

**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.**

**EIGHTH REPORT OF MILLER THOMSON LLP, IN ITS CAPACITY
AS COURT-APPOINTED REPRESENTATIVE COUNSEL**

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I. INTRODUCTION

1. Pursuant to the Order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated March 21, 2019 (the “**Appointment Order**”) Miller Thomson LLP was appointed as Representative Counsel to represent all individuals and/or entities (“**Investors**”) that hold an interest in a syndicated mortgage administered by Hi-Rise Capital Ltd. (“**Hi-Rise**”) in respect of the proposed development known as the “Adelaide Street Lofts” (the “**Project**”) at the property municipally known as 263 Adelaide Street West, Toronto, Ontario (the “**Property**”) and owned by Adelaide Street Lofts Inc. (“**Adelaide**”), in connection with the negotiation and implementation of a settlement with respect to such investments, except for those Investors who opted out of representation by Representative Counsel in accordance with the terms of the Appointment Order (the “**Opt Out Investors**”). Copies of the Appointment Order and Endorsement of Justice Hainey dated March 22, 2019 are attached hereto as **Appendix “A”**.

2. Pursuant to the Appointment Order, Representative Counsel was directed to establish an Official Committee of Investors (the “**Official Committee**”) in accordance with the process and procedure described in Schedule “B” attached to the Appointment Order.

3. Pursuant to the Order and Endorsement of Justice Hainey dated April 15, 2019 (copies of which are attached hereto as **Appendix “B”**), the Official Committee was approved and constituted. There are currently 4 members of the Official Committee. Representative Counsel regularly consults with and takes instruction from the Official Committee.

4. Pursuant to the Endorsement of Justice Hainey dated April 4, 2019, a copy of which is attached hereto as **Appendix “C”**, Representative Counsel was granted leave to file reports with the Court.

II. PURPOSE OF REPORT

A. Judicial Mediation & Minutes of Settlement

5. On November 27, 2019, Representative Counsel, members of the Official Committee, Hi-Rise, Adelaide, Meridian Credit Union Limited, Lanterra Developments Ltd. (“**Lanterra**”) and certain of the Opt Out Investors attended a Court-ordered mediation before the Honourable Mr. Justice McEwen (the “**Judicial Mediation**”).

6. The Judicial Mediation was successful insofar as the parties agreed upon a settlement (the “**Settlement**”) memorialized in the Minutes of Settlement, as amended by the First Amendment to the Minutes of Settlement (the “**Minutes**”, a copy of which is attached hereto as **Appendix “D”**). The Minutes and the Settlement contemplated, among other things, a sale of the Property to Lanterra for a purchase price of \$69,000,000 (the “**Lanterra Transaction**”), and were

subsequently approved by the Investors (by way of an Investor vote). Thereafter, Hi-Rise sought approval of the Settlement and Minutes by the Court (the “**Approval Motion**”).

7. On April 27, 2020, Justice Hainey granted the Approval Motion and issued an Approval and Vesting Order (the “**Approval and Vesting Order**”) which, *inter alia*, approved the Lanterra Transaction and the Minutes (including the First Amendment), declared that Adelaide’s right, title and interest in and to the Purchased Assets (as defined in the Approval and Vesting Order) shall vest absolutely in Lanterra upon certain conditions being met, and directed that the Distribution of the Purchase Price in accordance with the Minutes be approved. Pursuant to the First Amendment to the Minutes of Settlement, the Closing Date was extended to November 16, 2020. A copy of the Approval and Vesting Order is attached hereto as **Appendix “E”**.

8. Prior to the closing of the Lanterra Transaction, Adelaide was the registered owner of the Property. Adelaide is wholly owned by 263 Holdings Inc. (“**263 Holdings**”). Mr. Jim Neilas (“**Neilas**” together with Adelaide and 263 Holdings, the “**Neilas Parties**”) executed the Minutes on behalf of each of the Neilas Parties.

9. In accordance with the Minutes, the Lanterra Transaction closed on November 16, 2020, and the amount of \$46,074,666.27 of the proceeds (the “**Net Sale Proceeds**”) was delivered to Representative Counsel, representing the balance of the purchase price after certain payments contemplated in the Minutes were made.

B. Tax Arrears & Disputed Funds

10. Immediately after the closing of the Lanterra Transaction, a dispute arose between Representative Counsel and the Neilas Parties with respect to liability for payment of unpaid municipal tax arrears owing in respect of the Property in the amount of \$914,793.40 as at

November 16, 2020 (the “**Tax Arrears**”). Details with respect to the Tax Arrears are set out in the Statement of Adjustments related to the closing of the Lanterra Transaction and the Tax Statement issued to Adelaide, a copy of which is attached hereto as **Appendix “F”**.

11. In light of the dispute, the amount of the Tax Arrears was held back from the amounts distributed to 263 Holdings, and the funds in the amount of the Tax Arrears (the “**Disputed Funds**”) are now being held in trust by counsel to the Neilas Parties pending a judicial determination of this issue.

12. On January 21, 2021, the parties attended a case conference before Justice Hainey to determine a schedule for the hearing of a motion with respect to liability for payment of the Tax Arrears, or in other words, the entitlement to the Disputed Funds (the “**Municipal Tax Motion**”). Pursuant to the Endorsement of Justice Hainey dated January 21, 2021, a copy of which is attached as **Appendix “G”**, the Municipal Tax Motion is scheduled to be heard on May 13, 2021.

13. Details with respect to the Municipal Tax Motion have been previously reported by Representative Counsel in its Supplemental Sixth Report dated November 20, 2020 and its Seventh Report dated March 10, 2021¹. This Eighth Report is filed to respond to certain of the issues raised in the motion record of 263 Holdings dated February 12, 2021 and Affidavit of Jim Neilas sworn February 12, 2021 (the “**Neilas Affidavit**”), filed in respect of the Municipal Tax Motion.

¹ Supplemental Sixth Report dated November 20, 2020, a copy of which is attached as **Appendix “H”** (without appendixes) at paras. 9 to 13; Seventh Report dated March 10, 2021, a copy of which is attached as **Appendix “I”** (without appendixes), at paras. 41 to 44.

III. TERMS OF REFERENCE

14. In preparing this Eighth Report and making the comments herein Representative Counsel has, where applicable, relied upon information prepared or provided by Hi-Rise and/or Adelaide, and information from other third-party sources (collectively, the “**Information**”). Certain of the information contained in this Eighth Report may refer to, or is based on, the Information. As the Information has been provided by third parties or has been obtained from documents filed with the Court in this matter, Representative Counsel has relied on the Information and, to the extent possible, has reviewed the Information for reasonableness. However, Representative Counsel has neither audited nor otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook and accordingly, Representative Counsel expresses no opinion or other form of assurance in respect of the Information.

15. All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Appointment Order and the Minutes.

IV. POSITION OF THE PARTIES

16. Although the Tax Arrears were paid from the closing funds (thereby reducing the amount ultimately available for Investors), Representative Counsel takes the position that such liability ought to have been paid by Adelaide, and that the Disputed Funds should therefore be deducted from the amount otherwise payable to 263 Holdings under the Minutes and remitted to Representative Counsel for Distribution to the Investors.

17. The Neilas Parties' position is that because Adelaide had decided to stop paying municipal taxes in respect of the Property prior to the date of the execution of the Minutes, it is not liable for same. The Neilas Parties seek to instead shift the burden for payment of the Tax Arrears to the Investors, some of whom are already suffering a significant shortfall on their recoveries.

18. In support of its position, 263 Holding relies on information and documents that were circulated with respect to the first proposed settlement by Adelaide/263 Holdings (prior to the Judicial Mediation and the Settlement), which contemplated a joint venture with Lanterra and 263 Holding's continued interest and involvement in the Property (the "**First Settlement**"). This First Settlement was not supported by Representative Counsel or the Official Committee², and was ultimately turned down by vote of the Investors.³

19. In Representative Counsel's view, the Neilas Parties' argument that Representative Counsel knew of the Tax Arrears prior to execution of the Minutes is not relevant to whether it should effectively be borne by the Investors.

V. REPRESENTATIVE COUNSEL'S RESPONSE TO THE NEILAS AFFIDAVIT

20. Representative Counsel wishes to respond to the following points raised in the Neilas Affidavit.

² Details with respect to the recommendation against the First Settlement is set out in the Third Report of Representative Counsel dated October 18, 2021 at paras. 10 to 17, filed, and attached as Exhibit "J" to the Neilas Affidavit.

³ Details with respect to the outcome of the First Settlement and corresponding vote is set out in the Fourth Report of Representative Counsel dated January 9, 2020 at paras. 20 to 26, filed, and attached as Exhibit "L" to the Neilas Affidavit.

A. Communication Issued to Investors

21. At paragraph 17 of the Neilas Affidavit, the affiant cites a Communication to Investors dated July 4, 2019 (the “**July Communication**”), a copy of which is attached hereto as **Appendix “J”**, in support of the proposition that Representative Counsel advised Investors that any distribution to Investors would be net of municipal taxes. This is simply not true.

22. Notwithstanding that the July Communication was issued prior to the Judicial Mediation and the Settlement, the July Communication states that “the balance (net of professional fees, commissions, taxes and certain other disbursements) will be distributed to Investors.”

23. Communications issued by Representative Counsel are intended to provide Investors with information on the status of the within proceeding in clear and certain terms. This July Communication relates to the First Settlement, which as noted above, was recommended against and voted down by Investors. In any event, the context makes clear that Representative Counsel is referring to “taxes” on professional fees and the like, and it also refers to “other disbursements”, such as those associated with discharging professional obligations.

24. Further and importantly, nowhere in any Court Report or Communication issued by Representative Counsel to Investors has Representative Counsel advised that Distributions would be net of municipal taxes owing on the Property.

B. Information Officer Report

25. At paragraphs 20 to 29, the Neilas Parties rely on the report dated October 7, 2019 (the “**IO Report**”)⁴ of Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Information Officer

⁴ Attached as Exhibit “I” to the Neilas Affidavit.

in these proceedings (the “**Information Officer**”) appointed pursuant to the Order of Justice Hailey dated September 17, 2019 (the “**IO Appointment Order**”).⁵ Pursuant to the IO Appointment Order, the Information Officer’s mandate included reviewing and reporting to the Court and all stakeholders in respect of, *inter alia*, the “Company’s proposed sale of the Property”.

26. The Neilas Affidavit takes the contents of the IO Report and Representative Counsel’s views on the IO Report out of context.

27. The IO Report, and the projected returns to Investors set out therein, was prepared in connection with the First Settlement. Again, the Official Committee recommended against the First Settlement and it was ultimately turned down by Investor vote.⁶

28. In any event, paragraph 9 of the Information Officer’s Report states that “...Readers are cautioned that since projections are based upon assumptions about future events that are not ascertainable, the actual results will vary from the projections, and the variations could be significant.” Accordingly, the projections contained in the IO Report (and which are reproduced in the Neilas Affidavit) were not intended to be binding or determinative.

29. Further, Paragraph 10 of the IO Report states that “This Report should be read in conjunction with the Initial Application, the Information Officer Appointment Order and Representative Counsel’s Reports.”

30. Representative Counsel agrees that the Information Officer completed its mandate and that it stated this in its Third Report, but the Third Report was dedicated to recommending against

⁵ Attached as Exhibit “H” to the Neilas Affidavit.

⁶ *Supra*, 2 and 3, above.

Investors casting their vote in favour of the First Settlement. This recommendation was made with knowledge of the IO Report, and the projections contained therein.⁷

VI. CONCLUSION

31. Representative Counsel's opposes the relief sought in the Motion Record of 263 Holdings. In Representative Counsel's view, Adelaide's decision to stop paying municipal taxes does not mean that it should now be permitted to shift Adelaide's liability for the Tax Arrears to the Investors.

32. For the foregoing reasons, Representative Counsel respectfully requests that the Court deny the relief sought by 263 Holdings, and instead, order that the Disputed Funds be released to Representative Counsel and for Distribution to the Investors.

All of which is respectfully submitted at Toronto, Ontario this 12 day of March, 2021.



**Miller Thomson LLP, solely in its capacity
as Court-appointed Representative Counsel**

⁷ *Supra*, footnote 2, above.

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**EIGHTH REPORT OF REPRESENTATIVE
COUNSEL
(March 12, 2021)**

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