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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**

REPLY FACTUM OF THE MOVING PARTY

September 19, 2024

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TO: THE SERVICE LIST

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REPLY OF THE MOVING PARTY

1. This reply factum primarily responds to two arguments made by the receiver, namely that:
 - (a) There is no statutory trust because the Agreements of Purchases and Sale (“APS”) state that deposits do not go to the common elements; and
 - (b) Even if there is a statutory trust, mortgagees would have priority due to Ontario’s *Land Titles Act*.
2. Both of those arguments are incorrect. In brief, the 1st argument would strip the statutory trust of all meaning and the 2nd argument would overturn the primacy of the *Bankruptcy and Insolvency Act* in bankruptcy proceedings. Each of these is addressed in turn below.
3. One other point is worth a brief comment. The receiver argues that it lacks funds to conduct a tracing. It would be inequitable for this court to consider this argument, as any lack of funds is solely a product of the receiver’s own misconduct. The receiver distributed the funds in the face of this motion, repeated requests by the moving party to hold back those funds, and a court order stating that the issues raised by this motion might remain unresolved by the Tarion Decision.¹

A. The Receiver’s 1st Argument Would Strip the Statutory Trust of All Meaning

4. Section 176 of the *Condominium Act* states that the act applies “despite any agreement to the contrary”.² Thus, if any term in an APS undermines either the provisions or the scheme of the *Condominium Act*, then those provisions are void.

5. Section 81(1) of the *Condominium Act* creates a statutory trust over “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;

¹ [Endorsement of Justice Osborne dated November 16, 2023](#) at para 25.

² *Condominium Act, 1998*, [SO 1998, c 19](#), s 176.

- (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.³

6. Section 138(4)(a) extends this statutory trust to common elements condominiums, except that “proposed unit” should be read as “proposed common interest in the corporation”.⁴

7. The clear purpose of this statutory trust is to ensure that the developer keeps money in respect of a common interest in the corporation in trust for the benefit of homebuyers. It specifically refers to funds “reserving a right to enter into an agreement” to ensure that this trust applies to deposit money. It specifically distinguishes funds “on account of an [APS]” from funds “on account of a sale” because the former includes deposit money. The text is clear that deposits in respect of a common interest in the corporation are subject to the statutory trust.

8. The receiver argues that a developer can easily avoid this statutory obligation by arbitrarily deeming the common interest element to be worth \$2 and attributing none of the deposit to it.

9. If the receiver is correct, then developers could – and would – insert the impugned sentence into every APS, and thereby avoid having to keep any funds in trust. This would be an absurd result, depriving the statutory trust for common element condominiums of any meaning as there would never be any funds subject to that trust.

10. In support of its position, the receiver relies on a recent endorsement of Justice Steele in *Cameron Stephens*. There are several reasons not to give this endorsement any weight:

- (a) **Obiter:** This was a motion by the receiver to (i) disclaim 28 APS; and (ii) increase its own borrowing limit.⁵ The trust issue was raised by a homeowner (Mr. Lee), and

³ *Condominium Act, 1998*, [SO 1998, c 19](#), s 81(1).

⁴ *Condominium Act, 1998*, [SO 1998, c 19](#), s 138(4)(a).

⁵ Factum of Receiver dated May 22, 2024 at para 1; [Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp., 2024 ONSC 3507](#) at para. 1.

its purpose was to buttress his argument for a future warranty claim from Tarion. There was no cross-motion. Any conclusions on the trust issue were thus *obiter*.

- (b) **Limited Opposing Submissions:** Although Mr. Lee submitted a brief factum, his counsel did not make any oral submissions at the hearing.⁶
- (c) **No Authorities Cited:** The endorsement does not refer to any authorities in support of its conclusion on the trust issue.⁷ Indeed, it does not even refer to section 138(4) or 176 of the *Condominium Act* which are critical to the argument advanced here.
- (d) **Conflates Different Regimes:** The endorsement says a homebuyer cannot get both the higher Tarion warranty for a freehold under the *Warranties Act* and the trust provisions under the *Condominium Act*.⁸ This is flawed for two reasons:
 - (i) Common elements condominiums are defined to include both freehold and condominium aspects – that is why they are defined as a separate category in the *Condominium Act*. The defining features of a common elements condominium are that (1) there is a “**freehold condominium** corporation”;⁹ and (2) each of the owners of the “common elements **condominium** corporation ... also owns the **freehold** estate in a parcel of land”.¹⁰
 - (ii) The *Warranties Act* and the *Condominium Act* are designed to provide overlapping protection for consumers. Giving consumers access to both is fully consistent with their respective purposes. Neither the receiver nor the endorsement refer to any authorities to the contrary.

⁶ [Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp., 2024 ONSC 3507](#) at para. 5.

⁷ [Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp., 2024 ONSC 3507](#) at paras. 23-25.

⁸ [Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp., 2024 ONSC 3507](#) at paras. 26-27.

⁹ *Condominium Act, 1998*, [SO 1998, c 19](#), s 138(3) (emphasis added).

¹⁰ *Condominium Act, 1998*, [SO 1998, c 19](#), s 139(1)(a) (emphasis added).

11. The receiver also claims that the common elements are “a *de minimis* component of the consideration offered to the purchasers”, so allocating only \$2 of the purchase price and none of the deposit to the common elements is commercially reasonable. This argument strains credulity.

12. The marketing materials for Nao II make clear that the common elements are key selling points, including such essential features as roadways and parking, as well as amenities including:

PLEASING LANDSCAPING FEATURES

- Front, rear and side yards will be fully sodded creating a truly desirable and prestigious streetscape
- Relating outdoor lounge areas and private landscaped courtyard
- Visitor parking available
- Professionally landscaped Parkette and maintained grounds¹¹

13. Such essential features and amenities are clearly worth much more than \$2.

B. In Bankruptcy Proceedings, Bankruptcy Priorities Prevail

14. The Supreme Court of Canada has repeatedly held that, in bankruptcy proceedings, the priority order in the *Bankruptcy and Insolvency Act* prevails over provincial statutes:

This Court has on many occasions ruled on conflicts between the BIA’s order of priority and ... provincial statutes ... Those decisions established that statutory provisions enacted by the provinces, although valid in the context of provincial law, are inapplicable in bankruptcy if they conflict with the BIA. It is well established that the BIA will prevail regardless of a province’s intention.¹²

15. It is well-established that, under the *Bankruptcy and Insolvency Act*, trust property supersedes everything other than Crown trusts because that property “belongs to another person”.¹³

¹¹ [Appendix “D” to the Receiver’s Seventh Report, dated February 7, 2024](#), p 10, Motion Record of the Receiver dated February 8, 2024, Tab 2, p 114. [See also diagram at para 12 of receiver’s responding factum.](#)

¹² [DIMS Construction inc \(Trustee of\) v Quebec \(Attorney General\), 2005 SCC 52](#) at para 12.

¹³ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 67(1)(a), 67(2); [British Columbia v Henfrey Samson Belair Ltd, \[1989\] 2 SCR 24](#), 38 BCLR (2d) 145.

16. In support of its position, the receiver relies on *1864684 Alberta Ltd.* That case actually stands for the opposite proposition. The purchasers referred the court to an appellate authority, *Iona Contractors*,¹⁴ which came to the same conclusion as the moving party urges in this case. A lower court distinguished *Iona Contractors* on the basis that *Iona Contractors* was a proceeding under the *Bankruptcy and Insolvency Act*:

the decision was concerned with whether the provincial *Builder's Lien Act* was in operational conflict with the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 for the purpose of determining whether the money held in a provincial statutory trust was to be included or excluded in the bankrupt's estate pursuant to paragraph 67(1)(a) of the *Bankruptcy and Insolvency Act*. **This present application does not involve bankruptcy nor does it involve the interpretation of the *Bankruptcy and Insolvency Act*.**¹⁵

17. The receiver also relies on *Counsel Holdings*. In that case, the court expressly found that there was no trust,¹⁶ so it is of no assistance to the receiver on the issue of who has priority if the funds are impressed with a statutory trust.

C. There is No Collateral Attack

18. Lastly, the receiver argues in paragraph 5 of its factum that this motion is a “collateral attack” on the Tarion Decision. The homebuyers were not party to the Tarion Motion, and the statutory trust argument advanced here was not advanced on the Tarion Motion by any party. It is not clear why standing Tarion had to argue anything on behalf of the homebuyers as the issue was not addressed in the Tarion Decision. Moreover, while the Tarion Decision was under reserve, the receiver advised Justice Osborne on a previous motion, and Justice Osborne found, that the issues raised by the moving party on this motion might have to be argued separately after the Tarion Decision was released.¹⁷ This is a clear indication that this motion is not a collateral attack.

¹⁴ [Iona Contractors Ltd v Guarantee Company of North America, 2015 ABCA 240.](#)

¹⁵ [1864684 Alberta Ltd v 1693737 Alberta Inc, 2016 ABQB 371](#) at para 50.

¹⁶ [Counsel Holdings Canada Limited v Chanel Club Limited](#) (1999), [43 OR \(3d\) 319](#), [1999] OJ No 681 (QL) (ONCA).

¹⁷ [Endorsement of Justice Osborne dated November 16, 2023](#) at para 25.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2024.



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SCHEDULE “A”**LIST OF AUTHORITIES****Tab Title**

- 1 [*Cameron Stephens Mortgage Capital Ltd v 2011836 Ontario Corp*, 2024 ONSC 3507](#)
- 2 [*DIMS Construction inc \(Trustee of\) v Quebec \(Attorney General\)*, 2005 SCC 52, \[2005\] 2 SCR 564](#)
- 3 [*British Columbia v Henfrey Samson Belair Ltd*, \[1989\] 2 SCR 24](#)
- 4 [*Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240](#)
- 5 [*1864684 Alberta Ltd v 1693737 Alberta Inc*, 2016 ABQB 371](#)
- 6 [*Counsel Holdings Canada Limited v Chanel Club Limited* \(1999\), 43 OR \(3d\) 319 \(CA\)](#)

SCHEDULE “B”**TEXT OF STATUTES, REGULATIONS, AND BY-LAWS*****Condominium Act, 1998, [SO 1998, c 19](#)*****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).

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).

Note: On a day to be named by proclamation of the Lieutenant Governor, [subsection 138 \(3\)](#) of the Act is amended by striking out “or, except as provided in the regulations made under this Act, a phased condominium corporation” at the end. (See: [2015, c. 28](#), Sched. 1, s. 122 (1))

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).

Owners' land

139 (1) A declaration for a common elements condominium corporation shall not be registered unless each of the owners of a common interest in the corporation,

(a) also owns the freehold estate in a parcel of land,

(i) that is not included in the land described in the description,

(ii) that, subject to the regulations, is situated within the boundaries of the land titles and registry divisions of the land registry office in which the description of the corporation is registered, and

(iii) to which the [Land Titles Act](#) applies or for which a certificate of title has been registered under the [Certification of Titles Act](#) as that Act read immediately before subsection 2 (1) of Schedule 17 to the [Good Government Act, 2009](#) came into force; and

(b) has signed a certificate in a form prescribed by the Minister stating the owner consents to the registration of the declaration and the notice described in subclause (2) (b) (i). 1998, c. 19, s. 139 (1); [2009, c. 33](#), Sched. 17, s. 4; [2015, c. 28](#), Sched. 1, s. 146 (1).

Act prevails

176 This Act applies despite any agreement to the contrary. 1998, c. 19, s. 176.

Bankruptcy and Insolvency Act, [RSC 1985, c B-3](#)

Property of bankrupt

- **67 (1)** The property of a bankrupt divisible among his creditors shall not comprise
 - (a) property held by the bankrupt in trust for any other person;
 - (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
 - (b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
 - (b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
 - (b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan, a registered retirement income fund or a registered disability savings plan, as those expressions are defined in the *Income Tax Act*, or

in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
 - (i) is not subject to the operation of this Act, or
 - (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

- **Deemed trusts**

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

- **Exceptions**

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, [subsection 23\(3\)](#) or [\(4\)](#) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\)](#) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

- (a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
- (b) the province is a **province providing a comprehensive pension plan** as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan*, that law of the province establishes a **provincial pension plan** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in [subsection 23\(3\)](#) or [\(4\)](#) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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IN THE MATTER OF THE RECEIVERSHIP 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.

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PROCEEDING COMMENCED AT TORONTO

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