

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS
AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE,
R.R.O. 1990, REG. 194, AS AMENDED**

**AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF
ADELAIDE STREET LOFTS INC.**

**FACTUM OF THE APPLICANT
(APPLICATION RETURNABLE MARCH 21, 2019)**

March 19, 2019

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PART I - OVERVIEW

1. Hi-Rise Capital Ltd. (“**Hi-Rise**”) is the trustee and mortgage administrator in respect of a syndicated mortgage (the “**Syndicated Mortgage**”) securing a loan to Adelaide Street Lofts Inc. (“**Adelaide**”) by numerous investors (the “**Investors**”). Adelaide owns the property located at 263 Adelaide Street West, Toronto, Ontario (the “**Adelaide Project**” or the “**Project**”).¹

2. As a result of the syndicated mortgage “freeze” in 2017, Adelaide has been unable to obtain construction financing for the Adelaide Project. As such, the Project remains in an undeveloped state. In the fall of 2018, Adelaide commenced a sales process for the Adelaide Project to obtain the highest possible value for the Project, in order to maximize recoveries for Investors in the Syndicated Mortgage.²

3. During the sales process, it became apparent that instead of an outright sale of the Property, a joint venture between a purchaser and Adelaide to co-develop the Property would result in a higher recovery to the syndicated mortgage investors. Accordingly, a joint venture structure was pursued (the “**Transaction**”). As a result of the

¹ Affidavit of Noor Al-Awqati, sworn March 19, 2019 (“Al-Awqati Affidavit”), para. 2, Application Record Tab 2.

² Al-Awqati Affidavit, paras. 18 and 31, Application Record Tab 2.

sales process, a reputable and successful developer (the “**Developer**”) was identified as the best party with whom to transact.³

4. To ensure that Investors are adequately protected, and that their interests are adequately represented, Hi-Rise brings this application on notice to the Superintendent of Financial Services (the “**Superintendent**”), to Miller Thomson LLP (“**MT**”) as proposed representative counsel (“**Rep Counsel**”), and to the Advisory Committee of Investors (defined below), seeking the appointment of Rep Counsel pursuant to section 10 of the *Rules of Civil Procedure*⁴ (the “**Rules**”) and seeking this Court’s advice and direction pursuant to section 60 of the *Trustee Act*⁵ and Rules 14.05(3)(a) and (d) of the *Rules*.

5. Specifically, Hi-Rise wishes to effect a two-step court process (the “**Two-Step Process**”) that contemplates this initial hearing and a subsequent hearing. First, at this initial hearing of the application, Hi-Rise seeks to secure the appointment of MT as Rep Counsel for Investors and to establish a process that allows for Investor approval of the Transaction and the distribution of proceeds therefrom (the “**Distribution**”). Hi-Rise requires this Court’s direction to determine whether it can call a meeting (the “**Meeting**”) of the Investors to allow Investors to consider, and if determined advisable, pass a resolution approving the Transaction and Distribution. The Transaction would be considered “approved” by Investors if at the Meeting a majority in number of the Investors representing two-thirds in value present and voting either in person or by proxy cast votes in favour of the proposed Transaction (the “**Required Approval**”).⁶

³ Al-Awqati Affidavit, paras. 32-33, Application Record Tab 2.

⁴ RRO 1990, Reg 194.

⁵ RSO 1990, c T.23

⁶ Al-Awqati Affidavit, para. 3 and 54, Application Record Tab 2.

6. Hi-Rise also requires this Court's direction to determine whether it has the power under loan participation agreements (each, an "**LPA**") and mortgage administration agreements (each, a "**MAA**") that it entered into with Investors or at law to grant a discharge of the Syndicated Mortgage if the proceeds to be received from the disposition the Transaction are insufficient to pay in full amounts owing under the Syndicated Mortgage. Such power would only be exercised if the Transaction receives the Required Approval and if, on a subsequent return of this application, the Court determines that the Transaction is fair and reasonable. Finally Hi-Rise requires this Court's direction to determine whether an administration charge can be created securing the fees of Rep Counsel ("**Rep Counsel Charge**") and counsel for Hi-Rise ("**Company Charge**") in priority to all other charges except the existing first mortgage in favour of Meridian Credit Union Limited ("**Meridian**").⁷

7. Second, upon the subsequent return of this application, if the Transaction has received the Required Approval, Hi-Rise will seek final approval from this Court on the basis that the Transaction is fair and reasonable. Hi-Rise may also seek additional direction from this Court as is necessary to permit it to carry out its role in a manner consistent with the LPA and MAA and its duties at law.⁸

8. To be clear, the intention of this initial hearing of the application is not to make any final determinations regarding the Transaction. Instead, this hearing is intended to appoint Rep Counsel and have Rep Counsel work with Hi-Rise and Adelaide to evaluate the Transaction, hold a meeting of Investors to vote on the Transaction, and then, if Investors approve the Transaction by the specified majority, to return to court for final

⁷ Al-Awqati Affidavit, paras. 3 and 54, Application Record Tab 2.

⁸ Al-Awqati Affidavit, paras. 3 and 54, Application Record Tab 2.

approval, including asking the court at that time to consider whether the Transaction is fair and reasonable.⁹

9. In implementing this Two-Step Process, Hi-Rise wants to ensure that it acts in a manner that is consistent with Hi-Rise's powers pursuant to the LPA and MAA, that it adequately protects Investors' rights, and that it provides Investors with the greatest possible recovery and/or benefit in the circumstances. Hi-Rise believes that the Two-Step Process will benefit Investors by ensuring that their interests are fairly represented and by ensuring that the Court has final oversight over the approval of Transaction.¹⁰

PART II - THE FACTS

A. The Adelaide Project

10. The Adelaide Project is a 0.35 acre (15,429 square feet) parcel on which currently sits a Multi-Tenant Class "B" five-storey mixed-use building (both commercial and residential) with a brick and concrete block exterior and which was constructed around 1915. The existing structure has 45 units and a gross leasable area of 56,630 square feet. However, 15 units with a total area of 34,423 square feet are vacant.¹¹

11. Adelaide first purchased the existing land and building in June 2011 for the purpose of developing a high-rise condominium containing approximately 290 units.¹²

12. After purchasing the land, Adelaide decided to amend the plan for the Adelaide Project to include 390 units. Adelaide experienced various delays in obtaining the site approvals required as a result of the change in the number of units and as a result of

⁹ Al-Awqati Affidavit, para. 61, Application Record Tab 2.

¹⁰ Al-Awqati Affidavit, para. 50, Application Record Tab 2.

¹¹ Al-Awqati Affidavit, para. 22, Application Record Tab 2.

¹² Al-Awqati Affidavit, para. 23, Application Record Tab 2.

Ontario Municipal Board hearings and subsequent appeals in relation to the site approvals. In addition, in October 2017, certain aspects of the building were designated as heritage attributes that must be retained despite any redevelopment. As such, construction costs for the Adelaide Project are likely to be higher.¹³

13. Also in 2017, the market for syndicated mortgages in Ontario effectively “froze” because a number of other mortgage brokers and administrators became insolvent and were the subject of regulatory action by the Superintendent. Accordingly, lenders refused to provide construction financing to the few remaining projects with syndicated mortgages administered by Hi-Rise (including the Adelaide Project) where construction had either not started or was at an early stage.¹⁴

14. For more than the last year, Adelaide has been attempting to realize value from the Adelaide Project. For example, in 2017, after the “freeze” occurred in the syndicated mortgage market, Adelaide retained Bank of Montreal (“**BMO**”) as a financial advisor to market the Adelaide Project for sale in its current state. Although one or more offers were obtained for the Adelaide Project, Adelaide concluded that such offers were inadequate in light of the comparatively higher value achieved from another project for which Hi-Rise also administered the syndicated mortgage.¹⁵

15. By the later part of 2018, Adelaide decided to place the Adelaide Project back on the market. Again, BMO acted as financial advisor and conducted a sales process for the Property which included the identification of potential purchasers, the preparation of a confidential information memorandum, and a solicitation of interest from potential

¹³ Al-Awqati Affidavit, para. 26, Application Record Tab 2.

¹⁴ Al-Awqati Affidavit, paras. 18-19, Application Record Tab 2.

¹⁵ Al-Awqati Affidavit, paras. 29-30, Application Record Tab 2.

purchasers. As set out above, the purpose of the sales process was to obtain the highest possible value for the Property, in order to maximize recoveries for Syndicated Mortgage Investors.¹⁶

16. As further set out above, during the sales process, it became apparent that instead of an outright sale of the Property, a joint venture between a purchaser and Adelaide to co-develop the Property would result in a higher recovery to the Syndicated Mortgage Investors. Accordingly, a joint venture structure was pursued (defined above as the “Transaction”).¹⁷

17. As a result of the sales process, a reputable and successful developer (the “Developer”) was identified as the best party with whom to transact. The Developer and Adelaide have therefore entered into a confidential letter of intent (“LOI”) which provides for a joint venture structure for the Transaction. It further provides that the Developer has until March 29, 2019 to conduct due diligence on the Property; and if the Developer waives conditions, Adelaide will have 30 days to receive the Required Approval, which (if obtained) Hi-Rise will provide to Adelaide.¹⁸

18. Because the terms of the Transaction are more complex than a straightforward sale of the property in its current state, Hi-Rise would like to have Rep Counsel appointed to ensure that Investors’ interests are adequately represented, and to provide information to Investors and allow them to decide whether to approve the Transaction despite the fact

¹⁶ Al-Awqati Affidavit, para. 31, Application Record Tab 2.

¹⁷ Al-Awqati Affidavit, para. 32, Application Record Tab 2.

¹⁸ Al-Awqati Affidavit, paras. 33-34, Application Record Tab 2.

that the proceeds received from the Transaction may be insufficient to repay the full amounts owing to Investors under the Syndicated Mortgage.¹⁹

B. The Initial Return of This Application

i. The Necessity of Rep Counsel

19. In the summer of 2018, Hi-Rise recognized that Investors would be best served if they had counsel to represent them. Cassels was aware of the work that MT had done as representative counsel in a number of investment firm restructurings. At the Investors' request, Cassels introduced them to MT.²⁰

20. Subsequently, pursuant to an Engagement Letter dated September 6, 2018 (the "**Engagement Letter**"), this group of Investors (collectively, the "**Advisory Committee**") engaged MT to act on their behalf in seeking a resolution to matters related to the Adelaide Project, including recovery of funds advanced under the Syndicated Mortgage (the "**Existing Engagement**").²¹

21. The Advisory Committee was created in order to enable MT to comply with its professional obligations including managing potential conflicts of interest and *Canada's Anti-Spam Legislation* requirements. Unfortunately, the Advisory Committee has proved ineffective such that MT cannot effectively fulfill its role of negotiating for, and advocating on behalf of, Investors within the current structure of the existing engagement.²²

22. The Rep Counsel Order (the "**Order**") sought through this application is intended to address the problems with the current mandate. It will require the establishment of an

¹⁹ Al-Awqati Affidavit, para. 35, Application Record Tab 2.

²⁰ Al-Awqati Affidavit, para. 39, Application Record Tab 2.

²¹ Al-Awqati Affidavit, para. 40, Application Record Tab 2.

²² Al-Awqati Affidavit, para. 42, Application Record Tab 2.

“Official Committee” to provide instructions to Rep Counsel, and such Official Committee will be established through the “Official Committee Process” and will follow the “Official Committee Protocol”, both of which are attached as schedules to the draft order.²³ These structures will be in place to ensure that Rep Counsel is able to effectively assist efforts to resolve matters relating to the Adelaide Project. Importantly, if the Transaction is approved in accordance with the Required Approval, MT will not have the authority to bind the Investors without further approval by this court. Finally, Investors will have the option to opt-out of any representation by Rep Counsel, and seek their own representation (at their own expense).²⁴

23. The Order also contemplates that notice of the appointment of Rep Counsel will be given to Investors and Investors will have the ability to opt out of representation by Rep Counsel. Any Investors who opt out will be able to represent themselves in these proceedings or engage their own counsel at their own expense.²⁵

ii. Hi-Rise’s Powers and Obligations Pursuant to the MAA and LPA

24. Hi-Rise is not certain whether it has the power under the LPA, MAA, and/or the *Trustee Act* to compromise and/or settle amounts owing to Investors under the Syndicated Mortgage in a deficiency situation. The MAA provides that Hi-Rise holds the amount advanced by the Investor and the Syndicated Mortgage as trustee for the Investor. The MAA also provides that the rights and obligations of the parties (i.e., Hi-Rise and the Investor/ Plan Administrator) are set out in the LPA. The LPA governs Hi-Rise’s

²³ Draft Order, Application Record, Tab 3.

²⁴ Al-Awqati Affidavit, paras. 43-44, Application Record Tab 2.

²⁵ Draft Order, Application Record, Tab 3.

rights, powers, and obligations in respect of administrating the Syndicated Mortgage. These rights, powers, and obligations of Hi-Rise include the following.²⁶

- (a) pursuant to section 8 of the LPA: upon default of the Borrower to “make such decisions, to take such action and exercise all such rights and remedies as Hi-Rise may, in its absolute discretion, deem advisable in the best interests of all participants in the Participation Loan, including the right to re-negotiate the Loan Commitment with the Borrower upon such terms as Hi-Rise shall deem advisable”; and
- (b) pursuant to section 13 of the LPA: “to give a good and valid discharge or assignment of the Participation Loan without the consent of the participants in the Participation Loan, provided all monies due under the Participation Loan as originally agreed upon or as amended, together with all other costs and charges, have been fully repaid or will be fully repaid under the terms of any discharge or assignment”. [emphasis added]

25. In addition, certain LPAs executed in 2011, and all LPAs executed after 2011 permit Hi-Rise “to make all decisions and take any actions it may deem necessary to protect the principal advanced under the Participation Loan and enhance the value of the security including, without limitation, changing the nature and scope of the mortgage security”.²⁷

²⁶ Al-Awqati Affidavit, para. 50, Application Record Tab 2.

²⁷ Al-Awqati Affidavit, para. 52, Application Record Tab 2.

26. The terms of the LPA (especially section 13) do not appear to contemplate situations like this where Hi-Rise wishes to discharge the Syndicated Mortgage even though the proceeds being realized may not be sufficient to repay Investors in full.²⁸

27. Hi-Rise believes that it has the power pursuant to its MAAs and LPAs to initiate the Two-Step Process, however, in doing so Hi-Rise wants to ensure that it is acting in a manner consistent with its obligations pursuant to the MAA and LPA, and at law, and that it provides a democratic process that permits Investors to vote on the Transaction.²⁹

iii. Creation of Rep Counsel Charge and Company Charge

28. Hi-Rise seeks an order creating a Rep Counsel Charge and Company Charge (collectively, the “**Charges**”). The Rep Counsel Charge would cover fees incurred by MT; the Company Charge would cover fees incurred by Hi-Rise in respect of work done by Cassels Brock in preparing and bringing this application.³⁰ The Order contemplates that the Charges would be subject to a cap of \$250,000. Hi-Rise proposes that the Charges rank subordinate to the Meridian Mortgage but in priority to the Syndicated Mortgage, and that relative to each other, the Company Charge and the Rep Counsel Charge rank *pari passu*.³¹

29. A portion of the legal fees of MT have not been paid by Adelaide. Hi-Rise proposes that these fees (which include fees of MT associated with preparing for this court application) be secured as part of the Rep Counsel Charge.³²

²⁸ Al-Awqati Affidavit, para. 53, Application Record Tab 2.

²⁹ Al-Awqati Affidavit, paras. 54-55, Application Record Tab 2.

³⁰ Al-Awqati Affidavit, para. 56, Application Record Tab 2.

³¹ Draft Order, Application Record Tab 3.

³² Al-Awqati Affidavit, para. 57, Application Record Tab 2.

30. Section 4 of the LPA appears allow Hi-Rise to pay expenses incurred in enforcing Investors' rights in priority to any payment owed to Investors. However, Hi-Rise wants to ensure that this interpretation of its rights under the LPA is accurate and consistent with its obligations to Investors.³³

C. The Subsequent Return of this Application

31. If the Required Approval of the Transaction is obtained, Hi-Rise will return before this court at a later date to seek an order approving and sanctioning the Transaction, and may seek additional direction pursuant to the *Trustee Act*, as required, to allow the Transaction to be completed.³⁴

32. Hi-Rise will also seek an order approving the conduct and fees of Rep Counsel.³⁵

PART III - THE ISSUES

33. The issues to be determined by this Court are as follows:

- (a) Whether to appoint Rep Counsel and grant additional relief as set out in the draft order to ensure that Rep Counsel is able to effectively fulfill its mandate;
- (b) Whether to create an administrative charge securing the fees Rep Counsel Charge and the Company Charge in priority to all other charges except the existing first mortgage in favour of Meridian;

³³ Al-Awqati Affidavit, para. 59, Application Record Tab 2.

³⁴ Al-Awqati Affidavit, paras. 3 and 54, Application Record Tab 2.

³⁵ Al-Awqati Affidavit, paras. 3 and 54, Application Record Tab 2.

- (c) Whether Hi-Rise has the power, pursuant to its LPAs, MAAs, or at law, to discharge the Syndicated Mortgage if the proceeds received from the disposition of the Transaction are insufficient to pay in full amounts owing under the Syndicated Mortgage;
- (d) Whether Hi-Rise is permitted to call, hold, and conduct the Meeting of the Investors in order for the Investors to consider and, if determined advisable, pass a resolution approving the Transaction and the Distribution;
- (e) Whether Hi-Rise is permitted to return for a further hearing at a later date to seek final approval of the Transaction if the Transaction has been approved by the Required Approval.

PART IV - LAW & ARGUMENT

D. The Appointment of Rep Counsel

34. Rule 10.01(1)(c) of the *Rules* permits a judge to appoint representative counsel in a proceeding concerning (among other things) the approval of a “sale, purchase, settlement, or other transaction” or in “any other matter where it appears necessary or desirable to make an order under [Rule 10]”.

35. The test for appointing Rep Counsel is a “balance of convenience” test:

... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience

that would be experienced by each party if the representation order were or were not granted.³⁶ [emphasis added]

36. In this circumstance, there are 642 individuals who directly (or whose registered plans) have advanced funds in respect of the Syndicated Mortgage over the Adelaide Project. Requiring each Investor to obtain their own counsel to ensure that their interests are protected in respect of the Transaction would lead to inefficiency, over-lawyering, and increased costs. Moreover, it would be nearly impossible for Adelaide to discuss and/or negotiate with each individual Investor and requiring Adelaide to do so would inevitably prolong the timeline for completion of the Transaction, potentially thwarting the completion of the Transaction entirely.³⁷

37. In contrast, the Rep Counsel order sought in this Application provides a mechanism through which Investors' interests can be represented by the establishment of an Official Committee to provide instructions to, and consult with, Rep Counsel with respect to matters related to the Syndicated Mortgage, the Transaction, and the Adelaide Project. By representing the Investors as a group, Rep Counsel will be more effectively able to advocate for the Investors' interests and work with Adelaide to ensure that the Investors' interests are adequately and fairly protected. Moreover the order contemplates an opt-out provision for Investors who do not wish to be represented by Rep Counsel. In these circumstances, the balance of convenience favours the appointment of Rep Counsel.³⁸

³⁶ *Dugal v. Research in Motion Ltd.*, [2007] O.J. No. 4535 (S.C.) para. 20, Applicant's BOA Tab 1. See also: *MacKinnon v Ontario (Municipal Employees Retirement Board)*, 2012 ONSC 4450, Applicant's BOA Tab 5.

³⁷ Al-Awqati Affidavit, paras. 32-34, Application Record Tab 2.

³⁸ Al-Awqati Affidavit, paras. 43-45, Application Record Tab 2.

E. Direction Pursuant to the *Trustee Act* and the *Rules*

38. The *Trustee Act*³⁹ and the *Rules*⁴⁰ create a framework for trustees to seek the Court's guidance in the interpretation and implementation of their power and authority pursuant to applicable governing agreements and at law.

39. In particular, section 60 of the *Trustee Act* permits a trustee to seek "advice as to the legal matters or legal difficulties arising in the *discharge of [their] duties...*" [emphasis added].⁴¹ Pursuant to this section, the Court has the power to provide direction in respect of a trustee's proposed plan to manage or administer trust property to ensure that such management or administration is consistent with a trustee's obligations.⁴² The Court has relied on this power to assist trustees in the management of complex transactions related to trust property where the Court's advice and direction are required to

- (a) sanction, in effect, the sequence of the steps which will be required to complete a proposed transaction; and
- (b) permit a final order hearing to consider whether the proposed transaction is fair and reasonable.⁴³

40. The Court's advice and direction is particularly required where, as here, the agreements governing Hi-Rise's obligations to investors do not clearly authorize Hi-Rise to implement the Two-Step Process that it proposes to effect. The MAA and LPA do not provide clear guidance regarding Hi-Rise's power to

³⁹ Section 60.

⁴⁰ *Rules* 14.05(2), 14.05(3)(a) and (d).

⁴¹ *Trustee Act*, s. 60; *InnVest Real Estate Investment*, 2011 ONSC 7693 ("*Invest*"), paras. 12-14, Applicant's Book of Authorities Tab 4.

⁴² *Gilchrist v. Deakin Estate*, 2011 ONSC 1289, para. 4, Applicant's Book of Authorities Tab 3.

⁴³ *Innvest*, para. 10, Applicant's BOA Tab 4. See also: Endorsement of Justice Hainey dated February 28, 2019 in *Hi-Rise Capital Ltd. v Superintendent of Financial Services et. al.* (CV-19-00614404-00CL) ("*Hainey J. Endorsement*"), Applicant's Book of Authorities Tab 2.

- (a) hold a meeting,
- (b) put the Transaction to a vote,
- (c) create the Charges, and
- (d) discharge the Syndicated Mortgage if there is a deficiency.

41. The overall purpose of the LPA and MAA is to ensure that Hi-Rise acts in the best interests of Investors and fairly manages their investment. Hi-Rise's proposed course of action will ensure that Investors are adequately represented by Rep Counsel and that they are given the opportunity to decide for themselves whether the Transaction ought to be approved. Moreover, the Required Approval that Hi-Rise proposes is that same as that in section 6 of the *Companies' Creditors Arrangement Act*.⁴⁴ This approval threshold of a majority in number of votes cast representing two-thirds of value is a well accepted test.

42. The Two-Step Process also ensures that this Court has final oversight to approve the Transaction if this Court determines that it is fair and reasonable. The spirit of the MAA, LPA, and section 60 of the *Trustee Act* should provide Hi-Rise with the power to implement the Two-Step Process that it proposes through this application. However, Hi-Rise requires this Court's guidance to ensure that it is acting in a way that is consistent with its obligations pursuant to the MAA, LPA, and at law.

43. Finally, this Court has determined in a similar application that Hi-Rise has the power pursuant to its LPAs and MAAs to discharge a syndicated mortgage even where the proceeds for distribution to investors are not sufficient to repay the investors their full

⁴⁴ RSC, 1985, c. C-36.

principal and interest owing under the syndicated mortgage.⁴⁵ Hi-Rise believes that this power is consistent with the language of the LPAs and MAAs that it has entered into with Investors in respect of the Adelaide Project, however, Hi-Rise requires this Court's direction to ensure that its interpretation of its powers pursuant to the LPAs and MAAs is correct and consistent with its obligations to Investors. To be clear, at this stage, Hi-Rise is only asking for a declaration that it has the power to discharge the Syndicated Mortgage if the proceeds from the Transaction are not sufficient to repay Investors in full, but would only exercise such power if the Transaction receives the Required Approval and is given final approval by this Court at a subsequent hearing.

PART V - ORDER REQUESTED

44. Hi-Rise therefore respectfully requests an Order

- (a) appointing Rep Counsel to represent all of the Investors that have invested funds in the Syndicated Mortgage along with additional relief to ensure that Rep Counsel is able to implement its mandate effectively;
- (b) creating a Rep Counsel Charge and Company Charge in priority to all other charges except the existing first mortgage in favour of Meridian;
- (c) subject to further order of the court as described in paragraph 44(e), declaring that Hi-Rise has the power under the LPAs and MAAs that it entered into with Investors or at law to grant a discharge of the Syndicated Mortgage held by Investors over the Adelaide Project if the proceeds received from the disposition of the Transaction are insufficient to pay in full

⁴⁵ Hainey J. Endorsement, Applicant's Book of Authorities Tab 2.

amounts owing under the Syndicated Mortgage, and if the court determines that Hi-Rise does have such power, a discharge shall only be granted if the Transaction is approved by Investors in accordance with the Required Approval and by the court upon a subsequent return of this application;

- (d) permitting Hi-Rise to call, hold and conduct the Meeting of the Investors to be held at a location, date and time to be determined by Hi-Rise, in order for the Investors to consider and, if determined advisable, pass a resolution approving the Transaction and the Distribution, and authorizes the conduct of such Meeting;
- (e) if, at the Meeting, the Required Approval is obtained, permitting Hi-Rise to return for a further hearing of this Application to seek
 - (i) final approval of the Transaction and Distribution;
 - (ii) further directions to pursuant to section 60 of the *Trustee Act* as are appropriate to permit it to carry out its role in a manner consistent with the LPA and MAA and its duties at law; and
 - (iii) approval of the conduct and fees of Rep Counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of March 2019.



CASSELS BROCK & BLACKWELL LLP

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Dugal v. Research in Motion Ltd.*, [2007] O.J. No. 4535 (S.C.)
2. *Endorsement* of Justice Hainey dated February 28, 2019 in *Hi-Rise Capital Ltd. v Superintendent of Financial Services et. al.* (CV-19-00614404-00CL)
3. *Gilchrist v. Deakin Estate*, 2011 ONSC 1289
4. *InnVest Real Estate Investment*, 2011 ONSC 7693
5. *MacKinnon v Ontario (Municipal Employees Retirement Board)*, 2012 ONSC 4450

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

Trustee Act, RSO 1990, c T.23

Trustee, etc., may apply for advice in management of trust property

60 (1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate. R.S.O. 1990, c. T.23, s. 60 (1); 2000, c. 26, Sched. A, [s. 15 \(2\)](#).

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 10 REPRESENTATION ORDER

Representation Of An Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the Variation of Trusts Act;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

Settlement Affecting Persons Who Are Not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

Representation Of A Deceased Person

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding.

Relief From Binding Effect Of Order

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;

(b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside.

APPLICATIONS — BY NOTICE OF APPLICATION

Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30). R.R.O. 1990, Reg. 194, [r. 14.05 \(1\)](#); O. Reg. 484/94, s. 5; O. Reg. 43/14, s. 5 (1).

Information for Court Use

(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 14E, 14E.1, 68A or 73A. O. Reg. 260/05, s. 2; O. Reg. 43/14, s. 5 (2).

Application under Statute

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, [r. 14.05 \(2\)](#); O. Reg. 292/99, s. 1 (2).

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
- (g.1) for a remedy under the [Canadian Charter of Rights and Freedoms](#); or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, [r. 14.05 \(3\)](#); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.

HI-RISE CAPITAL LTD.
Applicant

SUPERINTENDENT OF FINANCIAL SERVICES *et. al.*
Respondents

Court File No. CV-19-616261-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE APPLICANT
(APPLICATION RETURNABLE MARCH 21, 2019)**

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