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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION

Plaintiffs

- AND -

STATEVIEW HOMES (NAO TOWNS II) INC.

Defendant

REPLY FACTUM OF THE RECEIVER

(Holdback motion returnable March 5, 2024)

March 1, 2024

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OVERVIEW

1. The Receiver files this reply factum to supplement the submissions in its February 9, 2023 factum regarding the relief sought by the Proposed Class.[1]

2. The principal focus of these reply submissions is twofold. First, the Receiver addresses the authorities and arguments set out in the Proposed Class's factum, which the Receiver views as inaccurate in law.

3. Second, the Receiver addresses a key factual development that came to light after the February 15, 2024 hearing, namely that the Receiver now understands that the financial stakes of this motion are *de minimis*. Specifically, the amount at issue on this motion is only $37,191.65 (assuming the Proposed Class is successful on all arguments) given that the Proposed Class stands to recover 99.5% of its total deposits on the NAO II project from Tarion, as explained in detail below.

4. In the Receiver's view, this fact bears directly on the reasonableness and appropriateness of the complex, costly, and unfunded tracing and valuation exercises sought by the Proposed Class on this motion (even apart from the fact that the ultimate relief sought by the Proposed Class has no basis in law and has been disposed of by Justice Steele's decision dated December 22, 2023).

FACTS

5. The main background facts are summarized in the Receiver's initial factum on this motion and its 7th Report to the Court. The following additional facts are drawn from the Supplement to the 7th Report to the Court, delivered following the February 15, 2024 attendance.

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[1] All capitalized terms not otherwise defined in this factum have the meanings given to those terms in the Receiver's February 9, 2023 factum.

A. The Proposed Class's *de minimis* economic interest

6. The aggregate sales price for all of the 76 units sold in the NAO II development was approximately $79.9 million. The Pre-Sale Purchasers paid total deposits of approximately $7.6 million in respect of these units.[2]

7. Since the February 15, 2024 attendance, it has come to the Receiver's attention through further analysis of the Debtor's books that 63 of the 76 Pre-Sale Purchasers on the NAO II project stand to be reimbursed fully by Tarion, as their deposits did not exceed Tarion's coverage limits.[3]

8. The remaining 13 Pre-Sale Purchasers have an aggregate exposure of just $37,161.95 in excess of Tarion's coverage limits.[4] In other words, the total possible recovery for the Proposed Class, even if their claims are entirely successful after a tracing and valuation exercise, is only $37,161.95.

9. Of those 13 Pre-Sale Purchasers, only two have claims in excess of $3,001, and four have claims of just $1.[5]

10. The Receiver brought this to the attention of the Proposed Class's counsel in a letter sent the day after the February 15 hearing. That letter enclosed supporting records and contained a "with prejudice" offer to resolve all claims against the NAO II project in exchange for payment of

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[2] Supplement to the Receiver's 7th Report (**"Supplemental Report"**), section 2.2 and Appendix "F".

[3] Supplemental Report, section 2.2.

[4] Supplemental Report, section 2.2. As set out in more detail therein, Tarion reimburses home buyers for their deposits up to 10% of the purchase price to a maximum of $100,000. Accordingly, if a Pre-Sale Purchaser bought a unit for $1 million or greater and made a $100,000 deposit (as was the case for 63 of the 76 Pre-Sale Purchasers), the Pre-Sale Purchaser will be fully reimbursed from Tarion. The Receiver's precise calculations of each of the outstanding deposits is set out in the enclosure to the letter from Paliare Roland dated February 16, 2023, Appendix F to the Supplemental Report.

[5] *Ibid*.

$5,000 (having regard for the relatively nominal value of the common element portions of the development, which were the only portions subject to any trust obligations).[6]

11. The Proposed Class never responded to this offer.

B. The common elements are extremely minor

12. The Receiver's Supplement to the 7th Report also contains additional information about the common elements of the NAO II project.

13. As the Supplement to the 7th Report illustrates, the actual common elements in question are merely a common roadway/parking area within the 76 unit townhome development. The Receiver understands that the common elements were the roads marked Private Street A, B, and C, as well as the parking area shown at the bottom of the following diagram:

[6] Appendix F to the Supplemental Report.

14. While the Receiver has not yet conducted a formal valuation of these common elements, this diagram illustrates the minor aspect of the roadway/parking area relative to the townhomes themselves.

15. The nature and extent of the common elements is relevant because only deposits paid on account of common elements attract trust obligations under the *Condominium Act, 1998* (**"*Condominium Act*"**).

16. The Receiver notes that the Pre-Sale Purchase Agreements all expressly stipulate that no part of the deposits paid by Pre-Sale Purchasers are on account of the common elements (the **"Common Element Provisions"**).[7] However, even if one disregards the Common Element Provisions in the agreements, it is clear that the common elements represent only a very small portion of the overall project and, by extension, any deposits on account of the common elements must be equally, and proportionately, small; in this sense, the Proposed Class's estimate that 20% of the deposits are in respect of the common elements is arbitrary and disconnected from the realities of the project.

SUBMISSIONS

17. The Receiver makes four primary submissions in reply to the Proposed Class's factum:

(a) the proposed tracing is unsound both practically and legally;

(b) the Proposed Class has no priority entitlement in law in any event;

[7] See Sample Pre-Sale Purchaser Agreement, s. 55(a), Appendix D to Seventh Report, Motion Record p. 146 ("That portion of the Purchase Price applicable to the common interest in the Condominium shall be $2.00 […] There is no deposit payable by the Purchaser for the purchase of the common interest in the Condominium").

(c) the alleged "contracting out" of the *Condominium Act* does not actually arise in this case; and

(d) Justice Steele's decision on the Tarion Motion remains dispositive of this motion.

A. *The relief sought by the Proposed Class is impractical and legally unsound*

18. The Proposed Class's motion factum repeatedly argues that they enjoy 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.

19. In any case, "an award of the equitable remedy of tracing is discretionary."[8] 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.

20. In this case, the overriding consideration in weighing the equities is that there is just $37,191.65 at stake, given that the Proposed Class will recover 99.5% of its deposits from Tarion. The tiny residual amount will almost certainly be dwarfed by the professional fees involved in the tracing and valuation exercises that the Proposed Class seeks.

21. Moreover, the Proposed Class does not appear to have the means or the willingness to fund these exercises; rather, the Proposed Class presumably wants the monies that are earmarked for the first secured creditor to fund the tracing exercise. This is a genuine concern given the small amount in issue and the fact that there is no evidence that the representative plaintiff has any means

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

to fund a cost award should the tracing exercise ultimately prove futile (which, again, it already is given the amounts at stake).

22. These factors must be weighed against the reality that the proposed tracing exercise is very unlikely to be workable on a practical level. It is undisputed that:

(a) NAO II, the project entity at issue, shared a bank account with another Stateview entity known as NAO I (the **"Shared Account"**);

(b) as of the date of the Receiver's appointment, the total remaining account balance in the Shared Account was just $74,622.75[9] despite the two companies having taken in total deposits of approximately $15,296,000;[10]

(c) Stateview's management has advised that it used deposit funds to "fund the general operations of the Receivership Companies and the development of [all of Stateview's] Projects".[11]

23. The Receiver's most recent report outlines further practical concerns:

> As a further complication for any tracing exercise, the Receiver notes that its authority is limited to the receivership entities. The Receiver has not attempted to trace transactions from the single NAO bank account (for both NAO and NAO II) to other bank accounts of other entities in the Stateview Group over which the Receiver has no authority. A motion would likely be required to gain access to the books, records and bank accounts of the non-Stateview receivership entities, which may be opposed. The Receiver has no funding for that motion either.

[9] Receiver's Fifth Report to the Court, section 2.3(7), Proposed Class's Motion Record, tab 4.

[10] Receiver's Fifth Report to the Court, section 2.3(4), Proposed Class's Motion Record, tab 4.

[11] See Receiver's Fifth Report to the Court, section 2.3(6), Proposed Class's Motion Record, tab 4.

24. In the face of these significant practical concerns, it is highly doubtful that any tracing exercise could yield useful results for the Proposed Class. Indeed, as a matter of law, once "trust funds have been converted into property that cannot be traced, that is fatal" to any trust claim.[12]

25. In considering whether to exercise its discretion to award a tracing remedy, the Court should also take into account that Ms. Mehta, the plaintiff in the Proposed Class Action, issued her claim in clear breach of the stay of proceedings provisions of the relevant receivership orders, and has taken no steps to seek to have the claim certified as a class proceeding. Moreover, Ms. Mehta was a purchaser on the Highview project, not the NAO II project at issue on this motion,[13] meaning that there is no party before the Court who actually represents the interests of the NAO II Pre-Sale Purchasers.[14]

26. The Receiver respectfully submits that in all the circumstances, the proposed tracing and valuation exercises would be unworkable and disproportionate in light of the nature of the competing interests before the Court. As well, as set out in the following sections, there is no proper legal basis for the relief sought in any event.

B. No basis for a priority claim in any event

27. Even apart from the myriad of practical difficulties associated with the proposed tracing and valuation, the Proposed Class has no priority entitlement to the sale proceeds as a matter of law.

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

[13] See statement of claim, tab 7 to the Proposed Class's motion record, at para. 2.

[14] Jennifer Sitt, a home buyer in the NAO II project, swore an affidavit on this motion but is not a proposed representative plaintiff.

1. Registered mortgagee has priority regardless of outcome of tracing exercise

28. 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. 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.[15]

29. The Court of Appeal for Ontario has applied this proposition in 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".[16] This case features virtually identical subordination provisions in the purchaser agreements.[17]

30. 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**.

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[15] 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).

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

[17] The subordination provision is quoted by Justice Steele at paragraph 21 of the Tarion Decision; see appendix B to the Seventh Report, Motion Record p. 56. For an example of the relevant provision in a NAO II purchase agreement, see section 43 of the sample agreement contained at Appendix D to the Seventh Report, Motion Record p. 142.

> 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*.[18] [emphasis added]

2. The Proposed Class's key authority is not relevant

31. The Proposed Class's arguments regarding their rights under the *Condominium Act* rely almost exclusively on *Ward-Price v. Mariners Haven Inc.* (***"Ward"***).[19] This reliance is misplaced. *Ward* arose in an entirely different factual context and raised different legal issues.

(a) What *Ward* actually decided

32. *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 the developer, who then made a third-party claim for contribution and indemnity against the developer's lawyers.[20]

33. After the close of pleadings and prior to the certification motion,[21] 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.[22] The motion judge accepted this argument and granted summary judgment dismissing the action.

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[18] *1864684 Alberta Ltd v. 1693737 Alberta Inc*, 2016 ABQB 371 at para. 47.
[19] *Ward-Price v. Mariners Haven Inc.*, 2001 CanLII 24088 (Ont. C.A.) ["*Ward*"].
[20] See e.g. *Ward* at paras. 5-8.
[21] 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.
[22] *Ward* at paras. 7, 11.

34. 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.[23] This specific legal issue is irrelevant on the present facts.

(b) The Proposed Class's overreading of *Ward*

35. The Proposed Class misdescribes *Ward* in its factum, asserting that the Court of Appeal "awarded a tracing remedy" to the purchaser.[24] This is incorrect; the Court of Appeal merely reversed the dismissal of the claim – which had occurred after the close of pleadings, and before the class certification motion – without granting any substantive remedies at all.

36. The Court of Appeal's discussion of the purchaser's rights of tracing must be understood in that preliminary procedural context.

37. 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

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[23] *Ward* at paras. 38-39.
[24] Factum, para. 38.

invoke – for example, where registered mortgages are involved, the policy of certainty in land titles underlying the *Land Titles Act*.[25]

38. 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 Pre-Sale Purchasers can successfully trace their $37,191.65 into the Real Property, are they entitled to receive a distribution of sale proceeds in priority to the mortgagee?

(c) Justice Steele's decision disposes of the live issue

39. It is Justice Steele's reasons in the Tarion Motion, not *Ward*, that asks and answers the relevant issue for this motion.

40. Regardless of the state of the record before Justice Steele regarding tracing, it is clear from her Honour's reasons that she would not have imposed a constructive trust in any event:

> [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.
>
> [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.

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[25] 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.")

> [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**.[26]

41. This reasoning is a full answer to the Proposed Class's position on this motion. On essentially the same facts, Justice Steele was not persuaded to order the extraordinary remedy of a constructive trust and to do so in this case would be at odds with her Honour's decision. 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. 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.
>
> [72] 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 secured creditors to pay certain unsecured creditors.[27]

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[26] See Tarion Decision, paras. 79-81, at Appendix B to the Receiver's 7th Report, Motion Record, Tab 2B.

[27] See Tarion Decision, paras. 70-72, at Appendix B to the Receiver's 7th Report, Motion Record, Tab 2B.

42. The Proposed Class's factum offers three reasons to distinguish Justice Steele's decision, none of which is persuasive:

(a) first, the Proposed Class argues that they rely on a statutory trust, not a contractual trust.[28] However, Justice Steele also dealt with statutory trust obligations (and the breach of those trust obligations) in relation to the Elm Project. Specifically, the *Ontario New Homes Warranties Plan Act* and its regulations (the **"*Warranties Act*"**) expressly requires developers to enter into trust agreements (and hold deposits in trust) in certain circumstances which Justice Steele found existed in respect of the Elm project.[29] In any event, the distinction between statutory and contractual trusts is a distinction without a difference. The issue on both motions is the appropriate remedy for breach of trust in circumstances of competing creditor claims in an insolvency. The Proposed Class's factum acknowledges that it intends to seek a constructive trust remedy,[30] which is the very remedy considered and rejected by Justice Steele. The Proposed Class has offered no authority whatsoever for the proposition that statutory trusts attract stronger remedies than "mere" contractual trusts. No such authority exists;

(b) second, the Proposed Class argues that the subordination provisions of the Purchase Agreements, which Justice Steele relied on, cannot be considered on this motion, as to do so would be to permit a contracting out of the *Condominium Act*. While the Receiver accepts the general principle that contracting out is impermissible, the

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[28] Factum, para. 63.

[29] See Tarion Decision, paras. 33-36, at Appendix B to the Receiver's 7th Report, Motion Record tab 2B. See also O. Reg 165/08, s. 9 (setting out the obligation to enter into a form of Addendum agreement containing trust obligations).

[30] Factum, para. 65 (the Moving Party seeks to exercise a "right to a tracing exercise" "before making any constructive trust claims over the sale proceeds").

Proposed Class 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 *Condominium Act* purchasers in similar circumstances;[31]

(c) third, the Proposed Class argues that it principally seeks a tracing remedy, whereas Justice Steele was considering a request for a constructive trust. But the Proposed Class admits that the requested tracing is purely in aid of the constructive trust they intend to seek subsequently;[32] as set out above, Justice Steele's reasons dispose of the constructive trust argument regardless of any tracing.

43. As reviewed above, this Court can also dispose of the Proposed Class's request for a tracing on the basis that tracing could not possibly establish a priority claim over a registered mortgagee as a matter of law.

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[31] 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.).)

[32] Factum, para. 65 (the Moving Party seeks to exercise a "right to a tracing exercise" "before making any constructive trust claims over the sale proceeds").

3. No "contracting out" issue with respect to the Common Elements Provisions

44. The Proposed Class submits that the Common Elements Provisions of the Pre-Sale Purchase Agreements – which allocate $2 of the purchase price, and none of the deposit funds, to the common elements – represents an illegal attempt to contract out of the *Condominium Act*.

45. In the Receiver's submission, the Court does not need to decide this issue on this motion in light of the various other flaws identified above in the Proposed Class's position.

46. In any event, the Receiver accepts the general proposition that contracting out of the *Condominium Act* is prohibited, but disagrees that the Common Elements Provision can be disregarded on this basis.

47. The Proposed Class's factum deals with this issue in conclusory fashion, asserting without supporting evidence that the Common Elements Provision "is an attempt to contract out of" the *Condominium Act*.

48. But the evidence (as reviewed above) shows that the common element roadway/parking area on the contemplated development comprised minor elements of the proposed 76-townhome development as a whole.

49. In this context, the allocations set out in the Common Elements Provisions of the Pre-Sale Purchase Agreements 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; in other words, a homebuyer could not sell its common interest in the roadway/parking area.

RELIEF REQUESTED

50. The Receiver respectfully requests an order dismissing the Proposed Class's motion in its entirety and authorizing the release of the remaining holdback to the first secured creditor, as described in the Receiver's Seventh Report and prior factum.

51. Alternatively, to the extent that the Court declines to dispose of the Proposed Class's motion on its merits at this time, the Receiver respectfully submits that the maximum holdback imposed should be $37,161.95 less costs.

52. The Receiver respectfully submits that costs in its favour are appropriate in the circumstances, in light of the efforts it made to address this matter with the Proposed Class on a consensual basis and in light of the disproportionate complexity of these proceedings relative to the amounts in issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF MARCH, 2024

Jeffrey Larry / Daniel Rosenbluth
Paliare Roland Rosenberg Rothstein LLP
Lawyers for the Receiver and Manager, KSV Restructuring Inc.

SCHEDULE A

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

Counsel Holdings Canada Limited v. Chanel Club Ltd. (1997), 33 O.R. (3rd) 235 (C.A.).)

Counsel Holdings Canada Ltd. v. Chanel Club Ltd., 1997 CanLII 12130 (Ont. S.C.J.)

Counsel Holdings Canada Limited v. Chanel Club Limited, 1999 CanLII 1653 (Ont. C.A.)

Di Michele v. Di Michele, 2014 ONCA 261

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816

Hermanns v. Ingle, 2002 CanLII 41669 (Ont. C.A.)

Stanbarr Services Limited v. Metropolis Properties Inc., 2018 ONCA 244

The Guarantee Company of North America v. Royal Bank of Canada, 2019 ONCA 9

Ward-Price v. Mariners Haven Inc., 2001 CanLII 24088 (Ont. C.A.)

Ward-Price v. Mariners Haven Inc., 2002 CanLII 38058

SCHEDULE B

Land Titles Act, R.S.O. 1990, c. L.5

Effect of charge when registered

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

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Warranty for Delayed Closing or Delayed Occupancy, O Reg 165/08

Delayed closing after *New Home Construction Licensing Act, 2017*

9. (1) If, on or after February 1, 2021, parties enter into a purchase agreement for a freehold home or a vacant land condominium home, the vendor shall,

(a) ensure that the parties complete either,

(i) the Freehold Home Addendum (Tentative Closing Date) dated October 7, 2020, or

(ii) the Freehold Home Addendum (Firm Closing Date) dated October 7, 2020;

(b) ensure that the document required to be completed under clause (a) forms part of the purchase agreement; and

(c) upon request, furnish to the Registrar proof that the requirement in clause (b) is met. O. Reg. 636/20, s. 3; CTR 12 AU 22 - 6.

(2) The vendor warrants to the purchaser that the vendor will comply with the requirements applicable to the home that are imposed by section 7 of the applicable Addendum that forms part of the purchase agreement under subsection (1), even if the vendor has not complied with that subsection. O. Reg. 636/20, s. 3.

(3) The Corporation shall keep the forms for the documents mentioned in subsection (1) available for inspection at the offices of the Corporation during normal business hours, and shall make them available on the Corporation's website. O. Reg. 636/20, s. 3.

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

ATRIUM MORTGAGE INVESTMENT CORPORATION et al.	-and-	**STATEVIEW HOMES (NAO TOWNS II) INC.**
Applicants		Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

**REPLY FACTUM OF THE RECEIVER,
KSV RESTRUCTURING INC.**

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