Court of Appeal File No.
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 INTERESTED PARTY/MOVING PARTY, JEREEMY TAN (RE: MOTION TO EXTEND TIME ETC.)

September 23, 2020

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## PART I - OVERVIEW

1. The matter underlying this motion to extend time deals with the receivership proceedings for the property known municipally as 180 Mateo Place in Mississauga, Ontario (the "Property"). Jereemy Tan ("Jereemy", the "Interested Party" or "Moving Party"), was the purchaser in an agreement of purchase and sale for the Property (the "APS"), which was being developed by Elite Homes Inc. (the "Developer"). Prior to the closing date, the first mortgagee, C & K Mortgage Services Inc. (the "mortgagee") obtained an interim order which scuttled the closing scheduled for June 26, 2020. Subsequently, on July 2, 2020, the mortgagee obtained an Order appointing Rosen Goldberg Inc. as receiver (the "Receiver").

2. Subsequent to July 2, 2020, the Receiver advised the Interested Party that he had decided to disclaim the APS. This led to the Interested Party, mortgagee and Receiver to agree to seek directions from the Superior Court with respect to whether the disclaimer of the APS was appropriate (the "Directions Motion"). Justice Dietrich heard the matter and released a decision on August 27, 2020, that authorized the Receiver to proceed with the disclaimer.

3. The Interested Party has filed a motion seeking, amongst other things, an extension of time for delivering a notice of appeal of Her Honour's Ruling[1]. The deadline to deliver a notice of appeal was **September 8, 2020**. Through inadvertence of counsel, the date for filing the notice of appeal was missed. The Interested Party, through counsel, notified the Receiver and counsel for the mortgagee six days later, on Monday, **September 14, 2020**, of the intended appeal. A motion to extend time and a draft notice of appeal were delivered on **September 17, 2020**.

4. As set out below, it is submitted that an Order extending time to appeal should be granted because the Interested Party missed the deadline by less than a week, there is merit to the proposed appeal, and the other parties will not suffer prejudice if the extension of time is granted.

5. If time for service is extended, there is the next issue of whether the appeal is as of right or with leave of this Court. The Interested Party submits that the appeal is as of right.

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[1] Notice of Motion to Extend Time Etc., Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 1. p.1

However, as the proceedings are time sensitive, the notice of motion allows for this issue to be contested now, to the extent the Receiver or the mortgagee are so advised.

6. If the appeal is as of right, and the leading case law suggests it is, the Interested Party has included- as Schedule "A" to the Notice of Motion, the proposed Notice of Appeal. Moreover, in an appeal as of right scenario, under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C.B-3, BIA, s. 195, the lower court proceedings are stayed, the substratum of the appeal (the Property or the $500,000 in deposit funds) are protected and the appeal will not be rendered nugatory by a proposed sale by the Receiver of the property to a third party.

7. If the appeal requires leave, which the Interested Party disputes, the Interested Party, nonetheless, has included in Schedule "B" to the Notice of Motion, a proposed Notice of Motion for Leave to Appeal. In addition, the interested party has sought relief in the motion to extend etc. under s. 134(2) of the *Courts of Justice Act*, R.S.O. 1990 C.C.43, if the appeal is not as of right. Under this relief, any sale of the Property to a third party is to be stayed, or, alternatively, if sold, $500,000 of proceeds be preserved, pending disposition of the proceedings in this Court.

8. In any event, the Interested Party consents to expedite the appeal, if time for delivery is extended, as there has been an acceptance of an offer by the Receiver, from a third party, "subject to Court Approval", scheduled to close in late October, 2020. An attempt by the Interested Party to obtain a more definitive date for the closing has been not been responded to by the parties opposite.

Email from Richard Macklin, dated September 17, 2020, Affidavit of Richard Macklin, Exhibit B, Tab 2B, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), p. 34 (p. 37 of PDF)

## PART II - THE FACTS

### (a) Underlying Facts

9. Mr. 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. There is no dispute that the $400,000 went into the Property.

Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), paras. 4,5, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3, p. 40 (p. 43 of RDF)

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.

Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), paras. 8, 9, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3, p. 41 (p. 44 of PDF)

11. Jereemy and Melissa live with family in Vietnam and 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 has ruined their life plan.

Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), paras. 2, 7, 15, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3, pp. 39, 41, 43 (pp. 42, 44, 46 of PDF)

12. The mortgagee moved to appoint a Receiver in June 2020. This led to the vendor being unable to close. 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 and that the Receiver would not give Jereemy any credit for his $500,000 deposit. If the APS is disclaimed, Jereemy will lose the $500,000, subject to a maximum of $200,000 of available mitigation.

> Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), paras. 12, 13 and 14, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3, p. 42 (p. 45 of PDF)

13. 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.

> Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), para. 15, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3, p. 43 (p. 46 of PDF)

**(b) Facts Specific to Motion to Extend**

14. A notice of appeal was not delivered within the ten days prescribed by the *Bankruptcy and Insolvency General Rules* C.R.C., c. 368, s. 31(1), owing to inadvertence on the Interested Party's lawyer. The lawyer operated on the basis that the Interested Party had 30 days to deliver a notice of appeal.

> Affidavit of Richard Macklin, para. 2, Motion Record of the Interested Party (Re: Motion to Extend etc.), Tab 2, pp. 26-27 (pp. 29-30 PDF)

15. The Endorsement that will be the basis for the Order that the Interested Party proposes to appeal was released on **August 27, 2020**. Under the Rules, 10 days from August 27 is September 6 (a Sunday). Monday September 7, 2020, was also a holiday (Labour Day). Thus the notice of appeal was due on **September 8, 2020**. The Interested Party's lawyers notified the other parties to the proceedings (the mortgagee and the Receiver), of the Interested Party's intention to appeal on Monday, **September 14, 2020**. The Interested Party's lawyers served the notice of motion to extend time on **September 17, 2020**. In consultation with counsel for the mortgagee and Receiver, October 2, 2020, has been chosen as a mutually agreeable hearing date for the motion to extend time.

> Affidavit of Richard Macklin, para. 3, Motion Record of the Interested Party (Re: Motion to Extend etc.), Tab 2, p. 27 (P. 30 PDF)

16. The Interested Party's lawyers have been advised that the Property has been sold, subject to Court approval, to a third party purchaser, and is scheduled to close at the end of October, 2020. There is no scheduled Court date for approval of that sale.

> Affidavit of Richard Macklin, para. 4, Motion Record of the Interested Party (Re: Motion to Extend etc.), Tab 2, p. 27 (p. 30 PDF)

## PART III - THE LAW

### ISSUE 1: MOTION TO EXTEND TIME

#### i) General Principles

17. Section 187(11) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, ("*BIA*"), provides for the power of the Court to extend time:

> *(11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.*

18. In considering whether a Court should exercise its discretion to extend time for the filing of a notice of appeal , the following factors are considered:

(a) whether the appellant formed an intention to appeal within the relevant period;

(b) the length of the delay and explanation for the delay;

(c) any prejudice to the respondent;

(d) the merits of the appeal; and

(e) whether the "justice of the case" requires it.

*Rizzi v Mavros*, 2007 ONCA 350, at para 16; for the similar test in the bankruptcy context see *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2019 BCCA 368 (CanLII), at para 33.

19. The "justice of the case" is the primary consideration and can be used to overcome deficiencies in the other factors of the analysis.

*Frey v MacDonald*, (1989), 33 CPC (2d) 13 (Ontario Supreme Court, Court of Appeal).

**ii) Intention to appeal, length of the delay, and explanation for the delay**

20. Counsel for the Interested Party, through inadvertence, operated under the assumption that the 30-day period for delivery of a Notice of Appeal applied. It appears the unique 10-day period under the *BIA* Rules applies. The date for delivery of a notice of appeal was thus September 8, 2020. Nonetheless, counsel for the mortgagee and Receiver were notified on September 14, 2020, of the intent to appeal and the requisite pleadings were delivered On September 17, 2020. **The gap between the 10-day deadline and the date on which counsel opposite were notified of the intention to appeal was 6 days.**

21. In a case with a fact pattern strikingly similar to this case, the British Columbia Court of Appeal, applying the same test as applies in Ontario, extended the time for service of a Notice of Appeal, under the *BIA*, where counsel, with 27 years of bankruptcy law experience, was unaware of the 10 day filing period, and operated as if the 30-day period applied. As stated by Tysoe JA of the B.C. Court of Appeal:

> *6 The appellant did not file a notice of appeal in respect of Chief Justice Brenner's order within the 10 day period stipulated by Rule 31(1) of the Rules under the Bankruptcy and Insolvency Act.* ***Mr. Douglas has deposed that despite the fact that he has practised insolvency law for approximately 27 years, he was unaware that the appeal period for decisions made under the Act is 10 days****, as opposed to the 30 day period prescribed by s. 14 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, to apply in the absence of a different period being specified under another enactment. Mr. Douglas deposed that the appellant asked him about time limitations on filing an appeal of Chief Justice Brenner's order within a few days of the issuance of the reasons for judgment and that the appellant instructed him to pursue an appeal on December 3.*
>
> *15 I turn finally to the overriding question of whether it is in the interests of justice to grant the extension. I appreciate that the respondents believe that the appellant is using the Washington proceeding in a manner to inhibit the orderly*

> *administration of his bankruptcy and do not feel that he should be given ammunition in the form of an appeal of Chief Justice Brenner's order.* ***However, the essence of this situation is that there was a short delay resulting from an error on the part of the appellant's lawyer. It is the type of situation which was recognized in Davies v. Canadian Imperial Bank of Commerce as one in which there is a tendency by the court to grant extensions of time. In my opinion, it is in the interests of justice to grant the extension in this case because there was a short delay caused by a lawyer's mistake in circumstances where no inordinate prejudice has been or will be suffered and the appeal is not bound to fail****.* [emphasis added]
>
> *Braich (Re)*, 2007 B.C.J. No.2847 ("*Braich*"), at paras 6, 15.

22. Inadvertence of counsel is a well-recognized valid explanation for delay in extension of time cases.

> *Fraser v Canerector Inc.*, 2015 ONSC 7519 (CanLII), para. 53; *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173, para. 27

**iii) Prejudice to the respondent**

23. There is negligible prejudice to the mortgagee and the Receiver given that very little time has elapsed between the deadline for commencing an appeal and when counsel for the Interested Party notified the Receiver and counsel for the first mortgagee.

24. An anticipated argument from the Receiver and counsel for the first mortgagee is that an agreement of purchase and sale had been signed with a third party purchaser- after the 10-day filing period (the "New APS"), and this amounts to "change of position". However, the New APS was entered into subject to Court approval, and thus, the purchaser would have been aware of uncertainties in the process. No particulars of the sale have been disclosed to the Interested Party.

25. Moreover:

(a) The Interested Party consents to an expedited appeal, such that the appeal can be heard before the "late October" closing date; and

(b) In the alternative, the Interested Party consent to the sale with the New APS proceeding, so long as $500,000 of the proceeds is held by the Receiver, pending the result of these proceedings.

26. As noted in *Braich*, the Court declined the argument of prejudice by the responding party to the motion to extend time to commence an appeal, noting that "[T]here is bound to be some prejudice in all cases" and the prejudice cited was not "inordinate":

> *13 The respondents argue that they are prejudiced because they renewed their application in the Washington Court to dismiss the Washington proceeding after the expiry of the 10 day appeal period and because there is a prospect that other parties to the Washington proceeding may proceed with discovery while this appeal is pending. The respondents have not been able to point to any significant prejudice suffered by them between the expiry of the 10 day appeal period and the date on which they were informed that the appellant would be applying for an extension of the appeal period.* ***There is bound to be some prejudice in all cases as a result of an appeal being pursued, and I do not consider the prejudice in this case to be inordinate.*** **[Emphasis added]**
>
> *Braich (Re)*, 2007 B.C.J. No.2847, at para 13.

**iv) Merits of the appeal**

27. For the purposes of this motion there are three main grounds asserted in terms of the merits of the proposed appeal:

(a) Justice Dietrich misapprehended the Court's role on the motion for directions;

(b) Justice Dietrich misapprehended the law on the application of the No Registration/Exclusion Clause; and

(c) Justice Dietrich incorrectly turned a broader equities analysis into a strict analysis of priorities.

*(a) Justice Dietrich misapprehended the Court's role on the motion for directions*

28. Justice Dietrich, with respect, misapprehended the Court's role on the Directions Motion by viewing the Interested Party'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 Interested Party'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 Justice Dietrich, August 27, 2020, at para 30, Motion Record of the Interested Party (Re; Motion to Extend Time etc.), Tab 4 ("Endorsement of Justice Dietrich August 27, 2020"). pp. 125-126 (pp. 128-129 of PDF)

29. 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.

30. In other words, when compared to a true disclaimer Order, Justice Conway's 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 Justice Conway's Order, and not a matter on which the Interested Party 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 |
|---|---|
| 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 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**:<br>[…]<br>(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] | [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 subject units. |

Order of Justice Conway, dated July 2, 2020, Motion Record of the Interested Party (Re: Motion to Extend etc.), Tab 5, pp. 133-134 (pp. 136-137 of PDF)

31. Having treated the Interested Party's motion as seeking to vary Justice Conway's 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 misapprehended the law on the application of the No Interest in Real Estate/Exclusion Clause*

32. A key argument by the Interested Party before Justice Dietrich was that he possessed a proprietary interest in the Property by virtue of the deposit paid. On this issue, the dispute between the parties is whether a No Interest in Real Estate/Exclusion Clause has the effect of estopping or otherwise preventing the Interested Party from arguing that it had a proprietary interest in the Property.

33. The No Interest in Real Property/Exclusion Clause in this case 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]

Agreement of Purchase and Sale dated February 12, 2020, Exhibit "A" to the Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3A, p. 63 (p. 66 of PDF)

34. The No Interest in Real Estate/Exclusion Clause was clearly for the benefit of the vendor. The **no registration** portion of the clause expressly provides that it survives the vendor's "default". The "no interest in Real Property" portion does not.

35. The main argument of the Interested Party, both in his factum and by his counsel in oral submissions, was that a party **in [fundamental] breach** of the APS cannot rely on clauses such as the one above (the "Exclusion Clause law"). Thus, the vendor in this case, upon failing to close in June 2020 and thus being in fundamental breach of the APS, would not have been in a position to assert that the Interested Party had waived their common law purchaser's lien. It follows that Clause 27 was negated regarding the Interested Party's purchaser's lien (a lien on the Property, based on its deposit of $500,000, up to that amount). It follows that the Interested Party had a proprietary, and secured interest, as opposed to merely a contractual, right to the property and the deposit funds.

Re: Purchaser's lien see: *J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA)

Re: Exclusion Claw law see: *Beaufort Realties et al. v. Chomedey Aluminum*, 1979 CanLII 66 (ON CA), affirmed in *Beaufort Realties et al. v. Chomedey Aluminum*, 1980 CanLII 47 (SCC), [1980] 2 SCR 718; *McGrath v. B.G. Schickedanz Homes Inc.*, [2000] O.J. No. 4161 (S.C.J) at paras 64, 67; *T.G. Appliance Group v Legend Homes*, 2016 ONSC 7802 (CanLII)

36. At paragraphs 39 and 40 of Justice Dietrich's Endorsement, however, Her Honour held that the No Interest in Real Estate/Exclusion Clause could only be negated if the vendor

**terminated** the APS[2]. The receivership pre-empted the vendor's ability to **terminate** the APS. However, when the vendor failed to close the APS in June, it was in **fundamental breach** of the APS. As noted above, based on the law in *Beaufort Realty*, and other cases, the fundamental **breach** was sufficient to negate the No Interest in Real Estate Clause, thereby restoring the Interested Party's right to a purchaser's lien, and a secured proprietary interest in the property. The absence of a **termination** of the APS was not a relevant consideration.

> Endorsement of Justice Dietrich, August 27, 2020, at paras 39-40, pp. 127-128 of Motion Record (pp. 130-131 of PDF).

37. The failure to accept that the Interested Party 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. There do not appear to be any cases where a contract establishing a proprietary interest was disclaimed by a receiver.

38. Justice Dietrich's misapprehension of the No Interest in Real Estate/Exclusion Clause law strongly influenced her decision to distinguish a case relied upon by the Interested Party- *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC) ("*Armadale*"). *Armadale* is the most analogous case to the facts of the within case, with the exception that the contract in *Armadale* did not contain language similar to the No

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[2] In the Court's Reasons, there is a suggestion that the Interested Party argued that the No Interest in Real Estate Clause 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 Interested Party's argument was that the "no interest in property clause" did not survive the vendor's breach. This excerpt from the factum is attached as Schedule "C" to this factum.

Registration/Exclusion Clause in the APS. At paragraph 33, immediately before distinguishing *Armadale*, Justice Dietrich stated that:

> *[…] It is note worthy that, unlike in the case of Mr. Tan's APS, in Armadale, there was no reference to a contractual provision negating Mr. Goldschlager's interest in land or subordinating it to the mortgagee's interest.*
>
> Endorsement of Justice Dietrich, August 27, 2020, at para 33, p. 126 (p. 129 of PDF).

39. It is clear from Justice Dietrich's statement above that she accepted that the No Interest in Real Estate/Exclusion Clause negated the Interested Party's interest in land, which is itself an incorrect statement of law, and used it as a key consideration to distinguish *Armadale*.

40. But-for Justice Dietrich's incorrect ruling on the effect of the No Interest in Real Estate/Exclusion clause, *Armadale* provides persuasive authority, in circumstances highly similar to this case, that the disclaimer of the APS is inappropriate. In *Armadale,* a contest over a proposed disclaimer, between a purchaser that had paid a high deposit directly to the vendor and a secured first mortgagee, was decided in favour of the purchaser. In fact, the purchaser paid the entire purchase price by way of deposit directly to an unrelated company owned by the principal of the company in bankruptcy, at the principal's direction. Lax J. concluded that, although the debtor's estate would receive no benefit from completing the transaction, it would be "dishonourable" for the trustee to disclaim the contract. Over its objection, because the "equities" so dictated, the mortgagee was, through the trustee, directed to discharge registrations on title and take all other necessary steps to complete the transaction :

> *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.*

*(c) Justice Dietrich incorrectly turned a broader equities analysis into a strict analysis of priorities.*

41. 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.

42. Maximizing the recovery of the debtor's assets is not the only factor to be considered when determining whether to exercise a receiver's power to disclaim. The Receiver must also weigh the equitable considerations – in this case, the fact that the Interest Party, who is also a stakeholder, will lose substantially all of his deposit and had a proprietary interest in the Property.

*Romspen*, above, para. 32

43. Justice Dietrich's application of a strict priorities analysis in these circumstances was pre-mature. It is correct that the mortgagee stands in priority to the Interested Party upon liquidation of the insolvent party/vendor's assets, and a payout of the funds derived from those assets. The Interested Party, however, was the purchaser in a valid APS for one of the assets to liquidated – 180 Mateo Place. Based on the Interested Party's proprietary interest, amongst other things, the APS should have proceeded, *i.e.*, 180 Mateo Place sold to the Interested Party, with the proceeds of that sale paid to the Receiver to be distributed. Then and only then does the

mortgagee's "priority" come into play, and the mortgagee receives funds prior to various other parties.

44. Justice Dietrich further erred, with respect, in failing to consider the equities between the parties. Specifically, Justice Dietrich erred in finding that to reject the disclaimer of the APS would lead to the result that "Mr. Tan would enjoy a preference and the Applicant 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 reliable evidence before Justice Dietrich that the purchase price for the New APS would be higher than the APS. Second and more importantly, the Interested Party would not be "enjoying a preference" merely by virtue of completing an APS he was legally entitled to complete.

Endorsement of Justice Dietrich, August 27, 2020, at para 44, p. 128 (p. 131 of PDF).

45. Rather, it is the disclaimer situation that would cause an unfair preference to be given to the first mortgagee. The only known "advantage" to disclaiming the APS is that the New APS would include the value of the improvements made using the $400,000.00 deposits advanced by the Interested Party to the Developer to complete the Property. The Receiver's logic effectively boils down to a choice between the following scenarios:

(a) Honour the APS and credit the $500,000.00 deposit already paid towards the final purchase price, leading to the first mortgagee still recovering roughly $1,300,000.00 and the Interested Party being whole; or

(b) Exercise an exceptional remedy to disclaim the valid APS, leaving the Interested Party short by $400,000.00 deposits he would not be able to recover from the Developer, and giving the $400,000.00 worth of improvements, paid for by the Interested Party, to the first mortgagee;

(c) In other words, but for the "free" money paid by Jereemy, into the Property, it would be unfinished and worth considerably less. If anyone obtained an unfair preference from the disclaimer, it was the mortgagee. A non-disclaimer would have left Jereemy getting exactly what he contracted for (at fair market value), and the mortgagee recovering what funds it could in an orderly fair market value liquidation of the assets.

46. Furthermore, as the Interested Party noted in his affidavit for Directions Motion, losing the bulk of his deposits would impose significant financial hardship to him as the deposits comprised many years of savings and a substantial retirement gift from his employer for work done over 18 years. In addition, it would take many more years for the Interested Party to save up enough money to be able to buy a new home again, which would significantly impact the Interested Party's plans to come to Canada to start his business, which plan had already been in motion for some time.

Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), paras. 6 and 7, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3, pp. 40-41 (pp. 43-44 of PDF)

47. Despite the clear inequity to disclaiming the APS and the failure by the Receiver to consider the interest of the Interested Party, Justice Dietrich construed the honouring of the

APS as giving the Interested Party a preference when it is clear that the disclaimer would be what gives the first mortgagee an unfair preference.

48. With respect, Justice Dietrich was incorrect when she noted that "Mr. Tan appears to be asking this court to resolve one inequity by creating another". It is the Receiver's proposed disclaimer of the APS, and Justice Dietrich's approval of the disclaimer, that is seeking to create an inequity in order to allow the first mortgagee to recover a higher portion of its mortgage. If the APS is simply honoured, the first mortgagee will still obtain the full benefit of more than $1,300,000.00 in purchase funds.

*(d) Other Errors*

49. Her Honour also held that a subordination clause in the APS (Clause 41), further militated against the Interested Party (see paras. 38 and 49 of the Endorsement), citing the findings of Morawetz J., as he then was, in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816. First, like the No Interest In Real Property Clause, the subordination clause does not survive default. Second, all that is subordinated as a result of Clause 41 is the APS. A potential purchaser's lien, however, is not subordinated. In any event, as noted by Morawetz J., in *Firm Capital*, subordination agreements "negate any argument that the mortgagee is bound by actual notice of a prior registration" (see para. 25). This makes sense and the Interested Party in this case 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, in priority to the mortgagee. What drove the result in *Firm Capital* was not the

subordination clause but was the applicability of the No Interest in Property Clause (see paragraph 26 in *Firm Capital*). Unlike the Clause in the Interested Party's case, however, the No Interest in Property Clause in *Firm Capital* may well have survived default (this is not clear from the Report). In any event, the arguments raised by the Interested Party set out above (fundamental breach negates the "No Interest in Property" Clause), were not raised before Morawetz J. Thus, for these reasons and others, *Firm Capital* s distinguishable and the subordination clause has no bearing on these proceedings.

> Agreement of Purchase and Sale dated February 12, 2020, Exhibit "A" to the Affidavit of Yong Yeow (Jereemy) Tan (from lower court proceedings), Motion Record of the Interested Party (Re: Motion to Extend Time etc.), Tab 3A, p. 69 (p. 72 of PDF)

50. The two disclaimer cases relied upon by Her Honour (*Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, 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, if disclaiming of some contracts was not granted (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 relatively similar financial loss, but the purchaser has a proprietary interest. This is the factual matrix of the *Armadale* case, discussed above, and the case at bar, and- as noted- in *Armadale,* 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).

51. Her Honour also held that the Receiver did not improperly rush straight to disclaimer, 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 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's counsel were unfamiliar with the Receiver's mandate and the evidence was that the Receiver did not investigate other assets before arriving at his disclaimer decision. At a minimum, deference is not owed to the Receiver's decision to disclaim.

> Email from Brahm Rosen to Richard Macklin, dated July 9, 2020 (Tab 2H, p. 298 in Mr. Tan's Motion Record in the lower Court), found at Tab 3B, Motion Record of the Interested Party (Re: Motion to Extend Time etc.), p. 119 (p. 122 of PDF)

**Justice of the Case**

52. In addition to the explanation for delay and merits, the Interested Party relies on the "Justice of the Case" test in support of his motion to extend. Jereemy stands to lose

significantly if he is denied his appeal rights. Specifically, the Interested Party advanced $400,000.00 of his deposits to the Developer to assist in the completion of the Property. Because the Developer will likely have no realizable assets, should the Receiver proceed with his planned disclaimers, the Interested Party will lose $300,000.00 to $400,000.00 of its deposit (depending on whether the Interested Party may recover up to $200,000.00 from Tarion and the vendor's realtor).

> Affidavit of Richard Macklin, para. 5, Motion Record of the Interested Party (Re: Motion to Extend etc.), Tab 2, p. 27 (p. 30 PDF)

53. This is a highly inequitable result. In terms of extending time to file a notice of appeal, the Interested Party has established that there was a very brief delay (6 days) between the notifying of the other side of the intent to appeal and the date the Notice of Appeal was due. This brief delay is reasonably explained by the Interested Party's lawyer's inadvertence. As noted above, there is merit to the appeal. As further noted above, the Receiver and mortgagee will suffer negligible prejudice from an Order extending time. In all of the circumstances, it is submitted that time to file a notice of appeal be extended as necessary.

**ISSUE 2: APPEAL AS OF RIGHT VERSUS LEAVE TO APPEAL**

54. In the event that this Honourable Court is inclined to grant an Order extending time to commence an appeal, the Interested Party's position is that he has an appeal as of right pursuant to s. 193(b) and (c) of the *BIA*, which reads as follows:

> *193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:*
>
> *(a) if the point at issue involves future rights;*

> *(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;*
>
> *(c) if the property involved in the appeal exceeds in value ten thousand dollars;*
>
> *(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and*
>
> *(e) in any other case by leave of a judge of the Court of Appeal.*

55. In *Forjay Management Ltd. v Peeverconn Properties Inc.*, 2018 BCCA 188 ("*Forjay*"), a case that also deals with an appeal from a judge's review of a receiver's decision with respect to disclaiming contracts for the sale of properties, Justice Willcock ruled that the appeal was as of right.

> *Forjay Management Ltd. v Peeverconn Properties Inc.*, 2018 BCCA 188, at paras 40-47, 50-54.

56. The circumstances of the present case are substantially similar to those before Justice Willcock. *Forjay* therefore has persuasive authority.

57. Section 193 of the *BIA* was found to result in a requirement for leave to appeal in a non disclaimer case in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 (CanLII) ("*Bending Lake*"). The Court in *Forjay* (B.C.C.A.), applied the test in *Bending Lake* in arriving at its result (see paras. 47-54 of *Forjay*). In other words, both *Forjay* (B.C.C.A.) and *Bending Lake* point to the Interested Party's appeal being as of right.

58. With respect to s.193(c), where appeal is as of right "if the property involved in the appeal exceeds in value ten thousand dollars", Justice Brown in *Bending Lake*, interpreted this section as not applying to "(i) orders that are procedural in nature, (ii) orders that do not

bring into play the value of the debtor's property, or (iii) orders that do not result in a loss". In the present case, Justice Dietrich's Order has the effect of approving the proposed disclaimer of the APS. This is clearly a substantive Order which directly bring into issue the value of the debtor's property (the Property being contested) will result in a significant loss to the Interested Party (minimum $300,000). Indeed, each party, before Justice Dietrich, pointed to the loss they would suffer, relative to the value of the property, if the disclaimer was, or was not, granted.

*Bending Lake*, at para 53.

59. Accordingly, even based on the interpretation of s.193 found in *Bending Lake*, the Interested Party is entitled to an appeal as of right based on s.193(c) of the *BIA*.

**ISSUE 3: STAY OF SALE OF PROPERTY**

60. In the event this Honourable Court decides to grant the requested extension of time to commence an appeal, and rules that appeal is as of right, s. 195 of the *BIA*, dictates that the lower court proceedings are stayed, pending disposition of the appeal. Such a result preserves the substratum of the appeal, the Property or $500,000 of the proceeds, such that the appeal will not be rendered nugatory[3]. The Interested Party consents to expedite the appeal so that it is heard before the "subject to Court approval" New APS is scheduled to close in late October. It is submitted this result is a just one.

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[3] *Talsky v. Talsky*, [1973] O.J.No. 2143 (C.A.), at para. 19

61. In the event this Honourable Court decides to grant the requested extension of time to commence appeal proceedings, but rules that leave to appeal is required, the Interested Party requests an interim stay of the lower court proceedings pending the outcome of the motion and possible appeal. In the alternative, the Interested Party submits that the New APS can be carried out, but that $500,000 be held back from the proceeds, by the Receiver, pending the disposition of the appeal court proceedings.

See s. 134(2) of the *Courts of Justice Act*, RSO 1990, c. C.43.

62. The test for an Order granting an interim relief pending an appeal is the same as the test set out in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC) ("*RJR-MacDonald*"): first, a preliminary assessment of the merits of the appeal to determine whether there is a serious question to be determined on appeal; second, whether the appellant would suffer irreparable harm if no stay is granted; and third, the balance of convenience as between the parties.

*RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC).

63. The merits of the proposed appeal has been dealt with earlier in this factum. As noted in *RJR-MacDonald*, this is a "relatively low threshold" test.

64. The Interested Party would suffer irreparable harm if no stay is granted as he would be barred from completing the APS if the New APS closes instead. The Interested Party has spent considerable time working with the Developer to modify the Property to serve his particular needs. In addition, since the Developer will have no remaining assets, once the sales

proceeds are paid to the first mortgagee, the Interested Party would have substantial difficulty recovering anything from the Developer. The lack of a stay would therefore render the appeal nugatory. Even if the Interested Party is ultimately successful, he would have neither the property, nor the return of his deposit.

> Affidavit of Richard Macklin, para. 5, Motion Record of the Interested Party (Re: Motion to Extend etc.), Tab 2, p. 27 (p. 30 PDF)

65. As noted, the balance of convenience can be resolved in favour of the Interested Party as follows:

(a) If this Honourable Court allows the appeal to be expedited such that it can be heard before the closing date of the New APS, the Interested Party consents to perfecting its appeal within 14 days of an Order; or

(b) Alternatively, without prejudice to any arguments on the merits made by the Interested Party, he consents to an Order for the sale under the New APS to proceed, with $500,000.00 to be held back by the Receiver pending the outcome of this appeal.

66. The Receiver is empowered under paragraph 3(i) of Justice Conway's Order to "…defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver**, and to settle or comprise any such proceeding**".

## PART IV - RELIEF SOUGHT

67. The Interested Party requests:

(a) An order extending the time for delivery of the notice of appeal;

(b) If leave is required, an order extending time for service of the notice of motion for leave to appeal;

(c) To the extent necessary, an order staying the pending sale, to a third party, of 180 Mateo Place, which sale is subject to future Court approval in the Superior Court of Justice;

(d) In the alternative, to the extent necessary, an order that the sale of 180 Mateo Place can proceed, but that $500,000 (or such dollar amount as to this Court is just) be held in trust by Rosen Goldberg Inc., the court -appointed receiver, pending the results of the proceedings in this Court; and

(e) Such further and other relief as counsel may advise and to this Court appears just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 23, 2020

M. Whelton / W. Jiang

Maureen Whelton/Wei Jiang
Lawyers for the Interested Party, Jereemy Tan

## SCHEDULE "A" – TABLE OF AUTHORITIES

*2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 (CanLII)

*Armadale Properties Ltd. v 700 King Street (1997) Ltd*., 2001 CanLII 28461 (ON SC)

*Beaufort Realties et al. v. Chomedey Aluminum,* 1979 CanLII 66 (ON CA), affirmed in *Beaufort Realties et al. v. Chomedey Aluminum*, 1980 CanLII 47 (SCC), [1980] 2 SCR 718

*Braich (Re),* 2007 B.C.J. No.2847

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

*Forjay Management Ltd v 0981478 BC Ltd*., 2018 BCSC 1251

*Forjay Management Ltd. v. 625536 B.C. Ltd*., 2019 BCCA 368 (CanLII)

*Forjay Management Ltd. v Peeverconn Properties Inc*., 2018 BCCA 188

*Fraser v Canerector Inc*., 2015 ONSC 7519 (CanLII)

*Frey v MacDonald*, 33 CPC (2d) 13

*H.B. Fuller Company v. Rogers (Rogers Law Office),* 2015 ONCA 173

*J.A.R. Leaseholds Ltd. v. Tormet Ltd. and Kaye*, 1964 CanLII 219 (ON CA)

*McGrath v. B.G. Schickedanz Homes Inc*., [2000] O.J. No. 4161 (S.C.J)

*Rizzi v Mavros*, 2007 ONCA 350

*RJR-MacDonald Inc v Canada (Attorney General),* 1994 CanLII 117 (SCC)

*Romspen Investment Corporation v Horseshoe Valley Lands Ltd*., 2017 ONSC 426

*Talsky v. Talsky* (No. 2), [1973] O.J. No. 2143

*T.G. Appliance Group v Legend Homes*, 2016 ONSC 7802 (CanLII)

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

**SCHEDULE "B" – STATUTES**

*Bankruptcy and Insolvency Act*, RSC 1985, c. B-3

# Authority of the Courts

**Marginal note:Seal of court**

**187 (1)** Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

**Marginal note:Court not subject to be restrained**

**(2)** The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

**Marginal note:Power of judge in chambers**

**(3)** Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

**Marginal note:Periodical sittings**

**(4)** Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

**Marginal note:Court may review, etc.**

**(5)** Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

**Marginal note:Enforcement of orders**

**(6)** Every order of a court may be enforced as if it were a judgment of the court.

**Marginal note:Transfer of proceedings to another division**

**(7)** The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

**Marginal note:Trial of issue, etc.**

**(8)** The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

**Marginal note:Formal defect not to invalidate proceedings**

**(9)** No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

**Marginal note:Proceedings taken in wrong court**

**(10)** Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

**Marginal note:Court may extend time**

**(11)** Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

**Marginal note:Court may dispense with certain requirements respecting notices**

**(12)** Where in the opinion of the court the cost of preparing statements, lists of creditors or other material required by this Act to be sent with notices to creditors, or the cost of sending the material or notices, is unjustified in the circumstances, the court may give leave to omit the material or any part thereof or to send the material or notices in such manner as the court may direct.

**Court of Appeal**

**193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- **(a)** if the point at issue involves future rights;
- **(b)** if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
- **(d)** from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- **(e)** in any other case by leave of a judge of the Court of Appeal.

**Stay of proceedings on filing of appeal**

**195** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

**3** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Appeal to Court of Appeal

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

*Courts of Justice Act*, RSO 1990, c. C.43

**Powers on appeal**

**134** (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

**Interim orders**

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

**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

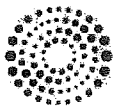
**SCHEDULE "D" – Excerpts from Robert J. Sharpe, *Injunctions and Specific Performance* Looseleaf (2nd ed), paras.4.590-4.620.**

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,

C & K MORTGAGE SERVICES INC.
Applicant (Respondent in Appeal)

-and-

CAMILLA COURT HOMES INC. and others
Respondents

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

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