a perfected security interest in the Appliances. The Receiver obtained a legal opinion from its independent counsel indicating that Peoples holds a first priority perfected security interest in all personal property of the Debtors at the Condominium Building.²³
27. Counsel to TA alleges that the Kitchen Appliances are “consumer goods” and therefore fall outside the scope of Peoples’ PPSA registration against the Debtors. Peoples’ PPSA registration is against the typical classes of collateral of a commercial debtor (inventory,

²¹ First Report, at para 45.

²² Supplemental Report, at paras 8-10.

²³ *Ibid.*

accounts, other) and not consumer goods. Peoples' position is that the purchase of 134 sets of appliances by the Debtors for the 134 units at the Condominium Building would constitute "inventory" in the hands of the Debtors, and not consumer goods as they would be if individual homeowners had purchased appliances for their own use.²⁴

28. The Receiver requested and received a copy of the default Judgment obtained by TA against the Debtors, and a copy of the contract dated February 11, 2021 (the "**TA Supply Contract**") between the Debtors and TA regarding the purchase and installation of 134 sets of appliances, including those relating to the Unsold Units over which the Receiver was appointed. The Unsold Units comprise approximately 15% of the original 134 units in the Condominium Building, with the vast majority of units having been previously sold and transferred to purchasers by the Debtors in July, 2023.²⁵
29. The Receiver notes the following in respect of the TA Supply Contract²⁶:
- (a) it appears to be on the Debtors' standard form construction contract, with appendices that include all of the schedules that are typical for construction contracts and terms that include a provision for invoices to be delivered to the Construction Manager for the Condominium Building and for TA to provide

²⁴ First Report at para 30.

²⁵ Supplemental Report at para 10.

²⁶ Supplemental Report, Appendix "B".

evidence of Commercial Liability Insurance naming Backyard and the Construction Manager as “Additional Insureds”;

- (b) it describes TA as the “Contractor” throughout;
 - (c) it provides for a holdback of 10% on the installation portion of the TA Supply Contract only, and not the cost of the Appliances, and states that it is subject in all respects to the *Construction Act*;
 - (d) it states that the installation cost for the 134 units is \$235 per unit, for a total installation cost of \$31,490 (to which a 10% holdback relates); and
 - (e) there is no reservation of title or similar language in favour of TA with respect to the Appliances delivered pursuant to the TA Supply Contract.
30. The Receiver has confirmed with its counsel that TA did not register a lien in respect of its claim at any time.
31. The Receiver’s independent counsel is reviewing and addressing all aspects of TA’s claim to priority in respect of the Appliances.
32. In order to permit a full record to be before the Court for any determination of entitlement or priority of TA as asserted to date through correspondence, the Receiver has advised TA that it will hold the amount of \$4,000 from the Net Proceeds of sale of Unit 302, on the basis that TA brings a motion forthwith to be heard on the next return date for any approval and vesting order in respect of any of the other Unsold Units.

Other Claims Asserted

33. Certain other Lien Claimants have asserted other rights and interests to the anticipated proceeds of sale of the Unsold Units over and beyond the Maximum Holdback Amount proposed by the Receiver defined and described herein, but have not filed any materials in support of such positions at this time. Among other things, they have claimed the proceeds of sale of the Unsold Units constitute a vendor's trust pursuant to Section 9 of the *CA* and other rights and remedies outside of the *CA* in alleged priority over the *CA*.²⁷

PART III - ISSUES

34. The issues before the Court are:
- (a) whether the Court should grant the proposed Approval and Vesting Order;
 - (b) whether the Court should grant the proposed Ancillary Order; and
 - (c) whether the Court should grant the proposed Lien Claims Process Order.

²⁷ Supplemental Report at para 17.

PART IV - LAW & ARGUMENT

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

35. 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.*,²⁸ 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.²⁹
36. 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.”³⁰
37. The Debtors had entered into the Unit 302 APS on January 7, 2024, prior to the Receiver’s appointment.³¹ Upon its appointment, the Receiver engaged in substantive discussions with

²⁸ [1991 CanLII 2727 \(ONCA\)](#).

²⁹ *Ibid*, at para 16.

³⁰ *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, 2003 CanLII 7759 (ON SC) at para 7.

³¹ First Report, at para 17.

VKP regarding the Debtors' marketing efforts to date, including the efforts leading to the Unit 302 APS.³² 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.³³

38. Following such discussions, the Receiver was satisfied: (i) sufficient efforts were made to obtain the highest and best price for Unit 302; (ii) the length of the marketing process was appropriate; (iii) the marketing process was conducted fairly and with integrity; and (iv) the offer received for Unit 302 represents the highest and best offer in the circumstances.³⁴
39. For all of the foregoing reasons, the Receiver respectfully recommends to the Court that the Unit 302 APS and the transaction contemplated thereby be approved.

ISSUE 2: The Court Should Grant the Ancillary Order

(a) Approval of the Receiver's Activities

40. There are good policy and practical reasons for the Court to approve the activities of a Receiver.³⁵ 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.³⁶ Among other benefits, Court approval presents an opportunity to address the

³² First Report, at para 13.

³³ First Report, at para 15.

³⁴ First Report, at para 20.

³⁵ *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](#).

¹ *Ibid.*

concerns of stakeholders, while enabling the Court to satisfy itself that the Receiver is acting prudently, diligently and in accordance with its powers.³⁷

41. The Receiver's activities as described in the First Report and the Supplemental 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 First Report and the Supplemental Report.

(b) Ratification of the Receiver's Termination of the Unit 211 APS

42. Pursuant to paragraph 3(c) Appointment Order, the Receiver is expressly empowered and authorized to, among other things:

to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

43. The Receiver is of the view that the Unit 211 APS purchase price is materially lower than the current fair market value of the subject unit. Terminating and re-listing the property would therefore benefit the estate, including the Applicants who have a prior interest to the Unit 211 purchaser in the subject property.³⁸

³⁷ *Target Canada* at [para 23](#); *Triple-I Capital* at [paras 65-66](#).

³⁸ See Unit 211 APS, para 26 – whereby the purchaser subordinated their interest to any mortgages arranged by the Vendor (as defined therein) and any advances thereunder from time to time.

44. The Receiver understands that the amount of the deposit paid by the purchaser under Unit 211 APS is under the threshold for what would be covered by Tarion, such that the purchaser should not incur any loss with respect to such deposit.
45. This Court has held that the legal equities favour a termination of a pre-sale agreement where (i) the purchaser has a remedy to recover their original deposits, and (ii) the mortgagee has legal priority ahead of the purchaser.³⁹
46. The Receiver further understands that the purchaser of Unit 211 is agreeable to terminating the Unit 211 APS and obtaining a refund of its deposit from Tarion.⁴⁰
47. For all of the above reasons, on February 24, 2024, pursuant to the authority granted to it under the Appointment Order, the Receiver terminated the Unit 211 APS. The Receiver requests this Court's ratification of such termination.

(c) Establish Cap at the Maximum Holdback Amount

48. In consultation with its real estate counsel, the Receiver has determined that the maximum amount that the Lien Claimants could assert in priority to the first-ranking Mortgage pursuant to the CA is \$1,979,540.34 (the "**Maximum Holdback Amount**"), being 10% of the total contract value for each Lien Claimant who had a direct contract with Backyard, as reported in each of the Lien Claimants' registered Claim for Lien.⁴¹

³⁹ *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd.*, 2012 ONSC 4816 at [para 38](#).

⁴⁰ First Report, at para 23.

⁴¹ First Report, at para 42.

49. Subsection 22(1) of the *CA* creates an obligation for owners, contractors, and subcontractors to hold back 10% of the price of the services or materials actually supplied under each contract or subcontract in respect of an improvement. The holdback must be preserved until such time as the respective liens that have or may be claimed have been satisfied or discharged.⁴²
50. The Ontario Superior Court of Justice (Divisional Court) has made clear that where a lien claimant contracts directly with the owner of the subject property, as is the case here, holdback under section 22(1) of the *CA* is based on the value of the services or materials actually supplied under the lien claimant's contract with the owner, and not based on the value of the services or materials supplied to the improvement as a whole.⁴³
51. As the owner and developer of the Unsold Units, Backyard was obligated to hold back 10% for the benefit of each party that it contracted with to supply materials or services to the Unsold Units pursuant to the *CA*. As of the date of the Receiver's appointment, the Debtors were not in possession of any holdback funds.⁴⁴
52. Under subsection 78(5) of the *CA*, a construction lien has priority over a mortgage registered after the time when the lien first arose,⁴⁵ to the extent of the deficiency in the holdbacks that an owner was required to retain. Otherwise, and pursuant to subsection

⁴² *Construction Act*, RSO 1990, c C.30, s. [22\(1\)](#) [*Construction Act*].

⁴³ *RSG Mechanical Incorporated v. 1398796 Ontario Inc.*, 2015 ONSC 2070 at [paras 64-65](#).

⁴⁴ First Report, at para 38.

⁴⁵ Section [15](#) of the *Construction Act* provides that a lien arises when the person first supplies services or materials to the improvement.

78(6) of CA, a mortgage registered after the time the liens first arose has priority to the liens unless (a) at the time the advance was made, there was a preserved or perfected lien against the premises, or (b) prior to the time the advance was made, the person making the advance had received written notice of a lien.

53. Based on the Receiver's review of the dates of registration of the Lien Claims, at the time the Loan was made by the Applicants, there were no preserved or perfected liens against the Unsold Units.⁴⁶
54. The sworn evidence filed in this proceeding by the Applicants is that no written notice of any Lien Claim had been received at the time the Loan was advanced.⁴⁷
55. Accordingly, the Applicants have priority to the preserved or perfected liens, other than to the extent of the deficiency in the holdbacks required to be maintained pursuant to the CA.⁴⁸
56. There is no privity of contract between the Lien Claimants and the Applicants. Further, there are no statutory obligations imposed on mortgage lenders under the CA, other than the requirement to respond to a request for information under section 39 of the CA. A mortgage lender is neither an "owner" nor a "payer" within the meaning of the CA, and therefore a mortgage lender owes no trust obligations to lien claimants. Funds advanced by

⁴⁶ First Report, at para 41.

⁴⁷ Lombard Affidavit at paras 34-35.

⁴⁸ *Construction Act*, s. [78\(2\)](#).

a mortgage lender are not trust funds until they are received by a payer.⁴⁹ A lien claimant's right against a mortgage lender is limited to the priority scheme established under section 78 of the CA.

57. The fact that the Lien Claimants may have priority to the First Mortgage to the extent of the deficiency in the holdbacks does not imply the existence of, or create, additional rights or remedies against the Applicants that are not provided for under section 78 of the CA, as this would undercut the comprehensive scheme of rights and remedies established by the CA.⁵⁰
58. To avoid further uncertainty and permit the Lien Holdback relief to be implemented, the Receiver respectfully requests that the Court establish a cap on the maximum aggregate entitlement of potential Lien Claims against the Property that could assert priority to the first-ranking Mortgage be set at the Maximum Holdback Amount, being \$1,979,540.34.

(d) Holdback Amount for Lien Claimants

59. The distribution of available Net Proceeds to the Applicants as Unsold Units are sold would serve to reduce the First Mortgage indebtedness and the related interest that is payable, thereby making further funds available for other creditors upon the First Mortgage being repaid and discharged.⁵¹

⁴⁹ *Simpson v. Bridgewater Bank*, 2012 ONSC 714 paras [32-36](#); See also *Basic Drywall Inc. v. 1539304 Ontario Inc. (Div. Ct.)*, 2012 ONSC 6391 at paras [17 and 24](#).

⁵⁰ *Tremblar Building Supplies Ltd. v. 1839563 Ontario Limited*, 2020 ONSC 6302 (Div. Ct.) at paras [11-18](#).

⁵¹ First Report, at para 43.

60. To protect the interests of the Lien Claimants, while at the same time balancing the need to reduce the amounts owing under the First Mortgage and accruing interest, the Receiver is proposing to hold back 15% of the Net Proceeds from each of the Unsold Units sold, representing the Lien Holdback.
61. This approach is consistent with the security provisions in section 44 of the CA. Specifically, subsection 44(2) of the CA permits the court to make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount the court determines to be reasonable in the circumstances to satisfy that lien.⁵²
62. Further, subsection 44(4) provides that, where a motion is made to vacate the registration of a general lien (as all the Lien Claims are) against individual premises subject to that lien, the CA permits the court to apportion the general lien between those premises and all other premises that are subject to the lien.⁵³
63. The Receiver is satisfied that the aggregate market value of the Unsold Units, net of commissions and other amounts payable on closing, will result in an aggregate Lien Holdback that is more than sufficient to cover the Maximum Holdback Amount, from the sale of all of the Unsold Units.⁵⁴ Should the Receiver's view change on the sufficiency of

⁵² *Construction Act*, s. [44\(2\)](#).

⁵³ *Construction Act*, s. [44\(4\)](#).

⁵⁴ First Report, at para 44.

such amounts as this proceeding progresses, the Receiver may seek an adjustment to that mechanism or seek the Court's advice and directions.

64. The Lien Holdback contemplated by the Ancillary Order and proposed by the Receiver, in conjunction with the Maximum Holdback Amount, will ensure that the Lien Claimants are not prejudiced with respect to their potential recoveries in priority to the First Mortgage. For all of the above reasons, the Receiver respectfully requests that the Court approve the Lien Holdback mechanism contemplated by the Ancillary Order.

ISSUE 3: The Court Should Grant the Lien Claims Process Order

65. The issue of whether the Lien Claims are valid and were filed on a timely basis, and whether any portion of the Lien Claims could be in priority to the First Mortgage, will ultimately need to be determined in order to address any payment to the Lien Claimants at a future date.⁵⁵
66. The proposed Liens Claim Process Order seeks solely to facilitate the delivery of information that would allow an assessment to be made at a later date as to the validity and priority of any Lien Claims. The Liens Claim Process Order does not address, or establish a process to make the actual assessment of Lien Claims.
67. The Receiver has already sought the delivery of such information from the Lien Claimants, including pursuant to email correspondence from the Receiver's counsel dated February

⁵⁵ First Report, at para 33.

22, 2024. The terms of the requested Court Order requiring delivery of same, are to ensure that all relevant information is delivered on a timely basis pursuant to a coordinated process, rather than causing the Receiver to incur costs through ongoing requests on an individual Lien Claimant basis.

68. The Liens Claim Process Order is being sought as a matter of expediency and cost-efficiency. With the extension of one month from the original timeline proposed by the Receiver following discussions with certain Lien Claimants⁵⁶, it would provide the Lien Claimants until May 1, 2024 (the “**Claims Bar Date**”) to provide completed proofs of lien claim in the form attached to the Order, together with supporting documentation. This is a reasonable time period for the Lien Claimants to file a proof of claim in the Reviewer’s view, and corresponds to the time period given to the claimants in similar claims processes approved by this Court.⁵⁷
69. Other than requiring the Lien Claimants to submit their supporting documentation by the Claims Bar Date, the proposed Order does not impose any obligations on, or in any way prejudice, the rights or remedies of the Lien Claimants or any other party.

⁵⁶ Supplemental Report, para 19.

⁵⁷ See Lien Claims Process Order by Justice Penny in (i) [Atlas Healthcare](#) dated December 12, 2019 (Court File No. CV-18-607303-00CL); and (ii) Liens Claims Adjudication Order by Justice Shelley in [Destiny Bioscience Global Corp](#) dated August 14, 2020 (Court File No. 2003-07758).

ISSUE 4: Priority Claim of TA Appliances

70. In view of the Receiver's proposed mechanism for holding \$4,000 from the Net Proceeds of sale of Unit 302 pending a motion on a full record to determine any priority asserted by TA to the Appliances in the Unsold Units, the Receiver will not address the legal arguments on that issue at this time. A Factum to address this issue will be filed when the motion brought by TA is returnable before the Court, upon the next sale of an Unsold Unit.

PART V - RELIEF REQUESTED

71. The Receiver seeks three Orders:

- (a) an Approval and Vesting Order substantially in the form attached at Tab 3 of the Receiver's Motion Record;
- (b) a Lien Claims Process Order substantially in the form attached at Tab 5 of the Receiver's Motion Record; and
- (c) an Ancillary Order substantially in the form attached at Tab 6 of the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this fourth day of March, 2024.



THORNTON GROUT FINNIGAN LLP
3200 – 100 Wellington Street West,
Toronto, ON M5K 1K7
Tel: 416-304-1616 / Fax: 416-304-1313

D.J. Miller (LSO# 34393P)

Email: djmiller@tgf.ca

Puya Fesharaki (LSO# 70588L)

Email: pfesharaki@tgf.ca

Rudrakshi Chakrabarti (LSO# 86868U)

Email: rchakrabarti@tgf.ca

Lawyers for the Court-appointed Receiver, RSM
Canada Limited (now known as TDB Restructuring
Limited)

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Basic Drywall Inc. v. 1539304 Ontario Inc., 2012 ONSC 6391.*](#)
2. [*Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816.*](#)
3. [*Morganite Canada Corp. v. Wolfhollow Properties Inc., 2003 CanLII 7759 \(ON SC\).*](#)
4. [*RSG Mechanical Incorporated v. 1398796 Ontario Inc., 2015 ONSC 2070.*](#)
5. [*Royal Bank v. Soundair Corp., 1991 CarswellOnt 205, \[1991\] O.J. No. 1137 \(C.A.\).*](#)
6. [*Simpson v. Bridgewater Bank, 2012 ONSC 714.*](#)
7. [*Target Canada Co. \(Re\), 2015 ONSC 7574.*](#)
8. [*Tremblar Building Supplies Ltd. v. 1839563 Ontario Limited, 2020 ONSC 6302.*](#)
9. [*Triple-I Capital Partners Limited v 12411300 Canada Inc., 2023 ONSC 3400.*](#)

**SCHEDULE “B”
STAUTORY REFERENCES**

Construction Act, RSO 1990, c C.30

**Contractor’s and subcontractor’s trust
Amounts received a trust**

8 (1) All amounts,

- (a) owing to a contractor or subcontractor, whether or not due or payable; or
- (b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1); 2017, c. 24, s. 66.

Obligations as trustee

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor’s or subcontractor’s own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

[...]

**Vendor’s trust
Amounts received a trust**

9 (1) Where the owner’s interest in a premises is sold by the owner, an amount equal to,

- (a) the value of the consideration received by the owner as a result of the sale,

less,

- (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 9 (1); 2017, c. 24, s. 9, 70.

Obligations as trustee

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner’s own use or to any use

inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement. R.S.O. 1990, c. C.30, s. 9 (2).

[...]

PART IV HOLDBACKS

Basic holdback

22 (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (1); 2017, c. 24, s. 17 (1), 66.

Separate holdback for finishing work

(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (2); 2017, c. 24, s. 17 (2), 66.

When obligation to retain applies

(3) The obligation to retain the holdbacks under subsections (1) and (2) applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion. R.S.O. 1990, c. C.30, s. 22 (3).

Permissible forms of holdback

(4) Some or all of any holdbacks may, instead of being retained in the form of funds, be retained in one or more of the following forms:

1. A letter of credit in the prescribed form.
2. A demand-worded holdback repayment bond in the prescribed form.
3. Any other form that may be prescribed. 2017, c. 24, s. 17 (3).

[...]

PART VII DISCHARGE OF PRESERVED OR PERFECTED LIENS

Withdrawal of written notice of lien

44 (2) A written notice of a lien may be withdrawn by giving a withdrawal in the prescribed form to the person to whom the written notice of a lien was given, and a payer given the withdrawal shall, in respect of the operation of subsection 24 (2), be in the same position as if the written notice of a lien had never been given

Where general lien

(4) Where a motion is made to vacate the registration of a general lien against one or more of the premises subject to that lien, the court may apportion the general lien between the premises in respect of which the motion is made and all other premises that are subject to the lien.

PART XI PRIORITIES

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. .

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unperfected lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance, but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

[...]

Priorities on insolvency

85 (1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created by section 8 that is derived from that trust, who has proved a lien. R.S.O. 1990, c. C.30, s. 85 (1).

Same

(2) Priority in the distribution of trust funds among those who have proved liens shall be in accordance with the respective priorities of their liens as set out in this Part. R.S.O. 1990, c. C.30, s. 85 (2).

Same

(3) The remaining trust funds shall be distributed among the beneficiaries of that trust and the beneficiaries of trusts created by section 8 that are derived from that trust, whose liens have not been proved, in accordance with the respective priorities to which those liens would have been entitled as set out in this Part, had those liens been proved. R.S.O. 1990, c. C.30, s. 85 (3).

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

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

Applicants

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

Respondents

Court File No. CV-24-00713783-00CL

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

Proceedings commenced at Toronto, Ontario

FACTUM OF THE RECEIVER

Thornton Grout Finnigan LLP

3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7
Tel: (416) 304-1616
Fax: (416) 304-1313

D.J. Miller (LSO# 34393P)

Email: djmiller@tgf.ca

Puya Fesharaki (LSO# 70588L)

Email: pfesharaki@tgf.ca

Rudrakshi Chakrabarti (LSO# 86868U)

Email: rchakrabarti@tgf.ca

Lawyers for the Court-appointed Receiver, RSM Canada
Limited (now known as TDB Restructuring Limited)