

Court File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL
CORPORATION

Applicants

and

STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI and CARLO
TAUASI

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1)
OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C 1985, C. B-3, AS
AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT,
R.S.O. 1990, C. C.43, AS AMENDED**

NOTICE OF APPEAL

THE APPELLANT APPEALS to the Court of Appeal for Ontario from the Order of the Honourable Justice Black stipulating that the Holdback Reduction (defined below) is to be distributed to the Applicants free and clear of all trusts or deemed trust interests and/or claims pursuant to an endorsement released March 5, 2024 and a supplemental endorsement released March 12, 2024, made at Toronto (the “**Appealed Order**”).

THE APPELLANT ASK that the Order be set aside and an Order be granted:

- (a) Declaring that the trusts claims of the purchasers of pre-construction homes from the Respondent, Stateview Homes (NAO Towns II) Inc. (the “**Homebuyers**”) are

proportionate to the amounts prescribed by section 81 and section 138(4)(a) of the *Condominium Act 1998*, S.O. 1998, C. 19 (the “*Condominium Act*”);

- (b) Declaring that the Applicants have no entitlement to any amount of the Holdback Reduction that may be found to be subject to a trust, statutory, contractual, deemed, constructive or otherwise, and that such amounts must be repaid to the Receiver for distribution to the Homebuyers and/or Tarion Warranty Corporation (“**Tarion**”), as the case may be;
- (c) In addition, and/or in the alternative to paragraph (b), an Order stipulating that the Receiver’s distribution of the Holdback Amount to the Applicants is made without prejudice to any trust claims, statutory, contractual, deemed, constructive or otherwise, that were subject of the Class Action Holdback set out at paragraph 8(c) of the original Ancillary Relief Order of Justice Black, dated February 15, 2024;
- (d) The costs of this appeal; and
- (e) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

Context of the Appealed Order

- (a) The Respondent, Stateview Homes (NAO Towns II) Inc. (“**Nao II**”) is one of eight related single-purpose real estate companies (collectively, the “**Debtors**”) that were in the business of developing townhomes (the “**Projects**”);

- (b) The Projects were organized as common elements condominiums (“**CECs**”);
- (c) Under a CEC model, homeowners hold freehold titles to specific land parcels which are linked to an undivided common interest (the “**Common Elements**”) in the CEC;
- (d) Pursuant to section 81 and section 138(4)(a) of the *Condominium Act*, deposits paid towards the Common Elements are required to be held in trust, whereas the amounts paid towards the freehold aspects are not so required;
- (e) Pursuant to orders dated May 2, 2023 and May 18, 2023, the Debtors were ordered into receivership, with KSV Restructuring Inc. (the “**Receiver**”), appointed as receiver over the Debtors under section 243(1) *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43, as amended;
- (f) According to the Receiver’s First Report, over \$77 million were paid in deposits by the Homebuyers (the “**Deposit Funds**”);
- (g) The Receiver has erroneously characterized the Projects as purely “freehold homes” in its reports to the Court, and on that basis, was of the view that it did not have to carry out a tracing exercise in respect of the Deposit Funds nor did it need to value the statutory trust claims of the Homebuyers;
- (h) On September 28, 2023, the appellant and moving party, Dharmi Mehta, (the “**Rep Plaintiff**”) commenced a class action on behalf of the Homebuyers against the Debtors and certain related individual defendants to recover the Deposit Funds (the “**Class Action**”);

- (i) In addition, through counsel, the Rep Plaintiff repeatedly advised the Receiver to refrain from distributing the proceeds from the sale of the Projects until its statutory trust claims under the *Condominium Act* (the “**Condo Act Claims**”) were adjudicated within the receivership proceedings;
- (j) The Receiver refused to do so, and between January 23, 2024 and January 29, 2024, it distributed the proceeds of sale acquired from the sale of several Projects without regard to the Condo Act Claims;
- (k) On January 30, 2024, the Receiver advised the Rep Plaintiff that it intended to seek court approval to completely distribute the proceeds of sale acquired from Nao II to the Applicants on a motion returnable before the Honourable Justice Black on February 15, 2024;
- (l) The Rep Plaintiff brought a cross-motion asserting the Condo Act Claims;
- (m) On February 15, 2024, Justice Black adjourned the hearing for March 5, 2024, to give the Receiver enough time to respond to the Condo Act Claims;
- (n) In the interim period, Justice Black ordered that \$1,523,400 be held back from the distribution of the sale proceeds to the Applicants (the “**Original Holdback**”);

Tarion’s Involvement

- (o) Tarion is a private, not-for-profit corporation established in 1976 to protect the rights of new home purchasers and owners in Ontario and designated by the

Province to administer the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O 31 (the “*Warranties Act*”);

- (p) Under section 6(1)(c) and section 6(1)(d) of O. Reg 892: Administration of the Plan (the “*Regulation*”), respectively, Tarion provides deposit insurance of up to 10% of the purchase price up to \$100,000 for freehold homes, and up to \$20,000 for deposits paid to condominium units;
- (q) Expecting that it would be liable to reimburse the Homebuyers for some of the lost Deposit Funds, Tarion made a motion on behalf of the Homebuyers asserting various contractual, statutory, constructive and/or remedial trusts returnable before the Honourable Justice Steele on November 2, 2023 (the “**Tarion Motion**”);
- (r) While the *Warranties Act*, *Regulation* and the common law make clear that Tarion cannot subrogate claims without first making payment, the issue of standing was not contested in the Tarion Motion;
- (s) Tarion did not make any statutory trust claims under the *Condominium Act*, and specifically represented to the Court that the purpose of its motion was to clarify the protections available for purchasers of pre-construction freehold homes;
- (t) By the time the Tarion Motion was heard, at no point did the Receiver or Tarion advise the Court of the true nature of the Projects being that of a CEC, rather than “pure freehold homes”;

- (u) On December 22, 2023, Justice Steele released her decision dismissing Tarion's motion;

The Appealed Order

- (v) On March 5, 2024, counsel for the Rep Plaintiff, Receiver and the Applicants appeared before Justice Black to argue the cross-motion;
- (w) However, given that only the service list for Nao II was served with the Rep Plaintiff's materials, and the Condo Act Claims were intended to apply to all of the Projects, the hearing had to be adjourned again to give all interested parties the opportunity to attend;
- (x) In the interim, Justice Black heard brief oral submissions on the issue of reducing the Original Holdback;
- (y) The Receiver argued that, *assuming* Tarion would pay the \$100,000 maximum amount it owed the Homebuyers of Nao II under the *Warranties Act*, the remaining uninsured amounts of the Deposit Funds for Nao II would only be \$37,191.65, and that the holdback should be reduced to that amount, with the difference being paid to the Applicants free and clear of all trust claims;
- (z) The Rep Plaintiff argued against the reduction of the Original Holdback Amount on the basis that:
 - (i) Tarion has not subrogated the claims for the Deposit Funds, in fact it has made no, or relatively little, payments to the Homebuyers;

- (ii) Tarion has never expressly stated the amount of its expected liability, and in fact, has said that it has yet to make such a determination;
 - (iii) To the extent that Tarion has undertaken to reimburse Homebuyers for their lost deposits, it has only done so in respect of the freehold aspects of the Projects and it has not stated its intention to insure deposits paid towards the Common Elements; and
 - (iv) Even if Tarion pays the \$100,000 maximum to each individual Nao II Homebuyer, leaving only \$37,191.65 uninsured, the secured creditors / Applicants are not entitled to collect on trust monies, as they do not form part of the estate;
- (aa) On March 5, 2024, Justice Black released his endorsement reducing the holdback amount from the Original Holdback to \$37,191.65, with the Receiver authorized to distribute the Holdback Reduction to the Applicants;
 - (bb) The Rep Plaintiff and the Receiver disagreed as to whether the Holdback Reduction was to be paid free and clear of all trust claims, including the Condo Act Claims;
 - (cc) On March 12, 2024, Justice Black released a supplemental endorsement holding that the Homebuyers have no claim above the \$37,181.65 to be held back;
 - (dd) By extinguishing all trust claims in the Holdback Reduction, Justice Black has made a final determination about the rights of the Homebuyers in the monies paid to the Applicants;

(ee) Justice Black erred in ruling that Tarion's presumed payment of the maximum policy / amount owing under section 6(1)(c) of the Regulation (10% of the purchase price up to \$100,000) extinguishes all trust claims in the Holdback Reduction paid to the Applicants for the following reasons:

(i) Tarion has paid little to no monies to the Homebuyers and therefore is restricted by statute and by common law from having subrogated those claims, including the Condo Act Claims;

(ii) Even if Tarion has undertaken to provide deposit insurance to Homebuyers, it has only explicitly done so for the freehold aspects and not the Common Elements, therefore the distribution to the Applicants should have been made without prejudice to the Condo Act Claims;

(iii) There is no basis to assume that Tarion has committed to reimbursing each Homebuyer of the Nao II Project 10% of the purchase price up to \$100,000;

(iv) Irrespective of whatever amount Tarion ultimately pays the Homebuyers, it is an error in law to hold that the secured creditors / Applicants are entitled to collect on trust property owing to the Homebuyers;

(ff) Justice Black's ruling effectively caps the recovery of the Homebuyers to the minimum insured amounts of the Deposit Funds for each Project.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

(a) Section 183 of the *BIA*;

- (b) The Order appealed from is final; and
- (c) Leave to appeal is not required.

March 18, 2024

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