CITATION: Kingsett Mortgage Corp et al v. Stateview Homes et al., 2023 ONSC 7105
COURT FILE NO.: CV-23-00698395-00CL
CV-23-00698632-00CL
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CV-23-00698576-00CL
CV-23-00699067-00CL
DATE: 2023-12-22

SUPERIOR COURT OF JUSTICE – ONTARIO [COMMERCIAL LIST]

RE: KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION, Applicant

AND:

STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC. et al, Respondents

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DORR CAPITAL CORPORATION Applicant

AND:

HIGHVIEW BUILDING CORP INC. Respondent

DORR CAPITAL CORPORATION Applicant

AND:

STATEVIEW HOMES (BEA TOWNS) INC. Respondent

ATRIUM MORTGAGE INVESTMENT CORPORATION AND DORR CAPITAL CORPORATION Applicant

AND:

STATEVIEW HOMES (NAO TOWNS II) INC., DINO TAURASI, AND CARLO TAURASI Respondents

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MERIDIAN CREDIT UNION Applicant

AND:

STATEVIEW HOMES (ELM&CO) INC. Respondent

BEFORE: J. STEELE J.

COUNSEL: *Adam Slavens, David Outerbridge, Mike Noel, Jonathan Silver* for the Moving Party, Tarion Warranty Corporation

Alan Merskey, Kiyan Jamal for the Receiver, KSV Restructuring Inc. (NAO Phase 1, Minu, On the Mark, High Crown and Taurasi Holdings Recieverships)

Jeffrey Larry, Daniel Rosenbluth for the Receiver, KSV Restructuring Inc. (NAO Phase 2, BEA, Highview and Elm Receiverships)

Sean Zweig, Joseph Blinick for Kingsett Mortgage Corporation

Eric Golden for Dorr Capital Corporation

George Benchetrit for Atrium Mortgage Corporation

Vern W. DaRe for Meridian Credit Union Limited

Geoff R. Hall for Toronto-Dominion Bank

Kelly Smith Wayland for Canada Revenue Agency

Stewart Thom for Reliance Comfort Limited Partnership d/b/a Reliance Home Comfort

HEARD: November 2, 2023

ENDORSEMENT

OVERVIEW

[1] This motion arises following the declaration of bankruptcy of the Stateview entities. The Stateview entities were residential real estate developers. When the Receiver was appointed over the assets of the Stateview entities, the home construction in respect of the residential projects, other than High Crown and On the Mark, had not started. Many purchasers, however, had made deposits to one of the Stateview entities in respect of a new home purchase (the "Purchasers"). The deposits made by the Purchasers have been spent by the Stateview entities. Tarion Warranty Corporation ("Tarion") seeks declaratory relief on behalf of these Purchasers. Tarion asks the court to declare that the deposits were subject to either an express trust or a constructive trust arising because of unjust enrichment, the beneficiaries of which express trust or constructive trust are the Purchasers. Because the deposits were not held by the Stateview entities in separate trust accounts, Tarion also seeks a remedial constructive trust and a charge elevating the Purchasers' ranking in priority.

[2] Under the *Ontario New Homes Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Warranties Act"), new home purchasers, who would otherwise lose their deposits if the vendor went bankrupt, are entitled to receive payment out of the guarantee fund administered by Tarion for the amount of the deposit (up to $100,000). Tarion has a statutory right of subrogation, which is why Tarion seeks declaratory relief on these issues.

[3] The Receiver made submissions opposing the relief sought by Tarion. KingSett Mortgage Corporation ("KingSett"), a secured creditor of the Stateview entities, filed materials and made submissions in support of the Receiver's position. Several other secured creditors made brief oral submissions in support of the Receiver's position. The Canada Revenue Agency also supports the Receiver's position.

[4] For the reasons set out below, Tarion's motion is dismissed.

[5] Below I provide the detailed analysis on the issues. However, at a high level, the motion fails for a few reasons. First, the Purchasers all entered into agreements with the Stateview entities under which they agreed that the lenders that provided a secured mortgage or construction financing would have priority. To the extent that any priority argument could be raised, the Purchasers contracted that these lenders would have a priority over the Purchasers' interest. Second, Parliament sets out a statutory scheme of priorities in bankruptcy. That priority scheme recognizes super priorities for certain statutory deemed trusts. There is no statutory deemed trust in respect of the deposit funds. Further, unlike the applicable statute for condominiums (see s. 81 of the *Condominium Act, 1998*, S.O. 1998, c. 19), the applicable legislation for new homes does not require the recipient of the deposit funds to hold them in trust. There were also no express trusts created, other than in respect of limited agreements where there was an early termination provision. In these cases, however, the monies were not set aside and held in trust by the Stateview entities. Finally, the court is generally reluctant to grant an equitable remedy such as a constructive trust where doing so would upset the priority scheme set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In a bankruptcy, there can be many parties that are negatively impacted, and Parliament has established a priority scheme to deal with what money is available in the bankrupt's estate.

[6] As submitted by Meridian, the first mortgagee on Stateview's Elm project, it is important that the law is interpreted in a way that supports certainty, predictability, and uniformity. The subordination clause in the pre-purchase agreements provides certainty to the lenders regarding their priority status. In terms of predictability, the lenders have lent millions of dollars based on the statutory regime, which does not provide for a statutory deemed trust for Purchaser deposit monies. Finally, the Purchasers are unsecured creditors, and under the BIA priority scheme secured creditors rank ahead.

Background

[7] The moving party, Tarion, is a consumer protection agency that the Ontario government designated to administer the Warranties Act and the regulations thereunder (the "Warranties Regulations").

[8] The Stateview entities owned and operated pre-construction residential development projects.

[9] The Stateview entities were placed into receivership under section 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 pursuant to orders granted on May 2, 2023, and May 18, 2023.

[10] KSV Restructuring was appointed as the Receiver over the Stateview entities' assets.

[11] The expectation is that there will not be sufficient money in the Stateview estates to pay the secured creditors in full.

[12] The beneficiaries of the trust remedy requested in this motion are approximately 765 Purchasers who paid deposits to the Stateview entities in respect of new homes to be built. In total, the deposits amount to approximately $77 million.

[13] Under the terms of the Pre-Sale Purchase Agreements, the Purchasers were not granted any security for the deposits over the Stateview entities' real or personal property.

[14] The deposits paid by the Purchasers were held by the Stateview entities in standard mixed operating bank accounts and were used, in addition to other sources of financing, by the Stateview entities to fund their general operations and the development of the various projects. Most, if not all, of the deposits were spent by the Stateview entities prior to the commencement of the receivership proceedings.

[15] Under the Warranties Act, if a new home purchaser is entitled to a refund of their deposit from a vendor and is unable to obtain such a refund, then the purchaser can make a claim from Tarion's guarantee fund up to a maximum of $100,000. Tarion then can assert a claim against the vendor.

[16] KingSett is owed approximately $168 million by the Stateview entities.

Analysis

[17] Tarion requests declaratory relief from the court. Tarion's view is that clarity is required regarding certain trust and other issues to confirm the protections applicable when purchasers make deposits in respect of freehold homes.

[18] The Receiver did not raise an issue regarding whether it is appropriate for Tarion to seek declaratory relief.

[19] I consider first whether the subordination clause in the Pre-Sale Purchase Agreements is a complete answer to Tarion's motion.

Does the Subordination Clause preclude the Purchasers from asserting a priority claim?

[20] The Purchasers executed agreements in which they agreed that secured mortgages and construction financing would have priority over their interests, which precludes them from now asserting priority.

[21] The Receiver submits that the Subordination Clause contained in the Pre-Sale Purchase Agreements precludes any express contractual trust, unjust enrichment constructive trust, and remedial constructive trust claims by the Purchasers. The relevant Subordination Clause provides:

> **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 and postponed to the mortgages(s) assumed and/or arranged by the Vendor**... The Purchaser agrees to execute all necessary documents and assurances to give effect to the foregoing as required by the Vendor. Any breach by the Purchaser of this section shall be considered a material breach... Further the Purchaser hereby covenants and agrees that at any time prior to the Closing Date any default by him in the performance of any of his covenants or obligations contained herein shall entitle the Vendor, at its sole option, to terminate this Agreement and upon such termination, all monies paid to the Vendor hereunder shall be forfeited to the Vendor and this Agreement shall be at an end and the Purchaser shall not have any further rights hereunder... [emphasis added]

[22] The Receiver submits that this language is included in the Pre-Sale Purchase Agreements to avoid priority disputes such as the one that is now before this court. The Receiver further submits that it is reasonable to assume that lenders required the inclusion of this language and/or relied upon it.

[23] The Purchasers entered into Pre-Sale Purchase Agreements that contained explicit language acknowledging the priority of any construction financing or other mortgages that are secured on the property over the Purchaser's interest.

[24] Tarion submits that the subordination clause only pertains to the Purchaser's interest in the "Property."[1] I disagree.

[25] As set out above, the Purchaser acknowledges the priority of any construction financing or secured mortgages "over his interest as Purchaser." The word "Property" is used in the above provision to describe the security of the mortgagee not to limit what is covered by the Purchaser's agreement to subordinate. The Purchaser agreed to a complete subordination of his or her interest, which would include any interest in the deposit funds.

[1] "Property" is defined to mean the Dwelling and the POTL collectively. The POTL is the freehold parcel-of-tied land.

[26] I agree that the subordination clause that was contractually agreed to by the Purchasers precludes the Purchasers from asserting a priority claim.

Trust Claims

[27] Tarion has asked the court for declarations in respect of the trust issues in any event, which I next address.

[28] I address first whether there was an express trust in respect of home buyers where the contracts contained an early termination provision. I determine that there was an express trust in respect of these Purchasers.

[29] I next consider whether there was unjust enrichment. The unjust enrichment claim would apply in respect of those Purchasers where there is no express trust. I determine that there was no unjust enrichment because I am not satisfied that there is a lack of juristic reason.

[30] Finally, I consider whether a remedial constructive trust ought to be imposed in respect of the Purchasers where I determined that there was an express trust. I determine not to impose a remedial constructive trust based on the record before me.

Was there an express trust in respect of certain home buyers?

[31] Tarion asserts that the deposits made by the Purchasers in the Elm project (and potentially other home buyers if they had contracts with similar early termination provisions) were subject to an express trust. There are approximately 145 Purchasers in the Elm project, who have in aggregate deposited over $16 million.

[32] I am satisfied that there was an express trust in respect of the contracts containing the early termination provisions.

[33] Purchase agreements for freehold homes in Ontario are required to incorporate the standard form Addendum pursuant to s. 9 of O. Reg. 165/08 passed under the Warranties Act. The Addendum is required to be attached to the agreement of purchase and sale and signed by the purchaser and vendor. The Addendum addresses numerous items, including conditions upon which a vendor may terminate the agreement. If the agreement is conditional on a certain sales threshold or conditional on the vendor obtaining financing (an "early termination provision"), schedule A to the Addendum contains language requiring the deposit amounts to be held in trust until the condition is waived or satisfied. Schedule A to the Addendum further provides that if the vendor fails to hold the deposit amounts in trust pending waiver or satisfaction of the early termination condition, the vendor will be deemed to hold the amounts in trust.[2]

[2] The Vendor of a home is permitted to make the Purchase Agreement conditional as follows:

> b. upon:
>
> i. Subject to paragraph 1(c), receipt by the Vendor of confirmation that sales of homes in the Freehold Project have exceeded a specified threshold by a specified date;

[34] Tarion argues that the Elm project contracts contain an early termination provision regarding satisfactory financing and, therefore, Stateview was required to hold the deposit amounts in trust, or was deemed to do so, under Tarion's standard form Addendum.

[35] There was no evidence before the court as to whether the early termination provision regarding satisfactory financing in the Elm project had been satisfied.

[36] The relevant provisions in Schedule A to the Addendum, where applicable, require the vendor to hold the deposit funds pursuant to a Deposit Trust Agreement. Where the funds are deemed to be held in trust under Tarion's Addendum, they are deemed to be held on the same terms as set out in the form of Deposit Trust Agreement. The Recitals to the Deposit Trust Agreement that was generally used by Tarion include the following:

> B. Each purchaser (a "Purchaser") of a home in the Freehold Project (a "Home" or collectively referred to as the "Homes") has paid or will pay directly to the Escrow Agent in trust deposit monies, including any sums for upgrades and extras (a "Deposit" and collectively referred to as the "Deposits") pursuant to the provisions of the agreement of purchase and sale in connection therewith (the "Purchase Agreement" and collectively referred to as the "Purchase Agreements");
>
> C. The Purchase agreements will include conditions ("Early Termination Conditions") described in subparagraphs 1(b)(i) or 1(b) (ii) of Schedule A to the mandatory addendum form (the "Addendum") required to be attached pursuant to Regulation 165-08 under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended, and all regulations enacted thereunder (the "ONHWP Act") thus pursuant to Section 1(c)(iv) of Schedule A to the Addendum the Deposits are required to be held in trust (the "Purchaser Trust") by the Vendor's lawyer (Escrow Agent) pursuant to the Addendum and subject to the interest of Tarion pursuant to a deposit trust agreement in form specified by Tarion or secured by other security acceptable to Tarion and arranged in writing with Tarion. This Agreement is the afore-mentioned deposit trust agreement.

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ii. Subject to paragraph 1(c), receipt by the Vendor of confirmation that financing for the Freehold Project on terms satisfactory to the Vendor has been arranged by a specified date;

[...]

c. the following requirements apply with respect to the conditions set out in subparagraph 1(b)(i) or 1(b)(ii):

[...]

iv. until the condition is satisfied or waived, all monies paid by the Purchaser to the Vendor, including deposit(s) and monies for upgrades and extras: (A) shall be held in trust by the Vendor's lawyer pursuant to a deposit trust agreement (executed in advance in the form specified by Tarion Warranty Corporation, which form is available for inspection at the offices of Tarion Warranty Corporation during normal business hours), or secured by other security acceptable to Tarion and arranged in writing with Tarion, or (B) failing compliance with the requirement set out in clause (A) above, shall be deemed to be held in trust by the Vendor for the Purchaser on the same terms as are set out in the form of deposit trust agreement described in clause (A) above.

D. Subject to the contractual trust requirements – the Purchaser Trust – under Schedule A to the Addendum the Deposits are to be held in trust with the Escrow Agent until Tarion determines, in accordance with this Agreement, that the Deposit Funds can be released upon and subject to the terms of this Agreement;

E. The Escrow Agent has agreed to hold all of the Deposits received by it from time to time pursuant to the provisions of the Purchase Agreements and this Agreement and to place and invest same in a separate, designated and segregated trust account at, account no. (the "Bank Account"), and to hold and monitor same in trust for Purchasers and Tarion in accordance with the terms and provisions of this Agreement. Interest accruing on all Deposits held in the Bank Account shall remain in the Bank Account and may only be released from and after the Purchaser Trust Termination Date to the Vendor upon the production of Replacement Security (as this term is later defined) or upon Tarion's written confirmation that security in respect of the Deposits is no longer required hereunder, and under those circumstances contemplated in Section 5.2 hereof same shall be paid or remitted to Tarion;

F. The Deposits (together with all prescribed interest earned or accrued thereon, less any amounts released in accordance with the provisions of this Agreement) (the "Deposit Funds") placed or invested in the Bank Account shall constitute continuing security for the payment of the present and future indebtedness and/or liability of the Vendor (the "Secured Obligations") to Tarion in regard to the Freehold Project, arising out of or otherwise relating to (a) this Agreement; (b) an agreement between the Vendor and Tarion with respect to the obligations of the Vendor (the "Vendor/Builder Agreement"); and/or (c) the ONHWP Act; and

G. After the provisions of Section 1(c)(iv) of Schedule A to the Addendum no longer apply and the contractual trust for the deposits no longer applies (the "Purchaser Trust Termination Date"), the parties have agreed that the sum of [xxx $ per home] the "Tarion Security Amounts") shall be maintained in trust for Tarion as security for the obligations of the Vendor in regard to the Freehold Project, arising out of or otherwise relating to (a) this Agreement; (b) an agreement between the Vendor and Tarion with respect to the Secured Obligations and from and after the Purchaser Trust Termination Date the term Deposits is deemed to be a reference to the amounts referred to in this paragraph G.

[37] The Deposit Trust Agreements contained the following terms:

4.1 The Vendor covenants and agrees with Tarion that:

> a. all Deposit Funds held by the Escrow Agent shall be (a) held in trust for the Purchaser pursuant to the Addendum; and (b) subject to the trust referred to in (a), held in trust for Tarion and subject to Tarion's security interest pursuant to this Agreement;

> b. each of the Purchase Agreements shall provide and stipulate that all Deposits payable on account of the purchase price of any Home shall (prior to the Purchaser Trust Termination Date) be made payable to the Escrow Agent in trust, and as soon as the Vendor has received any funds representing Deposits, the Vendor shall within fifteen (15) business days after receipt of such funds deliver same to the Escrow Agent to be deposited in the Bank Account and held in accordance with the terms of the Addendum and this Agreement;

[38] Tarion submits that the provisions in the Addendum are enough to meet the requirements for an express trust for the benefit of Purchasers who have agreements with an early termination provision. Tarion's position is that the three certainties required for an express trust are satisfied: certainty of intention, certainty of objects, and certainty of subject matter.

[39] First, Tarion submits that the language in Schedule A to the Addendum sets out an intention to create a trust. Tarion submits that both the Purchasers and the applicable Stateview entity's intention that the deposits were to be held in trust was reduced to writing in the Addendum, which is required to be appended to the purchase agreement.

[40] In some cases, the Addendum was attached to the purchase agreement. Where the Addendum was attached to the agreement and there was an early termination provision that had not been met, I am satisfied that there was certainty of intention to create a trust regarding the deposit funds.

[41] I am also satisfied that there was certainty of intention where the Addendum was not attached to the purchase agreement. The Addendum is required under the Warranties Act to be attached. When the Stateview entities entered into the Builder/Vendor agreements with Tarion, the agreements specified that the vendor would ensure that the appropriate Addendum would be attached to each agreement of purchase and sale. As noted, the Addendum requires the vendor to hold the funds in trust until the applicable condition is met.

[42] Second, Tarion argues that the objects are certain. The Stateview vendor is to hold the money in trust for the respective Purchaser. It is clear who is the beneficiary of each trust.

[43] Finally, Tarion submits that the subject matter is certain. That is, until the applicable early termination condition is satisfied, all monies that are paid by the Purchaser to the Stateview vendor are to be held in trust by the Stateview vendor for the benefit of the Purchaser. The terms upon which the monies are held/released are further delineated in the Deposit Trust Agreement.

[44] The Receiver submits that there is no evidence whether some of the deposits have been released or whether the early termination condition has expired. This is a question that would have to be determined in respect of each trust. It does not impact whether an express trust was created.

[45] I am satisfied that there is certainty of subject matter. The monies paid by the Purchaser to the Stateview vendor are the subject matter of the trust. The applicable Stateview entity was required to hold that money in trust for the respective Purchaser in accordance with the trust terms.

[46] I am satisfied that there was an express trust created in respect of the agreements that contained the early termination provision.

[47] However, the deposit funds were not set aside and held in trust by the Stateview entities as required. Accordingly, where an express trust came into existence, and where the applicable termination condition has not been satisfied, and the trust funds have not been set aside and held in trust, the express trust terms would have been breached. Accordingly, below I discuss the requested remedy of constructive trust.

[48] While I agree with Tarion that there was an express trust created in respect of the agreements that contained the early termination provision, it is not a statutory deemed trust. A statutory trust is a "trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property:" *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225 ("*Guarantee Company*"), at para. 18. For statutory deemed trusts, the legislation deems the trust into existence. As noted by the Supreme Court in *Canada v. Canada North Group Inc.*, 2021 SCC 30, 460 D.L.R. (4th) 309, at paras. 118 and 119, statutory deemed trusts are "unique legal vehicle[s]" and do "not have to fulfill the ordinary requirements of trust law."

[49] The Warranties Act and Warranties Regulations do not create a statutory deemed trust. Instead, the Warranties Regulations require the parties to agree to create a trust and include deeming language if certain conditions are met. While the Schedule to the Addendum refers to the deposit amounts being deemed to be held in trust until the early termination provision is satisfied if the funds are not set aside in trust, this is not a statutory deemed trust. A statutory deemed trust is a creature of legislation and cannot be created by the parties agreeing to the terms of the Addendum. Although the Warranties Regulations require the Addendum, neither the statute nor the regulations deem a trust into existence or "impose a "statutory trust obligation", namely, an obligation on a person to hold in trust certain property:" *Guarantee Company*, at para. 19.

Was there unjust enrichment in respect of the Purchasers without an express trust?

[50] As noted above, the agreements in respect of the Elm project contained an early termination provision. However, there was no evidence as to whether there were similar early termination provisions in the contracts for the other projects. Where the applicable agreement does not contain an early termination provision, an express trust would not have been created further to the terms of the contract/Addendum. Tarion asks the court to find that there was unjust enrichment in respect of those Purchasers who did not have an express trust.

[51] I am not satisfied that there was unjust enrichment in respect of the Purchasers who did not have an express trust.

[52] Tarion submits that the Stateview entities were unjustly enriched by their misappropriation of the deposits in respect of all Purchasers. Tarion's position is that all Purchasers are entitled to a constructive trust remedy or good conscience trust remedy because of the unjust enrichment.

[53] For the court to find unjust enrichment, the court must be satisfied that there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment or deprivation: *Becker v. Pettkus*, [1980] 2 SCR 834, at p. 835.

[54] The Stateview entities were clearly enriched with the deposits made by the Purchasers, and the Purchasers have been correspondingly deprived. The Purchasers provided the deposit monies to the Stateview entities in good faith toward the purchase of new build homes. These Purchasers no longer have their deposit funds and given the insolvency proceedings, are not going to have the home they contracted to purchase.

[55] The issue is whether there is a juristic reason to allow the enrichment or deprivation. The Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 ("*Kerr*") described this element of the test for unjust enrichment as follows, at paras. 40 and 41:

> The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention unjust in the circumstances of the case.
>
> Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law. The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract". [Citations omitted.]

[56] Tarion submits that there is no juristic reason justifying the enrichment or deprivation. Tarion points to the Purchase Agreements and submits that the Stateview entities were not permitted to take the benefit of the deposits paid by the Purchasers and give them nothing in return.

[57] The Receiver submits that contract breaches in insolvencies are different because every creditor before the court has a claim. In an insolvency, for a party to have an absence of juristic reason for the enrichment or deprivation, the Receiver argues that there must be more than a breach of contract. The Receiver argues that in the absence of express statutory or contractual trusts, the Stateview entities were free to use the deposits in the everyday operation of their business, which they did.

[58] The Receiver submits that the operation of the BIA is in and of itself a juristic reason that precludes the possibility of a constructive trust. The Alberta Court of Appeal in *Bassano Growers ltd. v. Price Waterhouse Ltd.* (1997), 6 CBR (4th) 188 ("*Bassano Growers*"), citing the British Columbia Court of Appeal in *British Columbia v. National Bank of Canada* (1994), 30 C.B.R. (3d) 215, noted that the operation of the BIA can be a juristic reason precluding a constructive remedy, at para. 19:

> Before a constructive trust can be imposed, unjust enrichment must be established, see *Becker v. Pettkus*, [1980] 2 S.C.R. 834. An unjust enrichment occurs where there has been an enrichment, a corresponding deprivation, and no juristic reason

> to allow the enrichment and deprivation. The Applicants argue that Diamond S was unjustly enriched by virtue of the fact that the funds were retained by it upon bankruptcy. But this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the BIA. The British Columbia Court of Appeal was asked to find a constructive trust in *National Bank,* supra where taxes collected under a deemed trust had not been segregated from the tax collector's own funds. The Court found at 238-40 that there could be no unjust enrichment in such cases. In bankruptcy situations, the creditors who benefit from the failure of a s. 67(1)(a) trust claim are not "enriched," but merely recover what they are owed, and any deprivation experienced by the unsuccessful trust claimants results from the bankruptcy. In other words, **the operation of the BIA is a juristic reason which precludes the possibilities of awarding a constructive trust remedy**, *National Bank,* supra at 238. [emphasis added]

[59] The Receiver further notes that, as highlighted in *Kerr*, one consideration for the court is the legitimate expectations of the parties. Here, the Purchasers entered into Pre-Purchase Agreements with clear subordination clauses. The expectation of the secured mortgagees would be that the Purchasers would not then assert a priority claim.

[60] I agree with the Receiver. I am not satisfied that there is an absence of juristic reason in this case. The Stateview entities were free to use the deposit funds in their business because there was no express trust or statutory trust over the deposit funds. The Stateview entities are now in bankruptcy and there are limited funds to go around. The BIA contemplates how creditors will be addressed in an insolvency. Similar to *Bassano Growers,* the fact that the deposit funds were retained by the Stateview entities upon bankruptcy does not give rise to an unjust enrichment. "[T]he operation of the BIA is a juristic reason which precludes the possibilities of awarding a constructive trust remedy."

[61] In addition, the Purchasers agreed to subordinate their interests to the secured mortgagees and construction financing claimants. This is yet another reason why there is not an absence of juristic reason in this case.

[62] Accordingly, the Purchasers have not established unjust enrichment.

[63] Given that there is no unjust enrichment, the Purchasers that do not have an express trust cannot seek the imposition of a constructive trust.

Imposition of a constructive trust

[64] I next consider whether the Purchasers would be entitled to a constructive trust over the deposit funds where an express trust arose and there was a breach of such express trust by Stateview. Because I have concluded that the Purchasers who do not have an express trust have not established unjust enrichment, there is no need to consider whether a constructive trust should be imposed for those Purchasers.

[65] Where there has been a breach of an express trust, remedies may include damages or compensation, or recovery of the property through tracing. In this case, it was submitted that tracing would not be possible because of the status of the finances of the Stateview entities.

[66] Tarion submits that the proper remedy for the Stateview entities' breach of an express trust in respect of certain Purchasers is to impress the proceeds from the sale of the real property with a constructive trust for the Purchasers' benefit.

[67] A constructive trust is an equitable remedy that the court has jurisdiction to impose. The constructive trust is a proprietary remedy. It is granted over specified property. Where a constructive trust is granted, the property is removed from the bankrupt's estate, which effectively reorganizes the BIA priorities: *306440 Ontario Ltd. v. 782127 Ontario Ltd. (Alrange Container Services)*, 2014 ONCA 548, 324 O.A.C. 21 ("*Alrange Container Services*"), at para. 24.

[68] Here, Tarion asks the court to declare that the Purchasers are entitled to a constructive trust in the proceeds of sale from the real property as a remedy for breach of trust. The imposition of a constructive trust would effectively remove the property subject to the trust from the estate of the Stateview entity.

[69] A constructive trust is available as a remedy where a party has been unjustly enriched to the prejudice of another party, or a party has obtained property by committing a wrongful act, such as a breach of a fiduciary obligation: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 ("*Soulos*"), at para. 36.

[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.

[73] In *Ascent Ltd. (Re)*, [2006] 18 C.B.R. (5th) 269 (ON SC) ("*Ascent*"), this court imposed a constructive trust in an insolvency proceeding. However, in that case the court had made an order that Ascent set aside $24,374 and hold it in trust for a certain creditor pending certain events. Ascent did not set aside and hold the funds in trust as had been ordered. Accordingly, when Ascent was assigned into bankruptcy, the affected creditor argued that the proper remedy was a declaration of constructive trust over Ascent's assets sufficient to provide the creditor with the $24,374 that had been ordered by the court to be held in trust. The court found that there was unjust enrichment. In the court's analysis of whether there was juristic reason, the court emphasized that there was an intervening Court Order requiring the funds to be set aside and held in trust. The court stated, at para. 15, that the failure to comply with the Court Order was the source of the unjust enrichment. In determining that a constructive trust was an appropriate remedy, the court also referred to the failure to comply with the Court Order, and stated, at para. 17:

> It is also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. <u>It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment</u>. [Emphasis added.]

[74] Unlike *Ascent* there was no court order in the instant case requiring the Stateview entities to hold the deposit funds in trust. There was an express trust, and the Stateview entities, in their capacity as trustee, failed to adhere to the terms of the trust.

[75] Further, a constructive trust, which is not otherwise available, cannot be imposed by the court for the purpose of altering the priority scheme under the BIA: *Barnabe v. Touhey*, [1995] 26 O.R. (3d) 477 (C.A.).

[76] For a court to order a constructive trust remedy in a bankruptcy case, there must be a close and causal connection between the property over which the party seeks the constructive trust and the misappropriated trust property. The Court of Appeal in *Alrange Container Services*, stated at paras. 26 and 27:

> The very nature of the constructive trust remedy demands a close link between the property over which the constructive trust is sought and the improper benefit

> bestowed on the defendant or the corresponding detriment suffered by the plaintiff. Absent that close and direct connection, I see no basis, regardless of the nature of the restitutionary claim, for granting a remedy that gives the plaintiff important property-related rights over specific property. A constructive trust remedy only makes sense where the property that becomes the subject of the trust is closely connected to the loss suffered by the plaintiff and/or the benefit gained by the defendant. [...]
>
> Professor Paciocco goes on to argue that the requirement of a close connection between the property over which the trust is sought and the product of the unjust enrichment is particularly strong in the commercial context. He observes, at p. 333:
>
> > In the commercial contest where there should be a hesitance to award proprietary relief, a purer tracing process is justifiable. This approach accurately describes the prevailing trend in Canadian case law.

[77] Tarion acknowledges that a close causal connection to the property is required. Tarion cited *British Columbia Securities Commission v. Bossteam E-Commerce Inc.*, 2017 BCSC 787 ("*Bossteam*") as support for their position that establishing a close causal connection does not necessarily require forensic tracing. *Bossteam* involved an award of a constructive trust for fraud, and this award meant that defrauded investors benefitting from the trust were given priority over other creditors. This award was granted notwithstanding the fact that there was no tracing because the court found evidence of a close causal connection between the property in the bank account and the investor's money: *Bossteam*, at para. 36.

[78] Tarion submits that there is a close causal connection between the deposit monies and the proceeds of sale from the real property. Tarion points to Mr. Pollack's affidavit where he stated that certain monies funded from KingSett, the High Crown Real Property first mortgagee, and Purchaser deposits were for the purpose of paying development charges and cash in lieu of parkland dedication in connection with the High Crown Real Property. However, Mr. Pollack further stated that approximately half of those funds were inappropriately diverted for other purposes. The Receiver submits that Tarion has not provided any material evidence as to how the Purchaser deposits were used to improve or acquire the real property. The Receiver further notes that Tarion's assertion is contradicted by Tarion's other allegation that the deposits were misused in ways that were unconnected to the real property projects.

[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

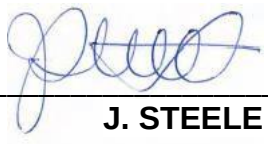
appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities.

[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.

[82] As noted above, the express trusts are individual trusts that arose between each individual Purchaser and the respective Stateview entity. There was not evidence before the court on each trust relationship. Accordingly, I am not foreclosing the possibility of the court in an individual case determining that a constructive trust remedy could be appropriate in the specific circumstances.

Disposition

[83] Tarion's motion is dismissed.



J. STEELE J.

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