

Court File No.:

COURT OF APPEAL FOR ONTARIO

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

BETWEEN:

B&M HANDELMAN INVESTMENTS LIMITED, FLORDALE HOLDINGS LIMITED M. HUEL HOLDINGS INC., 1530468 ONTARIO LTD., MAXOREN INVESTMENTS, AND SHEILACO INVESTMENTS INC.

Applicants

- and -

CHRISTINE DROTOS

Respondent

NOTICE OF APPEAL

THE APPELLANT, PILLAR CAPITAL CORPORATION (CAYMAN) (the "APPELLANT"), APPEALS to the Court of Appeal from the Order and decision of The Honourable Justice Dunphy of the Ontario Superior Court of Justice, Commercial List, dated November 26, 2018, discharging a Home Trust first mortgage (the "**First Mortgage**") and as a result invalidating the assignment of the First Mortgage to the Appellant (the "**Assignment**"), which Assignment was registered on title to the real

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property municipally known as 4 Birchmount Road, Toronto, Ontario (the "Birchmount Property") on May 5, 2015.

THE APPELLANT ASKS THAT:

1. The Honourable Justice Dunphy's Order discharging the First Mortgage be set aside;
2. A Declaration be made that the Assignment of the First Mortgage to the Appellant is valid and enforceable;
3. An Order be issued directing the Receiver in this Receivership to pay to the Appellant the proceeds of the First Mortgage including all interest and all expenses properly applied to the First Mortgage;
4. Costs of this appeal; and
5. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

6. The Appellant obtained the Assignment of the First Mortgage on the Birchmount Property and registered it on title on May 5, 2015;
7. The Appellant had advanced funds in the amount of approximately \$1.37M for the Assignment of the First Mortgage to Home Trust on or about August 15, 2014;

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8. In discharging the First Mortgage and invalidating the Assignment, the Honourable Justice Dunphy committed a number of errors that warrant the intervention of this Honourable Court. In particular, the Honourable Justice Dunphy erred by:

- (a) failing to consider or apply the doctrine of equitable assignment given that the Appellant had advanced funds to Home Trust on or about August 15, 2014 in consideration for the Assignment;
- (b) failing to recognize that, as a pre-condition to the registration of the Assignment of the First Mortgage, the Appellant complied with the provisions of Section 2 of the *Mortgages Act*, as required. In fact, the Appellant obtained the consent of Ms. Droto's trustee in bankruptcy which, amongst other things, delayed the registration of the Assignment;
- (c) failing to consider that even if the First Mortgage was discharged, the Appellant would continue, as a matter of law, to retain Home Trust's position as first mortgagee, thereby stepping into Home Trust's shoes in accordance with the doctrine of equitable subrogation;
- (d) discounting uncontroverted evidence of communications between the Appellant's solicitor, Anita Verma, and Home Trust evidencing Home Trust's agreement to assign the First Mortgage

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to the Appellant, for value, resulting in the registration of the Assignment;

- (e) ignoring the registration of the Assignment on title, which Assignment was with the approval of Home Trust;
- (f) failing to find that the payment made by the Appellant to Home Trust was consideration for the Assignment that was ultimately and properly registered on title, with the consent of the trustee in bankruptcy in accordance with section 2 of the *Mortgages Act*;
- (g) concluding that Home Trust provided the Assignment for the purpose of avoiding litigation with the Appellant, with no evidence to support that conclusion, and with no argument by the Applicant to that effect;
- (h) finding that the Appellant is not entitled to any credit for the payment of municipal tax arrears without hearing any submissions from any party;
- (i) misapprehending the evidence;
- (j) misapplying the applicable law;
- (k) failing to consider all of the evidence before the Court; and
- (l) such further and other grounds as counsel may advise and this Honourable Court permit;

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Automatic Right of Appeal

9. The Appellant relies on Section 101 of the *Courts of Justice Act*, and Rule 41 of the *Rules of Civil Procedure*, granting it an automatic right of appeal from a final order of a Judge of the Superior Court.

Leave to Appeal, if Necessary

10. In the alternative, should the above referenced sections not apply, the Appellant seeks leave to appeal the decision of the Honourable Justice Dunphy pursuant to section 193(e) of the *BIA*;
11. Pursuant to section 193(e) of the *BIA*, an appeal lies to the Court of Appeal by leave of a judge of the Court of Appeal;
12. Granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way;
13. Here, leave should be granted because:
- (a) the appeal is *prima facie* meritorious because the Order under appeal invalidated an Assignment properly granted for value and properly registered on title;
 - (b) there will be no non-compensable prejudice as the funds in issue will stay in the hands of the Receiver until the appeal is determined;
 - (c) such further and other grounds as counsel may advise and this Honourable Court permits.

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Proceedings commenced at Toronto

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