

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and-

**2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP,
1000162801 ONTARIO CORP., AMERICAN CORPORATION
and 1000199992 ONTARIO CORP.**

Respondents

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

**REPLY FACTUM OF THE RECEIVER FOR MOTION
TO DISCLAIM CERTAIN AGREEMENTS AND INCREASE RECEIVER'S
BORROWING LIMIT
(Returnable May 27, 2024)**

May 24, 2024

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PART I. OVERVIEW

1. This Reply Factum addresses the Factum of Hsin Yang Lee, dated May 23, 2024 (the “**Lee Factum**”). Mr. Lee is one of the Freehold Purchasers.¹
2. Mr. Lee’s factum contends that the deposits of the Freehold Purchasers paid to the Debtors’ in respect of the Freehold Towns (the “**Freehold Deposits**”) ought to have been held in trust under section 81(1) of the *Condominium Act* as payments made in respect of a “proposed common interest” in a condominium corporation.² On this basis, Mr. Lee argues that these alleged trust funds are exempt from the property of the Debtors’ estate and belong to the Freehold Purchasers.
3. Mr. Lee’s theory is wrong for numerous reasons and is not a basis for refusing the disclaimer of the Freehold APSs.
4. First, the Freehold Deposits did not pay for the Common Elements (as defined below). This is both explicitly provided for in the Freehold APSs and consistent with the fact that the Common Elements (as defined below) represent a *de minimis* economic interest.
5. Second, Mr. Lee’s theory undermines, and is inconsistent with, the entire scheme of homebuyer protections provided for in the *Condominium Act, 1998* (“**Condominium Act**”) and the *Ontario New Home Warranties Plan Act* (“**ONHWPA**”). Simply put, Mr. Lee attempts to confer on himself both the benefits of a condominium purchaser under the *Condominium Act* (where deposits are held in trust) and the benefits of a freehold

¹ Capitalized terms in this Receiver’s Reply Factum have the definitions adopted in the Factum of the Receiver, dated May 23, 2024, unless otherwise stated.

² Lee Factum, para. 16 ([F82](#)); *Condominium Act, 1998*, [S.O. 1998, c. 19, s. 81\(1\)](#) [“**Condominium Act**”].

purchaser under the ONHWPA (which provides Mr. Lee with deposit protection of \$100,000 in this case) This theory would throw the practices of the entire homebuilding industry into disarray.

6. Third, even if there was a breach of trust by the Debtors in respect of the Freehold Deposits (which is denied), this does not affect the legal priority of secured creditors over the Freehold Purchasers with respect to the Freehold Deposits.

PART II. FACTS

A. *The POTLs*

7. The Freehold Towns are parcels of tied land (“**POTLs**”) meaning they consist of a freehold interest in respect of the townhome itself and an interest in certain common elements such a shared access driveway, visitor parking and other ancillary components of the Project (the “**Common Elements**”), by way of a condominium corporation.³

PART III. SUBMISSIONS

8. The Receiver makes three primary submissions in response to Mr. Lee’s Factum:
- (a) The Freehold Deposits did not pay for the Common Elements and, therefore, they are outside of the ambit of the deposit trust scheme provided for in s. 81(1) of the *Condominium Act*;
 - (b) The inclusion of the Freehold Deposits in the *Condominium Act*’s deposit trust provision would undermine the home buyer protection scheme developed by the Legislature; and

³ Second Report at para. 89 ([E1358](#)). See also the definition of “POTL” at art. 1 of the Example Freehold APS, Appendix A to the Second Supplemental Report ([E2290](#)).

- (c) Even if there was a breach of trust in respect of the Freehold Deposits, the Freehold Purchasers have no priority entitlement at law.

A. The Freehold Deposits did not pay for the Common Elements

9. The Freehold APSs are clear that: (i) none of the Freehold Deposits (approximately \$144,642⁴ on average) are attributable for the purchase of the Freehold Towns' Common Elements and (ii) only \$2 of the Freehold APSs purchase price is attributable to the Common Elements. As set out in art. 48 Freehold APSs:

That portion of the Purchase Price applicable to the common interest in the Condominium shall be Two (\$2.00) Dollars which shall be payable as part of the monies dues on the Unit Transfer Date from the Purchaser to the Vendor. There is no deposit payable by the Purchaser for the purchase of the common interest in the Condominium.⁵

10. This is significant because s. 81(1) only applies to payments made:

(a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a [proposed common interest in the corporation]

(b) on account of an agreement of purchase and sale of a [proposed common interest in the corporation]; or

(c) on account of a sale of a [proposed common interest in the corporation].⁶

11. As set out in art. 48 of the Freehold APSs, the Freehold Deposits are not payments in respect of the Common Elements which would require them to be held in trust under s. 81(1) of the *Condominium Act*. To the contrary, the Freehold Deposits are deposits for the purchase of freehold units which deposits do not have to be held in trust under the legislative scheme.

⁴ First Supplemental Report at para. 84 ([E1750](#)).

⁵ Example Freehold APS, art. 48(a), Appendix A to the Second Supplemental Report ([E2313](#))

⁶ *Condominium Act*, [s. 81\(1\)](#), read in concert with [s. 138\(4\)](#).

12. It is important to note that art. 48 of the Freehold APSs (which states that only \$2 of the purchase price and none of the deposit is attributable to the Common Elements) is not a mere deeming provision. Rather, it represents a reasonable allocation of the consideration paid by the homebuyer because a homebuyer does not actually acquire any valuable interest in the Common Elements at all. Unlike a standard condominium unit, a homebuyer could not sell its common interest in the access driveway and visitor parking, for example.⁷

B. Mr. Lee's Theory Undermines the Legislative Scheme of Homebuyer Protection

13. As Mr. Lee notes in his factum, Tarion distinguishes between freeholds, including POTLs (such as the Freehold Towns), and condominium homes for the purposes of its statutory warranty compensation under the *ONHWPA*. This is significant because, under *ONHWPA* regulations, there are two different limits on compensation for lost deposits, as between freehold and condominium homes:

- (a) For freehold homes, the greater of (1) \$60,000 and (2) the lesser of 10% of the sale price of the home and \$100,000; and
- (b) For condominiums, \$20,000 plus interest.⁸

14. Pursuant to this scheme, Mr. Lee's deposit is protected under the more generous, Tarion freehold home warranty (and he will get \$100,000 of deposit protection here).⁹

⁷ Example Freehold APS, art. 48(a), Appendix A to the Second Supplemental Report ([E2313](#)); Second Report at para. 89 ([E1358](#)).

⁸ *Administration of the Plan*, [R.R.O., Reg. 892, s. 6\(1\) and \(2\)](#).

⁹ Affidavit of Hsin Yang Lee, sworn May 23, 2024 at para. 9 ([F97](#)). See also the "Warranty Information Form" in Example Freehold APS, Appendix A to the Second Supplemental Report ([E2339](#)).

15. Mr. Lee submits that this distinction should not matter because it is based on the definition of “home” in the *ONHWPA*, which is purportedly distinct from the definition of “common elements condominium corporation” contained in the *Condominium Act*.¹⁰

16. This submission ignores the fact that the warranty scheme under the *ONHWPA* specifically complements the deposit trust provisions provided under the *Condominium Act*.

17. The regulations under the *ONHWPA* provide for greater statutory protection for deposits paid in respect of POTLs, like the Freehold Deposits (up to \$100,000 instead of up to \$20,000)¹¹ precisely because entities selling new condominiums have a statutory requirement under the *Condominium Act* to hold purchaser deposits in trust. Likewise, condominium buyers are entitled to lesser protection for their deposits because they must be held in trust pursuant to the *Condominium Act*.

18. This distinction is made explicit on Tarion’s website:

How much of my deposit is covered?

The level of deposit protection depends on the purchase price and type of home you buy. If the price of your new freehold home is \$600,000 or less, your deposit is covered for up to \$60,000. For example, if the price of the home you’re buying is \$550,000 and you put down \$60,000, your entire deposit is protected. If the purchase price is over \$600,000, your deposit is protected for 10 per cent of the purchase price, up to a maximum of \$100,000.

If you’re looking to buy a condo unit, you receive two levels of deposit protection. First, your deposit is protected by the trust provisions of the *Condominium Act*. Under the Act, your builder must hold your deposit money in a trust account. As a second level of protection, if for some reason your deposit was not placed in trust, the new home warranty provides protection for up to \$20,000.¹²

¹⁰ Lee Factum para. 15 ([F82](#)).

¹¹ *Administration of the Plan*, [R.R.O., Reg. 892, s. 6\(1\) and \(2\)](#).

¹² See [tarion.com: “How does deposit protection work on new homes?”](#)

19. Mr. Lee's proposed reading of the *Condominium Act* upsets this scheme by, on the one hand, seeking the protection owing to freehold buyers under the *ONHWPA* (i.e. \$100,000 of deposit protection in this case) and, on the other, seeking the protection owing to condominium buyers under the *Condominium Act* (i.e. the requirement to hold the deposits in trust).

20. This erroneous interpretation, if accepted, would upend the Tarion warranty protection scheme and, presumably, have significant repercussions throughout the development industry.

C. *The Secured Lenders Have Priority over the Freehold Purchasers, in Any Event*

21. Even if the injection of part or all of the Freehold Deposits into the Project was a breach of the trust provisions under the *Condominium Act*, these trust claims still would not have priority over the secured lenders.

22. It is fundamental to Ontario's land titles system that the registered interest of a bona fide mortgagee without notice trumps any prior unregistered interest in the property.¹³ Mr. Lee's position cannot succeed without violating this principle.

23. Similarly, a recent Alberta decision considered circumstances substantially identical to this case, and concluded that even if *Condominium Act* trust funds could be traced into the real property, the purchasers could no longer assert a trust as against registered encumbrancers of the land:

The Developer violated *Condominium Property Act* s. 14(3) [i.e. the equivalent of section 81(1) of Ontario's statute] and used the Deposits to pay costs associated with the development of the Land, including building costs. In doing so, the Developer breached

¹³ See e.g. *Di Michele v. Di Michele*, [2014 ONCA 261](#) at paras. 106-108, citing *Land Titles Act*, R.S.O. 1990, c. L.5, [s. 93\(3\)](#).

the statutory trust. However, **the Deposits ceased to be deposits when they were co-mingled with other funds and activities used to improve the Land. The Deposits were no longer uniquely identifiable and became inseparable from other funds and activities that added value to the Land, such as the work efforts undertaken by the Lienholders. Any trust interest associated with the Deposits became an interest in land subject to the *Land Titles Act* regime.**

As discussed above, the *Land Titles Act* requires the registration of interests in land in order to gain priority over others also claiming interests. It follows that the priority of the Deposits, which were capable of becoming registered interests in land, must have their priority dealt with according to the *Land Titles Act*.¹⁴ [emphasis added]

24. Finally, and in any event, to the extent that the Freehold Purchasers obtained an interest in the Real Property as a result of the *Condominium Act* trust (which is denied), the Freehold Purchasers expressly subordinated their interest in the Real Property to the secured lenders by virtue of art. 36(a) of the Freehold APSs. This article provides that:

The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary and agrees to execute all acknowledgements or postponements required to give full effect thereto.¹⁵

25. Justice Steele recently relied on similar subordination language in *Kingsett Mortgage Corp v. Stateview Homes* in refusing to grant a constructive trust remedy in respect of purchaser deposits injected into a real property development, in alleged breach of trust:

[80] [...] I am not satisfied that “extraordinary circumstances” exist in this case such that a constructive trust ought to be ordered. As noted, a remedial constructive trust would upset the BIA priority scheme. Here we have a situation where, on the one hand, if the Stateview entities had not breached the trusts, the creditors would not have had access to the deposits. However, on the other hand, had the Stateview entities not breached the trusts, the Stateview entities may have appeared less financially secure, and the creditors may not have extended credit or additional credit to the Stateview entities.

[81] In my view the fact that the Purchasers agreed to the Subordination Clause in the Pre-Sale Purchase Agreements is also a factor weighing against the ordering of this remedy.¹⁶

¹⁴ *1864684 Alberta Ltd v. 1693737 Alberta Inc*, [2016 ABQB 371](#) at para. 47.

¹⁵ Second Supplemental Report at para. 9 ([E2278](#)).

¹⁶ *Kingsett Mortgage Corp v. Statview Homes*, [2023 ONSC 2636](#) at paras. 80-81.

26. These decisions make clear that the interests of the secured lenders registered on title to the Real Property remains in priority to that of the Freehold Purchasers, even if one accepted Mr. Lee's erroneous argument that the injection of the Freehold Deposits into the Project was a breach of the *Condominium Act* deposit trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th of May, 2024.



Jeffrey Larry / Ryan Shah

SCHEDULE "A"

1. *Di Michele v. Di Michele*, [2014 ONCA 261](#)
2. *Kingsett Mortgage Corp v. Statview Homes*, [2023 ONSC 2636](#)
3. *1864684 Alberta Ltd v. 1693737 Alberta Inc.*, [2016 ABQB 371](#)

SCHEDULE “B”

Condominium Act, 1998, S.O. 1998, c.19

“common elements condominium corporation” means a common elements

condominium corporation described in subsection 138 (2); (“association condominiale de parties communes”)

“common interest” means the interest in the common elements appurtenant to,

(a) a unit, in the case of all corporations except a common elements condominium corporation, or

(b) an owner’s parcel of land to which the common interest is attached and which is described in the declaration, in the case of a common elements condominium corporation; (“intérêt commun”)

“proposed unit” means land described in an agreement of purchase and sale that provides for delivery to the purchaser of a deed in registerable form after a declaration and description have been registered in respect of the land; (“partie privative projetée”)

Money held in trust

81(1) A declarant shall ensure that a trustee of a prescribed class or the declarant’s solicitor receives and holds in trust all money, together with interest earned on it, as soon as a person makes a payment,

(a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit;

(b) on account of an agreement of purchase and sale of a proposed unit; or

(c) on account of a sale of a proposed unit. 1998, c. 19, s. 81 (1).

Exception

(2) Subsection (1) does not apply to money received,

(a) on account of the purchase of personal property included in the proposed unit that is not to be permanently affixed to the land; or

(b) as an occupancy fee under subsection 80 (4). 1998, c. 19, s. 81 (2).

Reservation money

(3) If a person has paid money to reserve a right to enter into an agreement of purchase and sale for the purchase of a proposed unit and subsequently enters into such an

agreement with the declarant, the declarant shall, on entering into the agreement, credit the money received to the purchase price under the agreement, despite any provision of the agreement. 1998, c. 19, s. 81 (3).

Creation

138(1) Subject to the regulations, a declarant may register a declaration and description that create common elements but do not divide the land into units. 1998, c. 19, s. 138 (1); 2015, c. 28, Sched. 1, s. 146 (1).

Type

(2) The type of corporation created by the registration of a declaration and description under subsection (1) shall be known as a common elements condominium corporation. 1998, c. 19, s. 138 (2).

Requirements for registration

(3) A declaration and description for a common elements condominium corporation shall not be registered unless the registration would create a freehold condominium corporation that is not a vacant land condominium corporation or, except as provided in the regulations made under this Act, a phased condominium corporation. 1998, c. 19, s. 138 (3)

Application

(4) Subject to this Part and the regulations, Parts I to IX, XI and XIV apply with necessary modifications to a common elements condominium corporation, except that,

(a) references to a unit or a proposed unit shall be deemed to be references to a common interest in the corporation or a proposed common interest in the corporation, respectively;

(b) references to a mortgagee of a unit shall be deemed to be references to a mortgagee of a common interest appurtenant to an owner's parcel of land mentioned in subsection 139 (1); and

(c) references to a common interest appurtenant to a unit shall be deemed to be references to a common interest appurtenant to an owner's parcel of land mentioned in subsection 139 (1). 1998, c. 19, s. 138 (4); 2015, c. 28, Sched. 1, s. 122 (2).

Other corporations

(5) This Part does not apply to a corporation that is not a common elements condominium corporation. 1998, c. 19, s. 138 (5)

Land Titles Act, RSO, 1990, c. L.5.

Charges

93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale. R.S.O. 1990, c. L.5, s. 93 (1).

Statement of principal

(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures. 1998, c. 18, Sched. E, s. 135 (1).

Effect of charge when registered

(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).

Where advances under registered charge to have priority over subsequent charges

(4) A registered charge is, as against the chargor, the heirs, executors, administrators, estate trustees and assigns of the chargor and every other person claiming by, through or under the chargor, a security upon the land thereby charged to the extent of the money or money's worth actually advanced or supplied under the charge, not exceeding the amount for which the charge is expressed to be a security, although the money or money's worth, or some part thereof, was advanced or supplied after the registration of a transfer, charge or other instrument affecting the land charged, executed by the chargor, or the heirs, executors, administrators or estate trustees of the chargor and registered subsequently to the first-mentioned charge, unless, before advancing or supplying the money or money's worth, the registered owner of the first-mentioned charge had actual notice of the execution and registration of such transfer, charge or other instrument, and the registration of such transfer, charge or other instrument after the registration of the first-mentioned charge does not constitute actual notice.

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31

"home" means,

(a) a self-contained one-family dwelling, detached or attached to one or more others by one or more common walls,

(b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,

(c) a condominium unit that is a residential dwelling, including the common elements in respect of which the unit has an appurtenant common interest as described in the condominium declaration of the condominium corporation, or

(d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies, and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes; (“logement”)

R.R.O. 1990, Reg. 892: Administration of the Plan under Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31

6. (1) In the case of a home of a type referred to in clause (a) or (b) of the definition of “home” in section 1 of the Act, the maximum amount payable to a person out of the guarantee fund in respect of a claim under subsection 14 (1) or (2) of the Act is,

(a) \$20,000 in respect of a claim in relation to a purchase agreement, or a construction contract, entered into before February 1, 2003;

(b) \$40,000 in respect of,

(i) a claim in relation to a purchase agreement entered into on or after February 1, 2003 and before January 1, 2018, or

(ii) a claim in relation to a construction contract entered into on or after February 1, 2003; or

(c) in respect of a claim in relation to a purchase agreement entered into on or after January 1, 2018, the greater of,

(i) \$60,000, and

(ii) the lesser of 10 per cent of the sale price of the home, and \$100,000.
O. Reg. 2/03, s. 1; O. Reg. 524/17, s. 1.

(2) In the case of a home that is a condominium dwelling unit, the maximum amount payable to a person out of the guarantee fund in respect of a claim under subsection 14 (1) of the Act is \$20,000, plus the amount of interest that has accrued, until the time of payment, on the net principal amount payable out of the guarantee fund in respect of the claim. O. Reg. 2/03, s. 1.

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