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)

BETWEEN:

KINGSETT MORTGAGE CORPORATION and DORR CAPITAL CORPORATION

Applicants

- 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 CORWN ESTATES) INC.

Respondents

ATRIUM MORTGAGE INVESTMENT CORPORATION and DORR CAPITAL CORPORATION

Applicants

- and -

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

Respondents

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

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, AS AMENDED

RESPONDING FACTUM OF THE RECEIVER, KSV RESTRUCTURING INC.

September 13, 2024

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

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

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

Cassels Brock & Blackwell LLP
40 Temperance St, Suite 3200
Toronto, ON M5H 0B4

Alan Merskey (41377I)
Tel: 416.860.2948
Email: amerskey@cassels.com

Lawyers for the Receiver,
KSV Restructuring Inc.

TO: THE SERVICE LIST

PART I. OVERVIEW

1. This motion concerns a request for tracing and valuation exercises that are complex, costly, and entirely unfunded.

2. These exercises would have no practical impact regardless of what they find. In any case, as a matter of law, the homebuyers in question rank subordinate to the registered mortgagees of the applicable Projects (as defined below) regardless of the outcome of any tracing or valuation. Accordingly, given that the mortgagees themselves have or will suffer shortfalls, the homebuyers have no economic interest in these projects.

3. There are a number of available routes to this conclusion. First, the statutory trust obligations under the Condo Act (as defined below) do not apply on the facts of this case, and even if they did, the homebuyers are not entitled to a remedy that would rank them ahead of the mortgagees to the extent that any such trust was breached.

4. Second, the homebuyers expressly subordinated their interests to the mortgagees through standard contractual provisions which are routinely upheld by the Courts.

5. Third, this Court already concluded on the Tarion Motion (as defined below) that in respect of the very same homebuyers and deposits at issue on this motion, the homebuyers rank subordinate to the mortgagees and no constructive trust remedy was available to the homebuyers. This motion is effectively a collateral attack on that finding.

6. In all the circumstances, the relevant mortgagees are the priority claimants in the receivership estates and there is no basis for this court to interfere with this priority. This motion should be dismissed so that the administration of the receiverships can continue toward an orderly

conclusion.

PART II. FACTS

A. The APSes and the Deposits

1. Overview

7. On May 2 and 18, 2023, the Court appointed KSV Restructuring Inc. (the **"Receiver"**) as receiver and manager of the property, assets, and undertakings of a number of companies within the Stateview Group of Companies (the **"Receivership Companies"**).

8. Prior to the receivership appointments, each Receivership Company was a single-purpose real estate development company which owned a piece of land on which it was to build a residential development (the **"Projects"**). The Projects at issue on this motion are known as Minu, High Crown, Elm, Highview, Bea, NAO I, and NAO II.

9. Each Receivership Company entered into pre-construction agreements of purchase and sale (the **"APSes"**) with various homebuyers (the **"Homebuyers"**). The APSes were standard-form and the Receiver has filed a sample agreement for each Project on this motion.

10. The Projects were structured as common elements condominium corporations (**"Common Elements Corporation"**), meaning that each Homebuyer would acquire (i) a freehold interest in respect of the home itself and (ii) an interest in certain common elements of the Project (the **"Common Elements"**), by way of an interest in the Common Elements Corporation. The relevant features of a Common Elements Corporation are reviewed in more detail below.

11. The sale process has resulted in transactions for the sale of relevant real property for each

Receivership Company except for Elm and Bea, which remain ongoing.[1] The Receiver expects that none of the sale processes will result in full repayment of the mortgage debt registered on the applicable property.[2]

2. The Common Elements

12. The Receiver understands that the Common Elements of each Project were generally minor amenities such as a shared access driveway, visitor parking and other ancillary components. For example, the APS applicable to the NAO II Project contains the following diagram, illustrating that the Common Elements for that Project were the roads marked Private Street A, B, and C, as well as the parking area shown at the bottom of the following diagram:

13. The other sample APSes in the record contain diagrams suggestive of similarly-minor

[1] Receiver's Eleventh Report ("Eleventh Report"), para. 3.0(1).
[2] Receiver's Fifth Report, para. 4.0(6), at Appendix A to the Eleventh Report.

Common Elements.

14. The Common Elements are not marketable separately from the Homebuyers' freehold interest in the home itself. Indeed, the *Condominium Act, 1998* (the **"Condo Act"**) provides that "the common interest of an owner in the corporation attaches to the owner's parcel of land"[3] and that the common interest "cannot be severed from the parcel upon the sale of the parcel".[4]

15. To underscore that the Common Elements have, in effect, no marketable value, each Project's standard APS contains the following provision or a substantially identical clause (the **"Common Elements Provision"**):

> The portion of the Purchase Price attributable to the purchase of the common interest in the Condominium Corporation shall be Two ($2.00) Dollars, and **no portion of the Deposits are attributable to the purchase of the common interest in the Condominium Corporation**.[5] [emphasis added]

16. As reviewed in more detail below, given that no portion of the Deposits (as defined below) was attributable to the common elements, the Condo Act did not require the developer to hold any of the Deposits in trust.

3. The Subordination Provisions

17. Each of the APSes contains a subordination provision that has the effect of fully subordinating the Homebuyers interest to the mortgagees.[6] By way of example, the APS for the NAO II Project provides (the **"Subordination Provisions"**):

> 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

---

[3] *Condominium Act, 1998, S.O. 1998*, c. 19 ("*Condo Act*"), s. 139(2)(a).

[4] *Condo Act*, s. 143(a).

[5] See the summary of the Common Elements Provisions in each APS as found in the Eleventh Report, para. 4.0(3).

[6] As set out in the Eleventh Report, there are minor and immaterial variations in wording across the various Projects. See paragraphs 4.0(2-3).

> Purchaser for the full amount of the said mortgage or construction financing […] Without limiting the generality of the foregoing, the Purchaser agrees that this Agreement shall be subordinated to and postponed to the mortgage(s) assumed and/or arranged by the Vendor (and presently registered or to be registered on title to the Property) and any advances made thereunder from time to time …

18. Each of the real properties owned by the Receivership Companies is encumbered by at least one mortgage. In each case, the Receiver was appointed on application by the applicable senior mortgagee(s).

4. Deposits made pursuant to the APSes

19. Based on the Receivership Companies' books and records, the Receivership Companies received a total of approximately $77 million in deposits from Homebuyers prior to the receiverships, summarized as follows (the **"Deposits"**):[7]

Project[2]	Number of Pre-Sale Purchasers	Deposit Value ('000s) ($)
Minu Towns	147	19,208
Nao Towns	96	7,680
Nao Towns II	76	7,617
Nashville (Highview)	4	Nil
BEA Towns	218	17,440
Elm	145	16,076
High Crown	47	5,016
On the Mark	32	3,883
	765	**76,920**

B. The receiverships and the state of the deposits

20. The Receivership Companies were placed into receivership by way of orders dated May 2 and May 18, 2023, after significant allegations of wrongdoing and misappropriation came to light. As set out in the Fifth Report of the Receiver, the Receiver was not able to identify any remaining deposit balances:

> Based on the Receiver's review of the Receivership Companies' bank accounts and

[7] Receiver's Fifth Report, para. 2.3(4), at Appendix A to the Eleventh Report.

> confirmed by certain of the Management the Receiver understands that the Deposits were not held in segregated banks accounts or trust accounts.
>
> The Receiver was advised by Management that, in addition to the funds from other sources, the deposits were used to fund the general operations of the Receivership Companies and the development of the Projects. The Receiver further understands that independent of the Deposits, the Receivership Companies did not have sufficient funding to cover operating costs and Project development costs. The use of the funds has not been confirmed by the Receiver.
>
> The Receiver's review of the bank accounts of the Receivership Companies reflects that none of them had a material bank balance as of the date of their respective Receivership Order…[8]

C. Sale processes and distributions

21. As noted above, the Receiver has now completed the marketing and sale of each Receivership Company's real property except for Elm and Bea.

22. In the case of the Minu, NAO I, and High Crown Projects, the Receiver distributed all net proceeds of the transaction to the applicable senior secured creditor (other than certain minor and unrelated reserves/other distributions) pursuant to a Distribution Order granted by Justice Osborne on November 16, 2023.

23. In the case of the other concluded transactions – Highview and NAO II – the Receiver has distributed net proceeds to the applicable senior secured creditor subject to holdbacks in varying amounts pending the resolution of Ms. Mehta's claims – $170,000 in the case of Highview (greater than the total value of the uninsured portion of the relevant deposits) and $1,523,000 in the case of NAO II.[9] The amount of the NAO II holdback has been reduced to approximately $37,000 pursuant to an order of Mr. Justice Black dated March 5, 2024. That order is currently subject to

[8] Receiver's Fifth Report, para 2.3 (5-7) at Appendix A to the Eleventh Report.

[9] The amount of the NAO II holdback has been reduced to approximately $37,000 by order of Justice Black dated March 5, 2024. That order is currently subject to appeal and therefore the reduction to the holdback (and the corresponding distribution to the secured creditor) has not yet been implemented.

appeal and therefore the reduction to the holdback (and the corresponding distribution to the secured creditor) has not yet been implemented.

24. With respect to all of the Receivership Companies but Elm and Bea (the only two ongoing sale processes), the Receiver's mandate is largely complete subject only to the outcome of this motion.

25. This context creates a real (and unanswered) question about who would fund the tracing and valuation exercises proposed by Ms. Mehta.

D. The status of the deposit funds

26. Apart from any funding issues, on a purely practical level, any tracing exercise would be difficult and costly even if funding were available given that:

(a) Stateview's management has advised that it used deposit funds to "fund the general operations of the Receivership Companies and the development of the Projects";[10]

(b) two of the Receivership Companies (NAO I and NAO II) shared a bank account;[11]

(c) the Receiver understands that the Deposits were not held in segregated bank accounts or trust account.[12] As of the date of the receiverships none of the bank accounts of the Receivership Companies held a material bank balance;[13] and

(d) there are other entities within the Stateview Group of Companies that are not subject to receivership and, therefore, the Receiver has no authority to access those

[10] See Receiver's Fifth Report to the Court, section 2.3(6), at Appendix A to the Eleventh Report.
[11] Supplement to Receiver's Seventh Report, section 2.3(2) at Appendix B to the Eleventh Report.
[12] Receiver's Fifth Report, section 2.3(5), at Appendix A to the Eleventh Report.
[13] Receiver's Fifth Report, section 2.3(7), at Appendix A to the Eleventh Report.

entities' records without bringing a motion. Such a motion might be opposed and the Receiver has no funding for that exercise either.[14]

E. The statutory scheme: the ONHWPA *and the* Condo Act

27. Two separate but related statutory schemes are relevant on this motion.

1. The *Condo Act*

28. The trust obligations at issue in this case must be understood in the context of the legal nature of a Common Elements Corporation under the *Condo Act*.

29. In essence, a purchaser who buys a home in a development structured as a Common Elements Corporation acquires both a freehold parcel of land and an interest in the Common Elements Corporation. This distinction is seen in section 139 of the *Condo Act*, which requires that any owner of an interest in a Common Elements Corporation "also own the freehold estate in a parcel of land".[15] The parcel of land can be situated anywhere in the same Land Titles Division that the common interest is located.

30. Section 81(1) of the *Condominium Act, 1998* (the **"*Condo Act*"**) applies to ordinary condominium corporations and obligates developers to hold a variety of funds in trust.

31. However, a developer's obligation to hold funds in trust is eliminated entirely in the case of the Common Element Corporations at issue in this motion.

32. Subsection 138(4) of the *Condo Act* provides that in the case of a Common Elements Corporation, the reference to "unit" in s. 81(1) is deemed to refer to "a common interest in the

[14] Supplement to Receiver's Seventh Report, section 2.3(3) at Appendix B to the Eleventh Report
[15] *Condominium Act*, s. 139(1).

corporation".

33. In effect, therefore, for a Common Elements Corporation, subsection 81(1) is deemed to read as follows:

> **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 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]**.[16]
>
> [emphasis added]

34. Accordingly, the Condo Act is clear that there is no obligation to hold any funds in trust with respect to the freehold component of the property but only to monies received on account of a proposed common interest in the corporation; in this case, as described in more detail below, there were **no** funds received on account of the Common Interest Corporation.

35. The reason for this different treatment between condominium and freehold units is explained by the scheme of the *Ontario New Home Warranties Plan Act* (**"*ONHWPA*"**).

2. The *ONHWPA*

36. The *ONHWPA* is the legislation which creates Tarion Warranty Corporation (**"Tarion"**). Among other things, Tarion administers a "guarantee fund" established under the *ONHWPA* which compensates homebuyers who have lost their deposits due to the vendor's bankruptcy or a

[16] *Condominium Act*, s. 81(1), read in concert with s. 138(4).

fundamental breach of the contract.[17]

37. Once Tarion makes payment out of the guarantee fund, it is subrogated by law to all rights of recovery of the homebuyer.[18]

38. The amount of compensation available under the guarantee fund depends on whether the home in issue is a condominium or freehold:

(a) for "condominium dwelling units," $20,000 plus interest; or

(b) for most other kinds of freehold homes, the greater of (i) $60,000 and (i) the lesser of 10% of the sale price of the home and $100,000.[19]

39. The homes at issue on this motion are treated by Tarion as freehold homes notwithstanding that the homes are sold together with a (de minimis) interest in a Common Elements Corporation. As a result, the Homebuyers are entitled to (and have been receiving) the higher reimbursement limits from Tarion.[20]

40. The *ONHWPA*'s warranty scheme works harmoniously with the *Condo Act*'s trust provisions reviewed above.

41. That is, the protection for deposits paid in respect of freehold homes is higher (up to $100,000 instead of up to $20,000)[21] because vendors of freehold homes are under no obligation to hold any deposit funds in trust. Conversely, condominium buyers receive less deposit protection

---

[17] *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 ("*ONHWPA*"), s. 14.
[18] *Administration of the Plan*, R.R.O., Reg. 892, s. 13(1).
[19] *Administration of the Plan*, R.R.O., Reg. 892, s. 6(1)(c).
[20] Eleventh Report, para. 5.0.
[21] *Administration of the Plan*, R.R.O., Reg. 892, s. 6(1) and (2).

under the *ONHWPA* because they already benefit from the trust provisions of the *Condominium Act*.

42. 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.[22]

43. On this motion, Ms. Mehta is, in effect, trying to have it both ways on behalf of the Homebuyers. While the Homebuyers are entitled to the higher limits available to freehold purchasers and have already received over $40 million in reimbursement from Tarion's guarantee fund,[23] Ms. Mehta also seeks the higher trust protections owing to condominium buyers under the *Condo Act.*

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

F. The Tarion Motion and Justice Steele's Decision

45. A year ago, Tarion brought a motion seeking a declaration that it had priority over the mortgagees in the receivership in respect of any amounts paid by Tarion to Homebuyers out of the

---

[22] See "How does deposit protection work on new homes?" online: https://www.tarion.com/media/how-does-deposit-protection-work-new-homes

[23] At Appendix K to the Eleventh Report.

guarantee fund (the **"Tarion Motion"**).[24]

46. This motion was in furtherance of Tarion's right of subrogation under the *ONHWPA*.[25] In effect, Tarion stood in the shoes of the very same Homebuyers who are represented by Ms. Mehta on this motion and Tarion argued that these Homebuyers had priority in respect of the very same Deposits.

47. Justice Steele dismissed the motion by endorsement dated December 20, 2023 (the **"Tarion Decision"**). She found that the applicable mortgagee(s) of the relevant Projects had priority over Tarion and that, in the circumstances, there was no basis to interfere with that priority by ordering a constructive trust remedy. Her specific findings are discussed in more depth below.

48. Tarion made numerous legal arguments in support of its motion although it did not rely on the *Condo Act* (presumably because Tarion understood that under its own legislative framework, the *Condo Act* has no application to the facts of this case). Nevertheless, as explained below, there is nothing unique about the Condo Act that could possibly drive a different result from the other arguments that Tarion advanced at the Tarion Motion.

PART III. ISSUE

49. The primary issue on this motion is whether the Deposits can rank in priority to the Mortgages. If the answer is no, then any issues of tracing and valuation become moot.

---

[24] Seventh Report at section 5.0(1) at Appendix B to the Eleventh Report.

[25] *Kingsett Mortgage Corp et al v. Stateview Homes et al.*, 2023 ONSC 2636 ("*Tarion Decision*") at para. 2 ("Tarion has a statutory right of subrogation, which is why Tarion seeks declaratory relief on these issues.")

PART IV. LAW & ARGUMENT

A. The Mortgages have priority regardless of the outcome of any tracing

1. No trust obligations applicable to the Deposits

(a) The Common Elements Provisions

50. The simplest answer to Ms. Mehta's position is that the Deposits were not subject to any trust obligation. This conclusion is fatal to Ms. Mehta's entire motion, which depends entirely on the alleged existence and breach of trust obligations.

51. The absence of any trust flows from the Common Elements Provisions in the APSes. As reviewed above, the Common Elements Provision in each of the APSes provides that (i) only $2 of the purchase price for each unit applies to the common interest in the condominium (the balance related to the freehold unit that was being acquired) and (ii) in any case, *none* of the Deposits relate to the common interest in the condominium.

52. As noted above, under the *Condo Act*, the statutory trust obligations under s. 81 do not apply to Common Elements Corporations except in relation to funds received on account of the common interest itself – not the entire condominium unit.[26] In this case, since none of Deposits related to the Common Elements Corporation, there was no obligation to hold any funds in trust.

53. In a June 2024 decision in *Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp. et al*, Justice Steele expressly endorsed a contractual provision materially identical to the Common Elements Provision and rejected a homebuyer's argument for priority under s. 81 of the

[26] 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.

Condo Act – the very argument that Ms. Mehta advances on this motion.[27] Justice Steele found: "because none of the Freehold deposits were attributable to the common elements, section 81 of the *Condominium Act*, which requires certain payments made to be held in trust, does not apply."[28]

54. The entire motion can and should be disposed of on this basis alone.

(b) "Contracting out" response is meritless

55. Ms. Mehta appears to accept that the application of the Common Elements Provisions would be fatal to her claims. Therefore, she argues that the Common Elements Provisions are void as an attempt to contract out of the *Condo Act*.

56. This argument has four key flaws.

57. First, the evidence demonstrates that the Common Elements Provisions represent commercially reasonable allocations. As reviewed above, the common elements in issue consist of amenities such as roadways and parking areas which are minor relative to the townhome developments as a whole.

58. In this context, the allocations set out in the Common Elements Provisions can reasonably be viewed as representing the parties' contractual agreement that the common elements represented a *de minimis* component of the consideration offered to the purchasers in connection with their townhome acquisitions. Moreover, the allocation is reasonable because a Homebuyer does not actually acquire any valuable interest in the common elements at all given that a Homebuyer cannot sell its common interest in the roadway/parking area. In other words, the

---

[27] *Cameron Stephens Mortgage Capital Ltd. v. 2011836 Ontario Corp. et al.*, ["*Cameron Stephens*"] 2024 ONSC 3507 at paras. 23-25.
[28] *Ibid.*

common element is completely unmarketable.

59. Second, there is no authority supporting the notion that these types of allocation clauses are illegal. To the contrary, Ms. Mehta's position is directly contradicted by Justice Steele's recent decision in *Cameron Stephens* outlined above.

60. Third, the "contracting out" argument is inconsistent with the interplay between the *Condo Act* and the *ONHWPA*. Far from an attempt to circumvent the *Condo Act*, the Common Elements Provision works harmoniously with the statutory scheme in that the Homebuyers receive far higher Tarion protection in exchange for the fact that the Deposits do not have to be placed in trust.

61. Fourth, Ms. Mehta's position has no support in the text or scheme of the *Condo Act*. She argues that the Court should set aside the Common Elements Provisions and instead find that the true scope of the statutory obligation was to hold in trust an amount equal to "the fraction of (1) the value of the Common Interest for each Project over (2) the full value of the Projects."[29]

62. In effect, Ms. Mehta's theory implies that the *Condo Act* imposes on declarants an obligation to appraise both of these elements ahead of time when taking in deposits, in order to ascertain the correct proportion of deposit funds required to be held in trust.

63. The *Condo Act* does not say or require this. If that is what the legislature intended, it would have said so. To the Receiver's knowledge, no developers in Ontario actually use the approach which Ms. Mehta says is the law.

[29] Moving Party's factum, para. 58.

2. The Deposits are subordinate even if a trust obligation applied

64. Even if the Deposits (or parts of them) were required to be held in trust under the *Condo Act*, the Homebuyers would still rank subordinate to the mortgagees for several reasons.

(a) Registered mortgagees have priority regardless of outcome of tracing exercise

65. 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.[30] Accordingly, even if the trust funds could be traced into the real property at issue in this case, the trust claimants still would not have priority over the registered mortgagee.

66. The mortgagees in question are clearly mortgagees without notice (at the time of the registration of the mortgages) of any possible claim that the Homebuyers could have had relating to an alleged breach of a trust under the *Condo Act*. Ms. Mehta does not suggest otherwise and has not led any such evidence.

67. The Court of Appeal for Ontario has applied this proposition in *Counsel Holdings*, a virtually identical contest between *Condominium Act* purchasers and a registered mortgagee, ruling that "notice of an interest that is expressly stated to be subordinate to the mortgage is not actual notice of a 'prior' interest and, therefore, cannot defeat [the mortgagee's] registered interest".[31] The Subordination Provisions in this case are substantially identical to the one at issue in *Counsel Holdings*.[32]

---

[30] 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).

[31] *Counsel Holdings Canada Limited v. Chanel Club Limited*, 1999 CanLII 1653 (Ont. C.A.) ["*Counsel Holdings*"].

[32] The subordination provision is quoted by Justice Steele at paragraph 21 of the *Tarion Decision*. For an example of the relevant provision in a NAO II purchase agreement, see section 43 of the sample agreement contained at Appendix E to the Eleventh Report.

68. Similarly, a recent Alberta decision considered circumstances virtually 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 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.[33] [emphasis added]

(b) The Proposed Class's key authority is not relevant

69. The Proposed Class's arguments regarding their rights under the *Condominium Act* rely almost exclusively on *Ward-Price v. Mariners Haven Inc.* (***"Ward"***).[34] This reliance is misplaced. *Ward* arose in an entirely different factual context and raised different legal issues.

(c) What **Ward** *actually decided*

70. *Ward* did not concern a priorities contest in an insolvency. Rather, *Ward* addressed a narrow issue arising out of a claim against solvent third parties. Specifically, a purchaser (on behalf of a proposed class) commenced a "knowing receipt" claim against the directors and officers of

---

[33] *1864684 Alberta Ltd v. 1693737 Alberta Inc*, 2016 ABQB 371 at para. 47. And see generally *Condominium Act*, R.S.A. 2000, c. C-22, s. 14(3) (the equivalent of s. 81(1) of the Ontario *Condo Act*).

[34] *Ward-Price v. Mariners Haven Inc*., 2001 CanLII 24088 (Ont. C.A.) ["*Ward*"].

the developer who then made a third-party claim for contribution and indemnity against the developer's lawyers.[35]

71. After the close of pleadings and prior to the certification motion,[36] the third party lawyers sought summary judgment in the main action on the basis that there was no extant trust under the *Condominium Act*, and therefore no possible accessory liability in knowing assistance. Their argument was that the statutory trust terminated after the developer obtained insurance for the deposits.[37] The motion judge accepted this argument and granted summary judgment dismissing the action.

72. As such, the sole issue for the Court of Appeal in *Ward* was whether the statutory trust remained extant despite the existence of insurance. The Court of Appeal held that the motion judge erred by answering this question in the negative; therefore, because the trust was still extant, the claim should not have been dismissed at such an early stage.[38] This specific legal issue is irrelevant on the present facts.

(d) Ms. Mehta's overreading of *Ward*

73. Ms. Mehta misdescribes *Ward* in her factum, asserting that the *Ward* establishes an absolute rule in her favour. This is incorrect; the Court of Appeal merely reversed the dismissal of a claim – which had occurred after the close of pleadings, and before the class certification motion – without granting any substantive remedies at all.

---

[35] See e.g. *Ward* at paras. 5-8.

[36] The proceeding was not certified as a class action until November, 2002: see the procedural history cited in *Ward-Price v. Mariners Haven Inc.*, 2002 CanLII 38058 at paras. 1-2.

[37] *Ward* at paras. 7, 11.

[38] *Ward* at paras. 38-39.

74. More fundamentally, the Court's discussion of tracing occurred in the context of a claim against solvent third parties outside of the developer's insolvency proceeding. This meant that neither level of Court had to consider the consequences of any breach of trust as against competing creditors of the insolvent estate, or the competing policy considerations that such contests often invoke – for example, where registered mortgages are involved, the policy of certainty in land titles underlying the *Land Titles Act*.[39]

75. As such, while the Receiver does not dispute the Court of Appeal's general overview in *Ward* of the law of tracing, that discussion does not address the specific legal issue raised on this motion: even if the Homebuyers can successfully trace their Deposits into the real properties, are they entitled to receive a distribution of sale proceeds in priority to the mortgagee?

(e) The Tarion Decision disposes of the live issue

76. It is Justice Steele's reasons in the Tarion Decision, not *Ward*, that addresses the relevant question: whether the Homebuyers are entitled to priority if they can trace the Deposits into the real properties.

77. Justice Steele was clear that she would not have imposed a constructive trust regardless of the results of any tracing:

> [79] I am not satisfied that Tarion has established a close causal connection between the deposits and the proceeds from the sale of the real property such that a proprietary remedy is appropriate in the circumstances.

---

[39] See generally *Stanbarr Services Limited v. Metropolis Properties Inc.*, 2018 ONCA 244 at para. 13 ("The philosophy of a land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and [are] the essence of the land titles system.")

> [80] **In addition, 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**.[40]

78. This reasoning is a full answer to the Proposed Class's position on this motion. On the same facts involving the same Deposits, Justice Steele declined to order the extraordinary remedy of a constructive trust; therefore, to do so in this case would be directly at odds with Her Honour's decision. The sole difference on this motion is the presence of one additional legal argument – the Condo Act – that does not alter the circumstances Justice Steele relied upon for refusing a constructive trust. As Justice Steele summarized earlier in her reasons (emphasis added):

> [70] A constructive trust arising from a wrongful act may be imposed by the court. As set out in *Soulos*, at para. 45, there are certain conditions that generally should be met before a constructive trust is ordered:
>
> a. The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in the defendant's hands;
>
> b. The assets in the defendant's hands must have resulted from agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
>
> c. The plaintiff must show a legitimate reason for seeking a proprietary remedy; and
>
> d. There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case.
>
> [71] **In considering the above in the context of an insolvency proceeding, courts in Canada have given significant weight to the fourth factor, specifically the impact on other creditors**: *Caterpillar Financial Services v. 360networks corporation*, 2007 BCCA 14, 61 B.C.L.R. (4th) 334, at para. 66, *KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd*., 2000 BCCA 458, 190 D.L.R. (4th) 47, at para. 71, and *Creditfinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C.

[40] See *Tarion Decision*, paras. 79-81.

> 377 ("Creditfinance"), at para. 44. If a constructive trust is ordered in respect of a bankrupt, there is an obvious impact on the other creditors of the bankrupt's estate. Accordingly, **the use of a constructive trust as a remedy in insolvency proceedings is used "only in the most extraordinary cases" and the test to show that there is a "constructive trust in a bankruptcy setting is high:"** Creditfinance, at paras. 32 and 33.

79. In the instant case, there will likely not be enough funds for the secured creditors. Accordingly, any remedial constructive trust awarded by this court would upset the priority scheme under the BIA and effectively take funds from the first ranking secured creditors to pay certain unsecured creditors (many of whom are being repaid in full, or substantially in full, by Tarion in any event).[41]

80. Moreover, it would be inconsistent and problematic for the Homebuyers to rank ahead of the mortgagees when this Court already determined that Tarion (standing in the shoes of the Homebuyers) ranks behind the mortgagees. Therefore, the relative priority of these Deposits must be taken as settled.

81. Finally, Ms. Mehta cannot relitigate the same issue that was before Justice Steele simply because the statutory trust claims under the *Condo Act* were not raised in the Tarion Motion. The *Condo Act* argument is an alternative legal theory that Tarion could have pursued and chose not to.[42] This Court should be skeptical of Ms. Mehta's request for a second kick at the can. In any event, there nothing substantive that turns on the argument that a trust obligation arose under the *Condo Act* (as opposed to a different act) for the reasons described in this factum.

---

[41] See *Tarion Decision*, paras. 70-72.

[42] See *The Catalyst Capital Group Inc. v. VimpelCom Ltd*., 2019 ONCA 354 at para. 50 (cause of action estoppel applies where the basis of the cause of action "could have been argued in the prior action" and "should have been brought forward in that action").

(f) No basis to distinguish the Tarion Decision

82. Ms. Mehta's factum offers two further reasons to distinguish Justice Steele's decision, neither of which is persuasive:

(a) first, Ms. Mehta argues that she relies on a statutory trust, not a contractual trust.[43] However, Justice Steele also dealt with statutory trust obligations (and the breach of those trust obligations) in relation to the Elm Project where Justice Steele accepted that the *ONHWPA* required the developer to hold deposits in trust in respect of that project.[44] In any event, the distinction between statutory and contractual trusts is a distinction without a difference. First, neither a trust created under the *Condo Act* nor under the *ONHWPA* gives the trust beneficiary priority over any other property of the debtor (as compared to, for example, certain trusts under the *Income Tax Act* in favour of CRA).[45] Second, the issue on both this motion and the Tarion Motion is the appropriate remedy for breach of a trust in circumstances of competing creditor claims in an insolvency.[46] Ms. Mehta offers no authority whatsoever for the proposition that statutory trusts attract stronger remedies than "mere" contractual trusts. No such authority exists and, in any event,

---

[43] Factum, para. 62.

[44] See *Tarion Decision*, paras. 33-36. The statutory source of the trust obligation in that case was the *Warranty for Delayed Closing or Delayed Occupancy* regulation made under the *ONWHPA* O. Reg 165/08, s. 9 setting out the obligation to enter into a prescribed form of Addendum agreement. The prescribed form of agreement "contains language requiring the deposit amounts to be held in trust" and "that if the vendor fails to hold the deposit amounts in trust pending waiver or satisfaction of the early termination condition, the vendor will be deemed to hold the amounts in trust": see the description in the *Tarion Decision* at para. 33.

[45] See *Income Tax Act*, RSC 1985, c 1 (5th Supp), s. 227(4.1), which creates a deemed trust that is "similar in principle to a floating charge over all the tax debtor's assets in favour of Her Majesty": *First Vancouver Finance v. M.R.N.*, 2002 SCC 49 at para. 4.

[46] Ms. Mehta's factum confirms at para. 64 that the Moving Party seeks to exercise a "right to a tracing exercise" "before making any constructive trust claims over the sale proceeds".

as noted above, Justice Steele refused to grant a remedy even though found that the trust imposed by the *ONHWPA* was breached in the Elm Project;

(b) second, Ms. Mehta argues that the Subordination Provisions, which Justice Steele relied on, cannot be considered on this motion, as to do so would be to permit a contracting out of the *Condo Act*. While the Receiver accepts the general principle that contracting out is impermissible, Ms. Mehta offers no authority to support the conclusion that a subordination clause is illegal. To the contrary, multiple reported decisions have relied on similar subordination clauses to find in favour of mortgagees in priority contests against *Condo Act* purchasers in similar circumstances.[47]

B. Tracing and valuation would be unworkable in any event

83. Finally, and in any event, an order for a tracing and valuation would not be just in all the circumstances.

---

[47] See e.g. *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.*, 1997 CanLII 12130 (Ont. S.C.J.), aff'd, 1999 CanLII 1653 (Ont. C.A.) ("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 [the debtor] in favour of [the mortgagee]. **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. […] **any claim against Chanel on a trust basis does not give priority over [the mortgagee], by reason of para. 26 of the purchase agreements**.")

See also *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 at paras. 22, 25, 27 ("as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the Land Titles Act.) […] In addition, **the purchase agreements and leases contain expressed clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest**. (See: *Counsel Holdings Canada Limited v. Chanel Club Ltd.* (1997), 33 O.R. (3rd) 235 (C.A.).)

84. Ms. Mehta's factum repeatedly argues that she enjoys an absolute right to the relief sought on this motion. Of course, in any insolvency proceeding, no litigant has an absolute right to any particular remedy without regard for the impact of their position on other stakeholders.

85. Rather, "an award of the equitable remedy of tracing is discretionary."[48] In exercising its discretion, the Court has the authority and the duty to look to all the circumstances of the case to ensure that the relief sought is appropriate and reasonable.

86. In this case, key considerations in weighing the equities include:

(a) there is no funding available for the Receiver to complete a tracing exercise, and Ms. Mehta does not appear to have the means or willingness to fund the relief she seeks. Rather, Ms. Mehta presumably wants the monies that are earmarked for the first secured creditor to fund the tracing exercise;

(b) the proposed tracing exercise will be complex and costly, for the reasons given above;

(c) the complexity of the exercise makes it unlikely to yield useful results for Ms. Mehta; as a matter of law, once "trust funds have been converted into property that cannot be traced, that is fatal" to any trust claim;[49] and

(d) Tarion has already provided substantial reimbursement to the Homebuyers and continues to do so.

---

[48] *Hermanns v. Ingle*, 2002 CanLII 41669 (Ont. C.A.) at para. 30.

[49] *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 at para. 89.

PART V. ORDER SOUGHT

87. The Receiver respectfully requests an order dismissing this motion and authorizing the release of any remaining holdbacks in respect of the Receivership Companies to the applicable secured creditors, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2024.

Jeffrey Larry/Daniel Rosenbluth
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Alan Merskey
CASSELS BROCK & BLACKWELL LLP

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

IN THE MATTER OF THE RECEIVERSHIP OF STATEVIEW HOMES (MINU TOWNS) INC. ET AL.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF THE RECEIVER

Paliare Roland Rosenberg Rothstein LLP

Jeffrey Larry (44608D)
Email: jeff.larry@paliareroland.com

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

Cassels Brock & Blackwell LLP

Alan Merskey (41377I)
Email: amerskey@cassels.com

Lawyers for the Receiver,
KSV Restructuring Inc.