

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

THE HONOURABLE)
)
MR. JUSTICE HAINEY) THURSDAY, THE 21st
) DAY OF MARCH, 2019

**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.**

ORDER

THIS APPLICATION, made by the Applicant, Hi-Rise Capital Ltd. ("**Hi-Rise**"), for advice and directions and an Order appointing representative counsel pursuant to section 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, as amended and Rule 10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, was heard this day at the Court House, 330 University Avenue, Toronto, Ontario.

ON READING the Application Record of the Applicant, including the Affidavit of Noor Al-Awqati sworn March 19, 2019, and on hearing the submissions of the lawyer(s) for each of the Applicant, the Superintendent of Financial Services, prospective Representative Counsel, Adelaide Street Lofts Inc. (the "**Borrower**"), Teresa Simonelli and Tony Simonelli and other investors represented by Guardian Legal Consultants (as set out on the counsel slip), Alexander Simonelli (appearing in person), Nicholas Verni (appearing in person), and Nick Tsakonacos (appearing in person) no one else appearing,

SERVICE

1. **THIS COURT ORDERS** that all parties entitled to notice of this Application have been served with the Notice of Application, and that service of the Notice of Application

is hereby abridged and validated such that this Application is properly returnable today, and further service of the Notice of Application is hereby dispensed with.

APPOINTMENT OF REPRESENTATIVE COUNSEL

2. **THIS COURT ORDERS** that Miller Thomson LLP is hereby appointed as representative counsel to represent the interests of all persons (hereafter, all persons that have not delivered an Opt-Out Notice (defined below) shall be referred to as the “**Investors**”) that have invested funds in syndicated mortgage investments (“**SMI**”) in respect of the proposed development known as the “Adelaide Street Lofts” (the “**Project**”) at the property known municipally as 263 Adelaide Street West, Toronto, Ontario (the “**Property**”).

3. **THIS COURT ORDERS** that any individual holding an SMI who does not wish to be represented by the Representative Counsel and does not wish to be bound by the actions of Representative Counsel shall notify the Representative Counsel in writing by facsimile, email to sdecaria@millerthomson.com (Attention: Stephanie De Caria), courier or delivery, substantially in the form attached as **Schedule “A”** hereto (the “**Opt-Out Notice**”), and shall thereafter not be so represented and shall not be bound by the actions of the Representative Counsel and shall represent himself or herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in respect of his or her SMI (any such Investor who delivers an Opt-Out Notice in compliance with the terms of this paragraph, “**Opt-Out Investor**”) and any Opt-Out Investor who wishes to receive notice of subsequent steps in this proceeding shall deliver a Notice of Appearance.

4. **THIS COURT ORDERS** that the Representative Counsel shall represent all Investors in connection with the negotiation and implementation of a settlement with respect to their investments in the SMI and the Project, and shall subject to the terms of the Official Committee Protocol be entitled to advocate, act, and negotiate on behalf of the Investors in this regard, provided that the Representative Counsel shall not be permitted to (i) bind investors to any settlement agreement or proposed distribution relating to the Property without approval by the investors and the Court; or (ii) commence or continue any proceedings against Hi Rise, its affiliates or principals, on

behalf of any of the Investors or any group of Investors, and for greater certainty, Representative Counsel's mandate shall not include initiating proceedings or providing advice with respect to the commencement of litigation but may include advising Investors with respect to the existence of alternative courses of action.

5. **THIS COURT ORDERS** that Representative Counsel be and it is hereby authorized to retain such actuarial, financial and other advisors and assistants (collectively, the "**Advisors**") as may be reasonably necessary or advisable in connection with its duties as Representative Counsel.

6. **THIS COURT ORDERS** that the Representative Counsel be and it is hereby authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order and fulfill its mandate hereunder.

TERMINATION OF EXISTING ADVISORY COMMITTEE

7. **THIS COURT ORDERS** that the Engagement Letter dated September 6, 2018, including the Terms of Reference attached as Schedule "A" thereto (the "**Engagement Letter**"), be and it is hereby terminated, provided that nothing contained herein shall terminate the requirement that outstanding fees and disbursements thereunder be paid.

8. **THIS COURT ORDERS** that the respective roles of the Advisory Committee and Communication Designate (as such terms are defined in the Engagement Letter) be and they are hereby terminated.

9. **THIS COURT ORDERS** that the Communication Designate shall forthwith provide to Representative Counsel all security credentials in respect of the Designated Email (as such term is defined in the Engagement Letter).

APPOINTMENT OF OFFICIAL COMMITTEE

10. **THIS COURT ORDERS** that Representative Counsel shall take steps to establish an Official Committee of Investors (the "**Official Committee**") substantially in accordance with the process and procedure described in the attached **Schedule "B"** ("**Official Committee Establishment Process**").

11. **THIS COURT ORDERS** that the Official Committee shall operate substantially in accordance with the protocol described in the attached **Schedule "C"** (the "**Official Committee Protocol**").

12. **THIS COURT ORDERS** that the Representative Counsel shall consult with and rely upon the advice, information, and instructions received from the Official Committee in carrying out the mandate of Representative Counsel without further communications with or instructions from the Investors, except as may be ordered otherwise by this Court.

13. **THIS COURT ORDERS** that in respect of any decision made by the Official Committee (a "**Committee Decision**"), the will of the majority of the members of the Official Committee will govern provided, however, that prior to acting upon any Committee Decision, Representative Counsel may seek advice and direction of the Court pursuant to paragraph 22 hereof.

14. **THIS COURT ORDERS** that, in circumstances where a member of the Official Committee has a conflict of interest with the interests of other investors respect to any issue being considered or decision being made by the Official Committee, such member shall recuse himself or herself from such matter and have no involvement in it.

15. **THIS COURT ORDERS** that the Representative Counsel shall not be obliged to seek or follow the instructions or directions of individual Investors but will take instruction from the Official Committee..

INVESTOR INFORMATION

16. **THIS COURT ORDERS** that Hi-Rise is hereby authorized and directed to provide to Representative Counsel the following information, documents and data (collectively, the "**Information**") in machine-readable format as soon as possible after the granting of this Order, without charge, for the purposes of enabling Representative Counsel to carry out its mandate in accordance with this Order:

- (a) the names, last known addresses and last known telephone numbers and e-mail addresses (if any) of the Investors; and

- (b) upon request of the Representative Counsel, such documents and data as the Representative Counsel deems necessary or desirable in order to carry out its mandate as Representative Counsel

and, in so doing, Hi-Rise is not required to obtain express consent from such Investors authorizing disclosure of the Information to the Representative Counsel and, further, in accordance with section 7(3) of the *Personal Information Protection and Electronic Documents Act*, this Order shall be sufficient to authorize the disclosure of the Information, without the knowledge or consent of the individual Investors.

FEES OF COUNSEL

which amount shall exclude disbursements incurred by Representative Counsel

17. **THIS COURT ORDERS** that the Representative Counsel shall be paid by the Borrower its reasonable fees ~~and disbursements~~ *and disbursements* consisting of fees ~~and disbursements~~ from and after the date of this order incurred in its capacity as Representative Counsel ("**Post-Appointment Fees**"), up to a maximum amount of \$250,000 or as may otherwise be ordered by this Court. The Borrower shall make payment on account of the Representative Counsel's ~~fees and disbursements~~ *fees* on a monthly basis, forthwith upon rendering its accounts to the Borrower for fulfilling its mandate in accordance with this Order, and subject to such redactions to the invoices as are necessary to maintain solicitor-client privilege between the Representative Counsel and the Official Committee and/or Investors. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination. Representative Counsel shall also obtain approval of its fees and disbursements from the Court on notice to the Official Committee.

18. **THIS COURT ORDERS** that the Representative Counsel is hereby granted a charge (the "**Rep Counsel Charge**") on the Property, as security for the Post-Appointment Fees and that the Rep Counsel Charge shall form an unregistered charge on the Property in priority to the existing \$60 million mortgage registered in the name of Hi-Rise Capital Ltd. and Community Trust Company as Instrument Numbers AT3522463, AT3586925, AT3946856, AT4420428, AT4505545, AT4529978, AT4572550, AT4527861, and AT4664798 (the "**Hi-Rise Mortgage**"), but subordinate to the \$16,414,000 mortgage in favour of Meridian Credit Union Limited registered as

Instrument Number AT4862974 ("**Meridian Mortgage**"), and that Rep Counsel Charge will be subject to a cap of \$250,000. No person shall register or cause to be registered the Rep Counsel Charge on title to the Property.

19. **THIS COURT ORDERS** that the motion by Representative Counsel for a charge for its fees prior to the date its appointment and by counsel for Hi-Rise seeking a charge for its fees incurred in respect of this Application both shall be heard before me on April 4, 2019.

20. **THIS COURT ORDERS** that the reasonable cost of Advisors engaged by Representative Counsel shall be paid by the Borrower. Any dispute over Advisor costs will be submitted to the Court for resolution.

21. **THIS COURT ORDERS** that the payments made by the Borrower pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers of undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

GENERAL

22. **THIS COURT ORDERS** that the Representative Counsel shall be at liberty, and it is hereby authorized, at any time, to apply to this Court for advice and directions in respect of its appointment or the fulfillment of its duties in carrying out the provisions of this Order or any variation of the powers and duties of the Representative Counsel, which shall be brought on notice to Hi-Rise and the Official Committee, the Financial Services Commission of Ontario ("**FSCO**") and any person who has filed a Notice of Appearance (including the Opt-Out Investors) unless this Court orders otherwise.

23. **THIS COURT ORDERS** that the Representative Counsel and the Official Committee shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order or any subsequent Orders, save and except for liability arising out of gross negligence or wilful misconduct.

24. **THIS COURT ORDERS** that any document, notice or other communication required to be delivered to Representative Counsel under this Order shall be in writing, and will be sufficiently delivered only if delivered to

**Miller Thomson LLP, in its capacity as
Representative Counsel**

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, Ontario M5H 3S1

Facsimile: 416-595-8695

Email: sdecaria@millerthomson.com and
gazeff@millerthomson.com

Attention: Gregory Azeff & Stephanie De Caria

25. **THIS COURT ORDERS** that the Representative Counsel shall as soon as possible establish a website and/or online portal (the “**Website**”) for the dissemination of information and documents to the Investors, and shall provide notice to Investors of material developments in this Application via email where an email address is available and via regular mail where appropriate and advisable.

POWERS OF HI-RISE CAPITAL LTD.

26. **THIS COURT ORDERS** that the issue of whether Hi-Rise has the power under loan participation agreements (each, an “**LPA**”) and mortgage administration agreements (each, a “**MAA**”) that it entered into with investors in the Project and at law grant to a discharge of the Hi-Rise Mortgage despite the fact that the proceeds received from the disposition of a transaction relating to the Property (the “**Transaction**”) may be insufficient to pay in full amounts owing under the Hi-Rise Mortgage will be determined by motion before me on April 4, 2019.

INVESTOR AND COURT APPROVAL

27. **THIS COURT ORDERS** that Hi-Rise is permitted to call, hold and conduct a meeting (the “**Meeting**”) of all investors in the Project, including Opt-Out 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 of proceeds therefrom (the "**Distribution**").

28. **THIS COURT ORDERS** that, in order to effect notice of the Meeting, Hi-Rise shall send notice of the location, date and time of the Meeting to investors at least ten days prior to the date of the Meeting, excluding the date of sending and the date of the Meeting, by the method authorized by paragraph 32 of this order.

29. **THIS COURT ORDERS** that accidental failure by Hi-Rise to give notice of the Meeting to one or more of the investors, or any failure to give such notice as a result of events beyond the reasonable control of Hi-Rise, or the non-receipt of such notice shall, subject to further order of this Court, not constitute a breach of this Order nor shall it invalidate any resolution passed or proceedings taken at the Meeting. If any such failure is brought to the attention of Hi-Rise, it shall use its best efforts to rectify it by the method and in the time most reasonably practicable in the circumstances.

30. **THIS COURT ORDERS** that Hi-Rise shall permit voting at the Meeting either in person or by proxy.

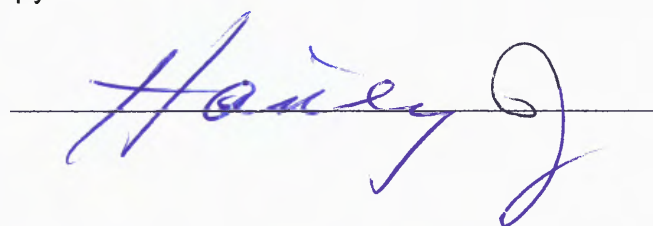
31. **THIS COURT ORDERS** that if at the Meeting a majority in number of the investors representing two-thirds in value present and voting either in person or by proxy cast votes in favour of the proposed Transaction and Distribution, Hi-Rise may proceed to bring a motion to this court, on a date to be fixed, for

- (a) final approval of the Transaction and Distribution;
- (b) 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
- (c) approval of the conduct and fees of Representative Counsel.

NOTICE TO INVESTORS

32. Hi-Rise or Representative Counsel shall mail a copy of this Order to the last known address of each investor within 10 days of the date of this Order or where an

Investor's email address is known, the Order may instead be sent by email. Representative Counsel shall also post a copy of this Order on the Website.

A handwritten signature in blue ink, appearing to read "Honey", is written over a horizontal line. The signature is cursive and extends to the right of the line.

Schedule "A"

OPT-OUT NOTICE

**Miller Thomson LLP, in its capacity as
Representative Counsel**

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, Ontario M5H 3S1

Facsimile: 416-595-8695
Email: sdecaria@millerthomson.com

Attention: Stephanie De Caria

I/we, _____, are Investor(s) in a Hi-Rise Capital Ltd. mortgage registered against titled to the property municipally known as 263 Adelaide Street West. [***Please ensure to insert the name, names or corporate entity that appear on your investment documents***].

Under paragraph 3 of the Order of the Honourable Justice Hailey dated March 21, 2019 (the "**Order**"), Investors who do not wish Miller Thomson LLP to act as their representative counsel may opt out.

I/we hereby notify Miller Thomson LLP that I/we do not wish to be represented by the Representative Counsel and do not wish to be bound by the actions of Representative Counsel and will instead either represent myself or retain my own, individual counsel at my own expense, with respect to the SMI in relation to Adelaide Street Lofts Inc. and the property known municipally as 263 Adelaide St. W., Toronto, Ontario.

I also understand that if I wish to receive notice of subsequent steps in the court proceedings relating to this property, I or my counsel must serve and file a Notice of Appearance.

If the Investor(s) is an individual, please execute below:

Date

Signature

Date

Signature

If the Investor is a corporation, please execute below:

) _____
) [insert corporation name above]
) Per: _____
) Name: Name
) Title: Title
) I/We have the authority to bind
) the corporation

Schedule "B"

Official Committee Establishment Process

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 "**Order**") Miller Thomson LLP was appointed to represent all individuals and/or entities ("**Investors**") that hold an interest in a syndicated mortgage ("**SMI**"), administered by Hi-Rise Capital Ltd. ("**Hi-Rise**"), in respect of the property municipally known as 263 Adelaide Street West, Toronto, Ontario (the "**Project**") and the proposed development known as the "Adelaide Street Lofts". Pursuant to the Order, Representative Counsel was directed to appoint the Official Committee of Investors (the "**Official Committee**") in accordance with this Official Committee Establishment Process. The Official Committee is expected to consist of five Investors.

All capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Order. All references to a singular word herein shall include the plural, and all references to a plural word herein shall include the singular.

Pursuant to the Order, the Representative Counsel shall, among other things, consult with and take instructions from the Official Committee in respect of the SMI and the Project.

This protocol sets out the procedure and process for the establishment of the Official Committee.

Establishment of the Official Committee

1. As soon as reasonably practicable, Representative Counsel will deliver a communication calling for applications ("**Call for Official Committee Applications**") to Investors by mail and by email where an email address is available. Representative Counsel shall also post on the Website (as defined in the Order) a copy of the Call for Official Committee Applications.

2. The deadline to submit an application pursuant to the Call for Official Committee Applications will be 5:00 p.m. EST on ~~March 29~~ ^{April 1}, 2019 (the "**Applications Deadline**"), or such later date as Representative Counsel may deem reasonably practicable. Investors wishing to act as a member of the Official Committee (each, an "**Official Committee Applicant**") shall submit their application by the Applications Deadline. Applications submitted past the Applications Deadline will not be reviewed by Representative Counsel.

3. In order to serve as a member of the Official Committee, the Official Committee Applicant must be an Investor that holds an SMI. If the SMI is held through a corporate entity, the Official Committee Applicant must be a director of the corporation in order to be a member of the Official Committee.

4. An Official Committee Applicant must not have a conflict of interest with the interests of other investors.

5. Representative Counsel will review applications submitted by the Applications Deadline and will create a short list (the "**Short List**") of no more than 20 candidates who should be extended invitations for an interview. As soon as reasonably practicable, the interviews will be conducted by teleconference by Representative Counsel (the "**Interviews**"). For consistency in evaluating each Official Committee Applicant,

(a) all of the interviews will follow the same structure and will be approximately the same length (about half an hour); and

(b) substantially similar questions will be posed to each interviewee.

6. Following the Interviews, Representative Counsel will select seven Official Committee Applicants (the "**Short List Candidates**") who, in Representative Counsel's judgment, are the best candidates to serve as either (i) a member of the Official Committee (a "**Member**") or (ii) an alternate Member should any of the Members resign or be removed from the Official Committee (an "**Alternate**"). From the Short List Candidates, Representative Counsel will select five Members and two Alternates. In determining the Short List Candidates, Representative Counsel reserves the right to consider, among other factors: (i) experience with governance or the mortgage industry; (ii) education; (iii) answers to interview questions; (iv) the amount of the Official Committee Applicant's SMI.

7. As soon as reasonably practicable, Representative Counsel will submit the Short List Candidates to the Court for approval, along with each of their applications. A summary of each Member and Alternate and their respective qualifications will also be submitted to the Court.

Schedule "C"

Official Committee Protocol

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 "**Order**") Miller Thomson LLP was appointed to represent all individuals and/or entities ("**Investors**") that hold an interest in a syndicated mortgage ("**SMI**"), administered by Hi-Rise Capital Ltd. ("**Hi-Rise**"), in respect of the property municipally known as 263 Adelaide Street West, Toronto, Ontario (the "**Project**") and the proposed development known as the "Adelaide Street Lofts".

All capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Order. All references to a singular word herein shall include the plural, and all references to a plural word herein shall include the singular.

This protocol sets out the terms governing the Official Committee established by Representative Counsel pursuant to the Official Committee Establishment Process, as approved by the Order. All Investors that have been accepted by Representative Counsel to serve as a member of the Official Committee (each, a "**Member**") shall be bound by the terms of this protocol.

This protocol is effective as at the date of the Order.

The Official Committee and Representative Counsel shall be governed by the following Official Committee Protocol:

1. **Definitions:** Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Order.
2. **Resignations:** A Member may resign from the Official Committee at any time by notifying Representative Counsel and the other Members, by email. If a Member is incapacitated or deceased, such Member shall be deemed to have resigned from the Official Committee effective immediately.
3. **Expulsions:** Any Member may be expelled from the Official Committee for cause by Representative Counsel or by order of the Court. For greater certainty, "for cause" includes but is not limited to: (a) if a Member is unreasonably disruptive to or interferes with the ability of the Official Committee or Representative Counsel to conduct its affairs or fulfill their duties; (b) if a Member is abusive (verbal or otherwise) towards Representative Counsel or any Member; (c) if a Member fails to attend either (i) two (2) consecutive meetings without a valid reason (as determined by Representative Counsel in its sole discretion) or (ii) three (3) meetings whether or not a valid reason is provided; (d) if a Member commits any act or engages in any conduct that, in Representative Counsel's opinion, may bring the reputation or credibility of the Official Committee into dispute; (e) if in Representative Counsel's opinion, an irreconcilable conflict of interest arises between a Member and the Official Committee; or, (f) if, for any reason, a Member is unable to reasonably fulfil his/her duties as a Committee Member.

4. **Role of the Official Committee:** The role of the Official Committee is to consult with and provide instructions to Representative Counsel, in accordance with the terms of this protocol, with respect to matters related to the SMI and the Project.
5. **Multiple Views:** It is recognized and understood that Members may have divided opinions and differing recommendations, and accordingly, consensus on feedback regarding any potential resolution of matters related to the SMI and Project may not be achievable. In such circumstances, the will of the majority of the Members will govern. In making decisions and taking steps, Representative Counsel may also seek the advice and direction of the Court if necessary.
6. **Good Faith:** For the purposes of participation in the Official Committee, each Member agrees that he or she will participate in good faith, and will have appropriate regard for the legitimate interests of all Investors.
7. **No liability:** No Member shall incur any liability to any party arising solely from such Members' participation in the Official Committee or as a result of any suggestion or feedback or instructions such Member may provide to Representative Counsel.
8. **Compensation:** No Member shall receive compensation for serving as a Member of the Consecutive Committee.
9. **Chair:** Representative Counsel shall be the chair of the meetings of the Official Committee.
10. **Calling Meetings:** Representative Counsel, at the request of a Member or at its own instance, may call meetings of the Official Committee on reasonable advance written notice to the Members, which notice shall be made by e-mail. Meetings may be convened in person, at the offices of Miller Thomson LLP, or by telephone conference call.
11. **Quorum:** While it is encouraged that all Members participate in meetings, a meeting may be held without all of the Members present provided that at least three (3) Members are present in person or by telephone.
12. **Minutes:** Representative Counsel shall act as secretary of the meetings of the Official Committee and shall keep minutes of the meetings. Where issues of disagreement among Members arise, the minutes will reflect such disagreements. Such minutes shall be confidential and shared with Members only. Minutes are for administrative record keeping purposes only and are not intended to be binding or conclusive in any way. The minutes will record attendance, significant issues discussed and the results of votes taken by the Official Committee.
13. **Additional Rules and Guidelines:** Representative Counsel may adopt in its sole discretion, such reasonable procedural rules and guidelines regarding the governing of Official Committee meetings. Notwithstanding any provision in this Protocol and subject to the terms of the Order, Representative Counsel may, in its sole discretion, apply to

the Court for advice and direction on any matter, including, without limitation, with respect to instruction received from the Official Committee.

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**

ORDER

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Lawyers for the Applicant, Hi-Rise Capital Ltd.