

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

BETWEEN:

KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION

Applicants

- and -

**STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS)
INC., STATEVIEW HOMES (ON THE MARK) INC., TLSFD TAURASI HOLDINGS
CORP. AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC.**

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**

**RESPONDING FACTUM OF KINGSETT MORTGAGE
CORPORATION**

(Returnable November 2, 2023)

October 30, 2023

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TO: **THE SERVICE LIST**

FACTUM OF KINGSETT MORTGAGE CORPORATION

PART I: INTRODUCTION

1. No one will dispute that the circumstances leading to this motion are unfortunate. Due to, among other things, the mismanagement and improper diversion of funds, the creditors of the Stateview Companies¹ will suffer significant shortfalls on their investments.

2. On this motion, Tarion Warranty Corporation ("Tarion"), purporting to stand in the shoes of various pre-sale home purchasers (the "Pre-Sale Purchasers"), is seeking to turn on its head the existing priority scheme under the *Bankruptcy and Insolvency Act* under the guise of trust claims: statutory, express, constructive and/or "good conscience" trusts. While the outcome of the Stateview Companies is no doubt unfortunate, including for the Pre-Sale Purchasers, that does not and cannot change the fact that there is no legal, statutory or equitable basis to impose a trust within this Receivership.

3. KingSett Mortgage Corporation ("KingSett") adopts and supports the submissions of the Receiver. As set out in the Receiver's Factum, Tarion's arguments for a trust – express, constructive or otherwise – must fail.

4. KingSett is a significant secured creditor of the Stateview Companies – owed almost \$168 million at the outset of the Receiverships – and is expected to suffer a material shortfall on its loans. The facts surrounding KingSett's loans on this motion are: (i) the applicable statutory regimes do not provide Pre-Sale Purchasers with a trust and instead provide a priority for KingSett

¹ The Stateview Companies are comprised of: Stateview Homes (Nao Towns) Inc., Stateview Homes (Minu Towns) Inc., Stateview Homes (High Crown Estates) Inc., Stateview Homes (On the Mark) Inc., and TLSFD Taurasi Holdings Corp.

(and other secured creditors) in these circumstances; (ii) the Pre-Sale Purchasers expressly agreed in their purchase agreements that their interests would be subordinate to any construction financing or mortgages; and (iii) the common and accepted industry practice and understanding for lending within the home construction industry does not contemplate such a trust claim.

5. On this motion, KingSett submits this factum solely to address two distinct issues:

- (a) Tarion's allegation that the affidavit of Daniel Pollack, sworn October 2, 2023 (the "Pollack Affidavit") is inadmissible; and
- (b) The requisite consideration of whether the imposition of a constructive trust would be unjust in the circumstances, including its potential impact on the Stateview Companies' secured creditors, such as KingSett, and unsecured creditors.

6. As further set out below:

- (a) Tarion has not properly sought to strike the Pollack Affidavit and, in any event, it is properly admissible.
- (b) In addition to all of the other reasons that a trust cannot be imposed as set out in the Receiver's Factum, the imposition of a constructive trust would be contrary to the statutory regime and contractual arrangements, and therefore contrary to the legitimate expectations of all parties, and would have a materially negative impact on the home construction and lending industry resulting in significant prejudice to KingSett and similarly situated creditors.

7. KingSett supports the Receiver's position that Tarion's motion must be dismissed.

PART II: FACTS

8. The facts underlying this motion are more fully set out in the affidavit of Daniel Pollack sworn April 26, 2023 and the Fifth Report of the Receiver dated October 2, 2023. In addition, KingSett relies on the facts as summarized in the Receiver's Factum on this motion. Certain additional facts relating to the issues discussed in this factum are set out below.

A. KingSett

9. KingSett is incorporated pursuant to the *Canada Business Corporations Act*,² and is headquartered in Toronto. KingSett is a subsidiary of KingSett Capital Inc., a private equity real estate investment firm with approximately \$19.5 billion in assets under management.³

10. In connection with the Stateview development projects, KingSett extended certain loans to the Stateview Companies.⁴ KingSett is also the economic beneficiary of a loan extended to Stateview Homes (High Crown Estates) Inc. that is serviced by Dorr Capital Corporation.⁵

11. KingSett is a secured creditor of all of the Stateview Companies and has registered mortgages/charges against the property of the borrowers, including:

- (a) a first ranking charge/mortgage registered against Stateview Homes (Nao Towns) Inc.⁶;

² *Canada Business Corporations Act*, [R.S.C. 1985, c. C-44](#), as amended.

³ Affidavit of Daniel Pollack, sworn April 26, 2023, Exhibit "H" to the Affidavit of Kevin Brodie, sworn August 31, 2023 ("April Pollack Affidavit"), Amended Motion Record of the Moving Party 9 ("AMR"), Tab 2H at para 9, pp. 172-173.

⁴ April Pollack Affidavit, *supra* note 3, at para 4, AMR, Tab 2H, p. 171.

⁵ April Pollack Affidavit, *supra* note 3, at para 1, AMR, Tab 2H, pp. 168-169.

⁶ April Pollack Affidavit, *supra* note 3, at para 54, AMR, Tab 2H, p. 185.

- (b) a first ranking charge/mortgage registered against Stateview Homes (On the Mark) Inc.⁷;
- (c) a first ranking charge/mortgage registered against TLSFD Taurasi Holdings Corp.⁸;
- (d) a second ranking charge/mortgage against the real property of Stateview Homes (On the Mark) Inc.⁹; and
- (e) a second and third ranking charge/mortgage against the real property of Stateview Homes (Nao Towns) Inc. and Stateview Homes (Minu Towns) Inc.¹⁰

12. KingSett also has other forms of security against the Stateview Companies registered under the *Personal Property Security Act*.¹¹

13. As of April 11, 2023, KingSett was owed almost \$168 million from the Stateview Companies.¹² KingSett will suffer material shortfalls on its loans due to, among other things, mismanagement, improper diversion and misappropriation of KingSett loan monies, the misuse of purchase deposits and fraudulent cheque kiting in excess of \$37 million dollars.¹³

B. The Pre-Sale Purchase and Sale Agreements

14. The Stateview Companies entered into various purchase and sale agreements with the Pre-Sale Purchasers in connection with their freehold home development projects (the "Purchase and Sale Agreements").

⁷ April Pollack Affidavit, *supra* note 3, at para 75, AMR, Tab 2H, p. 193.

⁸ April Pollack Affidavit, *supra* note 3, at para 96, AMR, Tab 2H, p. 199.

⁹ April Pollack Affidavit, *supra* note 3, at para 86, AMR, Tab 2H, p. 196.

¹⁰ April Pollack Affidavit, *supra* note 3, at para 65, AMR, Tab 2H, pp. 188-189.

¹¹ *Personal Property Security Act*, [R.S.O. 1990, c. P.10](#); see also April Pollack Affidavit, *supra* note 3, at paras 39 - 114, AMR, Tab 2H, pp. 181 - 205.

¹² April Pollack Affidavit, *supra* note 3, AMR, Tab 2H, p. 171.

¹³ Affidavit of Daniel Pollack, sworn October 2, 2023 ("October Pollack Affidavit"), at para 15, Responding Motion Record of the Receiver ("RMR"), Tab 3, p. 427.

15. The sample Purchase and Sale Agreement attached to the Fifth Report of the Receiver contains an acknowledgement from the Pre-Sale Purchasers that construction financing and other mortgages arranged by the Stateview Companies will have priority over the Pre-Sale Purchasers' interests:

The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary... Without limiting the generality of the foregoing the Purchaser agrees that this Agreement shall be subordinated to and postponed to the mortgage(s) assumed and/or arranged by the Vendor... [emphasis added]¹⁴

16. The Purchase and Sale Agreements did **not** require that deposits submitted by the Pre-Sale Purchasers be held in an express or segregated trust account, and they were not.¹⁵

C. The Pollack Affidavit

17. On October 2, 2023, Daniel Pollack, Senior Director, Special Loans and Portfolio Management of KingSett, swore the Pollack Affidavit in opposition to Tarion's motion. As set out therein, Mr. Pollack has extensive experience in projects such as those involving the Stateview Companies and had responsibility for matters pertaining to the borrowings of the Stateview Companies in particular.¹⁶

¹⁴ Fifth Report to Court of KSV Restructuring Inc. as Receiver and Manager of Stateview Homes (Mino Towns) Inc., Stateview Homes (Nao Towns) Inc., Stateview Homes (Nao Towns II) Inc., Stateview Homes (On the Mark) Inc., TLSFD Taurasi Holdings Corp., Stateview Homes (High Crown Estates) Inc., Highview Building Corp Inc., Stateview Homes (BEA Towns) Inc., and Stateview Homes (Elm&Co) Inc., of October 2, 2023 ("Fifth Report"), at 2.3 & 2.3.1 and Appendix A, RMR, Tab 1, pp – 7-8 and 16-76. There is substantially similar language in other Purchase and Sale Agreements: Fifth Report at 2.3.1 (3), RMR, Tab 1, p. 8.

¹⁵ Fifth Report, *supra* note 14, at 2.3.1, RMR, Tab 1, p. 8.

¹⁶ October Pollack Affidavit, *supra* note 13, at para 1, RMR, Tab 3, p. 422.

PART III: THE ISSUES

18. This factum addresses the following two issues:

- (a) The admissibility of the Pollack Affidavit; and
- (b) In response to Tarion's claim for a constructive trust, whether it would be unjust to impose such a trust in the circumstances, including in consideration of the interests of other creditors, secured and unsecured.

PART IV: LAW AND ARGUMENT**A. The Affidavit of Daniel Pollack**

19. At paragraph 24 of its factum, Tarion for the first time in this proceeding baldly states that this Court should strike out or give no weight to paragraphs 8-14 and 16 of the Pollack Affidavit. No further argument or submissions are made in this respect in Tarion's factum.

20. Notably, Tarion does not object to the entirety of the Pollack Affidavit. And importantly, Tarion could have, but chose not to, cross-examine Mr. Pollack on his Affidavit, and could also have, but chose not to, file a reply affidavit in respect of the Pollack Affidavit. Mr. Pollack's evidence is therefore uncross-examined upon and uncontradicted.

21. Significantly, no motion has been brought to strike the Pollack Affidavit, in whole or in part. The Pollack Affidavit was sworn on October 2, 2023, and the one paragraph in Tarion's factum (submitted on October 26, 2023) is the first and only time this issue has been raised. It appears to have been raised as an after-thought, in view of the potential impact of the evidence on the legal issues. Tarion's untimely objection does not properly raise or object to this issue, and it

is inappropriate to baldly state in one paragraph that the evidence should be inadmissible. If Tarion seriously wanted to exclude portions of the Pollack Affidavit, it was obliged to move to strike it.

22. Moreover, and in any event, Mr. Pollack's unchallenged background more than demonstrates his extensive industry experience with KingSett in relation to the matters at hand.¹⁷ KingSett has been a significant new home construction lender for 17 years, since 2006.¹⁸

23. The challenged paragraphs of the Pollack Affidavit speak to facts of industry practice, of which Mr. Pollack has direct experience as a participant, and his knowledge based on KingSett's experience in the industry. These facts are of assistance to the Court in evaluating the landscape on this motion that Tarion has purported to describe.

B. Imposition of a Trust Would be Unjust in the Circumstances

24. KingSett supports and adopts the submissions of the Receiver which demonstrate that there is no basis for a statutory, contractual, express or constructive trust. In respect of a remedial constructive trust, the Supreme Court in *Soulos* has set out the four conditions that must be satisfied:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

¹⁷ October Pollack Affidavit, *supra* note 13, at paras 1 and 6, RMR, Tab 3, pp. 422 and 427.

¹⁸ October Pollack Affidavit, *supra* note 13, at para 13, RMR, Tab 3, p. 427.

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.¹⁹

25. It should first be noted that KingSett has already suffered, and will continue to suffer, a significant loss at the hands of the Stateview Companies due to, among other things, mismanagement, improper diversion and misappropriation of KingSett monies, the misuse of purchase deposits and fraudulent cheque kiting.²⁰ Therefore, under the first and second factors above, KingSett is also the victim of the Stateview Companies' breaches.

26. However, a primary focus for any constructive trust analysis is the fourth factor – whether there is anything that would render the imposition of a constructive trust unjust and the interests of intervening creditors – which is attributed significant weight in these circumstances.²¹

27. Courts have almost always refused to grant a constructive trust where doing so would upset the established priority scheme as amongst creditors,²² particularly where a constructive trust would unfairly compromise the legitimate interests of a secured creditor.²³ In the insolvency context, this has been clarified to include both secured creditors and general creditors, as well as any other relevant third parties.²⁴

28. KingSett is a secured creditor of the Stateview Companies owed (as of April 11, 2023) approximately \$168 million, and will suffer a material shortfall on its loans.²⁵ Its expectations and

¹⁹ *Soulos v. Korkontzilas*, [1997] S.C.J. No. 52 [SCC] [*Soulos*] at para 45. The same test is cited by Tarion in support of its "good conscience" trust. At paragraph 64 of its factum, Tarion submits that Justice Morawetz (as he then was) articulated the four-part test for a "good conscience" constructive trust in the insolvency context (*Redstone Investment Corp., Re*, 2015 ONSC 533 at para 68). The test cited and quoted is the four-part test from *Soulos*.

²⁰ October Pollack Affidavit, *supra* note 13, at para 15, RMR, Tab 3, p. 427.

²¹ Responding Factum of the Receiver (Priority of the Deposit Claims) at para 69.

²² *Caterpillar Financial Services v. 360networks Corporation et al.*, 2007 BCCA 14 [*Caterpillar Financial Services*] at para 66; *PricewaterhouseCoopers v. Bank of Montreal*, 2017 NLTD(G) 43 at para 56; *Pacific Shores Resort & Spa Ltd., Re*, 2013 BCSC 480 at para 73.

²³ See e.g. *306440 Ontario Ltd. v. 782127 Ontario Ltd.*, 2014 ONCA 548 at paras 15 and 32.

²⁴ *Caterpillar Financial Services*, *supra* note 22, at para 66.

²⁵ April Pollack Affidavit, *supra* note 3, at para 4, AMR, Tab 2H, p. 171; October Pollack Affidavit, *supra* note 13, at para 15, RMR, Tab 3, p. 427.

interests, which are similar to other mortgagees, must be considered when deciding whether to impose a constructive trust.

29. *First*, KingSett's, and any secured creditor's, legitimate expectation would be that the security it registered in respect of its loans would be respected, and there is no statutory or contractual basis that Pre-Sale Purchasers would have greater rights. In addition, the statutory regime governing Tarion's claim (as Tarion will be the one compensating the Pre-Sale Purchasers for up to \$100,000 and primarily out of pocket for the deposits) does not provide it with any greater right than those of the Pre-Sale Purchasers. There is nothing to oust the priority afforded to KingSett's secured claims.

30. The fact that the applicable statutory regimes, and contractual arrangements, do not provide for any trust in favour of the Pre-Sale Purchasers supports the legitimate expectations of KingSett, and other mortgagees, that their loans would not be outranked by constructive trust claims that could not have been foreseen or accounted for at the time their loans were advanced.²⁶

31. *Second*, it would be plainly unjust in the circumstances to impose a constructive trust that overwrites the contractual agreements that Pre-Sale Purchasers made with respect to the priority of construction financing and mortgages, and one that is contrary to statute and would therefore upset the priority and distribution scheme. This would be contrary to the case law set out above, reordering the applicable priority scheme that governs all creditors.

32. *Third*, the imposition of a constructive trust would be contrary to the functioning of the broader home construction and homebuilding industry.²⁷ The chilling effect that such an outcome

²⁶ October Pollack Affidavit, *supra* note 13, at para 14, RMR, Tab 3, p. 427.

²⁷ October Pollack Affidavit, *supra* note 13, at para 9, RMR, Tab 3, p. 425.

may have, in addition to the immediate actions that secured lenders would have to take to protect their existing investments from such novel trust claims,²⁸ argues strongly against the imposition of a constructive trust. If the relief sought on this motion were granted, all secured lenders with current loans in the home construction industry may be suddenly and unexpectedly outranked by constructive trust claims.

33. Simply put, the imposition of a constructive trust would have a significant impact on the majority of lenders' valuation of projects under development,²⁹ and a materially negative impact on lending in this context.³⁰ These are relevant facts further demonstrating the unjustness of imposing a constructive trust in these circumstances, including the highly prejudicial impact on other creditors such as KingSett.

PART V: RELIEF REQUESTED

34. KingSett respectfully requests an order dismissing Tarion's motion, with costs in its favour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2023.



Bennett Jones LLP

²⁸ October Pollack Affidavit, *supra* note 13, at para 14, RMR, Tab 3, p. 427.

²⁹ See April Pollack Affidavit, *supra* note 3, AMR, Tab 2H.

³⁰ October Pollack Affidavit, *supra* note 13, para 9, RMR, Tab 3, p. 425.

SCHEDULE A – LIST OF AUTHORITIES***Cases Cited***

1. *306440 Ontario Ltd. v. 782127 Ontario Ltd.*, [2014 ONCA 548](#)
2. *Caterpillar Financial Services v. 360networks Corporation et al.*, [2007 BCCA 14](#)
3. *Pacific Shores Resort & Spa Ltd., Re*, [2013 BCSC 480](#)
4. *PricewaterhouseCoopers v. Bank of Montreal*, [2017 NLTD\(G\) 43](#)
5. *Redstone Investment Corp., Re*, [2015 ONSC 533](#)
6. *Soulos v. Korkontzilas*, [\[1997\] S.C.J. No. 52 \[SCC\]](#)

SCHEDULE B – STATUTES RELIED ON

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

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