

**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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FACTUM OF THE MOVING PARTY, JEREMY TAN

PART I - OVERVIEW

1. The moving party, Yong Yeow (Jeremy) Tan ("**Jeremy**"), seeks an order directing the Receiver in these proceedings to complete the Agreement of Purchase and Sale ("**APS**") between Jeremy and the respondent, Elite Homes Inc. ("**Elite Homes**"). Jeremy entered into the APS prior to the receivership as a *bona fide* purchaser for value. Jeremy intended to buy the property as his first home with his spouse, and move to Canada from Vietnam where they currently live. Allowing the Receiver to disclaim the APS will cause Jeremy and his spouse to lose their dream home, a deposit of \$500,000 which was paid out of

Jereemy's savings and retirement fund, and will stall their plans to build a new life and business in Canada.

2. The Receiver, who plans to disclaim the APS, owes fiduciary duties to act in the best interests of all stakeholders in the receivership, including to Jereemy, and was ordered to take all stakeholders' interests in account when exercising its powers¹. By disclaiming the APS, the receiver would act in breach of its duties and would favour the interests of the applicant mortgagee over those of other stakeholders. The APS is not onerous or commercially unreasonable, and therefore does not create a significant preference in favour of Jereemy. Thus, the test the Receiver must meet to disclaim is not met. Further, the equities (which are an express part of the disclaiming test), and in particular the significant and disproportionate financial hardship that Jereemy will face, weigh decidedly in favour of completing the APS.

3. Specifically, in looking at the positions of all of the stakeholders, we note that regardless of whether the contract is disclaimed, construction lien holders will be paid in full and it also appears a second purchaser (who paid a much smaller deposit), will be fully compensated.

4. If the APS is completed, as sought by Jereemy, he will obtain the property at a *bona fide* fair market price. The mortgagee, who entered into the mortgage from its vantage point as a sophisticated institutional lender, will recover all but roughly 20% of its investment.

¹ Affidavit of Yong Yeow (Jereemy) Tan, sworn August 6, 2020 ["Tan Affidavit"] at Exhibit "G", Motion Record of the Moving Party.

5. If the contract is disclaimed, the mortgagee will likely recover 100% its investment, while Jeremy will lose up to 80% of his.
6. In other words, the Receiver's decision to disclaim appears to be about making sure the mortgagee recovers \$2,500,000 (roughly 100% recovery), instead of \$2,000,000 (roughly 80% recovery), while wiping out Jeremy's \$500,000 deposit (net of some mitigation) (anticipated 20-40% recovery). While such a decision would perhaps be permitted in a private receivership, it fails the test that applies to a court-appointed receiver owing fiduciary parties to all stakeholders. The APS should be completed.
7. Finally, as a procedural matter, the ultimate decision in a court-appointed receiver disclaimer motion is often left to a motion after the property has been tentatively sold. In this case, all parties agreed to proceed by a "pre-emptive" motion, to either save the step of the resale (if Mr. Tan is successful), or remove cloud from title (if the mortgagee is successful).

PART II - THE FACTS

(a) Background

8. Jeremy is 54 years old and originally from Singapore. His spouse, Melissa, is a Canadian citizen who resides with him in Vietnam. Ever since Jeremy and Melissa married in 2015, they have resided either at Melissa's brother's house in Vietnam, or at Melissa's mother's house in Canada. Jeremy and Melissa have never owned a house together in Vietnam, Canada, or anywhere else. It is their dream to live in Canada together in their first home as a married

couple, and to build a life around it. They have visited Canada many times and they both love this country.²

9. Jeremy applied to immigrate to Canada in 2018. When he was approved in 2019, they were both very excited. Jeremy and Melissa began looking for the perfect house in January 2020. That is when they found the property at 180 Mateo Place in Mississauga, Ontario (**the "Property" or "180 Mateo"**) and made an offer.³

(b) The APS

10. On or about February 12, 2020, Jeremy signed an Agreement of Purchase and Sale to purchase 180 Mateo from Elite Homes for the price of \$1,758,000 (**the "APS"**). He provided Elite Homes with a total deposit of \$500,000. Of the total deposit, Jeremy paid \$400,000 to Elite Homes directly, and \$100,000 to the listing agent in trust. The balance of the purchase price was to be paid on closing, which was initially set to take place on April 30, 2020.⁴

11. Elite Homes advised Jeremy and Melissa that paying a larger deposit to it directly would allow them to speed up the closing on the Property. Jeremy agreed to pay the substantial deposit because he and Melissa wanted to move to Canada as soon as possible.⁵

² Tan Affidavit at para. 2.

³ Tan Affidavit at para 3.

⁴ Tan Affidavit at para 4, Exhibits "A" and "B".

⁵ Tan Affidavit at para 5.

12. Although the deposit is a large amount, Jereemy was able to pay it because of his many years of savings and a substantial retirement gift paid to him by his current employer. The gift was given to him because he helped found the company that he currently works for, and because he worked for them diligently for 18 years.⁶

13. Jereemy and Melissa's plan was to move to the Greater Toronto Area, where Jereemy could open his own logistics business (he currently works as a logistics consultant in Vietnam). Affording a house in the Greater Toronto Area is very challenging. If they lose their deposit on 180 Mateo, it will take them many years to be able to save up to buy a new home. Jereemy is already 54 years old. A loss of hundreds of thousands of dollars will put his plans to move to Canada and start a business on hold.⁷

14. Because of the pandemic, the closing did not take place on April 30. The closing date was extended a number of times, with the final closing date set for June 26, 2020.⁸

15. Jereemy and Melissa spent many hours working with Elite Homes to customize the Property to their liking. Because they wanted more space, they asked Elite Homes to tear down the wall dividing the master bedroom and the second bedroom. They also asked for customizations to be made to the foyer, the kitchen, and the shower. Jereemy and Melissa also asked Elite Homes to install a security camera system. They were excited and proud to be

⁶ Tan Affidavit, para 6.

⁷ Tan Affidavit, para 7.

⁸ Tan Affidavit, para 8, Exhibit "C".

moving to Canada to their dream home. Both Melissa and Jereemy have extended families and children from previous marriages. 180 Mateo has five bedrooms and six bathrooms, so their families can visit them.⁹

16. At the time of the events described below, the construction of the Property was nearly complete. Jeremy was and continues to be ready, willing, and able to complete the APS. He has confirmed this in correspondence from his lawyers, dated July 10, 2020.¹⁰

(c) The Receivership

17. On or about June 12, 2020, Jereemy received a Notice of Application by the applicant seeking to appoint a receiver for Elite Homes.¹¹

18. On June 18, 2020, and July 2, 2020, Jereemy's real estate lawyer, Stephen Poquiz, attended the return of the application before Justice Conway. Justice Conway first adjourned the hearing of the application to July 2, 2020. On July 2, 2020, Justice Conway signed an order appointing Rosen Goldberg Inc. as Receiver of Elite Homes (**the "Order"**).¹²

19. At the time, Jereemy did not expect that the Receiver would cancel or disclaim the APS. However, after July 2, Jereemy had a call with the Receiver. The Receiver indicated

⁹ Tan Affidavit, para 9.

¹⁰ Tan Affidavit, para 10, Exhibit "D".

¹¹ Tan Affidavit, para 11, Exhibit "E".

¹² Tan Affidavit, para 12, Exhibits "F" and "G".

that he intended to disclaim the APS, but that Jeremy could put in an offer for the Property and compete with other potential purchasers on the price. Jeremy was advised that he would receive no credit for his previous deposit, meaning that he would lose his substantial deposit.¹³

20. If the Receiver disclaims the APS without providing him with credit for the deposit he had already paid, Jeremy will lose at least \$300,000 of the \$500,000 deposit. He can likely recoup \$100,000 of the loss through the Tarion Corporation. He can also obtain a return of \$100,000 of the deposit, conditional on his releasing all claims against both realtors and Elite Homes.¹⁴

21. The possibility that Jeremy and Melissa will lose 180 Mateo and their deposit has been extremely distressing for them. They are first time home buyers. They never imagined that, having paid such a substantial deposit and secured a valid contract, these events could cause them to lose both the deposit and their dream home, and stall their dream life in Canada.¹⁵

22. Jeremy submits that the two options he faces – canceling the APS, or making him pay hundreds of thousands of dollars more for 180 Mateo – are grossly unfair to him and his spouse. Nobody has accused them of any wrongdoing. Jeremy agreed to pay a fair price for the Property, he paid a deposit of \$500,000, and has done everything that was asked of him.¹⁶

¹³ Tan Affidavit, para 13.

¹⁴ Tan Affidavit, para 14.

¹⁵ Tan Affidavit, para 15.

¹⁶ Tan Affidavit, para 16.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

23. There is only one issue on this motion: is it within the proper exercise of the Receiver's powers and duties to disclaim the APS?

ISSUE 1: It is not within the proper exercise of the Receiver's powers and duties to disclaim the APS.

(a) Duties of court-appointed receiver

24. A court-appointed receiver is an officer of the court.¹⁷ In contrast with a privately appointed receiver, which owes fiduciary duties only to the secured creditor that appointed it, a court-appointed receiver owes fiduciary duties to act in the best interests of all stakeholders in the debtor's estate, and must not favour the interests of one creditor above others.¹⁸ This is reflected in Justice Conway's Endorsement of July 2, which provides that the receiver must exercise its powers "taking into account the interests of all stakeholders".¹⁹

25. A court-appointed receiver does not have unlimited authority to disclaim contracts entered into by the debtor prior to receivership. The author in Bennett on Receiverships states:

However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached its standard of care

¹⁷ Bennett, Frank, "Bennett on Receiverships" (2011), 3rd ed., p. 231; see also *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), <<http://canlii.ca/t/hrbx5>> at paras 21-22.

¹⁸ Bennett, Frank, "Bennett on Receiverships" (2011), 3rd ed., pp. 231, 236; see also *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), <<http://canlii.ca/t/hrbx5>> at paras 21-22; *Bank of Montreal v. Probe Exploration Inc.*, 2000 CanLII 26966 (AB CA), <<http://canlii.ca/t/233dm>> at para 2.

¹⁹ Tan Affidavit, Exhibit "G".

by dissipating the debtor's assets. ... Consequently, the receiver should not disregard executory contracts where they are beneficial to the stakeholders.

...

Whether the receiver disclaims the contract unilaterally or applies to the court for an order to do so, the receiver must act reasonably and exercise good business sense. The receiver should review the contract in some detail, make appropriate investigations and inquiries including conferring with the principals of the debtor, and others in the industry to see if there is any merit in performing the contract for all the stakeholders since, if the contract is terminated, the other party has a claim in damages against the debtor.²⁰

26. The limitations on a receiver's ability to disclaim contracts are reflected in the legislation guiding disclaimer decisions in other comparable bankruptcy and insolvency processes. Under the *Companies' Creditors Arrangement Act ("CCAA")* and the proposal process under the *Bankruptcy and Insolvency Act ("BIA")*, the court is statutorily to consider the following factors when deciding whether to make an order allowing the disclaimer of a contract:

- (a) whether the monitor or trustee approved the proposed disclaimer;
- (b) whether the disclaimer would enhance the prospects of a viable arrangement or proposal being made in respect of the debtor;
- (c) **whether the disclaimer would likely cause significant financial hardship to a party to the agreement.**²¹ (Emphasis added)

27. The moving party submits that these factors are consonant with the judge-made law guiding disclaimer decisions in the context of a receivership under s. 243 of the *BIA*. In the court-appointed receiver context, courts have established that the maximizing the recovery of the

²⁰ Bennett, Frank, "Bennett on Receiverships" (2011), 3rd ed., pp. 434, 436.

²¹ See *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).

debtors' assets is not the only factor to be considered when determining whether to exercise its power to disclaim; the receiver must also weigh the equitable considerations.²²

28. The policy rationale underlying the disclaiming of a debtor's contracts is to allow the receiver to realize on the debtor's assets without the burden of onerous or commercially unreasonable contractual obligations.²³ Jeremy submits that the APS is not onerous or commercially unreasonable, and that it would be a breach of the receiver's fiduciary duties to disclaim the APS.

29. Section 247(b) of the *BIA* provides that a receiver shall deal with the property of the debtor in a commercially reasonable manner. Jeremy submits that it is not commercially reasonable to disclaim a contract for the sale of property to a *bona fide* purchaser for fair value which does not contain onerous terms. To allow the receiver to disclaim a contract in such circumstances would undermine the well-established principle of commercial certainty.

(b) Completing the APS does not create a significant preference in favour of Jeremy

30. A key question courts look to in receivership disclaiming cases is whether the continuation of the contract will create a significant preference in favour of the contracting party,

²² *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 (CanLII), <<http://canlii.ca/t/gxp1z>> at para 35; *New Skeena Forest Products Inc. et al v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818 (CanLII), <<http://canlii.ca/t/1p29c>> at para 23; *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC), <<http://canlii.ca/t/2441p>> at para. 78.

²³ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (CanLII), [2019] 1 SCR 150, <<http://canlii.ca/t/hx95f>> at para 196, citing Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed. London: Sweet & Maxwell/Thomson Reuters, 2011.

when compared to its pre-filing position.²⁴ Jeremy will not gain a significant preference – relative to his pre-filing position – if the APS is completed.

31. This principle is borne out in *Armada v. 700 King Street (1997) Ltd.*,²⁵ a case most like the one at bar. In *Armada*, 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 by this Court 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.²⁶

32. A review of other cases solidifies this point. In cases where the disclaimer was ordered, an unfair preference first had to be found, to the contracting party's benefit and to the mortgagee's detriment. Specifically, in these cases, the purchase price was found to be significantly below the market value of the property either at the time that the contract was signed or at the time of the receivership (*i.e.*, a windfall would result to the purchaser).²⁷ If the

²⁴ *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 (CanLII), <<http://canlii.ca/t/gxp1z>> at para 31.

²⁵ *Armada Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC), <<http://canlii.ca/t/1wfld>>

²⁶ *Armada Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC), <<http://canlii.ca/t/1wfld>> at paras. 11-15.

²⁷ *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; *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 (CanLII), <<http://canlii.ca/t/1zd1k>> at paras 87, 96; see also *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848 (ON SC), <<http://canlii.ca/t/25gj2>> at para 43; see also *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, 2006 CanLII 26476 (ON SC), <<http://canlii.ca/t/1p25z>> at para 20.

contracts were continued, the purchasers would gain a significant preference by way of the increase in value of the properties, which would not be available to the mortgagee. In the case at bar, Jeremy will not receive a windfall and will in fact lose a \$500,000 deposit (subject to some mitigation).

33. Moreover, the payment of \$400,000 of the deposit directly to Elite Homes, a fact relied upon extensively by the mortgagee party to this motion and apparently by the Receiver, should have little to no bearing on the result. As noted, in *Armada v. 700 King Street (1997) Ltd.*, the deposit was not secured or held in trust, and was paid directly to a company unrelated to the debtor. Nonetheless, the APS was honoured, and not disclaimed.

(b) The equities weigh in favour of completing the APS

34. The legal priorities are only one consideration in the decision to disclaim a contract. The receiver must also weigh the equitable considerations when deciding whether to exercise its power to disclaim a contract.²⁸ In the case at bar, the equities significantly favour completing the APS.

35. As stated above, under the *CCAA* and *BIA* proposal processes, a prescribed consideration in deciding whether to disclaim a contract is whether significant financial hardship would fall on the contracting party. In the context of receiverships under s. 243 of the *BIA*,

²⁸ *New Skeena Forest Products Inc. et al v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818 (CanLII), <<http://canlii.ca/t/1p29c>> at para 23

courts have also implicitly considered this factor determining whether disclaiming a contract was appropriate.²⁹

36. If the APS is disclaimed, Jeremy will suffer significant financial hardship, due to the loss of the large deposit which was paid out of his savings and a one-time monetary gift from his current employer. Jeremy's options for the recovery of his deposit are very limited. Jeremy 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.³⁰ Alternatively, he may have a cause of action against Elite Homes for \$400,000, on which he will likely not be able to collect, given the receivership proceedings. This financial hardship is disproportionate to any loss that will be suffered by the mortgagee, which will recover the vast majority of the moneys owed to it (recovery of roughly \$2,000,000 of the roughly \$2,500,000 that is owed).³¹

37. The potential loss of the deposit 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.³² Where purchasers did stand to

²⁹ *Armada Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC), <<http://canlii.ca/t/1wfld>> at para 14; *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 1251 (CanLII), <<http://canlii.ca/t/ht5ts>> at para. 64; *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), <<http://canlii.ca/t/hrbx5>> at paras 108-109; *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 (CanLII), <<http://canlii.ca/t/fsk46>> at para 34.

³⁰ Tan Affidavit, para 14.

³¹ See Tan Affidavit, Exhibit "E", Motion Record of the Moving Party at p. 129; see Tan Affidavit, Exhibit "H", Motion Record of the Moving Party p. 298..

³² *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 (CanLII), <<http://canlii.ca/t/hrbx5>> at para 127; 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.

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 Jeremy to bear the disproportionate financial hardship. First, Jeremy has a proprietary interest in the lands. Jeremy 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"

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 Jeremy, save for the payment of the balance of the purchase price, which Jeremy is ready, willing, and able to pay. Further, Jeremy 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, Jeremy 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, Jeremy 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 bankruptcy] 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

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

40. Similarly, Jereemy ought not be faulted for paying the deposit as directed by Elite Homes.

41. By contrast, the mortgagee is a sophisticated lender, and understood that Elite Homes was building residential properties to be sold. While it was available to the mortgagee to take steps to ensure that Elite Homes did not accept any deposits to it directly, there is no evidence that any such steps were taken. Therefore, contrary to what is stated in the mortgagee's representative's affidavit on this motion,⁴⁰ the mortgagee bore the risk that deposit moneys would be used for the construction of the homes, and would not be available in cash. Indeed, both unsold properties of the debtor involved agreements that included deposits paid into the trust account of a realtor and directly to the vendor.⁴¹ It also cannot be stated, as the mortgagee's representative has at paragraph 16 of his affidavit, that completing the APS would create "chaos in the industry".⁴² In *Armada*, which was decided in 1994, the APS was completed in similar circumstances. The industry has not been "in chaos" for the subsequent 26 years.

42. In addition, if the APS is disclaimed, the mortgagee will in fact benefit from Jereemy's payment of the deposit to Elite Homes. The \$400,000 portion of the deposit was to be paid to fund the construction of the Property. If the receiver is permitted to disclaim the APS and sell the Property without compensating Jereemy for that portion of the deposit, the debtor's estate (and ultimately, the mortgagee) will reap a windfall benefit of Jereemy's deposit.

⁴⁰ Affidavit of Gary Grunier, sworn August 11, 2020 ["Grunier Affidavit"] at paras 14-15, Responding Motion Record of C & K Mortgage Services Inc.

⁴¹ Tan Affidavit, Exhibit "E", Motion Record of the Moving Party at p. 230.

⁴² Grunier Affidavit, para. 16

43. Finally, as noted, the Court should not tacitly endorse the Receiver's disclaimer decision in this case. The Receiver is not privately appointed. It was enjoined by Court Order to disclaim a contract only if it was "necessary or desirable",⁴³ in considering the interests of all creditors.⁴⁴ Yet, with respect, it raced ahead with a disclaimer decision without investigating the assets held by the debtor.⁴⁵ In other words, without investigation of assets, it is not certain that disclaiming Jeremy's contract is necessary or desirable. The mortgagee may have a first charge on other assets, fully recover its unpaid debt, without resort to disclaiming Jeremy's contract. The issue ought to have been investigated before the Receiver came to a decision to disclaim the APS. It appears the Receiver, with respect, is applying principles from a private receivership (selling a property rather than investigating assets, in order to maximize returns to the mortgagee that appointed the receiver), as opposed to his court-ordered mandate (conduct a thorough investigation of options other than harming a stakeholder – Jeremy).

(c) The Court's jurisdiction to direct the receiver to complete the APS

44. At paragraph 3(c) of the Receivership Order, the Receiver is authorized to disclaim the contracts of the debtors where the Receiver considers it necessary or desirable.⁴⁶

⁴³ Tan Affidavit, Exhibit "F", Motion Record of the Moving Party, pp. 260-261.

⁴⁴ Tan Affidavit, Exhibit "G".

⁴⁵ **"In respect of Elite, we do not know if it has any assets at the current time"**. See Tan Affidavit, Exhibit "H", Motion Record of the Moving Party, p. 307.

⁴⁶ Tan Affidavit, Exhibit "F".

45. Despite paragraph 3(c) of the Receivership Order, this Court has jurisdiction to make a further order directing the Receiver in the exercise of the powers granted to it. The Receivership Order is procedural rather than a substantive, and did not finally determine any substantive rights.⁴⁷ The Receivership Order only authorizes the Receiver to disclaim the APS in accordance with the proper exercise of its duties and powers. It does not determine the proper exercise of those powers, which is in issue before this Court on this motion. The ultimate approval of any disclaimer order lies with the Court, and has yet to be obtained.

46. In the alternative, the moving party relies on the "come-back clause" in paragraph 32 of the Receivership Order, which provides that any interested party may apply to this Court to vary or amend the Order.⁴⁸ In addition, section 187(5) of the *BIA* provides that "every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

47. The materials before Justice Conway on July 2, 2020, did not indicate that the Receiver had determined to exercise its powers to disclaim the APS. The Affidavit of Gary Gruneir, sworn June 20, 2020, which was filed in support of the Notice of Application, does not state the Receiver's intentions with respect to disclaiming the APS.⁴⁹ Jeremy did not become

⁴⁷ *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 (CanLII), <<http://canlii.ca/t/gxp1z>> at para 34.

⁴⁸ Tan Affidavit, Exhibit "F", Motion Record of the Moving Party, p. 271.

⁴⁹ Tan Affidavit, Exhibit "E".

aware that the Receiver had made a determination to disclaim to the APS until after the Receivership Order was signed.⁵⁰

PART IV - ORDER SOUGHT

48. 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.

49. 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.

August 17, 2020



Richard Macklin and Yolanda Song
Lawyers for the moving party

⁵⁰ See *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 (CanLII), <<http://canlii.ca/t/hqjp5>> at para. 37; see, in comparison, *8527504 Canada Inc. v. Sun Pac Foods Limited*, 2015 ONCA 916 (CanLII), <<http://canlii.ca/t/gmph7>>.

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SCHEDULE “B” – STATUTES

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

Agreements

Disclaimer or resiliation of agreements

Factors to be considered

32 (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

Factors to be considered

65.11 (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.

Court may review, etc.

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

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Good faith, etc.

247 A receiver shall

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.