Court of Appeal File No. C68751
Ontario Superior Court File No. CV-20-00643021-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

C & K MORTGAGE SERVICES INC.

Applicant (Respondent in Proposed Appeal)

- and –

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30

FACTUM OF THE APPELLANT, INTERESTED PARTY JEREEMY TAN

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FACTUM OF THE APPELLANT

PART I - THE APPEAL

1. The Appellant, Yong Yeow (Jereemy) Tan (**"Jereemy"**), appeals the Order of the Honourable Justice Dietrich in the Superior Court of Justice, dated August 27, 2020 (the **"Order"**). Justice Dietrich ruled against the Appellant by denying his request to compel completion of an Agreement of Purchas and Sale ("APS") or for, alternatively, a compensation order, thereby disclaiming that APS.

> Order of Justice Dietrich, dated August 27, 2020, Appeal Book and Compendium of the Appellant, Interested Party Jereemy Tan ("Appellant's Compendium"), at Tab 2, pp. 11-13.

PART II - OVERVIEW AND ISSUES

2. The Underlying Motion to this appeal arose as a result of the court appointed Receiver, Rosen Goldberg Inc. (the **"Receiver"**), seeking to disclaim the Agreement of Purchase and Sale (**"APS"**) for 180 Mateo Place in Mississauga, Ontario (the **"Property"**) between Jereemy and the developer that has been put into receivership, Elite Homes Inc. (the **"Developer"**). On consent of the parties, a motion was brought before Justice Dietrich to seek the Court's directions on whether the disclaimer was appropriate (the **"Underlying Motion"**).

3. The Honourable Justice Dietrich heard the Underlying Motion on August 21, 2020, and ultimately ruled in favour of the Receiver's proposed disclaimer. The core error made by Justice Dietrich, with respect, was the Court's finding that Jereemy did not possess a proprietary and/or equitable interest in the Property (purchaser's lien and right to specific performance). Those interests arose as a result of the APS and his advancing $500,000 of deposits, $400,000 of which went to the Developer and were used in the construction of the Property. As part of this error, the Court failed to apply the correct analysis to determining whether a "no interest in property" provision in the APS continued to apply following the Developer's default under the APS.

4. There do not appear to be any cases where a contract is disclaimed against a person with a proprietary interest. That is for good reason. In the case of a proprietary interest, the property does not belong to the debtor and cannot be "expropriated" by the receiver (see *1565397 Ontario Inc. (Re)*, 2009 CanLii 32257 (ONSC-Comm List)).

5. In the course of arriving at the decision being appealed, Justice Dietrich, with respect, committed other reviewable errors: (1) Her Honour misapprehended the Court's role on the motion as the second judge "reviewing" a decision already made by another judge rather than as the judge hearing the motion at first instance, (2) Dietrich J., failed to properly apply the test for disclaimer of a contract, especially the "unfair preferences" analysis, (3) the Court misapprehended the scope of the Receiver's powers and obligations, leading to the unreasonable conclusion that the Receiver did not breach its fiduciary duty to Jereemy and (4) erred on the equities branch of the disclaimer test.

6. Jereemy entered into the APS prior to the receivership as a *bona fide* purchaser for value. Jereemy intended to buy the Property as his first home with his spouse, and move to Canada from Vietnam where they currently live. Jereemy paid $500,000.00 in deposits with what was effectively his retirement allowance from his current employer for his diligent work over 18 years, and some of his savings. There is no dispute that the purchase price under the APS was fair market value.

> Affidavit of Yong Yeow (Jereemy) Tan, sworn August 6, 2020 ("Tan Affidavit"), Appellant's Compendium, tab 10, pp. 84-85, Exhibit Book of the Appellant, Interested Party Jereemy Tan ("Appellant's Exhibit Book"), Tab 1, pp. 6-7, paras 2, 3, 4, 6.

7. The relative consequences of honouring the APS versus disclaiming it are stark. Because Jereemy advanced the bulk of his deposit to the Developer to assist in completing the Property (that now forms part of the Property), the bulk of which are not recoverable if the APS is disclaimed (Jereemy will potentially lose up to 80% of the $500,000 deposit). In contrast, if the contract is honoured, the mortgagee will have recovered 100% of the advances on the first four

homes in the development (prior to the receivership) and recover roughly 80% of the amount it expected to recover from two disclaimed APSs (including Jereemy's). In other words, the Receiver's decision to disclaim appears to be about making sure the mortgagee recovers the last $2,500,000 owed to it (roughly 100% recovery), instead of only $2,000,000 of the final installment (roughly 80% recovery), while wiping out Jereemy's $500,000 deposit (net of some mitigation – potential 20-40% recovery).

PART III - THE FACTS

8. Jereemy Tan purchased the home at 180 Mateo Place in Mississauga, Ontario on February 12, 2020. He paid a deposit of $500,000. $100,000 of that was paid to the vendor's realtor in trust. $400,000 was paid directly to the vendor in order to facilitate an earlier completion of construction and closing date. Before Justice Conway (the Receivership appointment Order) and Justice Dietrich (the Order under appeal), there was no dispute that the $400,000 went into completing the Property.

> Tan Affidavit, Appellant's Compendium, Tab 10, p. 85, Appellant's Exhibit Book, Tab 1, p. 7, paras 4, 5.
>
> Endorsement of Conway J., Appellant's Compendium, Tab 6, p. 45.
>
> Endorsement of Dietrich J., Appellant's Compendium, Tab 3, p. 16, para. 4.

9. Jereemy and Melissa live with family in Vietnam and occasionally family in Ontario. They have never owned a house of their own. The purchase of the Property was part of a significant life and career move to Canada, that meant a great deal to them. It is not disputed that the loss of the Property and hundreds of thousands of dollars will significantly delay their life plan.

Indeed, the deposit was composed of a one-time retirement gift paid to Jereemy by his current employer for his diligent work over 18 years plus many years of Jereemy's savings.

> Tan Affidavit, Appellant's Compendium, Tab 10, pp. 84-85, Appellant's Exhibit Book, Tab 1, pp. 7-8, paras 2-3, 6-7.

10. Because of the Pandemic, the closing was extended to June 26, 2020. In the meantime, Jereemy and his spouse Melissa Le, worked with the vendor to customize the home to their unique purposes.

> Tan Affidavit, Appellant's Compendium, Tab 10, p. 86, Appellant's Exhibit Book, Tab 1, p. 8, paras 8, 9.

11. In June, 2020, the mortgagee moved to appoint a Receiver. This led to the vendor being unable to close on the closing date of June 26, 2020. Dealings with the Property were halted by an interim Order of Conway J., dated June 18, 2020. The application to appoint the Receiver, Rosen Goldberg, was heard on July 2, 2020, and granted on that day. At that time, Jereemy did not expect that the Receiver would cancel (disclaim) his APS, but was advised, after July 2, 2020, that this was the Receiver's intention. The Receiver also advised that if Jereemy still wished to purchase the Property, he needed to compete with other potential purchasers, and would not receive any credit for the $500,000 deposit he had already paid. If the APS is disclaimed, Jereemy will lose the bulk of the deposit, subject to $100,000 - $200,000 of potential mitigation.

> Tan Affidavit, Appellant's Compendium, Tab 10, p. 87, Appellant's Exhibit Book, Tab 1, p. 9, paras 12-14.
>
> Endorsement of Conway J., Appellant's Compendium, Tab 4, p. 26.
>
> Endorsement of Conway J., Appellant's Compendium, Tab 5, p. 28.

12. It is not disputed that Jereemy agreed to pay fair market price for the Property, paid the $500,000 deposit, and has done everything legally required of him. It is also not disputed that

the Property is part of a small 6-unit development for which only two APSs are being disclaimed. The other purchaser's total deposit was $84,000 ($50,000 payable directly to the vendor, $34,000 payable to the realtor), of which the entirety will likely be recouped from Tarion Corporation.

Tan Affidavit, Appellant's Compendium, Tab 10, p. 88, Appellant's Exhibit Book, Tab 1, p. 10, para 15.

13. Jereemy submits that the two options he faced – canceling the APS, or making him pay hundreds of thousands of dollars more for 180 Mateo – were grossly unfair to him and his spouse. Nobody has accused them of any wrongdoing.

Tan Affidavit, Appellant's Compendium, Tab 10, p. 88, Appellant's Exhibit Book, Tab 1, p. 10, para 16.

Proceedings Before Justice Dietrich

14. The parties agreed to proceed by a "pre-emptive" motion, to have the court rule on the Receiver's proposed disclaimer of the APS. The motion came before Justice Dietrich. Her Honour denied the motion – paving the way for the proposed disclaimer – holding:

(a) The motion was an attempt to vary the previous Order of Conway J., wherein the Receiver was appointed, therefore Jereemy had a "limited" right of review (para. 30);

(b) That Jereemy did not have a proprietary interest in 18 Mateo Place (paras. 31-42); and

(c) That there was no basis in equity or in law that would permit the court to visit the consequences of Jereemy's decision on the secured lender. (para. 46).

Endorsement of Dietrich J., Appellant's Compendium, Tab 3, pp. 30, paras. 31-42, 46.

PART IV - ISSUES AND ARGUMENT

15. The issues on this appeal are as follows:

(a) What is the standard of review?

(b) Did Justice Dietrich commit a reviewable error in determining that Jereemy did not possess a proprietary and/or equitable interest in the Property?

(c) Did Justice Dietrich commit any other reviewable errors that affected the Court's decision?

Issue 1: What is the standard of review

16. The standard of review is palpable and overriding error for findings of fact and inferences from facts. The standard of review is correctness for question of law. Matters of mixed fact and law lie along a spectrum, where extricable questions of law are subject to the correctness standard. Contractual interpretation issues for standard form contracts are reviewed on a correctness basis.

> *Housen v. Nikolaisen*, 2002 SCC 33, at paras 8, 10, 36,<http://canlii.ca/t/51tl>*; Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, at para 24, <http://canlii.ca/t/gtpvn>

17. A Judge's Order to disclaim a contract, in the receivership context, will be set aside if the Judge "erred in principle, fundamentally misconceived the evidence or made any palpable and overriding errors in relation to the facts or reasons that would justify appellate intervention".

> *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251, at para. 1, <http://canlii.ca/t/hsw9k>.

Issue 2: Justice Dietrich erred in principle in determining that Jereemy did not possess a proprietary and/or equitable interest in the Property.

(a) The framework for determining whether a disclaimer of an APS is appropriate in the Receivership context.

18. The test for a disclaimer does not appear to have been considered by this Court. In *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 ("*Romspen*"), Justice Wilton-Siegel listed the following non-exhaustive factors to be considered by the Court in determining whether a disclaimer by a receiver should be ordered:

(a) the nature of the interest being disclaimed under the contract (*i.e.*, whether it is contractual or proprietary) [in this case Jereemy submits he has a proprietary interest];

(b) the relative priorities of the parties [in this case Jereemy versus the mortgagee];

(c) the evidence regarding the equities between the parties; and

(d) the operation of the doctrine of marshalling, if applicable.

Romspen, supra, at para 28, <http://canlii.ca/t/gxp1z>.

19. Justice Wilton-Siegel went on to note in *Romspen* that:

> *[31]* ***The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract.*** *This determines the standard by which the equities between the parties must be assessed. For example, as noted in Royal Bank of Canada v. Penex Metropolis Ltd., at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party […]"*

Romspen, supra, at para 31, <http://canlii.ca/t/gxp1z>.

20. A similar set of factors were discussed in *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII).

> *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), at paras 43-44, <http://canlii.ca/t/hrbx5>, aff'd on appeal *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251, at paras 1-4 <http://canlii.ca/t/hsw9k>.

21. What is clear is that a disclaimer is not to be based purely on the priority order between parties. The Court appointed Receiver owes a fiduciary duty to every stakeholder and must discharge that duty in good faith.

> *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426, at para 28, <http://canlii.ca/t/gxp1z>; *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 28177 (AB QB), at paras 31-32, 36-40, <http://canlii.ca/t/2bqnp>, aff'd on appeal *PricewaterhouseCoopers Inc. v. Midcoast Canada Operating Corp*, [2000] A.J. No. 1751] <https://advance.lexis.com/api/permalink/6d1dda0d-65cb-4a20-9dee-2ad59d372d65/?context=1505209>.; *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC), at paras 60 and 80, <http://canlii.ca/t/2441p>; *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CanLII 28461, at paras 12, 15, <http://canlii.ca/t/1wfld>; *Bristol Alliance Nominee No. 1 Limited and others v Bennett and others*, [2013] EWCA Civ 1626 (England and Wales Court of Appeal), at para 29 <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1626.html>; *New Skeena Forest Products Inc. et al v. Kitwanga Lumber Co. Ltd*., 2004 BCSC 1818 (CanLII), <http://canlii.ca/t/1p29c> at paras 22-23.

22. Even the fact that a preference will result from honouring a contract does not, by itself, mean that the contract should be disclaimed. The duty of the Receiver to act in good faith and consider the interests of all stakeholders, rather than to perform a strict arranging of priorities. This may mean that in some instances, contracts should be honoured even though disclaiming them would have led to a greater realization of assets for the mortgagee.

> See: *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 28177 (AB QB), at paras 31-32, 36-40, <http://canlii.ca/t/2bqnp>, aff'd on appeal *PricewaterhouseCoopers Inc. v. Midcoast Canada Operating Corp*, [2000] A.J. No. 1751] <https://advance.lexis.com/api/permalink/6d1dda0d-65cb-4a20-9dee-2ad59d372d65/?context=1505209>.

23. In addition, under analogous legislation, both the *Companies' Creditors Arrangement Act* (***"CCAA"***) and the *Bankruptcy and Insolvency Act* (***"BIA"***), provide legislative

guidance that significant financial hardship to a party is a factor the Court should consider when deciding whether to disclaim a contract.

> See Schedule "B" to this factum: *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 32(4); *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 65.11(5).

(b) Paramountcy of a Property Interest

24. Whether a disclaimee possess a proprietary/equitable interest in a Property, as opposed to a mere contractual interest, is a central question in the analysis of whether a disclaimer should be approved or not. As found by Justice Wilton-Siegel, sitting on the Commercial List, in *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC), **it does not appear that a court has ever authorized a receiver to disclaim a proprietary interest**. The rationale for why a proprietary interest cannot be disclaimed by a receiver is that it amounts to **expropriation of a property right**, without compensation. Specifically, as stated by the Court:

> *[59] The applicant says that it can disclaim the Undertaking even if it creates an interest in land. I understand disclaimer in this sense to be limited to repudiation of the Undertaking leaving the respondents with a right to claim damages for breach of contract against 156 for failure to perform the Undertaking.*
> *[60] I do not think the applicant's position is correct.* ***I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment of an interest in the Property would be the transfer of such interest to 156 [the debtor]. Such action amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors of 156****…*
> *[80] First, the respondents have valuable interests in property, rather than a mere contractual interest that can be terminated in respect of future obligations.* ***As mentioned, the effect of the requested relief would be to transfer the value of the respondents' interests in the Property to 156 [the debtor] for no compensation****.*
> *[Emphasis added]*

> *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC), at paras 60 and 80, <http://canlii.ca/t/2441p>; *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CanLII 28461, at paras 12, 15, <http://canlii.ca/t/1wfld>; *Bristol Alliance Nominee No.1 Limited and others v Bennett and others,* [2013] EWCA Civ 1626 (England and Wales Court of Appeal), at para 29 <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1626.html>.

25. In the England and Wales Court of Appeal case *Bristol Alliance Nominee No.1 Limited and others v Bennett and others*, the court allowed an appeal and reversed a disclaimer in the face of a proprietary interest. The Court applied the following *dicta* from in *re Bastable, Ex parte The Trustee* [1901] 2 KB 518:

> *But the matter does not rest there, because the subject-matter of the sale in this case is real estate, and such a contract of sale, whether followed or not by payment of a deposit, operates to pass to the purchaser an equitable interest in the land, and* ***the effect of a disclaimer of the contract now would be not to relieve the trustee from a burden, but to divest and take out of the purchaser the property which is already vested in him****. [Emphasis added]*
>
> *Bristol Alliance Nominee No.1 Limited and others v Bennett and others,* [2013] EWCA Civ 1626, para. 29, <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1626.html>.

26. In the case at bar, one of the key errors made by Justice Dietrich was her failure to recognize that Jereemy possessed a purchaser's lien on the Property by virtue of his payment of the deposits. As explained by the Ontario Court of Appeal in *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA), a purchaser's lien results from pre-payment (depositor or otherwise) under a contract for the purchase of land, which in turn causes a corresponding portion of the property's equity to be transferred to the purchaser. The interest is over the entirety of the real estate, to the extent of the pre-payment (in a case at bar – $500,000):

> *The nature and extent of a purchaser's lien was defined by the House of Lords in Rose v. Watson (1864), 10 H.L.C. 672, 11 E.R. 1187. It was there laid down that where under a contract for the purchase of land the money is to be paid in portions, every payment is a part performance of the contract by the purchaser and in equity transfers to him a corresponding portion of the estate. […]*
>
> *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA), at para. 26, <http://canlii.ca/t/g19k5>, <https://advance.lexis.com/api/permalink/7f6e74af-2bfb-4bbd-a08f-6e447b0d1bdf/?context=1505209>.
> *Pan Canadian Mortgage Group III Inv. v. 0859811 B.C. Ltd.* , 2014 BCCA 113, at paras, 1, 2, 21, <http://canlii.ca/t/g68dk>.

27. As discussed below, it appears Justice Dietrich, held that a "no interest in property" provision in the APS (clause 27) was still enforceable upon the vendor's default under the APS and the contract had the effect of negating Jereemy's proprietary interest. That finding is discussed next.

(c) Justice Dietrich erred in interpreting the "no interest in property" provision of the APS

28. As noted above, at para 24, if Jereemy had a proprietary interest, allowing the Receiver to disclaim the APS would have the impermissible effect of expropriating a proprietary interest belonging to Jereemy, and the conveying of that interest to a third party.

29. The "no interest in property" provision is embedded in a No Registration clause in the APS and reads as follows:

> *NO REGISTRATION*
>
> *27. The Purchaser acknowledges that this Purchase Agreement does not create an interest in the Real Property and that until a Transfer/Deed of Land is registered in favour of the Purchaser, he shall have no interest in the Real Property.* ***The Purchaser further covenants and agrees that he will not register or cause or permit this Purchase Agreement to be registered on title to the Land*** *and that no reference to it, or notice of it or any caution or any certificate of pending litigation, Purchaser's lien or any other notice or document of any type shall be registered on title* ***whether or not the Vendor is in default hereunder****. In the event that the Purchaser creates any encumbrance or makes any registration or causes or permits any encumbrance or registration to be made on title to the Land on or before Closing, any such action will constitute an event of default under this Purchase Agreement and the provision of Section 30 shall apply.* [emphasis added] [the underlined portion is what is referred to as the "no interest in property" provision]
>
> Agreement of Purchase and Sale dated February 12, 2020, Exhibit "A" to the Tan Affidavit, Appellant's Compendium, Tab 10, p. 107, Appellant's Exhibit Book, Tab 1, p. 29.

30. The main argument below, both in Jereemy's factum and by his counsel in oral submissions, was if the vendor is in default/breach of the APS, Jereemy was no longer bound by the

"no interest in property" provision in Clause 27. Thus, the vendor in this case, upon failing to close in June 2020 and thus being in default of the APS, freed Jereemy of the "no interest in property" portion of Clause 27. It follows that Jereemy had a proprietary interest, as opposed to merely contractual, in the property and the deposit funds. That proprietary interest was his purchaser's lien and entitlement to specific performance (the specific performance entitlement is discussed later in this factum).

> Re: Purchaser's lien see: *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA), at para. 28, <http://canlii.ca/t/g19k5>, <https://advance.lexis.com/api/permalink/7f6e74af-2bfb-4bbd-a08f-6e447b0d1bdf/?context=1505209>.
>
> Re: Default negating reliance on contract see: *Beaufort Realties et al. v. Chomedey Aluminum*, 1979 CanLII 66 (ON CA), at para 28-29 <http://canlii.ca/t/1vm6s>, <https://nextcanada.westlaw.com/Document/I10b717cf575c63f0e0440003ba0d6c6d/View/FullText.html?originationContext=kcJudicialHistory&transitionType=Document&contextData=(sc.Default)&docSource=8e9e278f08c24776b7b0ab0c2c1b46b2&rulebookMode=false>, aff'd on appeal in *Beaufort Realties et al. v. Chomedey Aluminum*, 1980 CanLII 47 (SCC), [1980] 2 SCR 718, at para 8, <http://canlii.ca/t/1txbm>, <https://nextcanada.westlaw.com/Document/I10b717cf575d63f0e0440003ba0d6c6d/View/FullText.html?docFamilyGuid=I19625280748711d79a8ab5f5a94ee96e&transitionType=History&contextData=%28sc.Default%29>; *McGrath v. B.G. Schickedanz Homes Inc*., [2000] O.J. No. 4161 (S.C.J) at paras 64, 67, <https://advance.lexis.com/api/permalink/2d3642a5-ebd5-4601-b9ef-27f11180475a/?context=1505209>; *T.G. Appliance Group v Legend Homes*, 2016 ONSC 7802 (CanLII), at paras 28, 65-66, <http://canlii.ca/t/gw1zj>.
>
> See also: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645, at paras 104-108, <http://canlii.ca/t/g6jzd>; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), <http://canlii.ca/t/27zz2>; *Fioravanti v. OLG*, 2018 ONSC 3777 (CanLII), at paras 70, <http://canlii.ca/t/hsqjx>; *Ben Air Systems Inc. v. Toronto Transit Commission et al*., 2018 ONSC 2375 (CanLII), at paras. 51,<http://canlii.ca/t/hrjjb>.

31. The same conclusion flows through interpreting the No Registration Clause (Clause 27) using the approach set out in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53: reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances. First, there is a practical and legitimate purpose to non-registration clauses. They have the effect of stopping registrations that could adversely affect the developer's ability to continue construction financing if disputes arise with individual purchasers. Second, Clause 27 expressly notes that the no registration requirement survives the Developer's

default, but fails to specify the same for the "no interest in property" provision. To forcefully interpret the "no interest in property" provision as also surviving default of the Developer would require a rewriting of the provision to add words to the effect that the purchaser still has no proprietary/equitable interest after the Developer's default. Such a rewriting is not permitted.

> *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, at paras 47, 57, <http://canlii.ca/t/g88q1>; *Raki Holdings Inc. v. Lionheart Enterprises Inc.*, 2018 ONSC 6421, at paras 31, 45, <http://canlii.ca/t/hvxz4>, affirmed, *Raki Holdings Inc. v Lionheart Enterprises Inc.*, 2019 ONCA 786, at para 3, <http://canlii.ca/t/j2nnn>.

32. Third, even if this clause is ambiguous as to whether the "no interest in property" provision survives the Developer's breach of the contract, the doctrine of *contra proferentem* dictates that the provision is interpreted against the drafter of the APS, the Developer and by extension the Receiver.

> See discussion of *contra proferentem* in: *Lien Trustee v. Toronto-Dominion Plaintiff Bank*, 1994 CanLII 729 (ON CA), at paras. 15, 93-94, <http://canlii.ca/t/6jxk>, <https://nextcanada.westlaw.com/Document/I10b717cf33cb63f0e0440003ba0d6c6d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)>.

33. At paragraphs 39 and 40 of Justice Dietrich's Endorsement, however, Her Honour held that the "no interest in property" provision could only be negated if the vendor **terminated** the APS[1]. The receivership proceedings, however, pre-empted the possibility of either party terminating the APS, and Jereemy's ability to notify the vendor of its breach and that he intended to keep the contract alive (specific performance) or claim return of his deposit (purchaser's lien). Specifically, the June 18, 2020 Order of Conway J., directed that "[t]he Respondent [the vendor]

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[1] In the Court's Reasons, there is a suggestion that the Appellant argued that the "no interest in property" provision did not apply because the APS was terminated (see paragraph 39 of the Endorsement). Such a suggestion would be incorrect. As the relevant section from the factum filed before Her Honour, paragraph 38, clearly states, the Appellant's argument was that the "no interest in property" provision did not survive the vendor's breach. This excerpt from the factum is attached as Schedule "C" to this factum.

shall preserve the mortgaged properties and keep the mortgaged properties locked when not in possession. The Respondent [vendor] shall not allow any third parties to take possession of the mortgaged properties." The July 2, 2020, Order authorized the full Receivership over "all the assets of the [debtor]". However, when the vendor failed to close the APS on June 26, 2020, it was in **default** of the APS. As noted above, based on the plain reading of the Clause and the law in *Beaufort Realty*, and other cases, a default of this nature was sufficient to negate the "no interest in property" portion of Clause 27. In *Beaufort Realty, supra*, a right to a mechanic's lien was first waived by contract and then re-activated on the defendant's breach (see para. 28 of the Court of Appeal for Ontario Ruling and para. 8 of the SCC Ruling).

Endorsement of Dietrich J., Appellant's Compendium, Tab 3, pp. 21-22, paras. 39-40.

34. The above error is an error in principal borne of a mistake of law and not of fact (misinterpretation of a standard form contract). The failure to accept that the Appellant had a proprietary interest in the lands/deposit, led Her Honour, with respect, into error on whether the APS could be disclaimed. A proprietary interest of the purchaser is a significant factor in determining whether the purchaser's APS can be disclaimed. As noted, there do not appear to be any cases where a proprietary interest was disclaimed by a receiver.

35. Justice Dietrich's misapprehension of the "no interest in property" provision law strongly influenced her decision to distinguish a case relied upon by the Appellant – *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC) ("*Armadale*").

Endorsement of Dietrich J., Appellant's Compendium, Tab 3, p. 20, para. 33.

36. *Armadale* provides persuasive authority that the disclaimer of the APS is inappropriate in circumstances similar to the case at bar. In *Armadale*, a contest over a proposed disclaimer, between a purchaser that had paid the full purchase price by deposit, and a secured first mortgagee, was decided in favour of the purchaser. In fact, the full deposit was paid directly to a company owned by the principal of the company in bankruptcy, at the principal's direction. Lax J. concluded that, although the debtor's estate (therefore the mortgagee) would receive no benefit from completing the transaction, it would be "dishonourable" for the trustee to disclaim the contract. The mortgagee was, through the trustee, directed to discharge registrations on title and take all other necessary steps to complete the transaction. The "over deposit" was not a basis to rule against the purchaser:

> *[12] In the event that I am wrong and section 75 does not apply, I would not allow the Trustee to disclaim this contract.* ***It is clear that a trustee can only succeed to the rights of a bankrupt and has no higher or greater interest. A trustee cannot terminate property rights that have passed under the contract prior to the bankruptcy*** *[…]*
>
> *[15] Finally, the Trustee is an officer of the court and must act fairly to all parties with an interest in the estate. It would be dishonourable for the Trustee to disclaim this contract. I therefore find that the Trustee is bound by the contract in the same manner and to the same extent as the bankrupt was at the time of the bankruptcy and has no power to disclaim the contract. The Trustee is directed to complete the transaction in its capacity as Construction Lien Trustee […]* [emphasis added]
>
> *Armadale Properties Ltd. v 700 King Street (1997) Ltd*., 2001 CanLII 28461 (ON SC), at para 15, <http://canlii.ca/t/1wfld>.

37. The main distinction between the case at bar and *Armadale* is that the contract in *Armadale* did not contain a "no interest in property" provision. However, as discussed above, the "no interest in property" provision was no longer operative at the time the Receiver decided to disclaim the APS.

38. Other instances where disclaimer was refused in the face of a proprietary interest can be found in *Bristol*, *supra* and *1565397 Ontario Inc. (Re)*, *supra*. In addition, in *Bank of Montreal v. Probe Exploration Inc.*, aff'd *PricewaterhouseCoopers Inc. v. Midcoast Canada Operating Corp.*, a Receiver's application for disclaimers on behalf of a mortgagee was dismissed on equitable grounds, even in the absence of a proprietary interest.

> *Bristol Alliance Nominee No. 1 Limited and others v Bennett and others,* [2013] EWCA Civ 1626 (England and Wales Court of Appeal), at para 29 <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1626.html>*;* *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC), at paras 60 and 80, <http://canlii.ca/t/2441p>; *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 28177 (AB QB), at paras 31-32, 36-40, <http://canlii.ca/t/2bqnp>, aff'd on appeal *PricewaterhouseCoopers Inc. v. Midcoast Canada Operating Corp,* [2000] A.J. No. 1751] <https://advance.lexis.com/api/permalink/6d1dda0d-65cb-4a20-9dee-2ad59d372d65/?context=1505209>.

39. In addition to the argument that Jereemy possessed a purchaser's lien, thus giving Jereemy a proprietary/equitable interest, Jereemy also advanced a specific performance argument. Specific performance is a remedy available to Jereemy in this case. The customizations requested by Jereemy and his wife for the Property, including structural changes to the Property, make the Property unique for their purposes. In addition, as noted in *Matthew Brady Self Storage Corporation v InStorage Limited Partnership*, 2014 ONCA 858, when assessing whether specific performance is a suitable remedy, two considerations emerge: (1) it is the subject-matter of the contract, and not just the land alone that must be unique or unusual, and (2) the measure of the adequacy of a money award is whether it "will purchase substitute performance". In *Minto v. Jones*, Justice Strathy (as he then was), granted summary judgment based on factors similar to those present in the case at bar, noting that damages was not an adequate remedy:

(a) the plaintiff [purchaser] gave evidence that the property contained a bundle of features that made it particularly attractive to her;

(b) the home was purchased for personal residence and not as an investment home;

(c) the defendant [party opposing the specific performance] presented no evidence that there was any specific substitute residence available in the same area;

(d) the defendant had forfeited the plaintiff's deposits, contributing to the plaintiff's difficulty in purchasing any comparable property in a rising market;

(e) the plaintiff incurred moving expenses, rent and other costs due to the aborted transaction that further strained her financial resources; and

(f) it could be more than a year before the plaintiff could find a comparable property.

Matthew Brady Self Storage Corporation v InStorage Limited Partnership, 2014 ONCA 858, at para 37, <**http://canlii.ca/t/gfgxx**>; *Walker v. Jones*, 2008 CanLII 47725 (ON SC), at paras 163-168, <http://canlii.ca/t/20tnx>, <https://advance.lexis.com/api/permalink/19f01887-e111-49f9-a993-63464d48998a/?context=1505209>.

Tan Affidavit, Appellant's Compendium, Tab 10, p. 86, para. 9.

40. Jereemy purchased the Property with the goal of moving to Ontario from Vietnam and starting his business. This was a major decision made relatively late in Jereemy's working life. Funding the purchase of the Property required Jereemy to draw on significant amounts from his savings and from his retirement gift, which he received for his outstanding contribution to his previous employer over the past 18 years.

41. Moreover, in this case, the Receiver has, of his own volition, taken steps to complete the construction on the property to the point of it being available for sale. Justice Wilton-Siegel notes in *1565397 Ontario Inc. (Re)* that in such circumstances, specific performance is available to defeat a disclaimer.

1565397 Ontario Inc. (Re), 2009 CanLII 32257 (ON SC), at para 34, <http://canlii.ca/t/2441p>

(d) Priorities Analysis Obviated by Property Interest

42. Paragraphs 41 to 51 of Justice Dietrich's endorsement show that, with respect, Her Honour applied a strict priorities analysis, rather than analyzing whether the Receiver acted in good faith and considered the interests of the various stakeholders as opposed to being solely focussed on interest of the first mortgagee.

43. With respect, Justice Dietrich's application of a strict priorities analysis in these circumstances was pre-mature. Her Honour noted two priority provisions: section 93 of the *Land Titles Act* and Clause 41 of the APS (the subordination clause). It is correct that the mortgagee stands in priority to Jereemy upon liquidation of the insolvent party/vendor's assets, and a payout of the funds derived from those assets. This is true, for instance, on a power of sale or foreclosure proceeding. In such proceedings, the *LTA* and s. 41 would likely, place the mortgagee in priority to Jereemy, following the liquidation of assets.

44. In this case, however, Jereemy was the purchaser in a valid APS for one of the assets to liquidated – 180 Mateo Place. Based on Jereemy's proprietary interest, amongst other things, the APS should have proceeded (*i.e.*, 180 Mateo Place sold to him) with the proceeds of that sale paid to the Receiver to be distributed. Only then does the mortgagee's priority come into play, and the mortgagee receives funds prior to various other parties.

45. There do not appear to be any cases, relying on the *LTA* or a subordination clause, where a proprietary interest was disclaimed by a Receiver.

46. In finding that the subordination clause in the APS (Clause 41) negated the proprietary interest, Her Honour cited the findings of Morawetz J., as he then was, in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816. As noted by Morawetz J., in *Firm Capital*, however, subordination agreements "negate any argument that the mortgagee is bound by actual notice of a prior registration" (see para. 25). This makes sense and in this case Jereemy is not asserting a prior registration. As noted above, he submits that his valid contract should be honoured, with proceeds paid to the Receiver to distribute to creditors in accordance with their priorities. In *Firm Capital* the purchasers acknowledged that their agreements did not create interests in property (see para. 26). Unlike the Clause in the case at bar, however, the "no interest in property" Clause in *Firm Capital* may well have expressly stated that it survived default (this is not clear from the Report). In any event, the arguments raised by Jereemy that the vendor's default negates the "no interest in property" Clause, reinstating his proprietary interest, were not raised before Morawetz J. For these reasons and others, *Firm Capital* is distinguishable and the subordination clause is not a basis on which to order a disclaimer.

> Endorsement of Dietrich J., Appellant's Compendium, Tab 3, p. 23, paras. 45, 49.
>
> *Firm Capital Mortgage Fund Inc.* v 2012241 Ontario Ltd. ("Firm Capital"), 2012 ONSC 4816, at para 8, 14, 25, 28, 32-38, <http://canlii.ca/t/fsk46>.

47. The two disclaimer cases relied upon by Her Honour (*Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, aff'd on appeal 2018 BCCA 251 and *Firm Capital*), and the disclaimer cases relied upon by the mortgagee and the Receiver, are cases of large multi-unit projects where mortgagees would be exposed to millions of dollars in losses, dwarfing the loss of the individual purchasers, if some contracts were not disclaimed (usually with the purchasers receiving full return of their deposits). In this line of cases, the purchasers also had no proprietary

interest in the property or their deposits. In these cases disclaimers were ordered. These cases, however, are distinguishable from smaller scale real estate projects, where the mortgagee and purchaser would potentially suffer similar financial loss as to each other (which would be proportionately more devastating for the purchaser), and where the purchaser has a proprietary interest. This is the factual matrix of the case at bar and of the *Armadale* case, discussed above, where the disclaimer motion was rejected and the APS ordered to be completed. Such a finding is consonant with the general sacrosanctity that the law accords to property rights (see cases collected in *Sharpe, Injunctions and Specific Performance* Looseleaf Edition (Canada Law Book: Toronto) Release 28 (November 2019), paras. 4.590-4.620).

Issue 3: Did Justice Dietrich commit any other reviewable errors that affected her decision?

48. Jereemy further submits that in exercising the Court's discretion, Justice Dietrich committed other errors in principle, and in applying law to fact. These errors are discussed next.

(a) Justice Dietrich committed a reviewable error in viewing the Underlying Motion as seeking to vary the Receivership Order

49. Justice Dietrich, with respect, misapprehended the Court's role on the Underlying Motion by viewing the Appellant's request as seeking a variation of Justice Conway's Order appointing the Receiver, dated July 2, 2020 (the "Receiver Order"). Her Honour held that as a result, the Appellant's right of review was "limited". In fact, Justice Dietrich was being asked, as a matter of first instance, to determine whether the Receiver's proposed disclaimer of the APS was appropriate.

Endorsement of Dietrich J., Appellant's Compendium, Tab 3, pp. 19-20, paras. 30.

50. The distinction between an Order appointing a receiver and a subsequent ruling on the appropriateness of a receiver's decision to disclaim a contract can be seen in *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 ("*Romspen*"). In *Romspen*, Justice Wilton-Siegel pointed out that an Order appointing a receiver is only a procedural Order and does not affect the substantive rights of a party to challenge a decision to disclaim a contract:

> *[34] Lotco argues, however, that Romspen will benefit from the Receiver's ability to seek court approval to disclaim the Grandview APS.* ***However, the Receivership Order involves only a procedural rather than a substantive change in circumstances.*** *The Receivership Order effected a stay of any proceedings that Lotco might otherwise have brought seeking a mandatory injunction against Romspen.* ***Under the receivership, Lotco's entitlement to such relief will be determined in the context of the Receiver's motion to disclaim the Grandview APS.*** *However, to repeat, the Receivership Order, and the principles governing a receiver's right to disclaim a contract, do not alter in any way the substantive rights that Lotco can assert on that motion.* [emphasis added]
>
> *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426, at para 34, <http://canlii.ca/t/gxp1z>.

51. In other words, when compared to a true disclaimer Order, the Receivership Order was "procedural" not "substantive". It follows that the parties seeking directions on the substantive question of whether the Receiver met the legal test for his proposed disclaimer, was a matter of first instance, not a collateral attack on the Receivership Order, and not a matter on which the Appellant had a limited right of review. Indeed, there is a clear distinction between the language of Justice Conway's Order and the language of a typical disclaimer order:

Justice Conway's July 2, 2020 Order	Example of the language for an Order for Disclaimer from *Forjay Management Ltd v 0981478 BC Ltd.*, 2018 BCSC 1251, <http://canlii.ca/t/hrbx5>
3. THIS COURT ORDERS that **the Receiver is hereby empowered and authorized, but not obligated**, to act at once in respect of the Property and, without in any	[69] The order sought is granted in that the Receiver is directed to immediately disclaim all of the remaining pre-sale contracts, and take steps to remarket and sell the

way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following **where the Receiver considers it necessary or desirable**: […] (c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, **or disclaim or cease to perform any contracts of the Debtors**, including, without limitation, agreements of purchase and sale entered into by the Debtors with respect to the Property; [emphasis added]	subject units.

Order of Justice Conway, dated July 2, 2020, Appellant's Compendium, Tab 5, pp. 29-30, paras. 3 and 3(c).

52. Having treated the Appellant's motion as seeking to vary the Receivership Order, the rest of Justice Dietrich's decision became unsafe as it was viewed through the lens of a "limited" right of review, when a full right of consideration applied.

(b) Justice Dietrich erred in applying the "unfair preferences" analysis

53. In addition to the arguments regarding his propriety interest, the appellant submits that Justice Dietrich erred in principal and committed palpable and overriding errors on the balance of the disclaimer test in the case at bar.

54. Justice Dietrich erred in the application of the "unfair prejudice" branch of the disclaimer test. The Court found that "Mr. Tan would enjoy a preference and the [mortgagee] would be subordinated by the shortfall in the deposit plus any incremental amount above the agreed upon purchase price that the Receiver might realize in the market". There are two issues with this conclusion. First, there is no evidence to suggest that Jereemy did not agree to pay a fair price

under the APS. Second and more importantly, Jereemy would not be "enjoying a preference" merely by virtue of completing an APS he was legally entitled to complete.

> Endorsement of Dietrich J., Appellant's Compendium, Tab 3, p. 22, paras. 44.

55. The "unfair preferences" analysis is described in *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 in terms of comparing the parties' pre-filing [pre-Receivership] positions:

> *[41] It is in the context of maximizing realizations that many of the case authorities discuss the balancing of interests – or consideration of equities as between the parties. This will include a consideration of the relative pre-filing positions of the parties and implicitly recognize that any failure to disclaim might result in an unjustified preference in favour of one stakeholder. […]*
>
> *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), at para. 41, <http://canlii.ca/t/hrbx5>.

56. In the case at bar, Justice Dietrich's "unfair preferences" analysis began and ended with Justice Dietrich ruling that Jereemy did not possess a proprietary interest and noting that the mortgagee had priority over the appellant. Justice Dietrich failed to consider the following factors:

(a) That the appellant's deposits are not property belonging to the Developer that was available for any other creditors to capture (see proprietary interest analysis above);

(b) That it is the mortgagee that is seeking to improve its pre-Receivership position by capturing the appellant's deposits, for free and without justification, which deposits were used to improve the property; and

(c) That the alleged preference to the Appellant, if any, was neither significant nor unjustified.

57. The pre-Receivership position of the parties was that the APS would have been completed (both the Developer and Jereemy were ready, willing, and able to close the APS but for the Receivership application), and the balance of the purchaser price would have gone towards the mortgagee. It is the mortgagee that is seeking to capture Jereemy's deposit, without justification, through the Receiver's disclaiming the APS.

> Tan Affidavit, Appellant's Compendium, Tab 10, pp. 86, 118, Appellant's Exhibit Book, Tab 1, pp. 8, 93, para. 10 and exhibit "C".

58. The only known "advantage" the mortgagee would obtain through the disclaimer of the APS is that the new APS would include the value of the improvements made using the $400,000.00 deposits advanced by Jereemy to the Developer to complete the Property. Beyond a **bald assertion** by a real estate agent, Arthur Cassidy, of the alleged value of the Property on August 11, 2020 in a two-page letter, which is **not backed by any analysis**, a declaration of expert's duty, or qualifications of the alleged expert[2] (and which was delivered at 5:06 p.m. two days before the hearing), there was no evidence that the Property would be sold for a higher price.

> First Report of Rosen Goldberg Inc. (August 17, 2020), Confidential Appendix 1, Appellant's Compendium, Tab 11, pp. 145-147, Appellant's Exhibit Book, Tab 4, pp..416-418.

59. Even if continuing the APS would constitute a preference to Jereemy, which it does not, the Receiver must still determine whether the preference is without justification and whether disclaiming the APS is consistent with its fiduciary duty to all stakeholders. In particular, but for the money advanced by Jereemy to the Developer to complete the Property, it would be substantially unfinished and worth considerably less, leaving the mortgagee in a far worse financial

[2] It is telling that the purported expert in this case expressly noted that he did not carry proper insurance to be permitted to give an opinion on the value of the property.

position. It would be unfair for the mortgagee to take further advantage of Jereemy's contribution to the Property through the Receiver's disclaiming of the APS.

> See: *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 28177 (AB QB), at paras 31-32, 36-40, <http://canlii.ca/t/2bqnp>, aff'd on appeal *PricewaterhouseCoopers Inc. v. Midcoast Canada Operating Corp*, [2000] A.J. No. 1751] <https://advance.lexis.com/api/permalink/6d1dda0d-65cb-4a20-9dee-2ad59d372d65/?context=1505209>..

(c) Justice Dietrich erred in concluding that the Receiver did not breach its fiduciary duty to take into account the interests of the various stakeholders, including Mr. Tan

60. With respect, Justice Dietrich further erred in fact and law in concluding that the Receiver did not breach its fiduciary duty to all stakeholders, including Jereemy. This resulted in part from Justice Dietrich's misapprehension of the Receivership Order.

61. Her Honour held that the Receiver did not improperly rush its decision to disclaim, without considering all of the vendor's assets and the interests of all stakeholders, because the Receivership Order only covered the Mateo property and one other (see paragraph 43 of the Endorsement). In other words, Her Honour held there were no other assets for the Receiver to consider prior to determining that the disclaimer met the "necessary or desirable" standard set out in the Order of Conway J., dated July 2, 2020 (see paragraph 43 of the Endorsement). Indeed, it was Receiver's counsel who suggested that the Receivership Order only applied to two properties. In fact, both Her Honour and Receiver's counsel are incorrect. Paragraph 2 of the July 2, 2020 Receivership Order states that Rosen Goldberg is appointed Receiver "of all the assets … of the Debtor[s]". In other words, the Court and the Receiver were unfamiliar with the Receiver's mandate.

62. In addition, it is undisputed that the Receiver failed to conduct research into the Developer's full assets before going straight to disclaim the APS. The Receiver did not even obtain a proper appraisal for the Property (see para 58 of this factum). In addition, pursuant to the agreement between the Developer and the mortgagee, Camilla Court Homes Inc., Elite Homes Inc., and Junaid Sadiq personally provided guarantees for the mortgage. There is no evidence that the Receiver explored the availability of assets from any of these entities to satisfy the mortgage. There may be deposits with the municipalities and Tarion Corporation. These were not explored. It was impossible to conduct a marshalling analysis without the Receiver having conducted proper research into the Developer's full assets and alternative means of recovery available to the mortgagee.

> Tan Affidavit, Appellant's Compendium, Tab 10, p. 121, Appellant's Exhibit Book, Tab 1, p. 306, exhibit "H"; Affidavit of Gary Grunier, sworn June 20, 2020, Appellant's Compendium, Tab 9, p. 80, Appellant's Exhibit Book, Tab 1, p. 127, para 8.

63. Furthermore, after to deciding to disclaim the APS, with the ensuing capture of the Appellant's deposits for the benefit of the mortgagee, the Receiver hired a real estate lawyer to opine on the enforceability of the mortgagee's security. Before Dietrich J., the Receiver's lawyer submitted that Jereemy did not have a proprietary interest in the property. Yet his legal opinion did not support that position. The opinion stated:

> *4. We express no opinion with respect to any equitable mortgage or any unregistered postponements or other agreements not disclosed by the registered title of the Property.*
>
> *[…]*
>
> *16. Our opinion is subject to the findings of the Court in the Yan [sic.] Motion with respect to, among other things, the priority of the Security vis-à-vis the Tan APS.*

First Report of Rosen Goldberg Inc. (August 17, 2020), Appendix B, Appellant's Compendium, Tab 11, pp. 136, 138, Appellant's Exhibit Book, Tab 4, pp. 407, 409.

64. The evidence suggests that the Receiver first decided to disclaim the APS without an opinion about Jereemy's proprietary/equitable claims. The Receiver then continued to insist on the disclaimer after a non-confirmatory legal opinion. All the while, the Receiver did not fully explore the assets available for realization. In light of the above, it is submitted that the Receiver clearly rushed to disclaim the APS without considering whether disclaimer was appropriate and without considering the interests of Jereemy. This was contrary to settled law that the Receiver owed fiduciary duties to all parties. Breach of that duty has been a basis to decline disclaimers.

Bank of Montreal v. Probe Exploration Inc., 2000 CanLII 28177 (AB QB), at paras 31-32, 36-40, <http://canlii.ca/t/2bqnp>, aff'd on appeal PricewaterhouseCoopers Inc. v. Midcoast Canada Operating Corp, [2000] A.J. No. 1751] <https://advance.lexis.com/api/permalink/6d1dda0d-65cb-4a20-9dee-2ad59d372d65/?context=1505209>.; 1565397 Ontario Inc. (Re), 2009 CanLII 32257 (ON SC), at paras 60 and 80, <http://canlii.ca/t/2441p>; Armadale Properties Ltd. v 700 King Street (1997) Ltd., 2001 CanLII 28461, at paras 12, 15, <http://canlii.ca/t/1wfld>.

(d) Justice Dietrich erred on the equities branch of the disclaimer test

65. Justice Dietrich's ultimate weighing of equities was affected by the errors discussed above and, with respect, is not entitled to deference. Justice Dietrich failed to speak to the legislative guidance, in analogous circumstances, that financial hardship is a factor to be considered when a Court decides a disclaimer case. In addition, in none of the cases relied upon by Justice Dietrich was there a serious concern about whether the Receiver fulfilled its fiduciary duty to someone in Jereemy's position by making the disclaimer.

66. In addition, Jereemy's options for the recovery of his deposit are very limited. Jereemy may be able to claim $100,000 from the Tarion guarantee fund. He may also be able to recover the $100,000 portion of his deposit which was paid in trust to the listing agent, if he releases the agent and the builder from liability. That still leaves a gap of at least $300,000. This

financial hardship is disproportionate to any loss that will be suffered by the mortgagee, which will recover the vast majority of the moneys it advanced.

> Tan Affidavit, Appellant's Compendium, Tab 10, pp. 87-88, Appellant's Exhibit Book, Tab 1, p. 10, para. 14; First Report of Rosen Goldberg Inc. (August 17, 2020), Confidential Appendix 2, Appellant's Compendium, Tab 11, p. 148, Appellant's Exhibit Book, Tab 4, p. 419; Affidavit of Gary Grunier, sworn June 20, 2020, Appellant's Compendium, Tab 9, p. 81, Appellant's Exhibit Book, Tab 1, p. 128, para. 13.

67. The potential loss of significant amounts of deposits, even with efforts to mitigate, distinguishes the case at bar from other cases in which contracts for the sale of property were disclaimed. In the bulk of those cases, the contract was disclaimed but the full deposit appeared to be protected. Where purchasers did stand to lose money paid as deposit or otherwise, those contracts either (a) contained a purchase price that was significantly under market value for the properties; or (b) related to the sale of single units in a multi-unit project, and presented onerous practical obstacles in marketing that project, which formed the only substantial asset in the receivership, and would likely lead to multi-million dollar losses to the mortgagee.

> *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 527 (CanLII), <http://canlii.ca/t/hrbx5> at paras. 92-93, 127; *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 1251 (CanLII), at paras 61-62, <http://canlii.ca/t/ht5ts>; *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 (CanLII), <http://canlii.ca/t/fsk46> at para 14; see also *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 (CanLII), <http://canlii.ca/t/1zd1k>, in which the reasons do not indicate that any deposit moneys paid would be lost.

68. If it is necessary to consider the balance of equities, then the equities favour Jereemy.

Issue 4: Other Issues

69. Her Honour, in allowing the disclaimer, relied on this Court's Ruling in *Third Eye Capital Corporation v. Resources Dianor Inc.* ("*Third Eye*"). Importantly, *Third Eye* is not a disclaimer case, but pertains to a related remedy, not sought by the Receiver in this case – "vesting

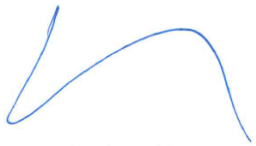
out". In any event, *Third Eye*, applies a test for vesting out that is similar to that which applies on a disclaimer application, and that would be defeated by the proprietary interest and equities in the case.

> Endorsement of Dietrich J., Appellant's Compendium, Tab 3, p. 23, para. 48; *Third Eye Capital Corporation v. Resources Dianor Inc.*, 2019 ONCA 508, at paras. 108-110, <http://canlii.ca/t/j12dh>.

PART V - ORDER SOUGHT

70. The moving party respectfully requests an order from this Court directing the Receiver to complete the APS described above, on the existing terms or with modifications as necessary. In the alternative, the moving party respectfully requests an order from this Court directing the Receiver to provide compensation to the moving party in a fair and reasonable amount, following the sale of the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



November 19, 2020

Richard Macklin and Wei Jiang
Lawyers for interested party Jereemy Tan

Court of Appeal File No. C68751
Ontario Superior Court File No. CV-20-00643021-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

C & K MORTGAGE SERVICES INC.

Applicant (Respondent in Proposed Appeal)

- and –

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30

PART VI - CERTIFICATE

I estimate that one (1) hour will be needed for my oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

November 19, 2020

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SCHEDULE "A" – TABLE OF AUTHORITIES

1. *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC), <http://canlii.ca/t/2441p>
2. *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CanLII 28461, <http://canlii.ca/t/1wfld>
3. *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 28177 (AB QB), <http://canlii.ca/t/2bqnp>
4. *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, <http://canlii.ca/t/1zd1k>
5. Ben Air Systems Inc. v. Toronto Transit Commission et al., 2018, 2018 ONSC 2375 (CanLII), <http://canlii.ca/t/hrjjb>
6. *Beaufort Realties et al. v. Chomedey Aluminum*, 1979 CanLII 66 (ON CA), <http://canlii.ca/t/1vm6s>
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8. *Bristol Alliance Nominee No. 1 Limited and others v Bennett and others*, [2013] EWCA Civ 1626 (England and Wales Court of Appeal), <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1626.html>
9. *Bul River Mineral Corporation (Re)*, 2014 BCSC 645 (CanLII), <http://canlii.ca/t/g6jzd>
10. *Fioravanti v. OLG*, 2018 ONSC 3777 (CanLII), <http://canlii.ca/t/hsqjx>
11. *Firm Capital Mortgage Fund Inc.* v 2012241 Ontario Ltd. ("Firm Capital"), 2012 ONSC 4816,<http://canlii.ca/t/fsk46>.
12. *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), <http://canlii.ca/t/hrbx5>,
13. *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 1251 (CanLII), <http://canlii.ca/t/ht5ts>
14. *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251, <http://canlii.ca/t/hsw9k>
15. *Housen v. Nikolaisen*, 2002 SCC 33,<http://canlii.ca/t/51tl>
16. *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA), <http://canlii.ca/t/g19k5>, <https://advance.lexis.com/api/permalink/7262e279-b0d2-461c-86c2-1c29b26145a1/?context=1505209>
17. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, <http://canlii.ca/t/gtpvn>
18. *Lien Trustee v. Toronto-Dominion Plaintiff Bank*, 1994 CanLII 729 (ON CA), <http://canlii.ca/t/6jxk>, <https://nextcanada.westlaw.com/Document/I10b717cf33cb63f0e0440003ba0d6c6d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)>.
19. *Matthew Brady Self Storage Corporation v InStorage Limited Partnership*, 2014 ONCA 858,<http://canlii.ca/t/gfgxx>.
20. Minto v Jones (Walker v Jones), [2008] OJ No 3687< https://advance.lexis.com/api/permalink/19f01887-e111-49f9-a993-63464d48998a/?context=1505209>

21. *McGrath v. B.G. Schickedanz Homes Inc*., [2000] O.J. No. 4161, <https://advance.lexis.com/api/permalink/2d3642a5-ebd5-4601-b9ef-27f11180475a/?context=1505209
22. *New Skeena Forest Products Inc. et al v. Kitwanga Lumber Co. Ltd*., 2004 BCSC 1818, <http://canlii.ca/t/1p29c>
23. *Pan Canadian Mortgage Group III Inv. v. 0859811 B.C. Ltd.* , 2014 BCCA 113, <http://canlii.ca/t/g68dk>
24. PricewaterhouseCoopers Inc v Midcoast Canada Operating Corp, [2000] AJ No 1751 <https://advance.lexis.com/api/permalink/6d1dda0d-65cb-4a20-9dee-2ad59d372d65/?context=1505209>.
25. *Raki Holdings Inc. v. Lionheart Enterprises Inc.*, 2018 ONSC 6421, <http://canlii.ca/t/hvxz4>,
26. *Raki Holdings Inc. v Lionheart Enterprises Inc.*, 2019 ONCA 786,<http://canlii.ca/t/j2nnn>.
27. *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426, <http://canlii.ca/t/gxp1z>
28. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, <http://canlii.ca/t/g88q1>;
29. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), [2010] 1 SCR 69, <http://canlii.ca/t/27zz2>
30. *T.G. Appliance Group v Legend Homes*, 2016 ONSC 7802 (CanLII), <http://canlii.ca/t/gw1zj>

SCHEDULE "B" – STATUTES

Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36)

Disclaimer or resiliation of agreements

- **32 (1)** Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
- **Marginal note: Court may prohibit disclaimer or resiliation**

  (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
- **Marginal note: Court-ordered disclaimer or resiliation**

  (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
- **Marginal note: Factors to be considered**

  (4) In deciding whether to make the order, the court is to consider, among other things,

    - **(a)** whether the monitor approved the proposed disclaimer or resiliation;
    - **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
    - **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Disclaimer or resiliation of agreements

- **65.11 (1)** Subject to subsections (3) and (4), a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) may — on notice given in the prescribed form and manner to the other

parties to the agreement and the trustee — disclaim or resiliate any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or resiliation.

- **Marginal note: Individuals**

  (2) In the case of an individual,

  - **(a)** they may not disclaim or resiliate an agreement under subsection (1) unless they are carrying on a business; and
  - **(b)** only an agreement in relation to the business may be disclaimed or resiliated.

- **Marginal note: Court may prohibit disclaimer or resiliation**

  (3) Within 15 days after the day on which the debtor gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

- **Marginal note: Court ordered disclaimer or resiliation**

  (4) If the trustee does not approve the proposed disclaimer or resiliation, the debtor may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement be disclaimed or resiliated.

- **Marginal note: Factors to be considered**

  (5) In deciding whether to make the order, the court is to consider, among other things,

  - **(a)** whether the trustee approved the proposed disclaimer or resiliation;
  - **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable proposal being made in respect of the debtor; and
  - **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

SCHEDULE “C” – Excerpt from the interested party factum (lower court)

Court File No. CV-20-00643021-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT,* R.S.O. 1990, C. 30

B E T W E E N:

C & K MORTGAGE SERVICES INC.

Applicant

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

FACTUM OF THE MOVING PARTY

August 17, 2020

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lose money paid as deposit or otherwise, those contracts either (a) contained a purchase price that was significantly under market value for the properties;[33] or (b) related to the sale of single units in a multi-unit project, and presented onerous practical obstacles in marketing that project, which formed the only substantial asset in the receivership, and would likely lead to multi-million dollar losses to the mortgagee.[34]

38. It is unjust for Jereemy to bear the disproportionate financial hardship. First, Jereemy has a proprietary interest in the lands. Jereemy paid $500,000 in deposit money on account of a contract to purchase specified real estate (180 Mateo Place). He thus has a proprietary "purchaser's lien" on the property.[35] The customizations to the house would, in non-insolvency circumstances, entitle him to seek specific performance of the APS.[36] While the APS does contain a "no interest in property" clause, the clause does not state that it survives the vendor's breach (of, amongst other things, failing to close on account of being "put into"

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[33] *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 527 (CanLII), <http://canlii.ca/t/hrbx5> at paras 92-93; *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 1251 (CanLII), <http://canlii.ca/t/ht5ts> at paras. 61-62

[34] *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.,* 2012 ONSC 4816 (CanLII), <http://canlii.ca/t/fsk46> at para 14.

[35] *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA), <http://canlii.ca/t/g19k5>.

[36] Specific performance was not available to the purchasers in some disclaiming cases because the receiver was required to perform further steps, such as construction or obtaining further financing, before the transfer of the properties was possible (see *Firm Capital* paras 28-29; *Forjay* 527 at paras 83-84; *bcIMC* at para 75). In contrast, in the case at bar, the receiver has on its own volition taken steps to complete the construction of the Property. This Court has stated that, in such circumstances, specific performance is available to a purchaser (see 1565397 Ontario Inc. (Re), [2009] O.J. No. 2596 (S.C.J.) at para. 34). There is no allegation or evidence showing that further steps are required to transfer the Property to Jereemy, save for the payment of the balance of the purchase price, which Jereemy is ready, willing, and able to pay. Further, Jereemy is not currently bringing a claim for specific performance before this Court, and therefore the availability of the specific performance remedy is not being litigated. Rather, Jereemy is asking the Court to exercise its statutory and equitable jurisdiction to direct the Receiver to complete the APS. See *2011680 Ontario Inc. v. 968831 Ontario Inc*., 2011 ONSC 4595 (CanLII), <http://canlii.ca/t/fmhq3>

receivership), and therefore does not survive the breaches.[37] Similarly, as stated by Lax J., in *Armadale*:

> As the Trustee [or receiver] stands in the shoes of the bankrupt [or a debtor], it cannot now complain of the very loss to the estate that the bankrupt brought about. [38]

39. Second, Jereemy signed a contract of adhesion. He is a first time home buyer and a newcomer to Canada who simply wished to be able to close as soon as possible. Compared to the mortgagee, he was not in a position to protect himself against the risks resulting from these receivership proceedings. In *Armadale*, Lax J. dismissed the trustee-in-bankruptcy's argument that the purchaser ought to bear the risk of paying his deposit directly to the vendor (in that case - a related party designated by the vendor):

> The Trustee submitted that Goldschlager [purchaser] was the author of his own misfortune in providing the entire purchase monies as deposit and it is therefore he and not the creditors of 700 King [vendor and company in bankruptcy] who should bear this loss. In my view, if there is culpability, it does not rest with Goldschlager. He had no relationship with Crenian [principal of the company in bankruptyc] except as a purchaser of real estate. He has offered an explanation for providing the deposit he did. Although Peregrine Homes Ltd. [company related to the principal that received the deposit] had no beneficial interest in Unit 8, it was the bankrupt that gave Crenian apparent authority to act as he did. Prior to the bankruptcy, 700 King could not assert as against Goldschlager that Crenian lacked the authority to direct payment of the funds to Peregrine Homes Ltd. As the Trustee stands in the shoes of the bankrupt, it cannot now complain of the very loss to the estate that the bankrupt brought about.[39]

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[37] *McGrath v. B.G. Schickedanz Homes Inc.*, [2000] O.J. No. 4161 (S.C.J) at paras 64, 67. See also *T.G. Appliance Group v Legend Homes*, 2016 ONSC 7802 (CanLII), <http://canlii.ca/t/gw1zj>.

[38] *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC), <http://canlii.ca/t/1wfld> at para 14

[39] *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC), <http://canlii.ca/t/1wfld> at para 14

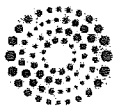
SCHEDULE "D" – Excerpts from Robert J. Sharpe, *Injunctions and Specific Performance* Looseleaf (2nd ed), paras. 4.590-4.620

CANADA LAW BOOK

Injunctions and Specific Performance

LOOSELEAF EDITION

The Honourable
Mr. Justice Robert J. Sharpe
Court of Appeal for Ontario



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Injunctions and Specific Performance

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the fact that the differences in wealth and ability to bargain render efficiency analysis much less precise than it first appears to be. The ability and willingness to pay is clearly affected by wealth and, hence, for every different distribution of wealth, there is a different efficient outcome.[132] Since efficiency analysis is determined in part by the respective wealth of the parties, it surely follows that efficiency alone is unlikely to produce a result which can be described as just, once distributive issues are taken into account.[133]

4.570 Economists do not, in fact, believe that all people always behave in a rational, economic and wealth-maximizing way, or that the existing distribution of wealth must not be tampered with. These assumptions are merely devices to make possible the construction of theoretical models which will reveal certain patterns or relationships which might not otherwise be seen.[134] The analysis is at a general and abstract level; it is not intended to solve particular problems. The lawyer's immediate objection to such assumptions derives from the legal need to develop theories and rules which facilitate the solution of each particular problem. A general theory which rests on such assumptions cannot be relied upon for this purpose.

4.580 At the same time, however, these criticisms are not a reason for totally rejecting economic analysis but rather suggest that it must be viewed critically and employed cautiously. Some of the leading exponents of economic analysis are explicit about the shortcomings of the formal analytic model-building approach.[135] Similarly, lawyers should be conscious of the advantages of an analysis which does tend to highlight or identify certain relationships and general theoretical points which might otherwise not be apparent. Economic analysis of the pollution problem provides no panacea; neither is it an exercise that the law should ignore. From the earlier discussion of the case-law, it does seem clear that the goal of efficiency plays an important part in the resolution of nuisance disputes, including the selection of the appropriate remedy. To the extent economists can help improve analysis already undertaken, that contribution should be welcomed. In particular, the perception that greater explicit attention should be paid to the fact that market forces will operate in

Heathrow Airport with his Post Office Savings book ready to strike a bargain over Concorde is risible.

132 Burrows and Veljanovski, "Introduction", *The Economic Approach to Law*, *op. cit.*, footnote 121, at p. 12: "for each different distribution of income, there is a different socially efficient outcome". Calabresi and Melamed, *op. cit.*, footnote 115, at pp. 1095-6.

133 Rawls, *A Theory of Justice*, Rev. ed. (Cambridge, Harvard University Press, 1999), at pp. 59-65.

134 Calabresi and Melamed, *op. cit.*, footnote 115, at p. 1128; Burrows and Veljanovski, *op. cit.*, footnote 132, at pp. 14-15.

135 Calabresi and Melamed, *ibid.*, especially the passages quoted, *supra*, footnote 130.

some cases to alter the legal result is an important one. The degree to which consideration of post-judgment bargaining helps explain and elucidate the significance of legal results suggests that courts and lawyers can benefit from taking economic analysis into account.

4. Trespass

4.590 Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favouring injunctive relief is even stronger than in the nuisance cases. Especially where the trespass is deliberate and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction. A damages award in such circumstances amounts to an expropriation without legislative sanction.[136] The courts have expressly condoned injunctive relief, even where the balance of convenience is overwhelmingly in favour of the defendant.[137] In trespass, there has been less concern than in nuisance with the problem of "extortion".[138] Even if the plaintiff is merely holding out for the highest possible price, and suffers no out-of-pocket loss because of the trespass, the courts have awarded injunctions.[139] Such orders may be said to vindicate the plaintiff's right to exploit the property for whatever it is worth to the defendant and prevent the defendant from circumventing the bargaining process.[140]

4.600 Yet even here, there may well be limits to the granting of injunctive relief and the present state of the law is by no means entirely settled. The difficult cases involve temporary interferences. In *Woollerton & Wilson Ltd. v. Richard Costain Ltd.*,[141] the plaintiff sued for an injunction to enjoin the defendant from permitting the jib of a crane to swing over the plaintiff's premises.

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136 See, *e.g.*, *Krehl v. Burrell* (1878), 7 Ch. D. 551.

137 See cases cited, *infra*, 4.610; *Stocker v. Planet Building Society* (1879), 27 W.R. 877 (C.A.); *RMH Teleservices International Inc. v. B.C.G.E.U.* (2003), 223 D.L.R. (4th) 750, 120 A.C.W.S. (3d) 790 (B.C.S.C.) (enjoining a union from soliciting members in the plaintiff employer's parking lot); *Gagné et al v. Sullivan et al* (2017), 287 A.C.W.S. (3d) 232, 2017 NBBR 228 (N.B. Q.B.), citing this passage at para. 39.

138 *Supra*, 4.100 and 4.110.

139 *Cooper v. Crabtree* (1882), 20 Ch. D. 589 (C.A.), at pp. 592-3, *per* Jessel M.R.; *Goodson v. Richardson* (1873), 9 Ch. App. 221. Proof of damage is not required: see, *e.g.*, *Long v. Roberts* (1965), 55 D.L.R. (2d) 195, [1966] 1 O.R. 771 (H.C.J.).

140 *Goodson v. Richardson*, *supra*; *Eardley v. Granville* (1876), 3 Ch. D. 826 at p. 832, *per* Jessel M.R.; Sharpe and Waddams, "Damages for Lost Opportunity to Bargain" (1982), 2 Ox. J.L.S. 290; *1465152 Ontario Ltd. v. Amexon Development Inc.* (2015), 381 D.L.R. (4th) 66, 330 O.A.C. 344 (Ont. C.A.) citing this passage at para. 27, leave to appeal refused 2015 CarswellOnt 10072, 2015 CarswellOnt 10073 (S.C.C.).

141 [1970] 1 W.L.R. 411 (Ch.).

This caused no harm or apprehension of injury to the plaintiff and, as Stamp J. put it,[142] "something more than £250 which the defendants have offered would have been required to induce [the plaintiffs] to change their mind" and permit the crane to swing overhead. As the construction was well in progress, an injunction would have worked a severe hardship on the defendants. Stamp J. held that, because the plaintiffs had made out a case of trespass, they were entitled to an injunction but that, in the circumstances, it was appropriate to suspend the order until the defendants had the opportunity to finish the job.[142a] He emphasized that the defendants got themselves into the position of being "held up to ransom, not by any flagrant disregard of the plaintiff's proprietary rights but by inadvertence".[143]

4.610 While denial of the injunction claim at the interlocutory stage would not preclude the plaintiff from proceeding with a claim for damages, Stamp J. assumed that no damages would be recoverable as the plaintiff suffered no loss.[144] This, it is submitted, is doubtful. The plaintiff should be given some remedy for the loss of opportunity to bargain for whatever the property right was worth.[145] As the defendant had apparently not acted in deliberate disregard of the plaintiff's right, a damages award seems preferable to an injunction in the circumstances. However, a Newfoundland case[146] posed the same problem and the court granted an injunction. Goodridge J. held that, despite the "tremendous inconvenience" to the defendant and the public, an injunction was called for: "Under our system of law, property rights are sacrosanct. For that reason, the rules that generally apply to injunctions do not always apply in cases such as this. The balance of convenience and other matters may have to take second place to the sacrosanctity of property rights in matters of trespass."[147] Faced with a similar problem, an

142 *Supra*, at p. 413.

142a See also *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.* (2017), 278 A.C.W.S. (3d) 613, 2017 NSCA 37 (N.S.C.A.) (refusing a stay pending appeal of a similar order).

143 *Supra*, at p. 416.

144 See also *Patel v. W.H. Smith (Eziot) Ltd.*, [1987] 1 W.L.R. 853 (C.A.).

145 Sharpe and Waddams, *op. cit.*, footnote 140; *Jaggard v. Sawyer*, [1994] 1 W.L.R. 268 (C.A.).

146 *Lewvest Ltd. v. Scotia Towers Ltd.* (1981), 126 D.L.R. (3d) 239, 10 C.E.L.R. 139 (Nfld. S.C.T.D.).

147 *Supra*, at p. 240 D.L.R. See also *Hamilton (City) v. Loucks* (2003), 232 D.L.R. (4th) 362, 40 C.P.C. (5th) 368 (Ont. S.C.J.) (injunction to restrain protest regarding proposed use of lands owned by a municipality); *John Voortman & Associates Ltd. v. Haudenosaunee Confederacy Chiefs Council*, [2009] 3 C.N.L.R. 117 at paras. 36-37, 83 R.P.R. (4th) 102 (Ont. S.C.J.). See also *Calgary Airport Authority v. Canadian Centre for Bio-Ethical Reform*, [2014] 11 W.W.R. 397, 244 A.C.W.S. (3d) 682 (Alta. Q.B.), citing this passage at para. 42; *Enbridge Pipelines Inc. v. Jane Doe* (2014), 243 A.C.W.S. (3d) 434, 2014 ONSC 4716 (Ont. S.C.J.), citing this

Australian court also came to the conclusion that an injunction must be awarded[148] and the result in *Woollerton* has been questioned by the English Court of Appeal.[149] In *Patel v. W.H. Smith (Eziot) Ltd.*[150] it was said that where the plaintiff's title was undisputed, absent "exceptional circumstances",[151] an injunction should be granted even if the trespass caused the plaintiff no harm.[152] The English Court of Appeal applied this principle in a case involving nomadic "travellers" who camped on publicly owned lands asserting a lack of suitable alternative accommodation:

> . . . the grant by the court, in a society governed by the rule of law, of an order to protect an established right cannot, in the absence of some countervailing right (and none is asserted here), be characterised as disproportionate.[153]

The court added that the authorities could be expected to consider their public law duties and to exercise appropriate discretion in the enforcement of such an injunction. The Supreme Court of the United Kingdom upheld the injunction, commenting that an injunction should not be withheld just because it is likely to be disobeyed or difficult to enforce.[153a]

4.620 In another English case,[154] the defendant was under compulsion of a municipal order to repair its building but could not do so without gaining access to the plaintiff's property. An injunction was awarded to the plaintiff who steadfastly refused permission. Although the defendant was caught between both "the Scylla of the dangerous building and . . . the Charybdis of trespassing upon the plaintiff's land",[155] the court held it had no choice but to award injunctive

passage at para. 10; *Payne v. Elfreda Freeman Alter Ego Trust (2015)* (2019), 303 A.C.W.S. (3d) 163, 2019 NSSC 34 (N.S. S.C.) citing this passage at para. 29, but refusing an injunction to remove barriers to a right of way where the defendant had provided alternate access to the plaintiff's property, additional reasons (2019), 303 A.C.W.S. (3d) 28, 2019 NSSC 51 (N.S. S.C.).

148 *Graham v. K.D. Morris & Sons Pty. Ltd.*, [1974] Qd. R. 1.

149 *Charrington v. Simons & Co. Ltd.*, [1971] 2 All E.R. 588 (C.A.), at p. 592, *per* Russell L.J.; *Jaggard v. Sawyer, supra*, footnote 145, at pp. 278-9. The substantive law question of trespass to air space is discussed in *Bernstein v. Skyviews & General Ltd.*, [1977] 2 All E.R. 902 (Q.B.); *Manitoba v. Air Canada* (1978), 86 D.L.R. (3d) 631, [1978] 2 W.W.R. 694 (Man. C.A.), affd [1980] 2 S.C.R. 303, 111 D.L.R. (3d) 513.

150 *Supra*, footnote 144.

151 Referring on this point to *Behrens v. Richards*, [1905] 2 Ch. 614, discussed, *infra*, 4.660 and 4.670.

152 See also *Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands Developments) Ltd.* (1987), 38 B.L.R. 87.

153 *Secretary of State for the Environment, Food and Rural Affairs v. Meier*, [2009] 1 W.L.R. 828 (C.A.), at para. 56.

153a *Secretary of State for the Environment, Food and Rural Affairs v. Meier*, [2010] 1 All E.R. 855, [2009] 1 W.L.R. 2780 (U.K.S.C.).

154 *John Trenberth Ltd. v. National Westminster Bank Ltd.* (1979), 39 P. & C.R. 104 (Ch.).

relief to the plaintiff. A possible distinguishing factor between this case and *Woollerton* was that here the defendant knew all along that he was acting against the wishes and rights of the plaintiff, and was deliberately violating a property right he knew the plaintiff intended to assert.

4.625 In cases where the defendant reasonably requires access to a neighbour's property, it is submitted that there is much to be said for refusing an injunction and ordering monetary compensation to the plaintiff. It is certainly not entirely without precedent. In an early Manitoba decision,[156] where a similar problem arose, an injunction was refused on the grounds that the injury was trifling and temporary. Galt J. said as follows:

> . . . where an adjoining land owner is desirous of erecting a building upon his property, it is inevitable that to a certain extent the workmen will frequently and almost of necessity do acts which in the strict eye of the law are legal trespasses upon the adjoining owner; but in such cases one would have supposed that people . . . would apply their reason, common sense and ordinary forbearance, rather than go to law over trifles.[157]

4.630 Even Jessel M.R., a stalwart champion of property rights, suggested in one decision[158] that no injunction should be awarded where a neighbour is merely erecting scaffolding temporarily to effect some necessary repair.[159]

4.640 While such cases technically amount to trespass, it might be preferable, if only from the remedial point of view, to adopt the analysis in two cases which treat the interference as a nuisance.[160]

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155 *Supra*, at p. 106, *per* Walton J.

156 *Bertram v. Builders' Ass'n of North Winnipeg* (1915), 23 D.L.R. 534, 31 W.L.R. 430 (Man. K.B.). See also *Douglas v. Bullen* (1912), 3 D.L.R. 898, 3 O.W.N. 1619 (H.C.), and 12 D.L.R. 652, 4 O.W.N. 1587 (S.C.); *Vaz v. Jong* (2000), 32 R.P.R. (3d) 271 (Ont. S.C.J.) (granting an injunction in an encroachment case but affirming the discretion to refuse one).

157 *Bertram*, *supra*, at pp. 539-40 D.L.R.

158 *Leader v. Moody* (1875), L.R. 20 Eq. 145 at p. 153.

159 *Cash & Carry Cleaners Ltd. v. Delmas* (1973), 44 D.L.R. (3d) 315, 7 N.B.R. (2d) 101 (S.C. App. Div.), appears somewhat ambivalent. Knowing the plaintiff would object, the defendant went ahead with repair work which interfered with the plaintiff's access. The court upheld an award of exemplary damages on the grounds that the defendant had acted high-handedly. The court also reluctantly upheld an injunction restraining parking on the plaintiff's property: see at p. 317 D.L.R., *per* Hughes C.J.N.B.:

> Where a trespass is trifling and causes no appreciable injury to the plaintiff a Court will not grant injunctive relief. Where, however, a plaintiff's rights in property are violated and threatened the plaintiff as a general proposition is entitled to protection of rights by injunction if that appears to be necessary.
>
> While I reluctantly uphold the permanent injunction restraining trespass of the plaintiff's property by the parking of vehicles I do so only because of the absence of any other satisfactory remedy for dealing with petty trespasses, such as is found in some of the other Provinces.

160 *Kingsbridge Development Inc. v. Hanson Needler Corp.* (1990), 71 O.R. (2d) 636,

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-and-

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COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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