

CITATION: Genesis Mortgage Investment Group v.
1776411 Ontario Ltd. and 1333 Weber Street Kitchener LP
2026 ONSC 3332

COURT FILE NO.: CV-23-00706813-00CL

DATE: 20260608

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

RE: GENESIS MORTGAGE INVESTMENT GROUP, Applicant

AND

1776411 ONTARIO LTD. and 1333 WEBER STREET KITCHENER LP,
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

BEFORE: W.D. Black J.

COUNSEL: Sean Zweig, Joseph Blinick and Thomas Gray, for GFD 1333W Limited
Partnership

Trung Nguyen, for Werner Leuschner, Kamal Patel, 1776411 Ontario Ltd. and
1333 Weber Street Kitchener LP

Adam M. Slavens, for Tarion Warranty Corporation

Calvin Horsten, for Equitable Bank, EQB Inc. and Computershare Trust
Company

Eric Golden, for the Receiver KSV Restructuring

HEARD: June 2, 2026

ENDORSEMENT

Overview

[1] This was a motion by GFD (in this endorsement I will use this and other terms as defined in the parties' materials), seeking a declaration that the Tarion Fee, remitted by the

Respondents to Tarion, constitutes a “Purchased Asset” under the Sale Agreement, and an order requiring and directing Tarion to remit the full Tarion Refund to GFD.

- [2] The Receiver supports GFD’s motion.
- [3] The Respondents purport to oppose GFD’s motion on the basis set out and discussed below. I use the word “purport” inasmuch as there are issues about the Respondents’ standing to assert the positions that they do (or any positions) in this motion, and issues concerning the outcome that follows from the thrust of the Respondents’ argument, and whether or not that outcome effectively renders the Respondents’ argument academic.

Relevant Background

- [4] By way of relevant background, this court made an order on October 12, 2023, on an application brought by GMIC – the junior secured lender in a syndicate of secured lenders of the Respondents – appointing KSV as the Receiver of the Property of the Respondents.
- [5] The Project at issue in this motion (located at 133 Weber Street in Kitchener, Ontario), contemplated the construction of a four-phase condominium development, consisting of Towers A-D. At the point at which the Receiver was appointed, Tower B consisted of a partially completed foundation on which it was contemplated a residential condominium building would be constructed. There were to be 189 condominium units in Tower B, all of which had been sold pursuant to pre-construction agreements
- [6] A sale process approved by this court did not result in any acceptable bids.
- [7] In the circumstances, GMIC and the other Purchasers entered into the March 4, 2024 Sale Agreement with the Receiver, under which the Purchasers agreed to purchase the Project. On October 7, 2024, the Purchasers assigned their interest in the Sale Agreement to GFD (a limited partnership in which the Purchasers are the limited partners).
- [8] On October 8, 2024, this court granted an AVO approving the Transaction, vesting all of the Respondents’ right, title and interest in and to the Purchased Assets in the Assignee, authorizing the Receiver to terminate and disclaim the APSs within Tower B in the Project on or following closing of the Transaction, and approving the Deposit Return Protocol for returning deposits to purchasers of units disclaimed by the Receiver in accordance with the AVO.
- [9] The Transaction closed on October 29, 2024.
- [10] As contemplated and confirmed in the AVO, all of the APSs for Tower B units have since been disclaimed. Since Tower B was only partially constructed at the time of the AVO, the Tower B unit purchasers did not at any time take possession of those units. As such, having had their APSs disclaimed without ever having taken possession, and having had the opportunity to have their deposits returned in accordance with the AVO and the Deposit Return Protocol, the Tower B unit purchasers have no continuing interest in the Project.

The Tarion Fee

- [11] Tarion is a not-for-profit consumer protection organization established by the Ontario government to administer Ontario's new home warranty program under the ONHWPA. The ONHWPA requires "builders" and "vendors" to remit certain fees to Tarion when new "homes" (including condominium units) are built.
- [12] Prior to the appointment of the Receiver, the Respondents remitted the Tarion Fee for the condominium units then expected to be developed in Tower B. At that time, as condominium units, the Tower B units were subject to the new home warranty program. GFD submits that the Tarion Fee therefore forms an essential part of the Tower B development that GFD acquired.

Conversion from Condominiums to Purpose-Built Rental

- [13] After its acquisition of the Project, GFD undertook a process to convert Tower B from condominium units to a "purpose-built rental," in which GFD will not sell units to be owned by members of the public, but instead the units will be owned – directly or indirectly – by GFD, and rented to tenants.
- [14] GFD maintains that the consequence of this conversion is decisive, and that Tower B will no longer contain "homes" within the meaning provided in the ONHWPA. In that a purpose-built rental does not qualify as a "home" under the ONHWPA, and given that GFD and its assigns will not be selling "homes" to the public, GFD does not qualify as a "vendor" within the meaning of the ONHWPA.
- [15] In the circumstances, as Tarion has confirmed, a refund will be issued in respect of the Tarion Fee previously paid by the Respondents, in an amount just over \$168,000.

The Issue: Who Should Receive the Tarion Refund

- [16] The question on this motion concerns who should receive the Tarion Refund.
- [17] GFD notes that Tarion does not oppose this motion (which counsel for Tarion, who attended before me, confirmed). Tarion acknowledges that the Tarion Refund should be paid, takes no position as to which party should receive it, and confirms that Tarion will comply with any order issued by this court in that respect.
- [18] The Receiver, as noted, agrees that GFD is entitled to receive the Tarion Refund.
- [19] The position of the Respondents has been something of a moving target, and the Respondents have been less than forthcoming and prompt in response to multiple inquiries as to that position.
- [20] It is apparent that in the early part of 2026, as confirmed in letters sent by GFD's counsel to Tarion and to counsel for the Respondents, dated February 4, 2026, GFD learned or understood that one of the Respondents, Werner Leuschner, had contacted Tarion and sought to have the Tarion Refund paid to him/the Respondents.

- [21] The Respondents fairly contend that the evidence as to Mr. Leuchner's request to Tarion at that time is in the nature of hearsay. While that is so, it is also true that there was no response in the evidence before me to the February 4 letters from GFD's counsel, and no denial by or on behalf of Mr. Leuchner that he had made that request.
- [22] In any event those letters from GFD's counsel, and the claim they assert, are really only offered as part of the narrative, to explain what prompted GFD ultimately to bring the motion herein.
- [23] In that regard, in response to the February 4 letter to Tarion, Tarion articulated the position that it has maintained up to today, that it would be prepared to pay the Tarion Refund upon,
- “(1) receipt of written confirmation via Statutory declaration that the project is being repurposed and will no longer be developed as a Condominium, and (2) upon receipt of a court order or an agreement of the parties directing Tarion to pay the funds to such party.”
- [24] As spelled out in affidavit evidence in this record, GFD, in response to the Tarion letter (and in the absence of a response to GFD's counsel's February 4 letter to Respondents' counsel), commenced efforts to obtain an agreement of the parties directing Tarion to pay the Tarion Refund to GFD.

Ongoing Delays in Substantive Response from Respondents

- [25] The record reflects that, in response to numerous entreaties from GFD's counsel to receive the Respondents' position, no substantive answer was provided (Respondents' counsel did at certain points advise that he was following up with his client, but did not then convey a substantive response.)
- [26] Ultimately, the parties attended a case conference before Kimmel J. on April 14, 2026, convened by the Receiver to address a host of matters. At that time, among various other items, the Receiver sought to schedule this motion. In agreeing to schedule the motion, Her Honour directed that:
- “the parties participating in this motion (expected to be the [Respondents] and the purchaser under the AVO, with the Receiver's support) shall agree upon a time table for all pre-hearing steps for this motion that will ensure that all materials (including a reply factum for the moving party if appropriate under the Commercial List Practice Direction) shall have been served, filed and uploaded into the appropriate hearing bundle in Case Center by no later than May 29, 2026 at 4:30 p.m.”
- [27] Justice Kimmel also gave the Receiver the option, if appropriate, to bring its motion for discharge on June 2, 2026, or at a later time. I note that the Receiver delivered materials in connection with its motion for discharge (and related matters) but Receiver's counsel advised the court in advance of today's hearing that it would not proceed with the discharge motion at this time, and confirmed that decision at the outset of today's hearing, given that

the outcome of the contest between GFD and the Respondents might factor into the relief the Receiver will seek on the discharge motion.

- [28] It is fair to say that the Respondents failed, woefully, to comply with Kimmel J.'s order concerning the timetable that Her Honour directed to be created, and with respect to the timely delivery of materials.
- [29] When the Receiver's counsel wrote to the court on May 29, 2026, to advise as to what matters the Receiver expected the court to hear today (June 2), the Receiver did not yet know if the Respondents would be opposing GFD's motion.
- [30] That is because, notwithstanding Kimmel J.'s clear directions, and notwithstanding multiple and increasingly urgent inquiries from GFD's counsel, the Respondents provided no definitive response, and no materials whatsoever until delivering a factum at approximately 8:45 this morning in advance of the 10:00 a.m. motion, and uploading that factum to Case Center at some point thereafter (the time that the upload happened is unknown to me; I did not find it in checking Case Center a handful of times before I had to hear another matter at 9:30, and only saw it when I completed that matter at about 9:45). To say that this cut things close is an understatement; it is not helpful to the court nor to the process nor to one's own client to wait until the eleventh hour to deliver an argument.
- [31] Moreover, this last minute delivery of a factum came on the heels of the failure, described above, to deliver any evidence, or any record of any kind, again despite Kimmel J.'s clear endorsement.
- [32] Instead, as evident in an exchange of emails in the record before me, in response to emails from GFD's counsel noting the need for a timetable, and noting the need for advice from Respondents' counsel about when the Respondents proposed to deliver any materials, the responses from Respondents' counsel were largely by way of "explanations" that counsel was awaiting instructions.
- [33] It was only on May 5, 2026, after a string of inquiries from GFD's counsel commencing shortly after the case conference before Kimmel J. on April 14, that counsel for the Respondents advised of his clients' view that the Tarion enrollment fees were not "purchased assets" under the terms of the APS or AVO, and that the Respondents, while suggesting a delay pending other related proceedings, were "prepared to argue a motion on June 2, 2026, if necessary."
- [34] Understandably, with the available time for exchange of materials having become that much more compressed, and with the need to establish an expeditious timetable thus having become all the more acute, GFD's counsel redoubled their efforts to elicit a meaningful response on those points from Respondents' counsel.
- [35] No meaningful response was ever received. At a certain point, GFD necessarily served its materials and, as noted, no responding materials were ever provided. GFD, like the Receiver, did not know until the delivery of the Respondents' factum shortly before the motion commenced this morning, whether or not the Respondents were in fact opposing the relief sought. Counsel for the Respondents suggested in his submissions that GFD

ought to have known, based on counsel's May 5 email, that the Respondents would in fact be opposing GFD's motion. That suggestion rings hollow. After being told on May 5 that the Respondents "were prepared to argue a motion...if necessary" GFD's counsel received no response to his subsequent attempts to establish a timetable for exchange of materials, nor any indication as to whether and when the Respondents would deliver any materials. In my view it is understandable that GFD's counsel would be left wondering, in view of the deafening silence from Respondents' counsel, as to whether or not today's hearing would proceed with or without opposition, and what if any position the Respondents would take.

[36] Obviously, this conduct is totally unacceptable. It is starkly offside what is required by the Rules and by the Commercial List Practice Direction, and is significantly at odds with the "three Cs" animating commercial court practice. I could in the circumstances simply have refused to receive the Respondents' factum or to hear the Respondents' argument (for this and other reasons). I decided in the end to hear and consider the Respondents' argument, but, to be clear, this kind of conduct is not acceptable and generally will not be tolerated.

The Parties' Arguments

[37] Turning to the substantive issues, GFD's argument is essentially based on a straightforward interpretation of the court-approved Sale Agreement, and on the intention of the parties as reflected in that Sale Agreement.

[38] I note that, as a threshold matter, GFD questions the Respondents' standing to assert any entitlement to the Tarion Refund or to assert any other position on this motion.

[39] That is, in addition to having filed no evidence on the motion, and no materials at all until the factum this morning, the Respondents are in Receivership, and were not parties to the Sale Agreement.

[40] This standing argument is not without merit, and not merely offered as a technical foray. I determined to review the substantive arguments delivered in the Respondents' late-breaking factum and in their counsel's oral submissions, but the conduct described above, and the fact that the Respondents were strangers to the relevant contract meant that they were flirting with a scenario in which I would refuse to hear them at all.

[41] Nonetheless, I heard the arguments, from all sides, in full.

A. Discussion of GFD's Position

[42] GFD's argument proceeds from the well-established principles enunciated in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, and authorities that have followed it, to the effect that the court should read the contract as a whole, giving the words on the page their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[43] This unassailable guidance has been echoed and amplified repeatedly in countless cases.

[44] More recently, Centa J., in *Horn Ventures International Inc. v. Xylem Canada LP*, 2022 ONSC 4158, helpfully distilled a number of similar pronouncements from the Court of Appeal for Ontario, stating that the court should,

“read the contract in the context of the surrounding circumstances known to the parties at the time of its formation...such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which it was made”

but excluding “evidence about the subjective intention of the parties.” Justice Centa also noted that the court should,

“read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result.”

[45] GFD argues that, applying these principles, the Sale Agreement clearly establishes that the Tarion Refund constitutes a Purchased Asset to which GFD is entitled.

[46] It notes that there is no question that the “Purchased Assets” identified and defined in the Sale Agreement were acquired by GFD (through the Assignee) as confirmed in the AVO.

[47] The Purchased Assets expressly include “all intangible property (on-site or off-site) relating to the creation of the Buildings or the Project, including without limitation...the Levies.” “Buildings” includes Tower B.

[48] GFD asserts that the Tarion Fee was paid as a pre-requisite to developing the Tower B condominium units, and is by definition intangible property relating to the creation of the Buildings and the Project. It maintains that the corresponding right to receive the Tarion Refund is also intangible property related to the creation of the Buildings and the Project.

[49] More specifically, GFD argues, the Tarion Fee is also a “Levy”. The Sale Agreement defines Levies as:

“...all municipal development charges, educational development charges, community benefits charges, amounts owing pursuant to agreements under sections 37 and/or 45 of the Planning Act (Ontario), cash in lieu of parkland, lot levies, water allocation payments, sewer allocation payments, building permit application fees, planning application fees or any other amount paid to the municipality or other Governmental Authority as a prerequisite to obtaining a building permit for the construction of the Project or any part thereof or in respect of any development thereon.”

[50] A Governmental Authority is defined as:

“...governments, regulatory authorities, governmental departments, agencies, commissions, bureaus, officials, ministers, Crown corporations, courts, bodies, boards, tribunals or dispute settlement panels or other law or regulation-making organizations or entities: (a) having or purporting to have jurisdiction on behalf of any nation, province, republic, territory, state or other geographic or political

subdivision thereof, including, without limitation, any municipality in which the Property is located; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.”

- [51] GFD argues, and the Respondents concede, that Tarion is a Governmental Authority for purposes of the Sale Agreement. I agree.
- [52] As such, GFD argues that, in addition to being included in the broad definition of “Purchased Assets” as an intangible asset, the Tarion Fee is also, and more specifically, included in that definition as a “Levy.”
- [53] Further, the Purchased Assets also expressly include the Respondents’ right, title and interest in and to “the benefit of any prepaid expenses or deposits with any person...or Governmental Authority.” “Person” includes and “company or corporation” or “other entity however designated or constituted.”
- [54] Tarion, which the Respondents concede is a Governmental Authority, is also a “Person” as defined.
- [55] As a necessary amount that was paid in order to ultimately be able to sell new homes (i.e., the Tower B condominium units), GFD asserts, the Tarion Fee constitutes a “prepaid expense.” It also qualifies, GFD argues, as a deposit, since it is an amount that was paid to Tarion and subsequently became refundable. In each and either case, the Tarion Refund is a benefit associated with a prepaid expense or deposit paid to Tarion (a Person and a Governmental Authority) in connection with the development of the Tower B condominiums, and therefore constitutes a Purchased Asset.
- [56] GFD submits that, regardless of the specific definitional items discussed above, it is also clear that the parties’ intention was that the Tarion Refund was at all times intended to be captured as a Purchased Asset.
- [57] As GFD explains, it was clear that, through the Sale Agreement, GFD was to obtain the benefits associated with the Project. It would therefore be commercially absurd, urges GFD, to find that GFD did not intend to purchase, and the Receiver did not intend to sell, the right to the Tarion Refund.
- [58] On this point, GFD also emphasizes, and the Receiver agrees, that both parties to the Sale Agreement – GFD and the Receiver – agree that their intention under the Sale Agreement was that the Tarion Fee constitutes a Purchased Asset that was intended to be conveyed.
- [59] As GFD says, again echoed by the Receiver, no commercially reasonable party in GFD’s position would have agreed to purchase the Project without acquiring the benefit of the fees paid in respect of the development, including the Tarion Fee, and no commercially reasonable receiver would have purported to withhold that benefit from the purchaser.
- [60] Finally, to illustrate the force of the conclusion it seeks, GFD relies on a “counterfactual” scenario. That is, had GFD continued to develop Tower B as originally contemplated – by

constructing and selling condominium units – no Tarion Refund would have arisen. In that scenario, GFD would have received the full benefit of the Tarion Fee in the form of warranty coverage for the units it sold.

- [61] It follows, GFD argues, that GFD should not be deprived of the economic value of the Tarion Fee simply because it has taken the Project in a different direction.

B. Discussion of the Respondents' Position

- [62] In their last-minute factum and in their counsel's oral submissions, the Respondents take issue with GFD's suggested interpretation of the definitions in the Sale Agreement, point to other provisions of the Sale Agreement that they say support their position, and reference certain ONHWPB Bulletins relative to Tarion and its role and function.

- [63] With regard to the interpretation of the Sale Agreement, the Respondents say, first, that at the time the Sale Agreement was negotiated and executed, there is no evidence that the Receiver, Purchasers or GFD knew of the existence of the Tarion Fee, and therefore they could not possibly have intended to include the Tarion Fee within the definition of Purchased Assets in the Sale Agreement.

- [64] While, not surprisingly in my view, there is no evidence one way or the other as to whether or not the parties to the Sale Agreement specifically focused on the Tarion Fee, there is uncontroverted evidence that, in defining "Purchased Assets" in the agreement, the contracting parties specifically intended to capture all manner of assets broadly contemplated by that definition. Frankly, I would expect that the Receiver and the Purchasers, as frequent and sophisticated participants in the property development sphere, including condominium development, would be aware of the obligations and mechanics vis-à-vis Tarion but, regardless, in my view, the appropriate exercise is to interpret the words of the Sale Agreement to determine its scope and effect, and not to parse the extent of individual contracting parties' knowledge of individual constituent elements of the agreement, particularly where, as here, the definitional net is cast broadly.

- [65] As to the contractual definitions themselves, the Respondents argue that the definition of "Excluded Assets" within article 1.1 of the Sale Agreement applies to the Tarion Fee. The Respondents point, in particular, to the language in subpart (g) within the definition of Excluded Assets therein, which, in the portion quoted by the Respondents, includes "...any monies paid to the Receivership Respondents or on their behalf...on account of a purchase of a condominium unit to be constructed in Tower B in the Project." The Respondents say that "That is precisely what the Tarion Fee is..."

- [66] However, as counsel for the Receiver fairly pointed out, the whole of subpart (g) defines as an Excluded Asset:

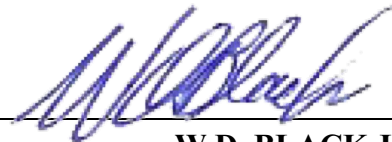
"the existing agreements of purchase and sale with respect to the purchase of condominium units within Tower B and Tower C in the Project and any monies paid to the Receivership Respondents or on their behalf as a deposit or on account of a purchase of a condominium unit to be constructed in the Tower B or Tower C in the Project."

- [67] It is evident that this provision, read in its entirety, in fact relates to deposits or other amounts paid by purchasers of individual condominium units towards their proposed purchase.
- [68] Read as a whole and without cherry-picking in the way that the Respondents' argument does, it is evident that this definition is not in fact aimed at or relevant to the Tarion Fee.
- [69] The Respondents then tackle the definitions cited by GFD, arguing, in a conclusory way, that the Tarion Fee is neither a "prepaid expense" nor a "deposit, but rather a regulatorily mandated cost of regulatory compliance."
- [70] Likewise the Respondents argue that the Tarion enrollment (and by extension the Tarion Fee) is not "intangible property" but is instead a "personal, statutory regulatory status tied exclusively to the builder's or vendor's license and registration under the ONHWPA."
- [71] This latter argument, asserting as well that statutory licenses and registrations are granted solely to the registrant and cannot be vested or transferred via a commercial sale agreement, is stated baldly in the Respondents' factum, and was repeated, emphatically, in Respondents' counsel's oral submissions.
- [72] I pointed out to Respondents' counsel in argument that I did not see any authority in the Respondents' factum for that proposition. In response, Respondents' counsel urged me to read certain material from and about Tarion, including certain Registrar's Bulletins linked in footnotes in the Respondents' factum (without taking me to any specific provisions or parts thereof).
- [73] Having reviewed those materials, I find no confirmation of the proposition on which the Respondents rely. Moreover, the parties to the Sale Agreement represent for purposes of the agreement that they possess the required standing, authority, and power in order to complete the transaction.
- [74] There is no precise evidence before me, beyond those representations, in response to the Respondents' bald allegation that the parties to the Sale Agreement lacked status to convey the entitlement to the Tarion Fee, but that is not surprising given the exceedingly late delivery of the Respondents' argument, and the absence of any authority therein, even at that, in support of this assertion.
- [75] In sum, I reject the Respondents' submissions, and find that the Tarion Refund was a Purchased Asset conveyed to GFD under the Sale Agreement. I order Tarion to pay the amount at issue – just over \$168,000 plus whatever interest has continued to accrue – to GFD.
- [76] I should note as well that the Respondents' stated position in their factum was not that they should receive the Tarion Refund, but that the Tarion Refund should be paid to the Receiver. When the Receiver and GFD pointed out that this conclusion would mean that the argument today was academic – since the Receiver's position is that GFD should receive the Tarion Fee – and when pressed in argument, Respondents' counsel made clear

that the Respondents' position was that they should receive the Tarion fee via the Receiver. In view of my other findings, I need not determine whether or not, given their stated position that the Tarion Refund should go to the Receiver, and the Receiver's confirmation that it would transfer the Tarion Refund to GFD, the Respondents' position is effectively academic. Again, on the basis of the Sale Agreement, I find that GFD should receive the Tarion Refund directly.

Costs

- [77] I also find that GFD is entitled to its costs of this motion.
- [78] Given the unacceptable conduct of the Respondents described above relative to the timetable ordered (by Kimmel J.) to be established, and their failure to deliver any materials until their factum delivered shortly before the motion commenced, I would not have been surprised to see GFD seek its costs on a scale higher than partial indemnity.
- [79] They showed restraint in not doing so, and they seek an all-inclusive total of \$26,421.66 on a partial indemnity basis.
- [80] This amount strikes me as reasonable in the circumstances, and is supported by the Costs Outline provided by GFD. Although counsel for the Respondents characterized this amount as "excessive," the Respondents provided no costs outline of their own, and offered no detailed analysis to support the general assertion that GFD's costs were high.
- [81] Accordingly, I order the Respondents to pay GFD's partial indemnity costs in the amount of \$26,421.66, including HST, within 30 days of the date of release of this endorsement.



W.D. BLACK J.

DATE: JUNE 8, 2026