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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION

Applicant

and

STATEVIEW HOMES (NAO TOWNS II) 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

FACTUM OF THE MOVING PARTY (CROSS-MOTION)

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

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Denna Pourmonazah Jalili (LSO # 84976N)
djalili@sotos.ca

Tel: 416-977-0007
Fax: 416-977-0717

Lawyers for the Moving Party (Cross-Motion)

TO: THE SERVICE LIST

MOVING PARTY' (CROSS-MOTION) FACTUM

I. OVERVIEW

1. The moving party to this cross-motion, Dharmi Mehta (the "**Moving Party**"), brings this motion on behalf of all purchasers of pre-construction homes (the "**Homebuyers**") from the Stateview corporations subject to these receivership proceedings (the "**Debtors**"). The Homebuyers are currently at risk of losing over $77,000,000 (the "**Deposit Funds**") paid collectively in deposits to the Debtors. The Moving Party is one of the Homebuyers, having paid a $150,000 deposit towards the purchase of a pre-construction home from one of the Debtors.

2. The purpose of this cross-motion is to obtain an order compelling KSV Restructuring Inc. (the "**Receiver**") in its capacity as receiver and manager of the debtor, Stateview Homes (Nao Towns II) Inc. ("**Nao Towns II**"), to (i) conduct a tracing exercise in respect of certain funds that were required to be held in trust pursuant to the *Condominium Act, 1998*, S.O. 1998, C. 19 (the "***Condominium Act***"); (ii) valuate certain statutory trust claims made by the Homebuyers; and (iii) hold back from distribution to the secured creditors an amount equivalent to 20% of the deposits paid to each of the Stateview companies in receivership, including Nao Towns II, pending the completion of the aforementioned tracing exercise and valuation.

3. The Debtors previously carried on business as real estate developers that sold pre-construction townhomes (the "**Projects**") organized as common elements condominiums ("**CEC**"). Under a CEC model, homeowners hold freehold titles to specific land parcels which are linked to an undivided common interest (the "**Common Interest**") in the CEC. Pursuant to s. 81

and s. 138(4)(a) of the *Condominium Act*, deposits paid towards the Common Interest are statutorily required to be held in trust, whereas the amounts paid towards the freehold aspects are not so required.

4. Since the outset of these receivership proceedings, the Receiver has erroneously reported to this Honourable Court that the Projects were purely "freehold homes" and, as such, the Stateview corporations were "not required to keep them in trust".[1] As a result, and by its own admission, the Receiver has not attempted to conduct a tracing exercise in respect of any of the deposits paid to the Debtors.

5. What's more, the Receiver failed to conduct a tracing exercise, despite being advised by the management of the Debtors that the deposits were used to "fund the general operations of the Receivership companies and the development of the Projects".[2]

6. The Receiver now makes a motion for, *inter alia*, court approval to distribute the proceeds from the sale of the real property owned by Nao Towns II to certain secured creditors. The Receiver seeks to distribute the entirety of these sale proceeds to the secured creditors, subject only to a minimal holdback to cover certain professional costs it has incurred in respect of the Nao Towns II receivership.[3]

7. The Receiver seeks to distribute these funds to the secured creditors notwithstanding that, by its own admission, it has been aware of the Homebuyers' claims for a statutory trust pursuant

---

[1] First Report of the Receiver dated May 30, 2023 (the "**First Report**"), page 11, paragraph 2 – Motion Record of the Moving Party (Cross-Motion)("**MRMP**"), Tab 3.
[2] Fifth Report of the Receiver dated October 2, 2023 (the "**Fifth Report**"), page 5, paragraph 6 – MRMP, Tab 4.
[3] Receiver's Notice of Motion dated February 8, 2024 at paragraph 21- Motion Record of the Receiver, Tab 1.

to s. 81 and s. 138(4)(a) of the *Condominium Act* (the "**Condo Act Claims**") since at least September 29, 2023 and that those claims have yet to be directly adjudicated.

8. The Ontario Court of Appeal has ruled that purchasers who have paid deposits subject to the statutory trust provisions of the *Condominium Act* have an "absolute equitable interest" in those monies and are, in circumstances where the deposits were improperly commingled and/or spent, entitled to a tracing exercise, including and specifically, in the insolvency context.[4]

9. Accordingly, the Homebuyers have the right to know of the fate of their statutorily protected deposit funds, and whether those monies can be traced into the properties held by the Debtors, and, consequently, the proceeds of sale deriving from same. The Moving Party brings this cross-motion to assert the rights of the Homebuyers which have been improperly disregarded by the Receiver.

II. SUMMARY OF FACTS

A. Background and Legal Structure of the Projects

10. The Debtors were a collection of single-purpose real estate development companies in the business of constructing residential units (i.e., the Projects).

11. The Projects were organized as CECs. Under a CEC model, homeowners hold freehold titles to specific land parcels which are linked to an undivided common interest in the CEC. This ownership structure combines the individual land ownership with shared interest in the common elements.

---

[4] *Ward-Price v Mariners Haven Inc* (2001), 57 OR (3d) 410 at paras 21, 32.

12. Beginning no later than January 15, 2021, the Debtors started entering into pre-construction purchase agreements with the Homebuyers. The Purchase Agreements are standardized, or substantially similar, across all the Projects. A sample purchase agreement entered into by Jennifer Sitt, as purchaser, and Nao Towns II, as vendor, for $1,020,990 (the "**Sitt Agreement**") is attached as Exhibit "A" to the Affidavit of Jennifer Sitt, sworn on February 14, 2024.[5]

13. As part of the Purchase Agreements, the Homebuyers paid deposits to the Debtors (the "**Deposit Funds**"). Pursuant to the Sitt Agreement, Jennifer paid $116,950 in deposits.

14. The Receiver and the Moving Party agree that the combination of s. 81 and s. 138(4)(a) of the *Condominium Act* imposes upon a declarant (in this case, the Debtors) a statutory obligation to hold any deposits that are paid towards the Common Interest in trust.[6]

15. S. 81 and section 138(4) of the *Condominium Act* state, respectively:

> **Money held in trust**
> **81** (1) A declarant shall ensure that a trustee of a prescribed class or the declarant's solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment,
> (a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit;
> (b) on account of an agreement of purchase and sale of a proposed unit; or
> (c) on account of a sale of a proposed unit. 1998, c. 19, s. 81 (1).
>
> **Exception**
> (2) Subsection (1) does not apply to money received,
> (a) on account of the purchase of personal property included in the proposed unit that is not to be permanently affixed to the land; or
> (b) as an occupancy fee under subsection 80 (4). 1998, c. 19, s. 81 (2).
>
> **Reservation money**
> (3) If a person has paid money to reserve a right to enter into an agreement of purchase and sale for the purchase of a proposed unit and subsequently enters into such an agreement with the declarant, the declarant shall, on entering into the agreement, credit the money received to the purchase price under the agreement, despite any provision of the agreement. 1998, c. 19, s. 81 (3).

[5] Exhibit "**A**" to the Affidavit of Jennifer Sitt, sworn February 14, 2024 (the "**Sitt Affidavit**") – MRMP, Tab 2.
[6] Factum of the Receiver dated February 9, 2024, at paragraph 49.

Trustee
(4) Upon receiving money that is required to be held in trust under subsection (1), a trustee of a prescribed class shall hold the money in trust in a separate account in Ontario designated as a trust account at a bank listed in Schedule I or II to the *Bank Act* (Canada), a trust corporation, a loan corporation or a credit union. 1998, c. 19, s. 81 (4); 2002, c. 8, Sched. I, s. 7 (1).

Declarant's solicitor
(5) Upon receiving money that is required to be held in trust under subsection (1), the declarant's solicitor shall hold the money in trust in a trust account in Ontario. 1998, c. 19, s. 81 (5).

Evidence of compliance
(6) Within 10 days of the payment of the money under subsection (1), the declarant shall provide to the person who paid the money written evidence, in the form prescribed by the Minister, of compliance with subsection (1) and one of subsections (4) and (5). 1998, c. 19, s. 81 (6).

Duration of trust
(7) Despite the registration of a declaration and description, the person who holds money in trust under subsection (1) shall hold it in trust until,

(a) the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with this Act and an agreement that the person who paid the money has entered into with respect to the proposed unit; or
(b) the declarant ensures that security of a prescribed class is provided for the money, except if the money has been received under clause (1) (a) and has not been credited to the purchase price under the agreement. 1998, c. 19, s. 81 (7).

138 (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).

16. Each of the Purchase Agreements are replete with references to the *Condominium Act*, such as:

(a) On page 1 of the Sitt Agreement, it specifies, that the agreement is for a "common elements condominium" and refers to the yet-to-be incorporated corporation that would manage the Common Interest as the "Condominium";

(b) On page 18, the definition of "Act" reads "*…the Condominium Act, S.O. 1998, C. 19, the regulations thereunder and any amendments thereto*";

(c) On page 18, the definition of "Condominium Corporation" and/or "Condominium" and "condominium" reads " *the Common Element Condominium Corporation create upon registration by the Vendor of the Creating Documents and the term "Condominium" shall mean the Common Elements Condominium created upon registration of the Creating Documents;*

(d) On page 23, it states that "in the event the Condominium has not been registered as of the Closing Date, the Purchaser shall take occupancy of the Property in accordance with the terms of this Purchase Agreement…."

(e) Beginning on page 25, there is an entire section dedicated to "Condominium Matters"; and

(f) On page 50, the Tarion Information advises the purchaser to review the "disclosure statement required by the *Condominium Act*, 1998" with a lawyer.

17. Hidden at pages 42-43 of the Sitt Agreement, is a singular provision stipulating that a mere $2 out of the $1,020,990 purchase price was to be paid towards the common interest of the condominium, with none of the deposit monies allocated for this purpose. All the Purchase Agreements contain language that is the same or substantially similar to this clause (the "**Impugned Clause**").

18. Where the Receiver and Moving Party disagree, is (i) in respect of the amounts of the Deposit Funds that were allocated in law to the Common Interest; and (ii) in any event, whether a trust pursuant to the *Condominium Act* can rank in priority to the secured creditors.

B. <u>The Receiver's First Report and Inaccurate Description of the Projects</u>

19. In April and May 2023, certain senior secured creditors applied to appoint a receiver over the Debtors. The Court granted these requests on May 2, 2023, and May 18, 2023.

20. According to the First Report of the Receiver, dated May 30, 2023 (the "**First Report**"), the Homebuyers paid deposits to the Debtors, totalling at least $77,322,000. These amounts are broken down as follows:

	(unaudited)	
Project	# of Homebuyers	Deposits ($000s)
Minu	147	19,208
Nao Phase I	96	7,680
High Crown	47	4,933
On the Mark[5]	32	4,218
Nao Phase II	76	7,617
Highview	4	None
BEA	218	17,440
Elm	145	16,076
Total	765	77,172

21. The Receiver has since revised the estimated deposits paid to Highview Building Corp Inc. ("**Highview**") from $0 to approximately $470,000.

22. Despite the Purchase Agreements clearly stating that the pre-construction units were sold under a CEC model[7], the Receiver reported to this Court that, because the units were "freehold homes", the deposits paid towards them were not required to be held in trust:

> Prior to these receivership proceedings, each of the Receivership Companies, other than Taurasi Holdings, sold freehold homes to Homebuyers, each of whom paid deposits.
>
> **As freehold homes, the Receivership Companies were not required to keep the deposits in trust.** The Receiver has been advised by the Stateview Group's representatives that all deposits have been spent; however, the use of those funds has not yet been determined and the **Receiver has not, as of the date of this Report, commenced a tracing exercise.**[8]

[7] For example, see page 1 of the Sitt Agreement.
[8] First Report, page 11, paragraph 2.

23. The Receiver did not mention the CECs or the application of the *Condominium Act*, and it did not conduct a tracing exercise in respect of the Deposit Funds. As a result of the Receiver's error, this Court was not made aware of the possibility that some or all of the Deposit Funds could have been subject to a statutory trust under the *Condominium Act*.

24. As seen on the very first page of the Sitt Agreement, the Purchase Agreements clearly state that the transactions are made in respect of a unit in a CEC rather than a pure freehold home.

25. In any event, on September 29, 2023, the Receiver was given formal notice of the Condo Act Claims when it was served with the Statement of Claim for a proposed class action on behalf of the Homebuyers.

C. Subsequent Reports and Positions taken by the Receiver

26. On October 2, 2023, the Receiver finalized its Fifth Report, which, among other things, stated that:

(a) management of the Debtors advised the Receiver that the "…Deposits were used to fund the general operations of the Receivership Companies and the development of the Projects", and without the Deposit Funds, there was not enough money to cover operating costs and project development costs;[9]

[9] Fifth Report, page 5, paragraph 6.

(b) the Receiver did not take steps to confirm how the Deposit Funds were used, despite being told by management that the monies necessarily went into the development of the Projects;[10] and

(c) the then-looming Tarion motion ought to be dismissed.

27. Put differently, the Receiver was advised by management of the Debtors that, the Deposit Funds were necessarily used to develop the Projects, as there was not enough money (i.e., loans) without the Deposit Funds to finance same. In short, the Receiver had direct knowledge of the Deposit Funds being used to develop the Projects, and yet still failed to conduct a tracing exercise.

28. On November 16, 2023, the Receiver made a motion before the Honourable Justice Osborne seeking largely the same relief as it does in this motion in respect of some of the other debtor Stateview corporations. As part of its motion record, the Receiver included its Sixth Report, which, among other things, disclosed to the Court, for the first time, the existence of the Condo Act Claims and of the potential need for a separate motion to decide the issue, depending on the outcome of the Tarion motion:

> However, the Receiver notes that the relief proposed to be sought in the Proposed Class Action includes the imposition of the same trusts and/or charges in respect of Homebuyer Deposits as sought in the Tarion Priority Motion, plus one additional smaller trust claim that was not sought in the Tarion Priority Motion. **Depending on the outcome of the Tarion Priority Motion, it may also be necessary to seek a determination of the additional smaller trust claim raised in the Proposed Class Action from the Court in the receivership proceedings on a further motion before the Court.[11]**

[10] Fifth Report, page 5, paragraph 6.
[11] Sixth Report dated November 8, 2023, page 12, paragraph 6 – MRMP, Tab 5.

29. On December 22, 2023, the Honourable Justice Steele released her decision dismissing Tarion's motion. Justice Steele did not decide the Condo Act Claims, nor was the issue argued before Her Honour.

30. On January 23, 2024, counsel for the Receiver stated its view that Justice Steele's reasons for dismissing the Tarion motion would equally apply to dismiss the Condo Act Claims, and, accordingly, that it would distribute the sale proceeds from the various Projects without regard to same.[12]

31. On January 30, 2024, counsel for the Receiver advised of its intention to seek approval from this Court to distribute the proceeds obtained from the sale of real property owned by Nao Towns II.

III. STATEMENT OF ISSUES, LAW & AUTHORITIES

32. The following issues are to be decided on the cross-motion:

(a) Does the Receiver have an obligation to conduct a tracing exercise in respect of the Deposit Funds and/or provide counsel for the Moving Party with the records that would enable them to carry it out?

(i) Yes.

(b) Is the Impugned Clause void for being contrary to public policy as an attempt to contract out of the protections conferred by the *Condominium Act*?

[12] Seventh Report of the Receiver dated February 7, 2024 (the "**Seventh Report**"), page 6, paragraphs 6-7 - MRMP, Tab 6.

(i) Yes.

(c) Does Justice Steele's decision dismissing Tarion's motion (the "**Tarion Decision**") apply to negate the Condo Act Claims from ranking ahead of the secured creditors?

(i) No.

A. The Homebuyers' Right to Trace the Deposit Funds

1. General principles

33. Section 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3 (the "***BIA***") excludes "trust property" held by the bankrupt from distribution to the creditors of its estate. Thus, if the Homebuyers can establish that a valid trust was established in respect of the Deposit Funds for the purposes of the *BIA*, then their interest in those funds (and any property they trace into) rank ahead of the interests of the Debtors' secured creditors. The Condo Act Claims rely on the statutory trust provisions created by s. 81 and s. 138(4)(a) of the *Condominium Act*, which establishes a trust over deposits paid towards the Common Interest of a CEC.

34. The *BIA* does not define "trust property". In *British Columbia v Henfrey Samson Belair Ltd*., [1989] 2 SCR 24 ("***Henfrey***"), the Supreme Court held that provincial statutes which create a statutory trust must meet the common law test for trusts (certainty of intention, object and subject-matter) to be eligible for exclusion from the distribution of the assets of the estate under s.67(1)(a) of the *BIA*.[13] The reason being that bankruptcy is a matter within the exclusive jurisdiction of the federal government, and therefore provincial statutes cannot legislate in a

[13] *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24.

manner that upsets the priority scheme set out by the *BIA*. However, because the *BIA* does not define what "trust property" is, if a statutory trust satisfies the common law test for trusts, then that trust can qualify for exclusion under s.67(1)(a) of the *BIA*.[14]

35. It is well-established that provincial statutes can supply the certainty of intention and certainty of object requirements required by common law trusts.[15] In "most cases" within the insolvency context, the question of whether property subject to a provincial statutory is exempt from distribution pursuant to s.67(1)(a) of the *BIA* turns on whether certainty of subject-matter is established.[16]

36. As further elaborated below, the Ontario Court of Appeal's decision in *Ward-Price v Mariners Haven Inc.,* 2001 OJ No 1711 ("***Ward***") is dispositive of whether the Deposit Funds satisfy the common law trust requirements. *Ward* specifically applies the principles set out in *Henfrey* to the statutory trust provisions of the *Condominium Act*. In doing so, the Court of Appeal outlines the inalienable equitable rights of purchasers who paid deposits subject to the statutory trust provisions of the *Condominium Act*.

2. Ward grants the Homebuyers an unequivocal right to trace the Deposit Funds

37. *Ward* concerned an appeal of summary judgement granted by a motion judge dismissing a class action seeking a tracing remedy in respect of statutory interest generated by the vendor/developer on deposits paid towards pre-construction homes. The proposed representative plaintiff argued that, not only were deposits impressed with a statutory trust under the

---

[14] *Ibid*.
[15] *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 at paras 38, 78.
[16] *Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240 at para 36.

Condominium Act, the statutorily prescribed interest generated on the deposits were also required to be held in trust. As such, purchasers in that class action were entitled to the equitable relief of tracing from the developers, who had since entered into bankruptcy.

38. The Court of Appeal granted the appeal and awarded a tracing remedy in respect of the interest generated on the deposits. In doing so, the Court of Appeal articulated several principles regarding the statutory trust created by the *Condominium Act*.

39. First, the statutory trust provision in the *Condominium Act* creates a valid statutory trust outside of the *BIA* context. The statutory trust created by the *Condominium Act* gave the purchasers "an absolute equitable interest in the purchase money…. This does not involve any questions of constructive or resulting trusts. The only trust issue is the express statutory trust." [17] This statutory trust is effective even if the developer commingles the deposits with funds from other sources:

> A convenient way to test my interpretation of s. 53(1) (b) is to ask what effect, if any, on the trust imposed on the purchase money would result from the developer's failure to hold the money in a separate trust account. **The answer, in my view, is that it would have no effect. Because the legislation has said that the purchase money is trust money, it is immaterial whether the purchase money is in fact kept separate and apart from the developer's own money**.[18]

40. Second, given the absolute equitable right of purchasers in deposits protected by the statutory trust provisions of the *Condominium Act*, tracing is a remedy available to them when such funds have been improperly disbursed by a developer that has entered bankruptcy:

> In my view, should the developer, as trustee, breach that trust by making wrongful use of the funds, it makes sense to interpret s. 53(3) both in the context of the entire section and in conformity with the proprietary remedy available to the purchaser. **Given that the beneficiary of a trust has the right to trace assets that have been wrongfully distributed, and given that the tracing includes any interest which the assets may have**

---

[17] *Ward-Price v Mariners Haven Inc*, *supra* note 4 at para 21.
[18] *Ibid* at para 31.

> **earned, it follows that a trust imposed by statute**, or a trust deed, on the assets of a trust necessarily constitutes a trust imposed on the interest. This is particularly true in this case, where, by statute, the trustee must account to the beneficiary for the interest. **The legislature is presumed to know the remedy for breach of trust and to have drafted s. 53 in accordance with that remedy**. See F. Bennion, Statutory Interpretation (Toronto: Butterworths, 1997) at pp. 827-30. Therefore, s. 53(3) should be interpreted to conform with the proprietary remedy available to the purchaser should the developer breach the trust imposed on the purchase money by s. 53(1).[19]

41. Third, a generous and purposive approach to interpreting the rights afforded by the statutory trust provision is reinforced by the nature of the *Condominium Act* as consumer protection legislation.

> In interpreting s. 53, the nature and purpose of the *Condominium Act* is also helpful**. It is well recognized that the Act is consumer protection legislation**. **The trust created by s. 53(1) is for the protection of purchasers.** Subsections (2) and (3) further protect purchasers by ensuring, in the circumstances provided for, that they receive interest on their deposits. As the motion judge recognized at p. 791 O.R., it has been held, including by this court in Ackland at p. 105 O.R., that the purpose of s. 53(3) "is to provide an incentive [to the developer] to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has [taken] occupancy". Applying a purposive approach to the interpretation of s. 53(3) therefore provides further support for my view that s. 53(3) is to be interpreted to give effect to the trust created by s. 53(1).[20]

42. Fourth, the statutory trust provisions and related equitable claims/relief, including tracing, were specifically intended to protect purchasers from the occasion of developer insolvency:

> Moreover, to hold that the statutory trust imposed on the purchase money for the purchaser's protection is terminated on the provision of security under s. 53(1)(b) would render the trust meaningless. The trust is intended to create a broader range of remedies for a purchaser than would be available if only a debtor-creditor relationship existed. It does this by providing the traditional remedies available to a beneficiary when there has been a breach of trust. **Indeed, the trust is also intended to protect the purchaser in the event of the developer's insolvency, which is the situation in this case**.[21]

---

[19] *Ibid* at para 24.
[20] *Ibid* at para 25.
[21] *Ibid* at para 32.

43. In summary, the Court of Appeal in *Ward* holds that the statutory trust provisions under the *Condominium Act* establish a trust over applicable deposits paid by purchasers. This statutory trust gives purchasers an "absolute equitable interest" over the deposit monies, accompanied with the equitable right to trace, that endures in the event of a developer's insolvency. As such, the Homebuyers have a right to trace the Deposit Funds.

3. The Receiver Must Trace the Funds

44. The Receiver has not put forward any evidence that it has attempted to trace the Deposit Funds. In fact, the Receiver has stated the opposite; that, given its mistaken position that the Projects were organized as pure freehold homes, none of the Deposit Funds were required to be held in trust and therefore no tracing was called for.[22]

45. The Receiver has refused to conduct a tracing exercise, despite, by its own admission, being advised by management of the Debtors that at least some of the Deposit Funds went into the "development of the Projects". Instead of considering whether such monies could be traced into the Projects, the Receiver opted to ignore the Condo Act Claims and steamroll forward with the distribution of the sale proceeds to the secured creditors.

46. The only statement the Receiver has made about a tracing exercise, other than refusing to conduct one, is its bald assertion that "in addition to the Deposits being depleted, the Deposits were commingled with the funds of the Receivership Companies' secured creditors and are not capable of being identified or traced".[23]

---

[22] First Report, page 11, paragraph 2.
[23] Fifth Report, page 11, paragraph 1(d).

47. As held by the Court of Appeal in *Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9, the fact that deposit monies were commingled does not in and of itself destroy a trust.[24] Rather, it is only when the funds are commingled and then converted into other forms of property that renders tracing impossible, does a trust cease to exist:

> Commingling of this kind does not deprive trust property of the required element of certainty of subject matter. Commingling of trust money with other money can destroy the element of certainty of subject matter, but only where commingling makes it impossible to identify or trace the trust property.[25]
>
> ….
>
> Second, the statement that once the purported trust funds are commingled with other funds, they cease to be trust funds must be read in the light of the fact that when making it, the court was explicitly following *Henfrey.* In *Henfrey*, as I have explained, McLachlin J. made it clear that it was only when **commingling is accompanied by conversion and tracing becomes impossible that the required element of certainty of subject matter is lost**.[26]
>
> …
>
> I am fortified in that conclusion by a considerable body of authority in addition to *Henfrey* that stands for the proposition that commingling alone will not destroy the element of certainty of subject matter under the general principles of trust law.[27]

48. In this case, the Receiver was informed by management of the Debtors that Deposit Funds were used to develop to the Projects.[28]

49. It is insufficient for the Receiver to evade its duty to trace the Deposit Funds by simply arguing that the statutory trust was destroyed by virtue of the Deposit Funds being commingled.

---

[24] *The Guarantee Company of North America v Royal Bank of Canada*, *supra* note 14 at para 99.
[25] *Ibid* at para 87.
[26] *Ibid* at para 97.
[27] *Ibid* at para 99.
[28] Fifth Report, page 5, paragraph 6.

B. The Impugned Clause is Void for being Contrary to Public Policy

50. The Receiver contends that the Impugned Clause renders any possible statutory trust over the Deposit Funds under the *Condominium Act* practically meaningless as the Impugned Clause (i) allocates only $2 of the purchase price to the Common Interest; and (ii) that none of the Deposit Funds were allocated to the Common Interest.

51. The Impugned Clause is void for being contrary to public policy as it is an attempt to contract out of its statutory trust protections conferred by the *Condominium Act*.

52. As the Supreme Court held in *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202 contractual provisions that attempt to contract out of public policy statutes are void; parties are not competent to contract themselves out of such enactments.[29] On that basis, the Court held that a provision in a collectively bargained agreement that had the effect of contracting out of certain protections conferred by the *Ontario Human Rights Code* was void.

53. More recently, in *Fleming v. Massey*, 2016 ONCA 70, the Ontario Court of Appal held that a contractual provision that had the effect of contracting out of *the Workplace Safety and Insurance Act, 1997,* S.O. 1997, c. 16 Sch (the "***WSIA***") was void for being contrary to public policy. The Court characterized the WSIA as public policy legislation and held that, absent any evidence of legislative intent permitting parties to contract out of its protections, such contractual provisions

[29] *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202 at para 31.

will be void.[30] The Court found no such legislative intent in the *WSIA*, thereby rendering the offending provision void.[31]

54. The *Condominium Act* has been repeatedly characterized by the jurisprudence as consumer protection legislation intended to advance the public policy objective of creating a more level playing field between purchasers and developers.[32]

55. For example, in *Harvey v Talon International Inc.,* 2017 ONCA 267, the Ontario Court of Appeal articulates the following about the *Condominium Act*:

> **The fact that the Act is consumer protection legislation is well established**. In *Ward-Price v. Mariners Havens Inc.* (2001), 2001 CanLII 24088 (ON CA), 57 O.R. (3d) 410, [2001] O.J. No. 1711 (C.A.), at para. 25, Borins J.A. stated that **"it is well recognized that the Act is consumer protection legislation**". More recently, in *Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930* (2010), 102 O.R. (3d) 737, [2010] O.J. No. 4853, 2010 ONCA 751, at para. 49, O'Connor A.C.J.O. stated that **"[a] significant purpose of the Act is consumer protection**". Rouleau J.A. cited this case in *Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, [2014] O.J. No. 4947, 2014 ONCA 724 when he acknowledged [at para. 44] that "**consumer protection is a significant purpose of the *Condominium Act*".**[33]
>
> **The goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals, on par with companies or citizens who regularly engage in business**. This court and the Supreme Court have identified guidelines for how consumer protection legislation is to be interpreted. The application judge referred to *Seidel v. Telus Communications Inc.*, [2011] 1 S.C.R. 531, [2011] S.C.J. No. 15, 2011 SCC 15 for the proposition that **consumer protection legislation must be interpreted generously in favour of the consumer**. This proposition [page201] comes directly from Binnie J., who was considering the British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BCPCA*"). At para. 37, he noted that the statutory purpose of the *BCPCA* was all about consumer protection. As such, its terms should be

---

[30] *Fleming v Massey*, 2016 ONCA 70 at para 34.
[31] *Ibid* at para 56.
[32] *Ward-Price v Mariners Haven Inc*, *supra* note 4 at para 25; and *Harvey v Talon International Inc*, 2017 ONCA 267 at para 62
[33] *Harvey v Talon International Inc*, *supra* note 30 at para 62.

> interpreted generously in favour of consumers. Another relevant Supreme Court case is *Celgane Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, [2011] S.C.J. No. 1, 2011 SCC 1. In that case, the court was considering the Federal Court's interpretation of a price-regulating provision in the *Patent Act*, R.S.C. 1985, c. P-4. Abella J. adopted the majority view of Evans J.A., who had held that because the provision could be interpreted in different ways, the one that best implemented the consumer protection objectives of such price-regulating provisions was the correct interpretation.[34]

56. Accordingly, the *Condominium Act*, like the *Ontario Human Rights Code* and the *WSIA*, constitutes public policy legislation with protections that cannot be negated via contractual agreement, such as the Impugned Clause.

57. The necessary treatment of the Impugned Clause as void for being contrary to public policy is furthered by the express language of s. 176 of the *Condominium Act*, which states that "The Act applies despite any agreement to the contrary". Put differently, the protections conferred by the *Condominium Act*, including those conferred by the statutory trust provisions, apply notwithstanding any contractual provisions that attempt to circumvent them, such as the Impugned Clause.

58. The voidance of the Impugned Clause leaves open the question as to what percentage of the Deposit Funds were required to be held in trust by the Debtors. The Moving Party contends that the percentage of the Deposit Funds that were supposed to be held in trust should comport with the percentage value of the Common Interest for each Project. For example, if 25% of the value of a given Project was made up by the Common Interest, then 25% of the Deposit Funds paid towards that Project should be deemed to have been subject to the statutory trust provisions.

---

[34] *Ibid* at para 63.

59. At this time, the Receiver remains in possession of the documents and records needed to valuate the Common Interest for each of the Projects. Pursuant to s. 248(a) of the *BIA*, this Court has the authority to compel the Receiver to carry out its duties, which in this case, includes an obligation to valuate the Common Interest.

60. In addition to granting an order to compel the Receiver to valuate the Common Interest for each Project, the Moving Party asks that this Court to direct the Receiver to hold back from the sale proceeds an amount equal to 20% of the Deposit Funds paid to each Project from being distributed to the secured creditors until the Receiver has completed the valuation.

C. The Tarion Decision does not apply to the Condo Act Claims

61. The Receiver contends that Justice Steele's reasons for dismissing the Tarion motion equally apply to dismiss the Condo Act Claims. Justice Steele made the following findings in her reasons for dismissing Tarion's motion:

(a) The subordination provisions in the Purchase Agreements precluded the Homebuyers from asserting any claims that rank ahead of the secured creditors.[35]

(b) An express trust was established over some of the Deposit Funds, and that such a trust was breached by the Debtors. Nonetheless, the beneficiaries of the express trust were not entitled to a constructive trust over the sale proceeds largely because

[35] *Kingsett Mortgage Corp v Stateview Homes (Minu Towns) Inc*, 2023 ONSC 7105 at paras 25, 28.

Tarion failed to provide evidence demonstrating a sufficient connection between the Deposit Funds and the Projects.[36]

(c) The Homebuyers did not suffer unjust enrichment.[37]

62. The Receiver is incorrect in its view of the applicability of the Tarion Decision to this cross-motion, for several reasons.

63. First, the claims for statutory trust under the *Condominium Act* were not put before Her Honour. In fact, when comparing the purported statutory trust provisions alleged by Tarion to exist under *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "***Warranties Act***"), Justice Steele states that the *Warranties Act* "unlike the applicable statute for condominiums…does not require the recipient of the deposit funds to hold them in trust".[38] The **only** trust that was at issue in the Tarion Decision was an express trust created by the Purchase Agreements in respect of Stateview Homes (Elm&Co) Inc.

64. Second, Justice Steele's reasons for holding that the subordination provision in the Purchase Agreements, which purports to preclude the Homebuyers from asserting any priority claim over the secured creditors, cannot apply to the Condo Act Claims, as doing so would result in impermissible contracting out of the *Condominium Act*. As described by the Ontario Court of Appeal in *Ward*, a key purpose of the statutory trust provisions in the *Condominium Act* is to protect purchasers from the occasion of developer insolvency.[39] While the subordination provision

---

[36] *Ibid* at paras 25, 28, 76.
[37] *Ibid* at paras 25, 29, 76.
[38] *Ibid* at para 5.
[39] *Ward-Price v Mariners Haven Inc*, *supra* note 4 at para 32.

may reasonably apply to an express trust created by contract (as was found by Justice Steele)[40], it cannot apply to the Condo Act Claims, as that would result in the protections conferred by the *Condominium Act* being negated by way of contract, which is prohibited.

65. Third, the relief sought in this cross-motion is fundamentally different than that sought by Tarion. The Moving Party's main request of this Court is to compel the Receiver to conduct a tracing remedy in respect of the Deposit Funds. In contrast, the crux of the relief sought by Tarion pertained to the imposition of various types of constructive trusts over the sale proceeds for, *inter alia*, breach of express trust and unjust enrichment. Justice Steele denied Tarion's claim for constructive trust as a remedy for breach of trust largely because Tarion did not prove that the trust monies went into the Projects. On the other hand, before making any constructive trust claims over the sale proceeds from the Projects, the Moving Party first seeks to exercise her equitable right to a tracing exercise, which is expected to yield a sufficient nexus between the Deposit Funds and the Projects.

IV. ORDER REQUESTED

66. The Moving Party requests an order directing the Receiver to:

(a) Hold back from distribution to the secured creditors an amount equivalent to 20% of the deposits paid to each of the Stateview companies in receivership, including Nao Towns II;

[40] *Kingsett Mortgage Corp v Stateview Homes (Minu Towns) Inc*, *supra* note 33 at para 28.

(b) Conduct a tracing exercise in respect of the Deposit Funds for each of the Projects; and

(c) Valuate the Common Interest for each Project.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14 day of February, 2024.

David Sterns

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

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Denna Pourmonazah Jalili (LSO # 84976N)
djalili@sotos.ca

Tel: 416-977-0007
Fax: 416-977-0717

Lawyers for the Moving Party (Cross-Motion)

SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Title	Pinpoints
1	*Ward-Price v Mariners Haven Inc* (2001), 57 OR (3d) 410	21, 24-25, 31-32
2	*British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24	
3	*The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9	38, 78, 87, 97, 99
4	*Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240	36
5	*Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202	31
6	*Fleming v Massey*, 2016 ONCA 70	34, 56
7	*Harvey v Talon International Inc*, 2017 ONCA 267	62-63
8	*Kingsett Mortgage Corp v Stateview Homes (Minu Towns) Inc*, 2023 ONSC 7105	5, 25, 28-29, 76

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C 1985, C. B-3, as amended.

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,

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Marginal note: Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both

Condominium Act, 1998, S.O. 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).

Exception

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

(a) on account of the purchase of personal property included in the proposed unit that is not to be permanently affixed to the land; or

(b) as an occupancy fee under subsection 80 (4). 1998, c. 19, s. 81 (2).

Reservation money

(3) If a person has paid money to reserve a right to enter into an agreement of purchase and sale for the purchase of a proposed unit and subsequently enters into such an agreement with the declarant, the declarant shall, on entering into the agreement, credit the money received to the purchase price under the agreement, despite any provision of the agreement. 1998, c. 19, s. 81 (3).

Trustee

(4) Upon receiving money that is required to be held in trust under subsection (1), a trustee of a prescribed class shall hold the money in trust in a separate account in Ontario designated as a trust account at a bank listed in Schedule I or II to the *Bank Act* (Canada), a trust corporation, a loan corporation or a credit union. 1998, c. 19, s. 81 (4); 2002, c. 8, Sched. I, s. 7 (1).

Declarant's solicitor

(5) Upon receiving money that is required to be held in trust under subsection (1), the declarant's solicitor shall hold the money in trust in a trust account in Ontario. 1998, c. 19, s. 81 (5).

Evidence of compliance

(6) Within 10 days of the payment of the money under subsection (1), the declarant shall provide to the person who paid the money written evidence, in the form prescribed by the Minister, of compliance with subsection (1) and one of subsections (4) and (5). 1998, c. 19, s. 81 (6).

Duration of trust

(7) Despite the registration of a declaration and description, the person who holds money in trust under subsection (1) shall hold it in trust until,

(a) the person holding the money in trust disposes of it to the person entitled to it, where the disposal is done in accordance with this Act and an agreement that the person who paid the money has entered into with respect to the proposed unit; or

(b) the declarant ensures that security of a prescribed class is provided for the money, except if the money has been received under clause (1) (a) and has not been credited to the purchase price under the agreement. 1998, c. 19, s. 81 (7).

138 (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).

Act prevails

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

MOVING PARTY'S FACTUM

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

David Sterns (LSO # 36274J)
dsterns@sotos.ca
Denna Pourmonazah Jalili (LSO # 84976N)
djalili@sotos.ca

Tel: 416-977-0007

Lawyers for the Moving Party (Cross-Motion)