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

COURT OF APPEAL FOR ONTARIO

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

B E T W EE N:

C & K MORTGAGE SERVICES INC.

Applicant
(Respondent in Appeal)

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

FACTUM OF THE RESPONDENT, C & K MORTGAGE SERVICES INC.

November 27, 2020

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FACTUM OF THE RESPONDENT,
C & K MORTGAGES SERVICES INC.

PART I - OVERVIEW

1. This appeal, if allowed, would not only turn commercial lending on its head in this Province, but would fly in the face of the leading legal authorities. It would mean that no residential construction lender could rely on its registered priority under the *Land Titles Act* (the "***LTA***") or protect itself against a buyer, with whom the lender has no privity, who signs an agreement of purchase and sale with the lender's mortgagor after the mortgage is registered.

2. The Appellant's factum glosses over the facts and ignores fundamental, first principles of mortgage law. Justice Dietrich (the "**Motion Judge**") carefully reviewed the evidence in dismissing the Appellant's motion to compel the Court-appointed receiver (the "**Receiver**") to complete his agreement of purchase and sale (the "**APS**") with Elite Homes Inc. ("**Elite**"), or compensate him for losing a $400K deposit, which he paid directly to Elite on an unsecured basis, although he had legal advice and advice from his real estate agent before signing the APS.

3. There is no justifiable basis to interfere with the Motion Judge's exercise of discretion in weighing the equities and she committed no errors of law. On the contrary, her reasoning is entirely consistent with the law regarding variations of orders under the *Bankruptcy and Insolvency Act* (the "***BIA***") and modern jurisprudence dealing with the extinguishment of interests in land, including agreements of purchase and sale, in the context of Court-supervised receiverships under the *BIA*.

PART II - THE FACTS

4. Pursuant to a commitment letter dated October 6, 2018 (the "**Loan Agreement**") among the Respondent C & K Mortgages Services Inc. (the "**Respondent**"**)**, and Camilla Court Homes Inc. ("**Camilla**") and Elite (and together with Camilla, the **"Debtors**"), the Respondent advanced a secured loan of $4.55M to the Debtors.[1] As security, it obtained a first charge (the "**First Mortgage**") against a number of properties located within a residential common area condominium that were being developed and constructed by the Debtors, including the property at 180 Mateo Place, Mississauga (the "**Mateo Property**").

5. In addition to the First Mortgage, the Mateo Property is subject to a second-ranking mortgage (that was postponed to the First Mortgage) and a number of construction liens that were subsequently registered.

6. Pursuant to the Loan Agreement, the Respondent agreed to provide partial discharges for individual house sales provided that it received 100 percent of the net proceeds of sale, less the Debtors' real estate commission, legal fees and HST, but not less than $1.75M per house.[2]

The APS

7. On February 12, 2020, the Appellant Jereemy Tan (the "**Appellant**") entered into an agreement to purchase the Mateo Property from Elite for $1.758M (the "**APS**"). Before signing, the Appellant received legal advice from and reviewed the APS with a lawyer, Stephen Poquiz.[3]

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[1] Commitment letter, as Amended, Exhibit C, Affidavit of Gary Gruneir sworn June 20, 2020 ("**First Gruneir Affidavit**"), Respondent's Compendium ("**RC**"), Tab 1, pp. 2-11, Exhibit Book, Tab 1E, pp. 135-144; First Mortgage, Exhibit D, First Gruneir Affidavit, RC, Tab 2, Exhibit Book, Tab 1E, p. 144.

[2] Commitment letter, as Amended, Exhibit C, First Gruneir Affidavit, RC, Tab 1, p. 8, Exhibit Book, Tab 1E, pp. 135-144.

8. Clause 41 of Schedule "A" to the APS provided that the APS "shall be, and is hereby, subordinated to and postponed to any mortgage(s) arranged by the Vendor and any advances made thereunder from time to time or liabilities secured thereunder …"

9. Clause 27 of Schedule "A" provided that:

> 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 thereunder. 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 provisions of Section 30 shall apply. [4]

10. The Appellant paid a deposit of $500K under the APS, $400K of which was paid directly to Elite on an unsecured basis, rather than into a real estate broker's or lawyer's trust account, and $100K of which was paid to a real estate broker, in trust. The closing was to take place on April 30, 2020. The closing date was extended to June 26, 2020.[5]

11. Because the Debtors had used the Appellant's $400K deposit, the net sale proceeds would be less than the amount required to obtain a partial discharge of the First Mortgage. The Respondent was unaware of the APS until receiving a copy from the Debtors' principal on or about June 11, 2020,

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[3] Transcript from cross-examination of Jereemy Tan held August 14, 2020 ("T**an Transcript**"), qq. 54, p. 11, RC, Tab 2, p. 13, Exhibit Book, Tab 3, p. 363.

[4] Agreement of Purchase and Sale between Yong Yeow (Jereemy) Tan and Elite Homes Inc., Exhibit A, Affidavit of Yong Yeow (Jereemy) Tan sworn August 6, 2020 ("**Tan Affidavit**"), RC, Tab 3, pp. 15-16, Exhibit Book, Tab 1A, pp. 29 and 35.

[5] Tan Affidavit at paras 4 and 8, RC, Tab 4, pp. 18-19, Exhibit Book, Tab 1, pp. 7-8.

nearly five months after it was signed. Had the Respondent been asked to approve the APS before it was executed, the Respondent would have refused because the deposit was unsecured.[6]

12. At the time of the Receiver's appointment on July 2, 2020, the hard security that remained for the Respondents' loan consisted of two partially constructed homes, including the Mateo Property.[7] The other house was also subject to an agreement of purchase and sale, which the Receiver disclaimed.

The Receivership Order

13. The Respondent's application to appoint the Receiver was brought on notice to the Appellant. Mr. Poquiz, the lawyer who advised the Appellant before he signed the APS, represented him at the initial return of the hearing on June 18, 2020, which was adjourned by Justice Conway, and at the July 2, 2020 hearing at which Justice Conway appointed the Receiver (the "**Receivership Order**"). In her endorsement, Justice Conway held that it was just and convenient to appoint the Receiver to take possession and control of the properties, finance the remaining construction and market and sell the properties, taking into account the interests of the various stakeholders, notwithstanding that she was sympathetic to the plight of the purchasers.[8]

14. Contrary to the Appellant's submission, the Receivership Order, which the Appellant did not move to vary or appeal, was not merely procedural in nature. Paragraph 3(c) expressly empowered and authorized the Receiver to disclaim any contracts of the Debtors, including the

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[6] Affidavit of Gary Gruneir sworn August 11, 2020 ("**Second Gruneir Affidavit**") at para. 14, Exhibit Book, Tab 2, p. 315.

[7] Second Gruneir Affidavit at para. 14, Exhibit Book, Tab 2, p. 31.

[8] Endorsement of Justice Conway dated July 2, 2020, Exhibit D, Second Gruneir Affidavit, RC, Tab 6, p. 25, Exhibit Book, Tab 2D, pp. 335-337.

APS. Moreover, paragraph 34 contained a substantive declaration that the Respondent's security over the Debtors' property ranks in priority to the interests, if any, of the Appellant under the APS.[9]

The Disclaimer

15. Following its appointment, the Receiver notified the Appellant of its intention to disclaim the APS. It also advised the Appellant that he could make an offer, and compete with other buyers, but he would not receive credit for his lost deposit.[10]

16. The Receiver's disclaimer prompted the Appellant to move to compel the Receiver to complete the APS. On August 27, 2020, the Motion Judge dismissed the motion on the basis that Justice Conway was well aware of the Appellant's concern and the real possibility that the APS would be disclaimed, but the Appellant did not take steps to appeal the Receivership Order.[11] The Motion Judge further held that the equities did not justify subordinating the legal priority of the First Mortgage and rejected the Appellant's argument that the Receiver breached its fiduciary duty to take into account the interests of the Debtors' stakeholders in deciding to disclaim the APS:

> I find that Mr. Tan has not met his burden to prove that the Receiver should prefer Mr. Tan over the secured creditor. The equities do not justify the subordination of the Applicant's legal priority. Such subordination is contrary to the terms of the APS and the Receivership Order.
>
> I accept that Mr. Tan is a victim of the improper use of the $400,000 deposit he paid directly to Elite Homes in the belief that this payment would expedite the construction of

[9] Receivership Order, Exhibit E, Second Gruneir Affidavit, RC, Tab 7, p. 29-31, Exhibit Book, Tab 2E, pp. 338-355.

[10] Endorsement at para. 17.

[11] Endorsement at para. 30.

> the Mateo Property. However, the Applicant in no way participated in Mr. Tan's decision to make the improvident payment and was unaware that such payment had been made until Elite Homes requested a partial discharge of the mortgage to permit a conveyance of the Mateo Property to Mr. Tan. I find that there is no basis in equity or in law that would permit this court to visit the consequences of Mr. Tan's unfortunate decision on the Applicant secured lender.[12]

PART III – ISSUES AND ARGUMENT

Issue 1: Standard of review

17. The Respondent agrees that the standard of review applicable to questions of fact and inferences of fact is palpable and overriding error and correctness for questions of law. Contractual interpretation is a question of mixed fact and law which lies along a spectrum, unless the issue is an extricable question of law, in which case a correctness standard applies.

18. The Respondent disagrees with the Appellant's suggestion that the APS is a standard form of contract that renders the Motion Judge's findings in respect of the APS reviewable on a correctness standard. The decision in *Ledcor v. Northbridge*, upon which the Appellant relies, involved a policy of all-risk property insurance, in which there was no meaningful factual matrix specific to the parties to assist the interpretation process.[13]

19. In the case at bar, it cannot be said that the APS was a contract of adhesion or that there was no meaningful factual matrix specific to the parties. The Appellant obtained legal advice and advice from his real estate agent before signing the APS. Although the printed form of the APS contemplated a deposit of 10% of the purchase price, it was struck out by hand and replaced with $500K. Each of the pages were initialled by hand and a schedule of extras which the Appellant

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[12] Endorsement at paras. 45-46.

[13] *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 4.

negotiated, in a different font than the APS, was attached as a schedule. The Respondent played no role in the Appellant's decision to make the improvident payment of $400K to Elite and was unaware of the APS or the deposit until Elite requested a partial discharge. In the context of the factual matrix before her, the Respondent submits that the Motion Judge's interpretation of the APS must be a question of mixed fact and law subject to deferential review on appeal.

Issue 2: Whether the Motion Judge erred in principle in determining the Appellant did not have a proprietary and/or equitable interest in the Mateo Property

20. Before addressing the Appellant's argument regarding the Motion Judge's failure to recognize the Appellant's purported proprietary interest, a brief summary of certain fundamental principles of mortgage law is warranted.

A mortgage is a conveyance of land subject to equity of redemption

21. It is trite that a mortgage is a conveyance of land as security for the payment of a debt, the security being redeemable on the payment of such debt.[14] Although, unlike a mortgage, a land titles charge does not confer title on the chargee, the *LTA* for all practical purposes assimilates the position of a chargee to that of a mortgagee.[15]

22. It follows that where a mortgagor contracts with a buyer to sell land subject to a prior mortgage, the buyer's rights cannot trump or prime the mortgage. That is because the land subject to the contract of sale is subject to an earlier conveyance to the prior mortgagee. The only entitlement the buyer can have in such circumstances is against the mortgagor's equity of redemption.

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[14] *Falconbridge on Mortgages*, 5th ed. / editor-in-chief Walter M. Traub, p. 1-5.

[15] *Ibid*., p. 1-8.

23. It precisely for this reason that the Appellant's submission that specific performance is a remedy available to him in this case is incorrect. The Appellant wants specific performance with credit for the $400K that he paid to Elite. In other words, on closing he would pay the Receiver $1.38M. The insurmountable hurdle the Appellant faces, leaving aside the second mortgage and the construction liens (which are also insurmountable hurdles), is that the Mateo Property is subject to a prior conveyance to the Respondent as security for a loan, which security is only redeemable on the payment of the minimum partial discharge amount of $1.75M.

24. For the same reason, the Appellant's argument that the Respondent's priority under the First Mortgage comes into play only when the APS is completed and funds are distributed by the Receiver is wrong. Without paying the minimum partial discharge amount of $1.75M, the Mateo Property cannot be redeemed and conveyed to the Appellant. The same holds true for the Appellant's purported purchaser's lien. A purchaser's lien against a prior mortgaged property arising from an aborted real estate transaction is only good against a vendor's equity of redemption. It cannot leapfrog over the prior mortgage.

Purposes of the *LTA*

25. The overall purposes and the principles underlying the *LTA* were summarized by Epstein J. in *Durrani v. Augier*:

> The ***essential purpose of land titles legislation is to provide the public with security of title*** and facility of transfer…The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> The philosophy of a land titles system embodies three ***principles***; namely, the ***mirror principle, where the register is a perfect mirror of the state of title, the curtain principle***, which holds that a ***purchaser need not investigate the history***

> ***of past dealings with the land, or search behind the title*** as depicted on the register, and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These ***principles form the doctrine of indefeasibility of title and is the essence of the land titles system***: Marcia Neave "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at 174.[16] [emphasis added]

Principle of deemed notice

26. According to *Falconbridge on Mortgages*, since 1850, "the registration of an instrument should in equity constitute notice thereof to all persons claiming any interest in the land subsequent to such registration."[17] Section 72(1) of the *LTA* represents a codification of this principle. It provides that "[n]o person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land..."

Special status accorded to charges

27. By virtue of section 93(3) of the *LTA*, the First Mortgage enjoys absolute priority over the unregistered interests of the Appellant under the APS. Section 93(3) deals specifically with registered charges and the issue of priority as between a registered charge and an unregistered interest:

> Effect of charge when registered
>
> 93(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the charger's interest is subject, ***but free from any unregistered interest in the land***. R.S.O. 1990, c. L.5, s. 93 (3). [emphasis added]

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[16] *Durrani v Augier*, (2000), 190 DL.R. (4th) 183 (Ont. SCJ) at paras. 41 to 42.

[17] *Falconbridge on Mortgages*, 5th ed. / editor-in-chief Walter M. Traub. at s. 8:10.50.

28. Spence J. (as he then was), in *The Cybernetic Exchange, Inc. v. J.C.N. Equities Ltd.*, a 2003 decision involving fraud, remarked in *obiter* that read literally section 93(3) of the *LTA* would seem to provide a mortgagee with an absolute defence notwithstanding that the mortgage was *prima facie* a fraudulent conveyance.[18] His Honour, however, commented that section 93(3) seems intended to be qualified by section 155 of the *LTA* which deals the invalidity of fraudulent instruments that are registered.[19] No issue of fraud arises in the facts at bar in relation to the First Mortgage and, therefore, no legitimate basis exists other than to apply section 93(3) according to its plain language.

29. In *Holborn Property Investments v. Romspen Investment Corp.* ("***Holborn***"), Wilton-Siegel J. agreed with the above analysis and concluded that section 93(3) of the *LTA* is sufficiently clear and unequivocal to preclude the possibility of an unregistered right to purchase having priority over a registered charge:

> 40 First, I do not think that the doctrine of actual notice applies in Ontario to subordinate the interest of a registered chargee who has actual notice of an unregistered agreement of purchase and sale. Subject to the qualification that subsection 93(3) has been read subject to section 155, which deals with the invalidity of the registration of fraudulent instruments and is not at issue in this proceeding, I conclude that subsection 93(3) provides a mortgagee with an absolute defence to a claim based on actual notice.[20]

30. Whereas the contest in *Holborn* was between a buyer under a prior unregistered agreement of purchase and sale and a subsequent mortgagee with actual notice of the prior agreement of purchase and sale, in the facts at bar, the First Mortgage was registered well before

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[18] *The Cybernetic Exchange, Inc. v J.C.N. Equities Ltd.*, 2003 CarswellOnt 4762 (ONSC) at para. 102.

[19] *The Cybernetic Exchange, Inc. v J.C.N. Equities Ltd.*, 2003 CarswellOnt 4762 (ONSC) at para. 102.

[20] *Holborn Property Investments Inc. v Romspen Investment Corp.*, 2008 CarswellOnt 6914 (Ont. SCJ) at para. 40.

the APS came into existence. The Respondent submits that insofar as *Holborn* confirms that a prior unregistered agreement of purchase and sale of which a subsequent mortgagee has actual notice cannot subordinate the subsequent mortgage, it must follow that a subsequent agreement of purchase and sale cannot subordinate a prior mortgage.

31. Viewed through the lens of mortgage law, if there is no residual equity available in a mortgaged property, it is irrelevant whether or not the terms of a subsequent agreement of purchase and sale expressly preclude the purchaser from having an interest in the land prior to closing. Unless there is sufficient equity to redeem a prior mortgage, a purchaser's equitable interest in a mortgaged property is a red herring.

(a) The framework for determining whether a disclaimer of an agreement of purchase and sale is appropriate in the context of a receivership

32. Although the Appellant characterizes the test for disclaimer as an issue of first instance before this Court, there is a substantial body of recent jurisprudence dealing with the extinguishment of interests in land, in the context of Court-supervised receiverships under the *BIA*, both in relation to disclaimers and vesting orders.

33. In *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.* ("***Third Eye***"), which the Motion Judge relied upon in paragraph 48 of her endorsement, this Court considered whether a third party interest in land, in the nature of a gross overriding royalty, could be extinguished by a vesting order in a receivership proceeding under the *BIA*.[21] Upon surveying the jurisprudence respecting vesting orders, Pepall J.A. articulated the following framework:

[21] *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 1.

> Thus, ***in considering whether an interest in land should be extinguished***, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.
>
> If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.[22] [emphasis added]

34. Although *Third Eye* involved a vesting order, the Respondent submits that as both vesting orders and disclaimers dealing with interests in land involve the extinguishment of rights, there is no meaningful distinction between them in assessing whether the Motion Judge committed an appealable error in upholding the Receiver's disclaimer of the APS.

35. Applying the framework in *Third Eye* to the facts before the Motion Judge:

(a) relative to the First Mortgage the APS was merely an entitlement against the Debtors' equity of redemption;

(b) under the terms of the APS, which expressly subordinated and postponed the Appellant's rights to any mortgages arranged by Elite and advances made thereunder, the Appellant acknowledged that he had no interest in the Mateo Property until a transfer/deed was registered in his favour. Therefore, he must be deemed to have consented to his interest being vested out if there was insufficient equity available to satisfy the minimum partial discharge amount of $1.75M under the First Mortgage; and

(c) even if the above noted factors are ambiguous or inconclusive, the equities, which the Motion Judge carefully weighed, did not justify subordinating the legal priority of the First Mortgage.

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[22] *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at paras. 109-110.

36. Although the Appellant argues that the Motion Judge's weighing of the equities amounted to a strict priority analysis, that is plainly not so. Among other facts, the Motion Judge considered that:

- the Appellant obtained legal advice from Mr. Poquiz before singing the APS;[23]
- Mr. Poquiz represented the Appellant in the hearings before Justice Conway leading to the Receivership Order. Justice Conway was well aware of the Appellant's concern and the real possibility that the APS would be disclaimed and yet the Appellant did not apply to vary or appeal the Receivership Order;[24]
- of the lost $400K deposit, the Appellant would likely recoup $100K from Tarion and he may have recourse against others as well (the obvious inference being Mr. Poquiz and his real estate agent);[25]
- although the Appellant was a victim of the improper use of $400K, the Respondent did not participate in the Appellant's decision to make the improvident payment and was unaware of it until Elite requested a partial discharge;[26] and
- there was not enough equity in the Mateo Property to satisfy the First Mortgage, let alone the second mortgage and the construction liens.

37. In *Forjay Management Ltd. v. 0981478 B.C. Ltd.* ("***Forjay***"), a decision which the Motion Judge relied upon in paragraph 47 of her endorsement, and which the Court of Appeal for British Columbia Court upheld, the principles applicable to disclaimer were articulated by Fitzpatrick J.[27] A receiver was appointed under the *BIA* over an unregistered condominium project. The project was substantially complete and the units were subject to pre-sale agreements. The receiver moved for directions and recommended that the pre-sale agreements be

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[23] Endorsement at para. 12.

[24] Endorsement at para. 29.

[25] Endorsement at para. 18.

[26] Endorsement at para. 46.

[27] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527, aff'd 2018 BCCA 251 (CanLII).

completed notwithstanding a significant rise in the value of the units and significant, accruing secured debt in the debtor's estate. The pre-sale agreements contained similar provisions to the APS, which negated any interest in land and subordinated the buyers' rights to the mortgage.

38. Fitzpatrick J. rejected the receiver's recommendation and directed the receiver to disclaim the agreements and remarket the units free of the buyers' interests. She found that the mortgage had legal priority over the buyers by virtue of the contractual provision negating any interest in the land.[28] She also found that the buyers did not have an equitable interest because of their inability to compel partial discharges from the mortgagee. [29]

39. Fitzpatrick J. noted perceptively:

> I would venture to say that most, if not all, insolvency landscapes are littered with the broken promises of the debtor. Secured creditors are not paid; suppliers and trades are not paid; employees are not paid; and the list goes on. Such is the nature of insolvency. The insolvency regimes available to stakeholders (such as bankruptcy, receivership or restructuring) are intended to stabilize matters and allow an orderly realization of assets for the benefit of stakeholders generally. To suggest that a stakeholder's claim is elevated by the debtor having broken its promise to that stakeholder does little to distinguish that claim from all others.[30]

40. Fitzpatrick J. considered the scope of a court-appointed receiver's duties beyond the duty to act in good faith and consider the interests of all stakeholders *simpliciter*. Her Honour noted that one of the primary, but not only, goals of a receiver is to maximize the recovery of the assets

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[28] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 at para. 67, aff'd 2018 BCCA 251 (CanLII).

[29] *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 527 at paras. 78-79, aff'd 2018 BCCA 251 (CanLII).

[30] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 at para. 99, aff'd 2018 BCCA 251 (CanLII).

under its charge.[31] The receiver is required to assess all equitable interests or "equities" in the disclaimer exercise. One of the tools by which a receiver maximizes the value of the assets for the benefit of the stakeholders is by considering whether it is beneficial to continue to abide by contracts between the debtor and other parties, or to disclaim them. The receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. It must exercise proper discretion in doing so since ultimately the receiver may face the criticism that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. If the receiver can demonstrate that the breach of an existing contract does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages.[32]

41. Quoting from *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*,[33] Fitzpatrick J. noted that any duty to preserve goodwill is owed to the debtor entity and not

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[31] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 at para. 35, aff'd 2018 BCCA 251 (CanLII).

[32] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 at paras. 37-38, aff'd 2018 BCCA 251 (CanLII).

[33] *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897.

to its creditors and the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract.[34]

42. Quoting from *Romspen Investment Corporation v. Horseshoe Valley Lands Ltd.* ("***Horseshoe***"),[35] a decision of Wilton-Siegel J. dealing with disclaimer, Fitzpatrick J. noted that a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must be exercised within the framework established by the respective priorities of the creditors.[36]

43. Fitzpatrick J. articulated the following framework with respect to the disclaimer of contracts by a receiver:

> (a) What are the respective legal priority positions as between the competing interests?
>
> (b) Would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
>
> (c) If a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer? [37]

44. Applying the framework in *Forjay* to the facts before the Motion Judge:

> (a) it was incontrovertible that the First Mortgage had legal priority;

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[34] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 at para. 39, aff'd 2018 BCCA 251 (CanLII).

[35] *Romspen Investment Corporation v. Horseshoe Valle Lands Ltd.*, 2017 ONSC 426.

[36] Forjay Management Ltd. v 0981478 B.C. Ltd. 2018 BCSC 527 at para. 43, aff'd 2018 BCCA 251 (CanLII).

[37] *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 527 at para. 44, aff'd 2018 BCCA 251 (CanLII)..

(b) the Motion Judge found from the record that there was little doubt that marketing and selling the Mateo Property would yield a greater recovery than would be the case if the APS were completed and the Appellant was given full credit for the lost deposit. She also found that the Appellant would enjoy a preference if the APS were completed, at the expense of the Respondent, because the First Mortgage would be subordinated by the shortfall in the deposit together with any incremental amount above the purchase price under the APS that the Receiver might realize;[38] and

(c) for the reasons hereinabove discussed in paragraph 36, the Motion Judge, in her discretion, found that the Appellant had failed to establish that the equities supported the APS being completed.

45. Fitzpatrick J. concluded that the failure to disclaim the purchase agreements would result in the buyers obtaining a preference for the same reasons as in the case at bar:

> I also have no difficulty concluding that a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security. In order to permit the pre-sale contracts to complete, the Court would need to order the discharge of the mortgages in circumstances where the mortgagees would not receive payment of the amounts they bargained to accept in exchange for a discharge. ***This would be an exceptional result and I know of no authority to order it in these circumstances***. I agree with the mortgagees that it would have the effect of elevating the claims of the purchasers above the legal priority and security of the mortgagees.[39] [emphasis added]

46. Fitzpatrick J. recognized that the pre-sale contracts did not close because of the debtor's actions, that many of the buyers would be priced out of the real estate market, and that the public policy objective of consumer protection weighed in favour of completing the contracts. She nonetheless concluded that the equities did not justify overriding the mortgagees' legal priority.

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[38] Endorsement at para 43. These findings proved to be prophetic. The Mateo Property has been sold for significantly more than the Appellant agreed to pay. The sale was approved by Koehnen J. on October 6, 2020. The sale transaction was stayed by Tulloch J.A. on October 23, 2020. The hearing of the within appeal was subsequently expedited by Tulloch J.A. as the new buyer is living in temporary accommodation pending the outcome of the within appeal.

[39] *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527 at paras. 91-93, aff'd 2018 BCCA 251 (CanLII).

47. There was a subsequent hearing in the Forjay receivership involving two buyers who paid the entirety of the purchase price under their pre-sale contracts and another buyer who asserted an interest in a unit on the basis of a constructive or resulting trust. Although Fitzpatrick J. recognized that those who had paid in full for their units would lose all of their investments, that did not alter the equities sufficiently to justify trumping the interests of the mortgagees.[40] With respect to the alleged trust, she found that even if a trust had arisen, at the time of the pre-sale contracts, there was no authority which demonstrated that such a trust or equitable interest could defeat a *bona fide* mortgagee.[41]

48. The Motion Judge also considered *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, a decision of Morawetz J. (as he then was), also cited in *Third Eye* and *Forjay*. Morawetz J. gave effect to a subordination clause in an agreement of purchase and sale which is virtually the same as clause 41 of the APS. A receiver was appointed over an unregistered condominium project. A number of units had been pre-sold to buyers, some of whom were occupying the units. Five buyers paid the balance of the purchase price under the purchase agreements directly to the debtor. The payments totaled more than $1.2 million. The receiver moved for authorization to market and sell the property and terminate the existing purchase agreements.[42]

49. Morawetz J. held that the mortgagee had legal priority over the interests of the buyers. He then then considered the equities and found that they did not justify overriding the first mortgagee's legal priority. His Honour noted the following:

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[40] *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 1251 at paras. 34, 45, 58 and 68, aff'd 2018 BCCA 251 (CanLII).

[41] *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 1251 at para. 58, aff'd 2018 BCCA 251 (CanLII).

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

> The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.
>
> The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.[43]

50. Before this Court, the Appellant relies, as he did before the Motion Judge, upon *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.* ("***Armadale***"),[44] in which Lax J. ordered the bankruptcy trustee/Construction Lien trustee to complete a pre-filing sale contract of a condominium unit notwithstanding that the debtor's estate would receive no benefit, because it would be "dishonourable" for the trustee to disclaim the contract.

51. Contrary to the Appellant's argument that *Armadale* is a case most like the one at bar, the Motion Judge rightly noted, as did Lax J., that the facts in *Armadale* were "unique."[45] *Armadale* was not a contest between a purchaser and mortgagee as the Appellant submits in its factum. It was a contest between a purchaser and the trustee. Nor is it clear from Lax J.'s reasons whether the condominium unit was subject to a mortgage.

52. In *Armadale*, the purchaser paid the entire purchase price to a personal company of the sole officer and director of the debtor, moved into the unit and made $80,000 worth of improvements.[46] There was no reference to a contractual provision negating the purchaser's interest in land or subordinating it to a mortgagee's interest. Lax J. held that the property had

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[43] *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 at paras. 35-36.

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

[45] Endorsement at para. 34.

[46] *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC) at para. 5.

been validly conveyed but for the delivery of a deed.[47] *Armadale* is wholly distinguishable. In the case at bar at the time of the Receiver's appointment, the Appellant had paid approximately 28 percent of the purchase price, the home was incomplete and the Appellant was not living in it. As the Motion Judge noted, the Receiver subsequently incurred approximately $40,000 in expenses on the Mateo Property to ready it for sale.[48]

53. The Appellant cites *Bank of Montreal v. Probe Exploration Inc.* ("***Probe***") for the proposition that in some instances, contracts should be honoured even though disclaiming them would lead to a greater realization for a secured creditor.[49] *Probe* is readily distinguishable on its facts. In that case, the bank was the debtor's first ranking secured creditor. The receiver, who had previously been retained by the bank as its agent to review the debtor's financial affairs, was then appointed by the court as receiver-manager of the debtor, without notice to Midcoast, the debtor's second secured creditor. Midcoast was in the business of providing natural gas producers, including the debtor, with transportation, gathering and processing services. The bank and Midcoast were parties to a pre-filing inter-creditor agreement, pursuant to which the bank agreed that if it or its agent or a private receiver appointed by the bank took possession of the debtor's assets, the servicing contracts between the debtor and Midcoast, which the receiver was seeking to disclaim, would be assumed by the bank or its agent. Under those unique

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[47] *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC) at para. 12.

[48] Endorsement at paras. 4 and 44.

[49] *Bank of Montreal v. Probe Exploration Inc.*, 2000 CanLII 28177 (AB QB), aff'd 2000 CanLII 26966 (AB CA).

circumstances, the court understandably refused to place the bank in a better position than it was in under the inter-creditor agreement by permitting the receiver to disclaim the contracts.[50]

54. In contrast, in the case at bar, the Respondent had no privity of contract with and was a stranger to the Appellant. There is no way in which the Respondent could have protected itself from the outcome which the Appellant urges on this Court. No cases involving similar facts are cited by the Appellant to support trumping the Respondent's legal priority. On the contrary, the jurisprudence involving similar facts overwhelmingly supports preserving the priority of the First Mortgage over the APS.[51]

(b) Appellant's argument regarding the "paramountcy" of a property interest

55. The Appellant relies on *1565397 Ontario Inc. (Re)* ("***156***"), a decision of Wilton-Siegel J., for the proposition that it does not appear that a court has ever authorized a receiver to disclaim a proprietary interest.[52] In *156*, the court-appointed receiver of the assets of the debtor moved for an order to disclaim an undertaking given by the debtor. The debtor had been incorporated solely for the purpose of acquiring a 107 acre parcel of land and developing a 28 lot subdivision thereon. The debtor gave the undertaking in connection with its purchase of the land. The undertaking consisted of a covenant by the debtor to hold two prospective lots in trust, one for the vendor and one for an individual (collectively, the "**Holders**") and a further covenant to convey the lots on demand without cost, upon the lots being created through registration of a

[50] *Bank of Montreal v. Probe Exploration Inc.*, 2000 CanLII 28177 (AB QB) at paras. 38-39, aff'd 2000 CanLII 26966 (AB CA).

[51] See for example: *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816; *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897; and *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648.

[52] *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (Ont. SCJ).

plan of subdivision. There were no further actions required by the Holders to perfect their rights. They were entitled to obtain the lots upon the lots being created. Notices of the interests of the Holders pursuant to the undertaking were not registered on title to the land, until after the Receiver's appointment. At the time of the receiver's appointment, the plan of subdivision had not been registered by the debtor.

56. CareVest Capital Inc., the receiver's appointing creditor, and sole mortgagee over the land, had knowledge of the undertaking prior to advancing funds to the debtor. CareVest had also recognized the "prior interest" of the Holders in letters from its legal counsel after the receiver's appointment. Based on CareVest's knowledge and recognition of the undertaking, Wilton-Siegel J. found that the security constituted by CareVest's mortgage did not extend to the Holders' interest. His Honourm therefore, rejected the receiver's motion to disclaim the undertaking. Among the reasons given that are relevant to the facts at bar, he noted that:

- there was no issue of priority as between the Holders and the debtor's secured creditors because the security constituted by CareVest's mortgage did not extend to the Holders' interest;[53]
- CareVest had acknowledged the interest of the Holders in the Land as ranking in priority to its mortgage;[54] and
- the receiver was not asking the Court to vest out the Holders' interest based on the absence of any residual equity in the land being available for the Holders.[55]

57. Based on the above factors, Wilton-Siegel J. viewed the order sought by the receiver as amounting to an expropriation of the Holders' assets, which for good reason he was unwilling to grant.[56] In contrast, in the facts at bar:

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[53] *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (Ont. SCJ) at paras. 7, 26 and 39.

[54] *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (Ont. SCJ) at para. 71.

[55] *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (Ont. SCJ) at paras. 30, 38, 64 and 76.

- the First Mortgage pre-dated the APS;
- the Appellant's rights under the APS are expressed to be subject to the First Mortgage;
- unlike CareVest, who recognized the existence of the Holders' rights as a prior interest, the Respondent never recognized the APS as a prior interest; and
- there are no documents in the record capable of reasonably being construed as limiting the Respondent's security over the Mateo Property. In fact, the reverse is true. The partial discharge provision clearly provided that a partial discharge is only available if the Respondent receives a minimum payment of $1.75M.

58. The Respondent submits that *156* is support for the proposition that in appropriate circumstances an interest in land can indeed be disclaimed by a Court-appointed receiver. In the course of his reasons, Wilton-Siegel J recognized that: "While the Court has the authority to order such a "vesting out" of property interests having no residual equity in order to permit a sale of property subject to security… these circumstances are not present in this proceeding."[57]

(c) The Motion Judge did not err in interpreting the 'no interest in property' provision in the APS

59. The Appellant argues that the Motion Judge erred in holding that clause 27 of the APS, which negated the Appellant's interest in the Mateo Property until he received a registered transfer/deed in closing, was unenforceable against him, as a result of Elite's failure to complete the transaction in June of 2020. Therefore, the Appellant argues that his proprietary interest remains alive.

60. Leaving aside the Respondent's submission in paragraph 31 hereinabove, that the question of whether the Appellant has a proprietary interest is a red herring because there is no

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[56] *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (Ont. SCJ) at para. 60.

[57] *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (Ont. SCJ) at para. 75.

residual equity of redemption for him to attach, the Respondent submits that it was clear from the record before the Motion Judge that the APS was never repudiated by Elite, nor was there an election by the Appellant to treat the APS as being in full force and effect. Moreover, since the doctrine of fundamental breach has been laid to rest, the Appellant cannot escape the effect of clause 27.

61. Among the cases which the Appellant relies upon in support of his position that clause 27 is ineffective, and which he relied upon before the Motion Judge, is *McGrath v. B.G. Schickendanz Homes Inc. ("**McGrath**")*. In *McGrath*, a buyer breached an agreement to purchase a condominium unit and the vendor treated the buyer's breach as conduct constituting repudiation, entitling the vendor to accept the repudiation and terminate the contract. The buyer sued for specific performance and damages, in the alternative, and registered a CPL. The vendor moved to discharge the CPL, in reliance on a clause in the agreement that prohibited the buyer from registering a CPL. The vendor argued that the CPL should be discharged because the effect of the no registration clause was to negate any interest in land. The agreement (unlike the APS in the case at bar) did not contain a no interest in land provision.[58]

62. Cameron J. dismissed the vendor's motion on the basis that the vendor could not unilaterally terminate the agreement, or accept termination, and yet continue to rely on a clause inserted for its benefit which was detrimental to the buyer's rights, as there was nothing in the agreement which allowed the clause to survive termination.[59]

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[58] *McGrath v. B.G. Schickendanz Homes Inc.*, 2000 CarswellOnt 3990.

[59] *McGrath v. B.G. Schickendanz Homes Inc.*, 2000 CarswellOnt 3990 at para. 64.

63. The Motion Judge agreed with the *dictum* in *McGrath* but found that there was no evidence before her of conduct constituting repudiation and no evidence that either party accepted a repudiation and terminated the APS. The Motion Judge further considered that *McGrath* was inapplicable because it was not Elite but rather the Respondent who sought to rely on clause 27. The Motion Judge also noted that the Appellant in seeking to compel the Receiver to complete the APS was supportive of the existence of the APS rather than its termination.[60]

64. The Respondent respectfully submits that the Motion Judge committed no appealable error with respect to her conclusion regarding clause 27.

(d) Priorities analysis was not obviated by the Appellant's property interest

65. For a discussion of why the Motion Judge did not apply a strict priorities analysis, see paragraph 36 hereinabove.

Issue 3: Did the Motion Judge commit any other reviewable errors that affected her decision?

(a) No reviewable error in treating the Appellant's motion as a motion to vary the Receivership Order

66. The Appellant argues that the Motion Judge committed a reviewable error in viewing the Appellants' motion as a request to vary the Receivership Order and relies on Wilton-Siegel J.'s statement in *Horseshoe* that an order appointing a receiver involves only a procedural change rather than a substantive change in circumstances. With respect, the Receivership Order in the facts at bar extended beyond the model receivership order developed by the Commercial List Users' Committee. Paragraph 3(c) expressly empowered and authorized the Receiver to disclaim

[60] Endorsement at paras. 39-40.

any contracts of the Debtors, including the APS. Paragraph 34 contained a substantive declaration that the Respondent's security over the Debtors' property ranks in priority to the interests, if any, of the Appellant under the APS. Those provisions of the Receivership Order were granted upon deliberation by Justice Conway, following a hearing at which the Appellant was represented by counsel, and notwithstanding that, as noted in her endorsement, she was sympathetic to the plight of the purchasers.

67. The Motion Judge held that because the Appellant was represented at the hearing before Justice Conway, his ability to see a variation of the Receivership Order was limited. In doing so, she correctly applied the proposition of law articulated by R.S.J. Leitch in *Textron Financial Canada Limited v. Beta Limitee*:

> Paragraph 29 of the receivership order permits an application to the Superior Court of Justice to vary or amend that order. I agree with the Receiver that the jurisdiction to vary an order must be exercised sparingly and that variance provisions are intended to apply in situations where parties impacted by an order are not provided with notice of the making of the order. A motion to vary is not a substitute for an appeal where the time for appeal has passed.[61]

68. The Motion Judge's holding is consistent with the jurisprudence involving section 187(5) of the *BIA*, which provides that "[e]very court may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

69. The principles governing an application under section 187(5) are whether the order should remain in force because of changed circumstances or fresh evidence. Fresh evidence means evidence that is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application. In addition, the

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[61] *Textron Financial Canada Limited v. Beta Brands Limited*, 2007 CanLII 30473 (ON SC) at para. 89.

application must be made promptly within a reasonable time of acquiring knowledge of the order and review jurisdiction must be exercised sparingly, considering the rights of the debtor, creditors and the public. The court should resort to its jurisdiction under section 187(5) only if it is just and expedient in the control of its own process, or where there is a lack of notice, particularly where the lack of notice negatively affects the integrity of the bankruptcy system. The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted.[62] If there is no evidence of change of circumstances but only an allegation that the order sought to be reviewed is unfair, the application will be dismissed.[63]

70. In *Impact Tool & Mould Inc. (Re)*, this Court dismissed an appeal from a motion refusing to vary an approval and vesting order because no appeal of the order had been taken and the variation motion was being used purely for the purpose of bringing an appeal out of time.[64]

71. As the Appellant did not meet the high threshold for varying the Receivership Order, the Respondent submits that the Motion Judge committed not appealable error2 in dismissing his motion.

(b) No error in applying the "unfair preferences" analysis

72. For a discussion of why the Motion Judge did not apply a strict priorities analysis, see paragraphs 24, 44(b) and 45, hereinabove.

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[62] *Re Garritty (Proposal)*, 2006 ABQB 238 at para. 46.

[63] *Black v. Ernst & Young Inc.*, 1997 NSCA 67, 1997 CarswellNS 239 at para. 51.

[64] *Impact Tool & Mould Inc. (Re)*, 2008 ONCA 187 at para. 8.

(c) No error in concluding that the Receiver did not breach its fiduciary duty

73. For a discussion of the scope of a court-appointed receiver's duties, see paragraphs 41 through 42, hereinabove.

(d) The Motion Judge did not err on the equities branch of the disclaimer test

74. For a discussion of Motion Judge's weighing of the equities, see paragraph 36 hereinabove.

Issue 4: Other issue raised by the Appellant

75. See paragraphs 34 and 35, hereinabove, for a discussion of why *Third Eye*, although it involved a vesting order, is nonetheless instructive because it addresses the extinguishment of rights.

PART V – ORDER REQUESTED

76. The Respondent respectfully requests that this appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2020.

David Preger
Dickinson Wright LLP

Lawyers for C & K Mortgages Services Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37
2. *Falconbridge on Mortgages*, 5th ed. / editor-in-chief Walter M. Traub
3. *Durrani v Augier*, 190 DL.R. (4th) 183 (Ont. SCJ)
4. *The Cybernetic Exchange, Inc. v J.C.N. Equities Ltd.*, 2003 CarswellOnt 4762 (Ont. SCJ)
5. *Holborn Property Investments Inc. v Romspen Investment Corp.*, 2008 CarswellOnt 6914 (Ont. SCJ)
6. *Third Eye Capital Corporation v. Resources Dianor Inc.*, 2019 ONCA 508
7. *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527
8. *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251
9. *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897
10. *Romspen Investment Corporation v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426
11. *Forjay Management Ltd. v 0981478 B.C. Ltd*., 2018 BCSC 1251
12. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd*., 2012 ONSC 4816
13. *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (ON SC)
14. *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 28177 (AB QB)
15. *Bank of Montreal v. Probe Exploration Inc*., 2000 CanLII 26966 (AB CA)
16. *Romspen Investment Corporation v. Woods Property Development Inc*., 2011 ONSC 3648
17. *1565397 Ontario Inc. (Re)*, 2009 CanLII 32257 (ON SC)
18. *McGrath v. B.G. Schickendanz Homes Inc.*, 2000 CarswellOnt 3990 (Ont. SCJ)
19. *Textron Financial Canada Limited v. Beta Brands Limited*, 2007 CanLII 30473 (ON SC)
20. *Re Garritty (Proposal)*, 2006 ABQB 238
21. *Black v. Ernst & Young Inc.*, 1997 NSCA 67, 1997 CarswellNS 239
22. *Impact Tool & Mould Inc. (Re)*, 2008 ONCA 187

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Land Titles Act, R.S.O. 1990, Chapter L.5

Effect of charge when registered

93. (3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land. R.S.O. 1990, c. L.5, s. 93 (3).

Estate of first registered owner with absolute title

45. The first registration of a person as owner of land, in this Act referred to as first registered owner with an absolute title, vests in the person so registered an estate in fee simple in the land, together with all rights, privileges and appurtenances, free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario, but subject to the following:

1. The encumbrances, if any, entered on the register.
2. The liabilities, rights and interests that are declared for the purposes of this Act not to be encumbrances, unless the contrary is expressed on the register.
3. Where the first registered owner is not entitled for the owner's own benefit to the land registered, then as between the owner and any persons claiming under the owner, any unregistered estates, rights, interests or equities to which such person may be entitled. R.S.O. 1990, c. L.5, s. 45.

Effect of unregistered instruments

72. (1) No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the records of the office kept for the entry of instruments received or are in course of entry. R.S.O. 1990, c. L.5, s. 72 (1).

Priorities

78. (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration. R.S.O. 1990, c. L.5, s. 78 (5).

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

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

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

COURT OF APPEAL FOR ONTARIO

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

B E T W E N:

C & K MORTGAGE SERVICES INC.

Applicant
(Respondent in Appeal)

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

CERTIFICATE

I, David P. Preger (Dickinson Wright LLP), lawyer for the Respondents, **hereby certify**:

1. that an order under subrule 61.09(2) (original record and exhibits) has been obtained or is not required; and

2. I estimate that counsel for the Respondents will require forty-five (45) minutes for oral argument of the appeal, not including Reply.

David P. Preger

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

-and-

CAMILLA COURT HOMES INC. et al
Respondents

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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