Court File No. CV-23-00698576-00CL
CV-23-00698395-00CL
CV-23-00698632-00CL
CV-23-00698637-00CL
CV-23-00699067-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

KINGSETT MORTGAGE CORPORATION and DORR CAPITAL CORPORATION
Applicant

and

STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., TLSFD TAURASI HOLDINGS CORP. and STATEVIEW HOMES (HIGH CROWN ESTATES) INC.
Respondent

ATRIUM MORTGAGE INVESTMENT CORPORATION and DORR CAPITAL CORPORATION
Applicant

and

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

DORR CAPITAL CORPORATION
Applicant

and

HIGHVIEW BUILDINGS CORP INC.
Respondent

DORR CAPITAL CORPORATION
Applicant

and

STATEVIEW HOMES (BEA TOWNS) INC.

Respondent

MERIDIAN CREDIT UNION LIMITED

Applicant

and

STATEVIEW HOMES (ELM & CO) INC.

Respondent

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

COMPENDIUM OF THE MOVING PARTY

September 23, 2024

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto ON M5G 1Z8

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Adil Abdulla (LSO # 82095E)
aabdulla@sotos.ca

Tel: 416-977-0007

Lawyers for the Moving Party
Dharmi Mehta

TO: THE SERVICE LIST

INDEX

TAB 1

Court File No. CV-23-00698395-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION

Applicant

- and -

STATEVIEW HOMES (NAO TOWNS II) INC.

Respondent

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

MOTION RECORD OF THE RECEIVER, KSV RESTRUCTURING INC.

February 8, 2024

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1

Jeffrey Larry (44608D)
Tel: (416) 646-4330
Email: jeff.larry@paliareroland.com

Daniel Rosenbluth (71044U)
Tel: 416.646.6307
Email: daniel.rosenbluth@paliareroland.com

Lawyers for the Receiver,
KSV Restructuring Inc.

TO: THE SERVICE LIST

NAO TOWNS PHASE 2
FEATURES & FINISHES

FEATURES OF AN ENERGY STAR® QUALIFIED NEW HOME

- For economical heating, the home will be insulated in accordance with EnergyStar® guidelines, which exceed the current Ontario Building Code specifications including full height basement insulation, expanding foam insulation to all garage ceilings with finished areas above, and around all windows and doors
- EnergyStar® qualified windows/skylights and glass sliding/French doors to be Low 'E' argon gas filled, rated for "Zone 2" rating (as per plan/elevations/options). Maintenance – free structural vinyl thermopane basement windows (as per plan/elevations/options)
- 3" x 6" Exterior wall construction with R-22 + 5 insulation, R-60 in attic. Expanding foam insulation to be R-31 to all garage ceilings with finished areas above
- (g) All bathrooms (with or without windows) have exhaust fan (EnergyStar® qualified) vented to the outside
- Forced air Natural Gas Condensing furnace, 96% ECM efficiency, with an ECM motor, power vented to the outside
- (g) Heat Recovery Ventilation Unit (H.R.V.) simplified system
- (g) EnergyStar® qualified condensing domestic hot water tank (rental unit)
- All main trunk ducts, including basements for supply and return and panned joists to be taped, for added heating and cooling efficiency
- (g) Centrally located electronic EnergyStar® qualified thermostat on main floor
- (g) LED light bulbs where applicable to help conserve energy
- Extensive caulking for improved energy conservation and draft prevention
- (g) The use of recycled material throughout the building process

PLEASING LANDSCAPING FEATURES

- Front, rear and side yards will be fully sodded creating a truly desirable and prestigious streetscape
- Relaxing outdoor lounge areas and private landscaped courtyard
- Visitor parking available
- Professionally landscaped Parkette and maintained grounds

STUNNING EXTERIOR FEATURES & STRUCTURAL COMPONENTS

Welcome to unexpected curb-appeal. With Modern-style roof lines and a blend of Traditional/Modern building materials revel in beauty of your arrival.

- Each home exterior is comprised of a combination of all brick, stone, stucco, fireze board and/or precast accents with masonry detailing around windows and doors (as per plan/elevations/options)
- Quality fiberglass self-sealing high-grade asphalt shingles, with a 25-year manufacturer's warranty, accenting metal roof details. (as per plan/elevations/options)
- Durable, maintenance free, pre-finished aluminum soffits, fascia, eaves trough and downspouts, all colour coordinated
- Prominent insulated entry door with door hardware package including grip-set and deadbolt, featuring glass inserts to front entry door features (as per plan/elevations/options) with complementing granite door sills to both front and rear doors for a custom touch
- Exterior aluminum railings for decorative applications, (where required by code). Actual railing detailing may vary from railings depicted on brochures (As per plan/elevations/options)
- Two exterior hose bibs are provided, one at rear (or side) and one in garage
- Sliding patio doors leading to rear (as per plan/elevations/option.)
- Pre-finished roll-up metal insulated garage doors with decorative glazing and hardware
- (g) Convenient direct access from garage to home includes an insulated EnergyStar® metal door complete with safety door closure with power bolt deadbolt shown on plans and model types only, and where grade permits only

GOURMET DREAM KITCHEN FEATURES

- Custom quality designed kitchen cabinets with choice of styles from vendor's standard samples. (As per plan/options)
- Space for dishwasher including rough-in plumbing and electrical
- Built in pantries and broom closets, breakfast counters / islands and bank of drawers. (As per plan/options)
- Luxurious granite kitchen countertops with your choice of colour from vendor's standard samples
- Colour coordinated kick plates to compliment cabinets
- Stainless steel finish, under mount sink in kitchen with pull-out faucet.
- 6" Kitchen stove vent to be vented to outside

LUXURIOUS BATHROOM FEATURES

- Custom quality designed master ensuite cabinets with choice of styles from vendor's standard samples (As per plan/options)
- Luxurious granite countertops in master ensuite with your choice of colour from vendor's standard samples
- Single lever faucet(s) in all bathrooms
- White vanity with single lever faucet for all second floor washrooms
- White pedestal sink for all powder rooms
- (g) High efficiency water saving white toilets in all bathrooms
- Deep acrylic soaker tubs. (As per plan/options)
- Wall tiles up to ceiling and mosaic floor tiles in all shower stalls
- Ensuite retreats with glass showers
- (g) All bathroom tub & shower enclosures to receive "mold resistant drywall"
- Shut off valves to all bathroom sinks & toilets
- Privacy locks on all bathroom doors

LIGHTING & ELECTRICAL FEATURES

- 100 Amp electrical services with breakers
- Two (2) weatherproof exterior electrical outlets, one (1) each accessible at front and rear of home
- Ceiling mounted light fixture in all bathrooms including all powder rooms (as per vendor's samples)
- Automatic smoke detector(s) with strobe lighting to meet OBC building codes for home and family safety
- All wiring in accordance with Ontario Hydro standards
- Electric door chime
- Decora light switches plugs and plates
- Carbon monoxide detectors
- Two (2) electrical outlets in garage, one (1) on wall and one (1) on ceiling
- Ground fault indicator receptacles, as per building code

EXQUISITE FLOORING COVERINGS

- Tile flooring – locations as per applicable model layouts
- Natural laminate flooring – locations as per applicable model layouts
- Luxurious broadloom with under pad in all bedrooms, Purchaser's choice of two colours from vendor's standard samples (as per plan/options)
- Sub-floor is glued, sanded, and screwed down before application of finished floors

LAUNDRY ROOM ACCENTS

- All upper floor laundry closets/rooms to include a floor drain. (As per plan/options)
- Convenient durable "no break" Polypropylene laundry tub with separate drain. (As per plan/options)
- Outside venting for dryer
- Hot and cold laundry taps for washer with heavy duty wiring for dryer

COMFORT, SAFETY, AND SECURITY

- High quality locks with dead bolts on all exterior swing door(s)
- Hinges and striker plates reinforced with extra-long screws
- Additional screws at patio door to help prevent lifting

HELPFUL ROUGH-INS FOR FUTURE CONNECTIVITY

- Three (3) cable television outlets (RG-6 Standard). Location to be determined by purchaser
- One (1) internet rough-in (CAD-5 Standard). Location to be determined by purchaser
- One (1) telephone outlet. Location to be determined by purchaser
- StateView Homes shall provide a personally scheduled appointment with our qualified Technical Contractor to explain and co-ordinate any additional Security/ Technology requirements requested
- Rough-in Central vacuum system to all finished floors with pipes dropped to garage as determined by StateView Homes
- Alarm Rough-in only
- Monitored security system available through StateView Homes supplier. With purchase of optional two-year security system, the buyer will receive a fully installed security system, which includes contacts on all opening windows and doors for "lookout" and "walkout" basement, one motion detector, one keypad, one siren and control panel with associated hardware. (See your Décor Representative for details)
- Municipal address plaques provided
- Professionally home cleaning service prior to occupancy
- Duct cleaning at time of occupancy

BREATHTAKING INTERIOR LIVING SPACES

Step inside a well-built luxurious setting. Built with exceptional attention to detail. Special touches abound, to make everything feel just right.

- Soaring ten (10') ceilings on the Second floor with nine (9') on the Main and Third floor (all heights are approximate and subjected to site plan approval conditions, bulkheads and low headroom areas due to mechanical systems and ceiling dropped down areas as required). All heights are measured to the top of the floor joist and can be adjusted at the discretion of StateView Homes. Purchaser accepts the same
- Sunken or raised foyer, mud room, laundry room, garage entrance landing (where permitted or dictated by grade) (as per plan/options) Purchaser accepts the same
- Easy maintenance free smooth ceilings in kitchen, powder rooms, all bathrooms
- Spray textured ceilings with 4" smooth boarder through-out balance of home. Walk-in closets to be stippled only – no border
- White paint on all walls and white semi-gloss paint on doors and trim
- Elegant oak stairs (veneer risers and stringers). Oak square 1 5/16" railings to finished areas with warm natural finished oak handrails (as per plan/options). Where available, access to staircase to the basement level through a doorway, such stairs and handrails to be unfinished spruce painted in a colour selected by StateView Homes
- 4" baseboards throughout with doorstop to tile or oak flooring areas. 2 3/4" casing on all doors windows and flat archways throughout finished areas
- Quality finished interior knobs on all interior doors with complimenting hinges
- 6'8" two- panel smooth doors, Pocket doors, and French doors (as per plan/options
- Decorated columns and complimenting low wall detail (as per plan/options)
- Art niche(s), stepped walls, vaulted and / or cathedral ceilings, double height and Palladian windows, curved walls, media centers and art ledges, and waffle ceilings (as per plan/options)
- Thoughtful storage considerations with well appointed linen, pantries and mud room closets, spacious walk-in closets with shelving installed (as per plan/options)

CUSTOMER FRIENDLY UPGRADE PROGRAM

- We are pleased to provide quotations prior to construction for extras or custom finishes for interior features. Purchasers have the opportunity to make upgraded interior selections when they attend to choose their colours and materials (when schedules permit)

COMF☺RT SMART HOME AUTOMATION

- (i) One (1) smart central Automation Hub with touchscreen located at the front entrance of the home
- (h) One (1) smart door lock on the inside garage door leading to house (grade/options permitting)
- (k) One (1) smart lighting control
- (l) One (1) smart thermostat control
- (n) One (1) smart water leak sensor
- (o) One (1) pre-construction homeowner system design consultation
- (p) One (1) customer system training session
- (q) StateView Homes shall provide a personally scheduled appointment with our qualified Technical Contractor to explain and co-ordinate any additional technology requirements requested

STATEVIEW HOMES GUARANTEE

- Backed by "Tarion" (Ontario New Home Warranty Program). StateView Homes, is a registered member of TARION and shall comply with all warranty requirements
- 7-year structural warranty, 2-year warranty, and 1-year Builder's comprehensive warranty

AS PER PLAN / ELEVATION / OPTIONS

- ✓ All references to size, measurements, materials, construction styles, trade/brand/industry name or terms may be converted from imperial to metric or vice versa and actual product size may vary slightly as a result.
- ✓ All references to features and finishes are as per applicable plan or elevation and each item may not be applicable to every home. Locations of features and finishes are as per applicable plan or at the vendor's sole discretion. Purchaser is aware that all items labeled as opt. /optional are not included in the standard layouts.
- ✓ All features and finishes where Purchasers are given the option to select the style and/or colour shall be from the predetermined standard selections.
- ✓ The vendor will not allow the purchaser to do any work and/or supply material to finish the dwelling before the "Home Closing Date".
- ✓ House types subject to final approval by the municipality or developer's architectural committee final siting and approval by the vendor's architect.
- ✓ Variations from vendor's samples may occur in finishing materials, kitchen and vanity cabinets, floors and wall finishes due to normal production process. The vendor is not responsible for shade differences occurring from different dye lots on all material such as ceramic tile or broadloom, roof shingles, hardwood flooring, wood stairs, railing, kitchen cabinets, countertops, or exterior materials. Colours and material will be as close as possible to vendor's samples but not necessarily identical. Where Purchasers are given the option to upgrade the stain of the interior stairs and railings, the purchaser is aware that the stain will complement the Hardwood. "It will not match the hardwood"
- ✓ Purchasers may be required to match colours and/or materials from the vendor's samples as a result of unavailability or discontinuation. Due to grade, floor from garage to house may not be available.
- ✓ Ceilings and walls may be modified to accommodate mechanical system.
- ✓ Purchaser acknowledges being advised that the windows may experience condensation as a result of changes in temperature and humidity in the house and accepts this as a natural characteristic of the windows, and is advised to keep humidity level constant to reduce this tendency.
- ✓ In an effort to continuously improve its product StateView Homes reserves the right to alter floorplans, exterior, specifications and prices without notice. All renderings, floor plans and maps in brochures and sales displays are artists' conceptions and are not necessarily to scale and the dimensions/square footages are approximate and may vary due to continuous improvement by the vendor.
- ✓ The Purchaser acknowledges that the floor plan may be reversed.
- ✓ The vendor reserves the right to substitute materials that are of equal or better quality. The determination of whether or not a substitute is of equal or better quality shall be made by the Vendor whose determination shall be final and binding.
- ✓ The ceiling height is measured from the top of the unfinished subfloor to the underside of the unfinished ceiling above before finishes and excluding bulkheads and drop ceilings, as per plan.
- ✓ If minor variations to the size of the Dwelling including internal dimensions or any steps are made to the Dwelling the Purchaser shall accept such minor variations without any abatement to the Purchase Price (5-10% total area allowance)

DS

DS

HARM☺NY

StateView's Harmony Package is specially designed set of Features and Finishes meant to save water and energy, be from sustainable, ethically sourced materials and promote eco-friendly lifestyle.

COMF☺RT

StateView's Comfort Plus Package is a smart home automation system designed to improve life of homeowners, help with maintenance, security and efficiency of each house.

STATEVIEW HOMES

TAB 2

Court File No.: CV-23-00698395-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

FACTUM OF THE RECEIVER
(NAO II SALE APPROVAL, INITIAL DISTRIBUTION AND ANCILLARY RELIEF)

February 9, 2024

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington St. W., 35th Floor
Toronto, ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)
Tel: 416.646.4330
jeff.larry@paliareroland.com

Daniel Rosenbluth (LSO #71044U)
Tel: 416.646.6307
daniel.rosenbluth@paliareroland.com

Lawyers for the Receiver

TO: THE SERVICE LIST

received on account of the common interest in the corporation – not the entire condominium unit.[39]

48. As such, the statutory trust obligations never arose in this case, since the funds at issue are solely deposit funds that were expressly allocated to the non-common interests in the condominium units.

(b) Justice Steele's Decision Disposes of any Priority Argument

49. Even if there were valid trust claims under the *Condominium Act*, the following key findings of the Tarion Decision are dispositive of any possible priority claim by the proposed class.

50. Justice Steele accepted that the agreements relied on by Tarion did create an express trust over certain of the funds at issue.[40] She also found that the debtor entities breached the express (and other) trusts for failing to property set the trust funds aside.

51. However, her Honour still declined to grant a constructive trust that would give Tarion priority in respect of those funds Her Honour noted that a constructive trust in this context is "used only in the most extraordinary cases" and "cannot be imposed by the court for the purpose of altering the priority scheme under the BIA" even where there would not otherwise be funds available for the victims of the breach of trust.[41]

---

[39] See *Condominium Act*, s. 138(4)(a) which, in the case of common element condominium corporations, deems all references in s. 81 to a "unit" to refer only to "a common interest" and therefore limits the operation of s. 81 in relation to common element condominium corporations.

[40] Tarion Decision, at e.g. para. 32 ("I am satisfied that there was an express trust in respect of the contracts containing the early termination provisions."), Appendix B to the Seventh Report.

[41] Tarion Decision at paras. 71, 75.

TAB 3

Court File No. CV-23-00710795-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and-

2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP, 1000162801 ONTARIO CORP., AMERCAN CORPORATION and 1000199992 ONTARIO CORP.

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

FACTUM OF THE RECEIVER FOR MOTION TO DISCLAIM CERTAIN AGREEMENTS AND INCREASE RECEIVER'S BORROWING LIMIT
(Returnable May 27, 2024)

May 22, 2024

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)
Tel: 416.646-4330
jeff.larry@paliareroland.com

Ryan Shah (LSO# 88250C)
Tel: 416.646-6356
ryan.shah@paliareroland.com

Lawyers for the Receiver, Albert Gelman Inc.

TO: **Service List**

PART I. OVERVIEW

1. Albert Gelman Inc. ("**AGI**"), the receiver and manager (in such capacity, the "**Receiver**") of 2011836 Ontario Corp. ("**201**") and Jefferson Properties Limited Partnership ("**JPLP**" and, together with 201, the "**Debtors**") seeks an order to, among other things:

   (a) authorize the Receiver to terminate and disclaim the 28 agreements of purchase and sale entered into between the Debtors and home buyers of the Freehold Towns (as defined below); and

   (b) increase the Receiver's Borrowing Limit in order to fund the remaining work necessary to complete the Project.

2. The Receiver was appointed pursuant to the order of Justice Cavanagh dated December 21, 2023 (the "**Appointment Order**").

3. At the time of the appointment, the Debtors were in the midst of constructing a residential development project called Richmond Hill Grace (the "**Project**") on the Debtors' real property (the "**Real Property**").

4. As described in detail in the Second Report (as defined below), the Project was poorly managed and the Receiver faced, and continues to face, significant challenges with the construction of the Project including deficiencies, delays and escalating costs.

5. In or around late-March 2024, because of mounting concerns with the Project, Cameron Stephens Mortgage Capital Ltd. ("**CS**") advised the Receiver that it would only

TAB 4

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and-

2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP, 1000162801 ONTARIO CORP., AMERCAN CORPORATION and 1000199992 ONTARIO CORP.

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

REPLY FACTUM OF THE RECEIVER FOR MOTION TO DISCLAIM CERTAIN AGREEMENTS AND INCREASE RECEIVER'S BORROWING LIMIT
(Returnable May 27, 2024)

May 24, 2024

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)
Tel: 416.646-4330
jeff.larry@paliareroland.com

Ryan Shah (LSO# 88250C)
Tel: 416.646-6356
ryan.shah@paliareroland.com

Lawyers for the Receiver, Albert Gelman Inc.

TO: Service List

PART I. OVERVIEW

1. This Reply Factum addresses the Factum of Hsin Yang Lee, dated May 23, 2024 (the "**Lee Factum**"). Mr. Lee is one of the Freehold Purchasers.[1]

2. Mr. Lee's factum contends that the deposits of the Freehold Purchasers paid to the Debtors' in respect of the Freehold Towns (the "**Freehold Deposits**") ought to have been held in trust under section 81(1) of the *Condominium Act* as payments made in respect of a "proposed common interest" in a condominium corporation.[2] On this basis, Mr. Lee argues that these alleged trust funds are exempt from the property of the Debtors' estate and belong to the Freehold Purchasers.

3. Mr. Lee's theory is wrong for numerous reasons and is not a basis for refusing the disclaimer of the Freehold APSs.

4. First, the Freehold Deposits did not pay for the Common Elements (as defined below). This is both explicitly provided for in the Freehold APSs and consistent with the fact that the Common Elements (as defined below) represent a *de minimis* economic interest.

5. Second, Mr. Lee's theory undermines, and is inconsistent with, the entire scheme of homebuyer protections provided for in the *Condominium Act, 1998* ("***Condominium Act***") and the *Ontario New Home Warranties Plan Act* ("***ONHWPA***"). Simply put, Mr. Lee attempts to confer on himself both the benefits of a condominium purchaser under the *Condominium Act* (where deposits are held in trust) and the benefits of a freehold

---

[1] Capitalized terms in this Receiver's Reply Factum have the definitions adopted in the Factum of the Receiver, dated May 23, 2024, unless otherwise stated.

[2] Lee Factum, para. 16 (F82); *Condominium Act, 1998*, S.O. 1998, c. 19, s. 81(1) ["***Condominium Act***"].

purchaser under the ONHWPA (which provides Mr. Lee with deposit protection of $100,000 in this case) This theory would throw the practices of the entire homebuilding industry into disarray.

6. Third, even if there was a breach of trust by the Debtors in respect of the Freehold Deposits (which is denied), this does not affect the legal priority of secured creditors over the Freehold Purchasers with respect to the Freehold Deposits.

PART II. FACTS

A. The POTLs

7. The Freehold Towns are parcels of tied land ("**POTLs**") meaning they consist of a freehold interest in respect of the townhome itself and an interest in certain common elements such a shared access driveway, visitor parking and other ancillary components of the Project (the "**Common Elements**"), by way of a condominium corporation.[3]

PART III. SUBMISSIONS

8. The Receiver makes three primary submissions in response to Mr. Lee's Factum:

(a) The Freehold Deposits did not pay for the Common Elements and, therefore, they are outside of the ambit of the deposit trust scheme provided for in s. 81(1) of the *Condominium Act*;

(b) The inclusion of the Freehold Deposits in the *Condominium Act*'s deposit trust provision would undermine the home buyer protection scheme developed by the Legislature; and

[3] Second Report at para. 89 (E1358). See also the definition of "POTL" at art. 1 of the Example Freehold APS, Appendix A to the Second Supplemental Report (E2290).

(c) Even if there was a breach of trust in respect of the Freehold Deposits, the Freehold Purchasers have no priority entitlement at law.

A. The Freehold Deposits did not pay for the Common Elements

9. The Freehold APSs are clear that: (i) none of the Freehold Deposits (approximately $144,642[4] on average) are attributable for the purchase of the Freehold Towns' Common Elements and (ii) only $2 of the Freehold APSs purchase price is attributable to the Common Elements. As set out in art. 48 Freehold APSs:

> That portion of the Purchase Price applicable to the common interest in the Condominium shall be Two ($2.00) Dollars which shall be payable as part of the monies dues on the Unit Transfer Date from the Purchaser to the Vendor. There is no deposit payable by the Purchaser for the purchase of the common interest in the Condominium.[5]

10. This is significant because s. 81(1) only applies to payments made:

> (a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a [proposed common interest in the corporation]
>
> (b) on account of an agreement of purchase and sale of a [proposed common
>
> interest in the corporation]; or
>
> (c) on account of a sale of a [proposed common interest in the corporation].[6]

11. As set out in art. 48 of the Freehold APSs, the Freehold Deposits are not payments in respect of the Common Elements which would require them to be held in trust under s. 81(1) of the *Condominium Act*. To the contrary, the Freehold Deposits are deposits for the purchase of freehold units which deposits do not have to be held in trust under the legislative scheme.

---

[4] First Supplemental Report at para. 84 (E1750).
[5] Example Freehold APS, art. 48(a), Appendix A to the Second Supplemental Report (E2313)
[6] *Condominium Act*, s. 81(1), read in concert with s. 138(4).

12. It is important to note that art. 48 of the Freehold APSs (which states that only $2 of the purchase price and none of the deposit is attributable to the Common Elements) is not a mere deeming provision. Rather, it represents a reasonable allocation of the consideration paid by the homebuyer because a homebuyer does not actually acquire any valuable interest in the Common Elements at all. Unlike a standard condominium unit, a homebuyer could not sell its common interest in the access driveway and visitor parking, for example.[7]

B. Mr. Lee's Theory Undermines the Legislative Scheme of Homebuyer Protection

13. As Mr. Lee notes in his factum, Tarion distinguishes between freeholds, including POTLs (such as the Freehold Towns), and condominium homes for the purposes of its statutory warranty compensation under the *ONHWPA*. This is significant because, under *ONHWPA* regulations, there are two different limits on compensation for lost deposits, as between freehold and condominium homes:

(a) For freehold homes, the greater of (1) $60,000 and (2) the lesser of 10% of the sale price of the home and $100,000; and

(b) For condominiums, $20,000 plus interest.[8]

14. Pursuant to this scheme, Mr. Lee's deposit is protected under the more generous, Tarion freehold home warranty (and he will get $100,000 of deposit protection here).[9]

---

[7] Example Freehold APS, art. 48(a), Appendix A to the Second Supplemental Report (E2313); Second Report at para. 89 (E1358).

[8] *Administration of the Plan*, R.R.O., Reg. 892, s. 6(1) and (2).

[9] Affidavit of Hsin Yang Lee, sworn May 23, 2024 at para. 9 (F97). See also the "Warranty Information Form" in Example Freehold APS, Appendix A to the Second Supplemental Report (E2339).

15. Mr. Lee submits that this distinction should not matter because it is based on the definition of "home" in the *ONHWPA*, which is purportedly distinct from the definition of "common elements condominium corporation" contained in the *Condominium Act*.[10]

16. This submission ignores the fact that the warranty scheme under the *ONHWPA* specifically complements the deposit trust provisions provided under the *Condominium Act*.

17. The regulations under the *ONHWPA* provide for greater statutory protection for deposits paid in respect of POTLs, like the Freehold Deposits (up to $100,000 instead of up to $20,000)[11] precisely because entities selling new condominiums have a statutory requirement under the *Condominium Act* to hold purchaser deposits in trust. Likewise, condominium buyers are entitled to lesser protection for their deposits because they must be held in trust pursuant to the *Condominium Act*.

18. This distinction is made explicit on Tarion's website:

> How much of my deposit is covered?
>
> The level of deposit protection depends on the purchase price and type of home you buy. If the price of your new freehold home is $600,000 or less, your deposit is covered for up to $60,000. For example, if the price of the home you're buying is $550,000 and you put down $60,000, your entire deposit is protected. If the purchase price is over $600,000, your deposit is protected for 10 per cent of the purchase price, up to a maximum of $100,000.
>
> If you're looking to buy a condo unit, you receive two levels of deposit protection. First, your deposit is protected by the trust provisions of the Condominium Act. Under the Act, your builder must hold your deposit money in a trust account. As a second level of protection, if for some reason your deposit was not placed in trust, the new home warranty provides protection for up to $20,000.[12]

---

[10] Lee Factum para. 15 (F82).

[11] *Administration of the Plan*, R.R.O., Reg. 892, s. 6(1) and (2).

[12] See tarion.com: "How does deposit protection work on new homes?"

19. Mr. Lee's proposed reading of the *Condominium Act* upsets this scheme by, on the one hand, seeking the protection owing to freehold buyers under the *ONHWPA* (i.e. $100,000 of deposit protection in this case) and, on the other, seeking the protection owing to condominium buyers under the *Condominium Act* (i.e. the requirement to hold the deposits in trust).

20. This erroneous interpretation, if accepted, would upend the Tarion warranty protection scheme and, presumably, have significant repercussions throughout the development industry.

C. The Secured Lenders Have Priority over the Freehold Purchasers, in Any Event

21. Even if the injection of part or all of the Freehold Deposits into the Project was a breach of the trust provisions under the *Condominium Act*, these trust claims still would not have priority over the secured lenders.

22. It is fundamental to Ontario's land titles system that the registered interest of a bona fide mortgagee without notice trumps any prior unregistered interest in the property.[13] Mr. Lee's position cannot succeed without violating this principle.

23. Similarly, a recent Alberta decision considered circumstances substantially identical to this case, and concluded that even if *Condominium Act* trust funds could be traced into the real property, the purchasers could no longer assert a trust as against registered encumbrancers of the land:

> The Developer violated *Condominium Property Act* s. 14(3) [*i.e. the equivalent of section 81(1) of Ontario's statute*] and used the Deposits to pay costs associated with the development of the Land, including building costs. In doing so, the Developer breached

[13] See e.g. *Di Michele v. Di Michele*, 2014 ONCA 261 at paras. 106-108, citing *Land Titles Act*, R.S.O. 1990, c. L.5, s. 93(3).

> the statutory trust. However, **the Deposits ceased to be deposits when they were co-mingled with other funds and activities used to improve the Land. The Deposits were no longer uniquely identifiable and became inseparable from other funds and activities that added value to the Land, such as the work efforts undertaken by the Lienholders. Any trust interest associated with the Deposits became an interest in land subject to the *Land Titles Act* regime**.
>
> As discussed above, the *Land Titles Act* requires the registration of interests in land in order to gain priority over others also claiming interests. It follows that the priority of the Deposits, which were capable of becoming registered interests in land, must have their priority dealt with according to the *Land Titles Act*.[14] [emphasis added]

24. Finally, and in any event, to the extent that the Freehold Purchasers obtained an interest in the Real Property as a result of the *Condominium Act* trust (which is denied), the Freehold Purchasers expressly subordinated their interest in the Real Property to the secured lenders by virtue of art. 36(a) of the Freehold APSs. This article provides that:

> The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary and agrees to execute all acknowledgements or postponements required to give full effect thereto.[15]

25. Justice Steele recently relied on similar subordination language in *Kingsett Mortgage Corp v. Stateview Homes* in refusing to grant a constructive trust remedy in respect of purchaser deposits injected into a real property development, in alleged breach of trust:

> [80] […] I am not satisfied that "extraordinary circumstances" exist in this case such that a constructive trust ought to be ordered. As noted, a remedial constructive trust would upset the BIA priority scheme. Here we have a situation where, on the one hand, if the Stateview entities had not breached the trusts, the creditors would not have had access to the deposits. However, on the other hand, had the Stateview entities not breached the trusts, the Stateview entities may have appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities.
>
> [81] In my view the fact that the Purchasers agreed to the Subordination Clause in the Pre-Sale Purchase Agreements is also a factor weighing against the ordering of this remedy.[16]

---

[14] *1864684 Alberta Ltd v. 1693737 Alberta Inc*, 2016 ABQB 371 at para. 47.
[15] Second Supplemental Report at para. 9 (E2278).
[16] *Kingsett Mortgage Corp v. Statview Homes*, 2023 ONSC 2636 at paras. 80-81.

26. These decisions make clear that the interests of the secured lenders registered on title to the Real Property remains in priority to that of the Freehold Purchasers, even if one accepted Mr. Lee's erroneous argument that the injection of the Freehold Deposits into the Project was a breach of the *Condominium Act* deposit trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th of May, 2024.

Jeffrey Larry / Ryan Shah

SCHEDULE "A"

1. *Di Michele v. Di Michele*, 2014 ONCA 261

2. *Kingsett Mortgage Corp v. Statview Homes*, 2023 ONSC 2636

3. *1864684 Alberta Ltd v. 1693737 Alberta Inc*, 2016 ABQB 371

SCHEDULE "B"

Condominium Act, 1998, S.O. 1998, c.19

"common elements condominium corporation" means a common elements

condominium corporation described in subsection 138 (2); ("association condominiale de parties communes")

"common interest" means the interest in the common elements appurtenant to,

> (a) a unit, in the case of all corporations except a common elements condominium corporation, or
>
> (b) an owner's parcel of land to which the common interest is attached and which is described in the declaration, in the case of a common elements condominium corporation; ("intérêt commun")

"proposed unit" means land described in an agreement of purchase and sale that provides for delivery to the purchaser of a deed in registerable form after a declaration and description have been registered in respect of the land; ("partie privative projetée")

Money held in trust

81(1) A declarant shall ensure that a trustee of a prescribed class or the declarant's solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment,

> (a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit;
>
> (b) on account of an agreement of purchase and sale of a proposed unit; or
>
> (c) on account of a sale of a proposed unit. 1998, c. 19, s. 81 (1).

Exception

(2) Subsection (1) does not apply to money received,

> (a) on account of the purchase of personal property included in the proposed unit that is not to be permanently affixed to the land; or
>
> (b) as an occupancy fee under subsection 80 (4). 1998, c. 19, s. 81 (2).

Reservation money

(3) If a person has paid money to reserve a right to enter into an agreement of purchase and sale for the purchase of a proposed unit and subsequently enters into such an

agreement with the declarant, the declarant shall, on entering into the agreement, credit the money received to the purchase price under the agreement, despite any provision of the agreement. 1998, c. 19, s. 81 (3).

Creation

138(1) Subject to the regulations, a declarant may register a declaration and description that create common elements but do not divide the land into units. 1998, c. 19, s. 138 (1); 2015, c. 28, Sched. 1, s. 146 (1).

Type

(2) The type of corporation created by the registration of a declaration and description under subsection (1) shall be known as a common elements condominium corporation. 1998, c. 19, s. 138 (2).

Requirements for registration

(3) A declaration and description for a common elements condominium corporation shall not be registered unless the registration would create a freehold condominium corporation that is not a vacant land condominium corporation or, except as provided in the regulations made under this Act, a phased condominium corporation. 1998, c. 19, s. 138 (3)

Application

(4) Subject to this Part and the regulations, Parts I to IX, XI and XIV apply with necessary modifications to a common elements condominium corporation, except that,

> (a) references to a unit or a proposed unit shall be deemed to be references to a common interest in the corporation or a proposed common interest in the corporation, respectively;
>
> (b) references to a mortgagee of a unit shall be deemed to be references to a mortgagee of a common interest appurtenant to an owner's parcel of land mentioned in subsection 139 (1); and
>
> (c) references to a common interest appurtenant to a unit shall be deemed to be references to a common interest appurtenant to an owner's parcel of land mentioned in subsection 139 (1). 1998, c. 19, s. 138 (4); 2015, c. 28, Sched. 1, s. 122 (2).

Other corporations

(5) This Part does not apply to a corporation that is not a common elements condominium corporation. 1998, c. 19, s. 138 (5)

Land Titles Act, RSO, 1990, c. L.5.

Charges

93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale. R.S.O. 1990, c. L.5, s. 93 (1).

Statement of principal

(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures. 1998, c. 18, Sched. E, s. 135 (1).

Effect of charge when registered

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land. R.S.O. 1990, c. L.5, s. 93 (3).

Where advances under registered charge to have priority over subsequent charges

(4) A registered charge is, as against the chargor, the heirs, executors, administrators, estate trustees and assigns of the chargor and every other person claiming by, through or under the chargor, a security upon the land thereby charged to the extent of the money or money's worth actually advanced or supplied under the charge, not exceeding the amount for which the charge is expressed to be a security, although the money or money's worth, or some part thereof, was advanced or supplied after the registration of a transfer, charge or other instrument affecting the land charged, executed by the chargor, or the heirs, executors, administrators or estate trustees of the chargor and registered subsequently to the first-mentioned charge, unless, before advancing or supplying the money or money's worth, the registered owner of the first-mentioned charge had actual notice of the execution and registration of such transfer, charge or other instrument, and the registration of such transfer, charge or other instrument after the registration of the first-mentioned charge does not constitute actual notice.

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31

"home" means,

> (a) a self-contained one-family dwelling, detached or attached to one or more others by one or more common walls,
>
> (b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,

(c) a condominium unit that is a residential dwelling, including the common elements in respect of which the unit has an appurtenant common interest as described in the condominium declaration of the condominium corporation, or

(d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies, and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes; ("logement")

R.R.O. 1990, Reg. 892: Administration of the Plan under *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31

6. (1) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to a person out of the guarantee fund in respect of a claim under subsection 14 (1) or (2) of the Act is,

(a) $20,000 in respect of a claim in relation to a purchase agreement, or a construction contract, entered into before February 1, 2003;

(b) $40,000 in respect of,

(i) a claim in relation to a purchase agreement entered into on or after February 1, 2003 and before January 1, 2018, or

(ii) a claim in relation to a construction contract entered into on or after February 1, 2003; or

(c) in respect of a claim in relation to a purchase agreement entered into on or after January 1, 2018, the greater of,

(i) $60,000, and

(ii) the lesser of 10 per cent of the sale price of the home, and $100,000. O. Reg. 2/03, s. 1; O. Reg. 524/17, s. 1.

(2) In the case of a home that is a condominium dwelling unit, the maximum amount payable to a person out of the guarantee fund in respect of a claim under subsection 14 (1) of the Act is $20,000, plus the amount of interest that has accrued, until the time of payment, on the net principal amount payable out of the guarantee fund in respect of the claim. O. Reg. 2/03, s. 1.

Applicant	Respondents	
	36 ONTARIO CORP., et al.	**Court File No./N° du dossier du greffe :** CV-23-00710795-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
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
Proceeding commenced at Toronto

REPLY FACTUM OF THE RECEIVER
(Motion Returnable May 27, 2024)

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Jeffrey Larry (LSO# 44608D)
Tel: 416.646-4330
jeff.larry@paliareroland.com

Ryan Shah (LSO# 88250C)
Tel: 416.646-6356
ryan.shah@paliareroland.com

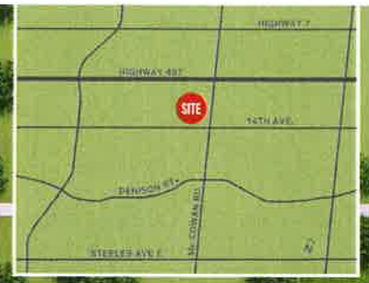
Lawyers for the Receiver, Albert Gelman Inc.

TAB 5

Eleventh Report to Court of KSV Restructuring Inc. as Receiver and Manager of Stateview Homes (Minu Towns) Inc., Stateview Homes (Nao Towns) Inc., Stateview Homes (Nao Towns II) Inc., Stateview Homes (On the Mark) Inc., TLSFD Taurasi Holdings Corp., Stateview Homes (High Crown Estates) Inc., Highview Building Corp Inc., Stateview Homes (BEA Towns) Inc., and Stateview Homes (Elm&Co) Inc.

August 8, 2024

32



LEGEND
- 2 CAR TOWNS (20')
- 2 CAR TOWNS (25')
- SINGLE CAR TOWNS (20')
- SINGLE CAR TOWNS (25')
- PHASE I

STATEVIEW HOMES
Live Inspired

PRIVATE STREET A
PRIVATE STREET A
PRIVATE STREET B
PRIVATE STREET C
PRIVATE STREET B
PRIVATE STREET A
PARK

BLOCK 14: 172 171 170 169 168 167
BLOCK 13: 166 165 164 163 162
BLOCK 12: 161 160 159 158 157 156
BLOCK 5: 125 124 123 122 121
BLOCK 6: 126 127 128 129 130
BLOCK 9: 145 144 143 142 141
BLOCK 10: 146 147 148 149 150
BLOCK 4: 120 119 118 117 116
BLOCK 7: 131 132 133 134 135
BLOCK 8: 140 139 138 137 136
BLOCK 11: 151 152 153 154 155
BLOCK 3: 115 114 113 112 111 110
BLOCK 2: 109 108 107 106 105 104 103
BLOCK 1: 102 101 100 99 98 97

SITE PLAN

NAO

PHASE II
— MARKHAM TOWNS —

SCHEDULE "S"

PURCHASER INITIALS:

TAB 6

ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00698576-00CL **DATE:** Thursday, November 16, 2023

NO. ON LIST: 4

TITLE OF PROCEEDING: KINGSETT MORTGAGE CORP v. STATEVIEW HOMES et al

BEFORE: JUSTICE PETER J. OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Joseph Bellissimo	Receiver	jbellissimo@cassels.com
Alan Merskey	Receiver	amerskey@cassels.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig	Applicants	zweigs@bennettjones.com
Chad Kopach	Dorr Capital Corporation	ckopach@blaney.com
Stewart Thom	Reliance Home Comfort	sthom@torkinmanes.com
Adam M. Slavens	Tarion Warranty Corp	aslavens@torys.com
David Capulli	Ragno Electric Ltd.	davidcappulli@capullilaw.com
Kelly Smith Wayland	CRA	Kelly.Smithwayland@justice.gc.ca
Murtaza Yailaqi	Rahim Ajani, Karim Teja, Almas Kara, Naz Arain, Shameer Arain, Atam Chug, Janaki Nagulan, Eric Asagba, Darshni D'Souza, Minaz Lakhani, & Mohammed Siddiqui	taz@rdlegal.ca

For Other Parties:

Name of Person Appearing	Name of Party	Contact Info
Matthew Valitutti – Observer	Jonny Calle and Susanna Calle	matthew@valituttilaw.com
Alyssa Wiebe - Observer	Pasquale Bono as agent for Carpenters Union	alyssa@rousseaumazzuca.com
Charles Haworth – Observer	GEI Consultants & Nao Towns	chaworth@rhlawoffices.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Receiver of the Statesview Receivership Companies seeks today the following relief:

a. An approval and vesting order ("TLSFD AVO") substantially in the form attached at Tab 3 of the Motion Record, *inter alia*:

(a) approving the sale transaction (the "TLSFD Transaction") in respect of certain of the property of TLSFD Taurasi Holdings Corp. ("Taurasi Holdings") contemplated by an agreement of purchase and sale between the Receiver and KingSett Real Estate Growth LP No. 8, by its general partner KingSett Real Estate Growth GP No. 8 Inc., ("KingSett REG LP") dated October 18, 2023 (the "TLSFD APS");

(b) following the Receiver's delivery of the Receiver's certificate substantially in the form attached as Schedule "A" to the proposed TLSFD AVO, transferring and vesting all of Taurasi Holdings' right, title and interest in and to the Purchased Assets (as defined in the TLSFD APS) (the "TLSFD Purchased Assets") in KingSett REG LP, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances; and

(c) sealing Confidential Appendices "1" and "5" to the Sixth Report of the Receiver dated November 8, 2023 (the "Sixth Report") until further order of the Court.

b. An approval and vesting order ("Minu AVO") substantially in the form attached at Tab 4 of the Motion Record, *inter alia*:

(a) approving the sale transaction (the "Minu Transaction") in respect of certain of the property of Stateview Homes (Minu Towns) Inc. ("Minu") contemplated by an amended and restated agreement of purchase and sale between the Receiver and Delton Acquisitions Inc. ("Delton") dated October 19, 2023 (the "Minu APS");

(b) following the Receiver's delivery of the Receiver's certificate substantially in the form attached as Schedule "A" to the proposed Minu AVO, transferring and vesting all of Minu's right, title and interest in and to the Purchased Assets (as defined in the Minu APS) (the "Minu Purchased Assets") in Delton, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances;

(c) authorizing and directing the Receiver to terminate and disclaim the Pre-Sale Purchase Agreements (as defined in the Sixth Report) with respect to the Minu Property; and

(d) sealing Confidential Appendix "4" to the Sixth Report until the earlier of the closing of the Minu Transaction or further order of the Court.

c. An approval and vesting order ("Nao AVO") substantially in the form attached at Tab 5 of the Motion Record, *inter alia*:

(a) approving the sale transaction (the "Nao Transaction") in respect of certain of the property of Stateview Homes (Nao Towns) Inc. ("Nao") contemplated by an amended and restated agreement of purchase and sale between the Receiver and Delton dated October 19, 2023 (the "Nao APS");

(b) following the Receiver's delivery of the Receiver's certificate substantially in the form attached as Schedule "A" to the proposed Nao AVO, transferring and vesting all of Nao's right, title and interest in and to the Purchased Assets (as defined in the Nao APS) (the "Nao Purchased Assets") in Delton, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances;

(c) authorizing and directing the Receiver to terminate and disclaim the Pre-Sale Purchase Agreements (as defined in the Sixth Report) with respect to the Nao Property; and

(d) sealing Confidential Appendices "3" and "7" to the Sixth Report until the earlier of the closing of the Nao Transaction or further order of the Court.

d. An approval and vesting order ("High Crown AVO") substantially in the form attached at Tab 6 of the Motion Record, *inter alia*:

(a) approving the sale transaction (the "High Crown Transaction") in respect of certain of the property of Stateview Homes (High Crown Estates) Inc. ("High Crown") contemplated by an amended and restated agreement of purchase and sale between the Receiver and Delton dated October 19, 2023 (the "High Crown APS");

(b) following the Receiver's delivery of the Receiver's certificate substantially in the form attached as Schedule "A" to the proposed High Crown AVO, transferring and vesting all of High Crown's right, title and interest in and to the Purchased Assets (as defined in the High Crown APS) (the "High Crown Purchased Assets") in Delton, free and clear of all liens, charges, security interests and encumbrances other than permitted encumbrances;

(c) authorizing and directing the Receiver to terminate and disclaim the Pre-Sale Purchase Agreements (as defined in the Sixth Report) with respect to the High Crown Property; and

(d) sealing Confidential Appendices "2" and "6" to the Sixth Report until the earlier of the closing of the High Crown Transaction or further order of the Court.

e. An order (the "Ancillary Matters and Distribution Order") substantially in the form attached at Tab 7 of the Motion Record, *inter alia*:

(a) authorizing the Receiver to make certain payments and distributions and maintain certain holdbacks and reserves from the net proceeds from the: (i) TLSFD Transaction (the "TLSFD Purchase Proceeds"); (ii) Minu Transaction (the "Minu Purchase Proceeds"); (iii) Nao Transaction (the "Nao Purchase Proceeds"); and (iv) High Crown Transaction (the "High Crown Purchase Proceeds" and collectively, the "Purchase Proceeds");

(b) approving the Sixth Report and the Receiver's statement of receipts and disbursements and the Receiver's activities described therein; and

(c) approving the fees and disbursements of the Receiver and its counsel, as detailed in the Sixth Report and the Affidavit of Noah Goldstein sworn November 8, 2023 and the Affidavit of Ryan Jacobs sworn November 8, 2023 (together, the "Fee

Affidavits") and approving the allocation of such fees and costs in connection with this proceeding among the Stateview Receivership Companies (as defined below) in accordance with the Fee Affidavits and the allocation methodology (the "Allocation Methodology") approved in the Distribution Order of this Court dated September 14, 2023 (the "OTM Distribution Order").

2. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

3. The Receiver relies upon the First Report, the Sixth Report dated November 8, 2023, and the Fee Affidavits.

4. The motion materials have been served on the Service List. The relief sought today is unopposed, and is strongly supported by the senior most directly affected stakeholders, Kingsett and Dorr.

5. The Receiver was appointed on May 2, 2023, its mandate was later expanded, and it was authorized pursuant to a series of orders that in the aggregate constitute the Sales Process Order of June 5, 2023 to conduct a sale process for the property of, among others, Taurasi Holdings and the Companies.

6. In the course of conducting the sales process, the Receiver was retained to assist with the Industrial Properties and the High Crown Project, and CBRE Limited to list for sale the Nao and Minu Projects.

7. A comprehensive summary of the Sale Process is set out in the Sixth Report and I have not repeated all here.

8. The Industrial Properties were marketed as a portfolio although prospective purchasers were advised that the Receiver would consider a bid for any combination of one or more of the Industrial Properties. One of those, the Oster Property, is not subject to the request for approval at this time and is still under consideration by the Receiver.

9. The TLSFD Transaction was determined to be the value maximizing transaction for the Bradwick and Rivermede Properties. I am satisfied that notwithstanding that KingSett REG LP is an affiliate of KingSett, appropriate safeguards were put in place as described in the Sixth Report to ensure that the two entities, which operate independently and with an internal confidentiality wall, enjoyed no advantage whatsoever given the process imposed by the Receiver.

10. With respect to the Minu, Nao and Hi Crown Projects, the Sale Process Results are also fully set out in the Sixth Report. The bid offered by Delton for each of the three Projects was determined by the Receiver to be the value maximizing transaction.

11. I am satisfied that the sale process was carried out in accordance with the Sales Process Order. Virtual data rooms were established and the material contained therein was comprehensive. It included financial information, contracts, permits, designs and other diligence information as well as a form of draft asset purchase agreement for review and consideration by process to purchasers.

12. I am satisfied that in each case, the market was widely canvassed, and that in addition to the process being in accord with the Sales Process Order, the process was commercially reasonable, appropriate and tailored to the particular circumstances of this matter.

13. In short, I am satisfied that the *Soundair Principles* have been satisfied here.

14. The approval and vesting orders are appropriate, reasonable, and effect that which is required to complete the transactions. I also observe that the draft orders are consistent with the model orders of the Commercial List. While not determinative of the issue, that provides additional support for the relief being sought.

15. I am also satisfied that the Pre-Sale Purchase Agreements relating to Minu, Nao and High Crown should be terminated as requested by the Receiver.

16. The authority to direct a receiver to disclaim a pre-sale purchase agreement in the context of a receivership and as part of a sales process within that receivership for real property developments is well-established: *Forjay Management Ltd. v 0981478 BC Ltd.*, 2018 BCSC 527 ("*Forjay*") at paras 131-132; *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*., 2020 BCSC 1013 at para 57; *Firm Capital Mortgage Fund Inc. v 2012241 Ontario Ltd*., 2012 ONSC 4816 at paras 31- 38; *BCIMC Construction Fund Corp. v Chandler Home Street Ventures Ltd*., 2008 BCSC 897 at paras 54-58; *BCIMC Construction Fund Corporation et. al. v The Clover on Yonge Inc. et. al.,* (September 15, 2020), ONSC (Commercial List) Court File No. CV-20-00637301-00CL (Approval and Vesting Order) at para 8; see also, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, s 243(1)(c).

17. The factors to be considered by the court in determining whether to authorize a receiver to disclaim pre-sale purchase agreements were clearly set out by Justice Fitzpatrick in *Forjay*, and I am satisfied that those factors are all satisfied here.

18. I observe that the Pre-Sale Purchase Agreements here contain express acknowledgements that they confer a personal right only and not an interest in the applicable Real Property and a provision to the effect that each Purchaser subordinates and postpones their Agreement to any mortgages, as applicable and any advances under such mortgages. None of those Agreements are registered on title to the applicable Real Property.

19. Given that the transactions approved today represent the value-maximizing transactions for each respective Project, and no offer was submitted in the Sale Process for any of Minu, Nao or High Crown that provided for the assumption of the applicable Pre-Sale Purchase Agreements, the termination and disclaimer of those agreements, which is a condition of the transactions approved today, is necessary to maximize the value and benefits for the stakeholders of the Statesview Receivership Companies. I further observe that none of the bids received in the Sale Process contemplated an assumption of the Pre-Sale Purchase Agreements.

20. I observe that it is the intention of the Receiver to provide notice to each of the Pre-Sale Purchasers by email or courier, as applicable, and post notice on the website of the Receiver.

21. Further, the Receiver intends to work with Tarion Warranty Corporation to assist with the deposit claims process for the Pre-Sale Purchasers in respect of the termination and disclaimer of their agreements. Mr. Yailaqi, who appears today for some of those Purchasers, agrees with this and with the fact that the rights of those Purchasers will be affected by the Tarion Priority Motion now under reserve by Steele, J.

22. The Receiver also seeks a sealing order in respect of the offer summaries and unredacted agreements collectively comprising Confidential Appendices 1 – 7 to the Sixth Report. The sealing relief is of limited duration and/or subject to further order of the court. It protects the integrity of the sales process and the value of the assets in the event that further steps are required, or the approved transactions do not close, all of which is accretive to the benefit to the stakeholders. In short, I am satisfied that the test as articulated by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* has been met here.

23. I am also satisfied that the fees and disbursements of the Receiver and its counsel are reasonable, appropriate, and reflect work done that was consistent with the scope of the mandate of the Receiver as appointed. The fees and disbursements were properly incurred in the discharge of the duties of the Receiver. They have been allocated to specific Statesview Receivership Companies when the activities relate to that specific entity and its corresponding project. Where the activities were of a general nature, the Allocation Methodology has been employed. I agree with the submission of the Receiver that this is the most practical and reasonable basis upon which to allocate fees.

24. The Receiver has acted reasonably and prudently, and the activities described in the Sixth Report are approved.

25. The proposed reserves, holdback payments and distributions are set out in detail in the Sixth Report. Depending on the result in the Tarion Priority Motion, certain reserves or holdbacks may also be required to address certain additional priority claims asserted in the Proposed Class Action as described in the Sixth Report.

26. In addition, and in response to submissions made today by counsel for Reliance Home Comfort, the Receiver will ensure that the holdbacks and reserves are sufficient to address the contingencies associated with that claim.

27. Finally, the Receiver's request for authorization and direction to make the distributions proposed, subject in some cases to the determination on the Tarion Priority Motion, is appropriate and is approved.

28. For all of these reasons, the orders sought today are appropriate and are granted. I have signed the orders and they have immediate effect without the necessity of issuing and entering.

Cleaver, J.

TAB 7

Counsel Holdings Canada Limited v.
The Chanel Club Limited et al.*

[Indexed as: Counsel Holdings Canada Ltd. v. Chanel Club Ltd.]

33 O.R. (3d) 285
[1997] O.J. No. 1428
Court File No. 43535/89

Ontario Court (General Division),
Adams J.,
April 10, 1997

* An appeal from the following judgment of Adams J. to the Ontario Court of Appeal (Labrosse, Charron and Feldman JJ.A.) was dismissed on March 5, 1999. See 43 O.R. (3d) 319.

Mortgages -- Priorities -- Purchaser's lien -- Purchaser of condominium unit agreeing that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

Real property -- Agreements of purchase and sale -- Agreement obliging vendor to hold deposit in trust -- Vendor entitled to use deposit funds after deposit receipt delivered to purchaser under Ontario New Home Warranty Program -- Condominium Act, R.S.O. 1990, c. C.26 -- Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Real property -- Registration -- Priorities -- Purchaser's lien -- Actual notice -- Purchaser of condominium unit agreeing

that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

In 1986, the defendant C Club began construction of an 89-unit condominium. For this project, it was the proposed declarant under the Condominium Act and a vendor of new homes under the Ontario New Home Warranties Plan Act ("ONHWPA"). The purchasers of units paid deposits under written agreements of purchase and sale that provided that the deposits were to be paid into an interest-bearing trust account. The agreements also provided that the purchaser's rights were to be subordinate to any mortgage arranged by C Club.

Under the Condominium Act, C Club was obliged to hold the deposits in a trust account to the extent that the purchasers had not received a "deposit receipt" issued under the ONHWPA by the defendant Ontario New Home Warranties Plan (the "Plan"). The ONHWPA provided that a purchaser with a deposit receipt and damages claim against a vendor was entitled to be paid by the Plan to a maximum of $20,000 and that the Plan was subrogated to the purchaser's claim. C Club entered into a vendor-builder agreement with the Plan and, in March 1987, the Plan provided C Club with 89 blank deposit receipts having received the security of a letter of credit and C Club's covenant to reimburse the Plan for any sums it might have to pay under the deposit receipts.

In December 1987, the plaintiff C Holdings replaced F Trust as the financier for the project. It agreed to provide a construction loan of $9,420,000 and a credit facility of up to $1,500,000 for the issuance of the deposit receipts. In return, it received a first registered charge on the project. Before agreeing to this loan, C Holdings had reviewed 58 purchase agreements that had already been signed and which provided that the purchaser's deposits were to be payable to C Club and F Trust. Some of these agreements were later amended to refer to

C Holdings instead of F Trust. After 1987, C Club entered into 30 additional agreements, under eight of which the deposits were payable to C Club alone, and under 22 of which the deposits were payable to C Club and C Holdings.

In 1989, the amount of the loan was increased, and a new first mortgage of $13,500,000 was registered. In November 1989, C Club defaulted under the loan and a receiver-manager was appointed. The receiver did not complete the project, and the Plan paid purchasers $1,628,141 pursuant to the deposit receipts. The Plan exercised its letter of credit but there was a shortfall of $549,231. C Holdings also suffered a shortfall on its mortgage in the amount of $4,436,979.09 as of April 1995. In an action, C Holdings claimed the proceeds of the receivership on the basis that it held the first registered mortgage; however, the Plan claimed priority on the basis that it was subrogated to the purchasers' lien claims because C Holdings had notice of these claims or on the basis that C Club was obliged to hold the deposits in trust notwithstanding the delivery of the deposit receipts and that C Holdings was equally responsible for the deposits.

Held, there should be judgment for C Holdings.

While a purchaser's lien arose in the context of all the purchase agreements, the liens were not registered and did not take priority over the first registered charge. Although the priority of a mortgage may be affected by actual notice of a prior equitable lien, the priority will not be affected where the lien, by its terms, is expressed to be subordinate or subject to the registered mortgage. This was the effect of the agreements in this case. Therefore, the only actual notice that the mortgagee had of the purchase agreements entered into before the mortgage was notice of a subordinate interest. While no issue arose with respect to the subsequent agreements, the same result would have prevailed. This was not a case of C Holdings enforcing an agreement to which it was not a party; rather, it was a question of the extent of notice of a purchaser's lien that would otherwise be assertable against the mortgage. Further, since a purchaser's lien arises by force of the purchaser's contract, the equitable liens of the purchasers

in this case under the agreements were within the meaning of the postponement clause found in the agreements.

There was no trust obligation imposed on C Club with respect to the deposits after the deposit receipts had been delivered. The agreements were drafted against the framework of the Condominium Act, which provided that deposits only had to be retained until prescribed security, i.e., the deposit receipts, were delivered. Had the parties to the agreement intended a trust arrangement different from that contemplated by the Condominium Act, they would have said so expressly. The purchasers accepted deposit receipts and acted on them. There was nothing in the material that suggested it was intended under the agreements that the purchasers were to be entitled to deposit receipts and to have C Club hold their deposits in trust. C Holdings was not a party to the purchase agreements but if it had trust obligations, they could be no higher than C Club's obligations. Accordingly, C Holdings had priority with respect to the proceeds of the receivership.

Cases referred to

Bramber Consulting Management Service Corp. v. Commerce Capital Mortgage Corp. (1981), 36 O.R. (2d) 601, 22 R.P.R. 17 (H.C.J.); Canada Trust Co. v. Queensland Management Services Ltd. (1980), 13 R.P.R. 156 (Ont. H.C.J.); Castellain v. Preston (1883), 11 Q.B.D. 380, 52 L.J.Q.B. 366, 49 L.T. 29, 31 W.R. 557 (C.A.); Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 8 O.A.C. 1, 16 D.L.R. (4th) 289, 54 C.B.R. (N.S.) 65, 4 P.P.S.A.C. 270 (C.A.); Harwood-Scully v. King-Frederick Realty Ltd., [1986] O.J. No. 1250 (H.C.J.); Molgat Holdings Ltd. v. Zephyr Development Ltd. (1979), 98 D.L.R. (3d) 104 (B.C.S.C.); Rose v. Watson (1864), 10 H.L. Cas. 672, 33 L.J. Ch. 385, 3 New Rep. 673, 10 L.T. 106, 10 Jur. N.S. 297, 12 W.R. 585, 11 E.R. 1187 (H.L.); Royal Trust Co. v. H.A. Roberts Group Ltd., [1995] 4 W.W.R. 305, 17 B.L.R. (2d) 263, 31 C.B.R. (3d) 207, 44 R.P.R. (2d) 255 (Sask. Q.B.); Whitbread & Co. v. Watt, [1902] 1 Ch. 835, 71 L.J. Ch. 424, 86 L.T. 395, 50 W.R. 442, 18 T.L.R. 465, 40 Sol. Jo. 378 (C.A.)

Statutes referred to

Condominium Act, R.S.O. 1990, c. C.26, s. 53(1), (2)
Courts of Justice Act, R.S.O. 1990, c. C.43
Land Titles Act, R.S.O. 1990, c. L.5, s. 78
Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, ss. 14(1), 23(1)(m)
Registry Act, R.S.O. 1990, c. R.20, ss. 70, 71, 72

Rules and regulations referred to

R.R.O. 1990, Reg. 121 (Condominium Act), s. 35(2)
R.R.O. 1990, Reg. 726 (Ontario New Home Warranties Plan Act), ss. 6(1), (2), 17

ACTION to determine the priority to the proceeds of a receivership.

Benjamin Zarnett and R. Bernstein, for plaintiff.
H.C.G. Underwood, for Ontario New Home Warranty Program.

ADAMS J.: -- This is a proceeding to determine who has priority to the proceeds of a receivership which arose from the insolvency of a condominium developer known as Chanel Club Limited ("Chanel") and the default under a mortgage in favour of the plaintiff, Counsel Holdings Canada Limited ("Counsel"), which secured its loans to Chanel. Counsel claims priority on the basis that it held the first registered mortgage on the lands which were realized upon in the receivership. The Ontario New Home Warranty Program ("ONHWP"), however, claims priority to a portion of the proceeds on the basis that it is subrogated to the lien claims of purchasers arising from their deposits made at the time of purchase of the proposed condominium units and in respect of which counsel had notice.

I

In 1986, Chanel commenced construction of an 89-unit

residential condominium project on College Street in the City of Toronto. The owner of the lands on which the project was to be constructed was the Toronto United Church Council (the "Church"). Chanel entered into an agreement with the Church to permit the construction of the condominium and, on registration, to obtain title to it. Accordingly, Chanel was the "proposed declarant" of the condominium.

Chanel sold units in the project and required the purchasers to pay deposits. The Condominium Act, R.S.O. 1990, c. C.26, provides that a proposed declarant is required to hold a deposit received from a purchaser in a trust account at a specified financial institution until their disposition to the person entitled to them or until the purchaser is provided with "prescribed security": see s. 53(1). Pursuant to regulations under the Condominium Act, "prescribed security" is defined to include a "deposit receipt" issued by ONHWP: see R.R.O. 1990, Reg. 121, s. 35(2). Accordingly, once a purchaser has received a deposit receipt, the proposed declarant is no longer required, under the terms of the Condominium Act, to hold a purchaser's deposit in trust to the extent the deposit is covered by that receipt.

In November 1986, Chanel registered with ONHWP and paid an enrollment fee in respect of all 89 units in the project. ONHWP is a non-profit corporation designated by the Lieutenant Governor in Council to administer the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31. Pursuant to s. 14(1) of the ONHWP Act, a person who has contracted with a vendor for the purchase of a new home (including a condominium unit) and who has a cause of action in damages against the vendor for financial loss resulting from the vendor's failure to perform the contract is entitled to be paid by ONHWP the amount of such damages subject to the limits fixed by the regulations. Sections 6(1) and (2) of R.R.O. 1990, Reg. 726 provide that the maximum amount that can be claimed by the purchaser of a condominium unit on account of damages is $20,000 as well as interest. Pursuant to s. 23(1)(m) of the ONHWP Act and Reg. 726, s. 17, ONHWP is subrogated to all rights of recovery of a person to whom it has made payment in respect of a claim made pursuant to s. 14(1)(a) of the Act.

Chanel entered into a vendor-builder agreement dated November 10, 1986 with ONHWP. Pursuant to that agreement, ONHWP agreed to provide Chanel with deposit receipts and Chanel was entitled to deliver those receipts to its purchasers in respect of deposits received from them. The deposit receipts provided to Chanel by ONHWP provided:

(a) that if the deposit paid by the purchaser to Chanel would become owing to the purchaser upon the bankruptcy of Chanel or upon Chanel's failure to perform its obligations under the purchase agreement, and if Chanel failed to pay the deposit to the purchaser, the purchaser would be entitled to payment from ONHWP in an amount equal to such deposit plus interest provided that the maximum amount payable under the deposit receipt would be $20,000 plus interest; and

(b) upon payment of any claim to the purchaser, ONHWP would be subrogated, to the extent of such payment, to all rights of recovery of the purchaser against Chanel.

ONHWP's potential exposure under the deposit receipts it issued to Chanel was $1,780,000 (i.e. 89 X $20,000) plus interest. ONHWP obtained a covenant from Chanel to reimburse it for any sums ONHWP might have to pay under the deposit receipts. As security for Chanel's obligations, ONHWP requested a letter of credit in the sum of $1,789,100 as well as personal guarantees from the principals of Chanel. In March 1987, ONHWP provided Chanel with 89 blank deposit receipts. Chanel was then at liberty to release these deposit receipts to purchasers who paid deposits in the manner contemplated by the Condominium Act. Under the Act, once a deposit receipt is issued to a purchaser, deposit moneys provided by the purchaser and covered by the deposit receipt can be removed by the vendor from the trust account. Thus, pursuant to the legislation, Chanel had access to the purchaser's deposit at that time.

The project was originally financed by Financial Trust Company ("Financial"). In December 1987, however, the plaintiff provided replacement financing in the form of an interim

construction loan and a letter of credit facility. At the time, approximately 75 per cent of the units had been pre-sold. Fifty-eight of these "initial purchase agreements" stipulated in para. 1(a) that the deposits were to be payable jointly to Chanel and Financial Trust Company and to be credited towards the purchase price on closing date.

All the initial purchase agreements provided, inter alia:

(2) The meaning of words and phrases used in this Agreement shall have the meaning described to them in the Act, unless otherwise provided for herein.

"Act" means the Condominium Act (Ontario) and any amendments and regulations thereto;

(3) The Vendor shall pay interest to the Purchaser in accordance with the Act (interest to be credited on the statement of adjustments on the Closing Date). The Deposits shall be paid into an interest bearing trust account of a Canadian chartered bank or Trust Company. Interest shall accrue to the Purchaser from and after the fifteenth (15th) day following the date upon which the Purchaser pays the second deposit required pursuant to paragraph 1(a)(ii) at the rate prescribed in the Act, unless the purchaser shall forfeit the Deposits (in which event the vendor shall be entitled to such interest). The balance of any interest earned shall be paid to the vendor.

(24) The Purchaser agrees that he will not register or cause or permit this agreement to be registered and that no reference to it or notice of it or any caution shall be registered on title. The Purchaser further agrees until Title Closing not to sell, lease, mortgage or in any way encumber the Unit or the Condominium directly or indirectly or permit any lease, notice of agreement, lien or any other interest to be registered with respect thereto. The Purchaser shall be deemed to be in default under this Agreement if he creates any encumbrance or makes any registration or causes or

permits any encumbrance or registration to be made on title prior to the Closing Date.

(26) This Agreement and the Purchaser's rights hereunder are subject and subordinate to (i) any mortgage arranged by the Vendor and any advances from time to time thereunder, (ii) any agreements entered or to be entered into by the Vendor with any public utility or any municipal or other governmental authority having jurisdiction relating to the development and/or servicing of the Building and (iii) the Creating Documents.

Counsel was not a signatory to any of the initial purchase agreements. All of them were between the purchasers and Chanel.

Chanel, the Church and Counsel executed a loan agreement dated December 1, 1987 which provided that Counsel would lend up to $9,420,000 to finance construction of the project and up to $1,500,000 to finance the acquisition of a letter of credit to be provided to ONHWP as security for the issuance of the deposit receipts and that, as security for the loan, Counsel would receive a first registered mortgage and charge on the project and its lands. Prior to entering into the loan agreement, Counsel reviewed the initial purchase agreements. On December 16, 1987, a charge/mortgage of land in the principal amount of $11,500,000 was executed by the Church as owner of the lands and registered in favour of Counsel.

After Counsel advanced its loan, some of the initial purchaser agreements were amended to provide that the reference to Financial Trust Company in para. 1(a) was to be amended to refer to Counsel. After December 1987, Chanel entered into 30 additional agreements of purchase and sale. These "subsequent agreements" contained the same provisions as set out above except that para. 1(a) provided, in the case of 22 agreements, that the deposit was to be paid jointly to Chanel and Counsel and, in the case of eight agreements, the deposit was to be paid to Chanel alone. Counsel was not signatory to any of the subsequent agreements.

The deposits paid by purchasers under the initial purchase agreements were received by Chanel and deposited in an account at Financial Trust Company. After Counsel became the lender to the project, the funds on deposit at the Financial Trust Company were transferred to Counsel. It deposited $1,141,163.08 with the National Bank of Canada to secure the issuance of the letter of credit in favour of ONHWP. The balance of the funds were paid into a trust account of Chanel designated as the "Excess Deposit Account" and were held there. Chanel received all deposits paid under the "subsequent" purchase agreements, i.e., subsequent to Counsel's involvement. Deposits up to and including $20,000 were transferred to Chanel's construction account and used to pay trade suppliers on the project. Deposits in excess of $20,000 were held in the Excess Deposit Account.

The loan agreement was amended by an amending agreement dated July 31, 1989 and was made between Chanel, Counsel and the Church. Counsel agreed to increase the construction loan. The loan amending agreement provided that a new first mortgage in favour of Counsel in the sum of $13,500,000 was to be provided and that it would constitute a first charge on the lands in question. Thus, a new mortgage of $13,500,000 was executed by the Church in Counsel's favour and registered to replace the original mortgage of $11,500,000. The registration of the new mortgage was on August 11, 1989.

In November 1989, Chanel defaulted under the terms of the loan agreement, the loan amending agreement, and the mortgage. Pursuant to an order of Farley J. dated December 15, 1989, Price Waterhouse Limited was appointed as receiver-manager of Chanel and of the lands which were subject to Counsel's mortgage. The receiver was found to have no obligation to complete the outstanding purchase agreements. Accordingly, the purchasers, under these agreements, were entitled to the return of their deposits. The portions of the deposits over $20,000, which were being held in trust in the Excess Deposit Account, were distributed to the purchasers as entitled. The portions of the deposits up to $20,000 were not returned by Chanel because of its insolvency. ONHWP paid to purchasers $1,628,141 including interest of $322,346 pursuant to the deposit receipts

issued to them under the initial purchase agreements and the subsequent purchase agreements.

On January 22, 1990, ONHWP realized on the letter of credit, placing the sum of $1,078,910 in its account. After application of the proceeds from the letter of credit, the difference between ONHWP's payment out to purchasers and the amount it received pursuant to the letter of credit was $549,231 (before crediting interest earned by ONHWP on its receipt of $1,078,910). Counsel also suffered a shortfall on its mortgage loan. After the sale of the lands and application of the net sale proceeds against the amount owing on the mortgage, the sum of $4,436,979.09 was still owing as of April 30, 1995. Pursuant to an order of this court, a surety bond has been posted by Counsel in the amount of $670,000.

II

Counsel holds the first registered mortgage/charge against the lands which were realized in the receivership. Accordingly, by reason of the provisions of the Registry Act, R.S.O. 1990, c. R.20, ss. 70, 71 and 72 and the Land Titles Act, R.S.O. 1990, c. L.5, s. 78(3), it claims first right to the proceeds of the disposition of those assets. ONHWP, however, submits that it is subrogated to the rights of the purchasers who were entitled to have their deposits refunded to them and that those rights have priority to Counsel's rights. ONHWP makes the following arguments:

(a) The purchasers held purchasers' liens against the lands mortgaged to Counsel and the liens are enforceable in priority to Counsel's mortgage, notwithstanding that the purchasers each signed purchase and sale agreements providing that their rights were subordinate and subject to a mortgage arranged by the vendor.

(b) Chanel was required to hold a purchaser's deposit in trust under the agreement of purchase and sale and was not entitled to release it, notwithstanding the delivery of prescribed security to the purchaser as permitted by the Condominium Act.

(c) ONHWP submits that Counsel, where deposits were to be paid jointly to Chanel and Counsel, is equally responsible with Chanel for the release of the funds from a trust account, notwithstanding that Counsel was not a party to those purchase agreements.

While I accept that a purchaser's lien arose in the context of all of these purchase and sale agreements, the liens were not registered and do not take priority over the first registered charge against the lands and premises of Chanel in favour of Counsel. Although the priority of a registered mortgage may be affected by actual notice of a prior equitable lien, the priority will not be affected where the lien, by its own terms, is expressed to be subordinate or subject to the registered mortgage; That is the effect of para. 26 of all of the agreements of purchase and sale concerning these condominium units. Therefore, the only actual notice that the initial purchase agreements gave to the plaintiff was notice of a subordinate interest of each purchaser to the rights of a mortgagee under a mortgage arranged by the vendor. While no issue of priority arises with respect to the subsequent purchase agreements, the same result would prevail in light of para. 26.

The issue was first considered in Harwood-Scully v. King-Frederick Realty Ltd., [1986] O.J. No. 1250 (H.C.J.) where an agreement of purchase and sale between Harwood-Scully as purchaser of a proposed condominium unit and the vendor provided (at p. 26):

> This Agreement is subordinate to and the Purchaser hereby postpones it to any Mortgage arranged by the Vendor and any advances from time to time . . .

In an action for the return of a deposit, the purchaser argued that she had priority over the first mortgagee because it had actual notice of her deposit and her agreement prior to making its mortgage advances and before it registered its interest. The court rejected all of the arguments now relied on by ONHWP in these proceedings. It was held that the mortgagee

had notice only of a subordinated interest which therefore ranked behind the mortgage. In my view, the Harwood-Scully decision is determinative of the issues raised by ONHWP in these proceedings.

This is not a case where Counsel is seeking to enforce a provision of an agreement to which it is not a party, i.e., para. 26 of the purchase agreement. Rather, this matter concerns the extent of notice Counsel had of a purchaser's lien in respect of a priority that it would otherwise be able to assert under its mortgage. Thus, Counsel is not seeking to "enforce" the purchase and sale agreements entered into between Chanel and the buyers of the condominium units. In rejecting a similar argument put forward in Royal Trust Co. v. H.A. Roberts Group Ltd. (1995), 44 R.P.R. (2d) 255 at p. 276, [1995] 4 W.W.R. 305 (Sask. Q.B.), it was stated:

> CIBC is not privy to the trust deed executed by Roberts and Royal Trust. But, in my view, CIBC is not attempting, per se, to enforce the trust deed. Rather, it is simply resisting the attempt of Royal Trust to take a prior security position to that of CIBC that is inconsistent with what Royal Trust has declared and agreed to in the trust deed regarding the priority of the respective securities.

Accordingly, notice of an interest which is stated to be subordinate is not actual notice of a prior interest which defeats a mortgagee's registered priority: see also Molgat Holdings Ltd. v. Zephyr Development Ltd. (1979), 98 D.L.R. (3d) 104 (B.C.S.C.); Bramber Consulting Management Service Corp. v. Commerce Capital Mortgage Corp. (1981), 36 O.R. (2d) 601, 22 R.P.R. 17 (H.C.J.); and Canada Trust Co. v. Queensland Management Services Ltd. (1980), 13 R.P.R. 156 (Ont. H.C.J.).

I am also of the view that Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4th) 289 (C.A.) does not dictate a contrary result. That case did not involve the question of notice. Rather, a party with a second unprotected interest in personalty was attempting to subordinate the rights of a party with a first registered interest and a statutory right in priority to that personalty

on the basis of an agreement between the first registered party and another party. In the instant case, Counsel has the first registered interest and statutory right to priority which ONHWP is attempting to defeat with an argument of actual notice. The issue then arises as to the content of that notice.

Further, the equitable liens of the purchasers in this case arise under the agreements of purchase and sale and, therefore, fall within the meaning of the postponement clause found at para. 26 of those same agreements. As Lord Westbury L.C. expressed in Rose v. Watson (1864), 10 H.L. Cas. 672 at pp. 678-79, 33 L.J. Ch. 385 (H.L.):

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract in the sense that the ownership of the estate is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.
>
> My Lords, that being so, we only have to enquire under the terms of the present contract whether the sums of money paid by the Respondent were, or were not, paid in pursuance of that contract. About that my Lords, there is no controversy whatever. They were bonafide payments made by the Respondent, in conformity with the contract which required such payments to be made in part of the purchase-money; and they were accepted by the vendor as portions of that purchase-money. In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.

In my view, there was no intent in Whitbread & Co. v. Watt, [1902] 1 Ch. 835, 71 L.J. Ch. 424 (C.A.), to disagree with the notion that a purchaser's lien arises "by force of the

contract". Accordingly, in the facts at hand, any lien is subordinated by para. 26 of the standard form purchase agreement.

ONHWP admits there was no breach of the trust imposed on the deposits by the Condominium Act. However, it now argues that a separate trust arose under the purchase agreements. In my view, this was not the intent of the purchase agreements. These purchase agreements were negotiated "in the shadow of" the Condominium Act. Indeed, the agreements make explicit reference to that legislation. This all being the case, I find the references in the purchase agreement to a deposit and to a trust account only require the maintenance of the trust account until such time as the prescribed security is delivered. The provisions of the Condominium Act permit the release of deposits from a trust on the delivery of prescribed security. Had the parties to the agreement intended a trust arrangement different from that contemplated by the provisions of the Condominium Act, they would have said so expressly.

ONHWP voluntarily entered into an agreement with Chanel whereby deposit receipts would be provided and took security from Chanel against the obligations which it might incur under the deposit receipts. ONHWP has admitted that upon delivery of a deposit receipt, a vendor is no longer required under the terms of the Condominium Act to hold the deposit moneys covered by that deposit receipt in trust. Given that the purchase agreement was drafted against the framework of the Condominium Act and specifically provides that words and phrases used in the agreement have the meaning ascribed to them in the Condominium Act, I am not prepared to hold that para. 3 of the agreement intended a deposit to remain in an interest-bearing trust account after a deposit receipt was given to a purchaser.

The purchasers in this case accepted deposit receipts and acted on them to collect payment of their deposits. The purpose of a deposit receipt is to permit a vendor to release deposit funds from trust. Nothing in the material before me supports a contractual intention that the purchasers were to be entitled to deposit receipts and to have Chanel hold their deposits in trust. Furthermore, any claim against Chanel on a trust basis

does not give priority over Counsel, by reason of para. 26 of the purchase agreements. Accordingly, whether or not (and I find not) Counsel was obligated to hold deposit funds in trust, there could be no breach of trust once deposit receipts were issued to the purchasers. Counsel, of course, was not a party to the purchase agreements. But if it had trust obligations pursuant to those agreements, they could be no higher than Chanel's.

III

Accordingly, the questions in the list of issues to be tried are answered as follows:

1. Q. Are the net receivership proceeds impressed with an express, constructive or resulting trust for any amount in respect of purchasers' claims for dwelling unit deposits?

A. No.

2. Q. If a trust has been created with respect to the deposits, which of the following parties are constituted a trustee for which deposits:

(a) The Chanel Club Limited?

(b) Counsel Trust Company and its assignee Counsel Holdings Canada Limited?

A. Only Chanel was required to hold deposits in trust until the delivery of deposit receipts, which terminated any trust.

3. Q. If any trust was created, was the trustee released from its obligations to hold those moneys in trust by the deposit receipt provisions of the Condominium Act or otherwise?

A. Yes, under both the Act and the purchase agreements.

4. Q. If any trust was created between certain purchasers and some party or parties, are such trust claims enforceable in priority to the plaintiff's claims to the extent that the

deposits cannot be identified or traced into receivership assets?

A. No. I find those moneys "went into" the building of the condominium for the purposes of tracing. However, the tracing does not arise.

5. Q. What is the effect of cl. 26 of the agreements of purchase and sale providing for subordination of purchasers' claims to the plaintiff's mortgage advances:

(a) If a trust was created with respect to the deposits in question?

(b) If no trust was created?

A. No claims or rights of the purchasers can be advanced in priority to Counsel as a result of cl. 26 of the agreements of purchase and sale whether or not a trust was created.

6. Q. With respect to the trust issues aforesaid, is ONHWP in any different position than the purchasers to whose claims ONHWP is subrogated?

A. No.

7. Q. Did the purchasers acquire an equitable lien in respect of their dwelling unit for the amount of their deposits when they made their deposits?

A. Yes, until they received deposit receipts.

8. Q. If the purchasers did acquire equitable liens, are their equitable liens thereunder subject and subordinate to the plaintiff's mortgage claims pursuant to the provisions of cl. 26 of the agreements of purchase and sale?

A. Yes.

9. Q. If the provisions of the said cl. 26 are found to provide for the subordination of the purchasers' deposit

claims to the plaintiff's mortgage claim, but such subordination is unenforceable at the instance of the plaintiff, should the court authorize and direct the enforcement of such subordination provisions at the instance of the court-appointed receiver and manager of the Chanel Club Limited?

A. No, although this issue does not arise in light of my other conclusions.

10. Q. With respect to the aforesaid equitable lien issues, is ONHWP in any different position than the purchasers to whose claims ONHWP is subrogated?

A. No.

11. Q. Where agreements of purchase and sale provide for deposits to be payable jointly to the Chanel Club Limited and to Financial Trust Company, or to the Chanel Club Limited and to the plaintiff, are the purchasers entitled to recover the amounts paid as deposits from the plaintiff?

A. No, it was not a party.

12. Q. Where the purchasers provided deposit cheques made payable jointly to the Chanel Club Limited and Financial Trust Company, or the Chanel Club Limited and the plaintiff, are the purchasers entitled to recover the amounts paid from the plaintiff as well as from the Chanel Club Limited?

A. No. Only Chanel was a party to the purchase agreements.

13. Q. In the event either of the questions in 10 or 11 is answered affirmatively, should the net receivership proceeds payable to the plaintiff be impressed with a constructive trust to the extent of the moneys found to be due to purchasers from the plaintiff?

A. No.

14. Q. With respect to the aforesaid "jointly payable" issues,

is ONHWP in any different position than the purchasers to whose claims it is subrogated?

A. No.

15. Q. On the theory of detrimental reliance is ONHWP estopped from asserting or proving any claim in priority to the plaintiff's mortgage claims for the following reasons:

(a) ONHWP concluded an arrangement with Chanel whereby, instead of holding a first $20,000 of each dwelling unit deposited in trust, the Chanel Club Limited provided security to ONHWP in the form of a letter of credit of $1,078,910; and,

(b) Counsel Trust Company made advances under its mortgage with knowledge of the said arrangement and in reliance upon the said arrangement being satisfactory to ONHWP?

A. No. In making its subrogated claim, ONHWP stands in the shoes of the purchasers. It is only their conduct that is relevant: see Castellain v. Preston (1883), 11 Q.B.D. 380, 52 L.J.Q.B. 366 (C.A.).

16. Q. Did ONHWP fail to mitigate its damages by failing to invest the moneys realized from drawing on the letter of credit in some form of reasonable and commercial investment which would realize a greater interest rate than that actually realized?

A. No. ONHWP earned interest at 2.5 per cent below the Toronto Dominion Bank prime rate. There is no evidence that a better rate could have or should have been obtained.

17. Q. In the event that question 15 is answered affirmatively, by what amount should ONHWP's recovery, if any, be reduced on account of the failure to mitigate?

A. There was no failure to mitigate.

18. Q. In the event that ONHWP is entitled to recover some amount as a result of the answers to questions aforesaid:

(a) Are the purchasers in question entitled to interest on the claims in question to which ONHWP is subrogated and at what rate?

(b) Is ONHWP in any different position than the purchasers to whose claims it is subrogated in respect of its claims for interest?

A. No, in the sense that there is no entitlement at all. However, if there was an entitlement, I note the purchaers are entitled to interest on deposits pursuant to s. 53(2) of the Condominium Act and ONHWP is subrogated to that right. ONHWP itself paid interest on purchasers' claims at the same rate. Accordingly, ONHWP would have been entitled to claim the same rate at which it allowed interest on the proceeds of the letter of credit so long as there was an unexpended balance. That rate is lower than ONHWP would be entitled to claim pursuant to the Courts of Justice Act, R.S.O. 1990, c. C.43.

Order accordingly.

RPLT