

**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, RSC, 1985, c. B-3, AS AMENDED AND SECTION
101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF HSIN YANG LEE OPPOSING RECEIVER'S MOTION TO DISCLAIM
CERTAIN AGREEMENTS OF PURCHASE AND SALE
(Returnable May 27, 2024)**

May 23, 2024

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PART I. OVERVIEW

1. This factum is filed in support of Hsin Yang Lee's opposition to Albert Gelman Inc.'s (the "**Receiver**") Notice of Motion dated May 1, 2024 and returnable May 27, 2024 (the "**Notice**") to *inter alia* allow the Receiver to terminate and disclaim the 28 agreements of purchase and sale entered into between Jefferson Properties Limited Partnership (the "**Vendor**") and home buyers in respect of the Freehold Towns (as defined in the Notice).

PART II. FACTS

2. On April 23, 2021, Hsin Yang Lee ("**Lee**") entered into an agreement of purchase and sale with the Vendor (the "**Agreement**") wherein he agreed to purchase the pre-construction unit described as "POTL #8" (the "**Property**").¹
3. The Property was described in the Agreement as a parcel of tied land ("**POTL**") consisting of a freehold unit and an interest in a common elements condominium corporation which was to be registered prior to completion of the Agreement. Furthermore, the Agreement required Lee to execute an acknowledgment wherein it stated that the Vendor had provided a disclosure statement in compliance with the *Condominium Act*, 1998, SO 1998, c 19 (the "**Condominium Act**") and notified Lee of his rescission rights pursuant to s.73 of the Condominium Act.²

¹ Paragraph 5, Hsin Yang Lee Affidavit, Motion Record of Hsin Yang Lee, Tab 1 ("Lee Affidavit")

² A sample agreement that is substantially similar to Hsin Yang Lee's Agreement can be found in Appendix "A", page 11 of the Receiver's Supplementary Motion Record dated May 21, 2024 ("Sample Agreement"). The acknowledgment regarding the disclosure statement and rescission rights is on pages 71-72 of the Receiver's Supplementary Motion Record. See also s.48 of the Sample Agreement (page 43 of the Receiver's Supplementary Motion Record) wherein it is established the purchaser is buying an interest in the common elements condominium corporation.

4. Lee entered into the Agreement acting in good faith. Lee does not have any relationship with the Respondents, their partners, directors, officers or shareholders.³
5. Lee intends to complete the transaction contemplated by the Agreement in accordance with its terms notwithstanding his belief that that the Property has decreased in value since the date of execution of the Agreement.⁴
6. Lee paid a total of \$170,000.00 as a deposit (the “Deposit”) pursuant to the Agreement to the Vendor.
7. The Receiver has been advised that the Deposit was utilized by the Vendor without any security as may be required by the Condominium Act and that such funds have been either invested into the construction of the Project (as defined in the Second Report of the Receiver dated February 26, 2024) or otherwise spent.⁵
8. If the Court grants the Receiver’s motion and the Receiver terminates and disclaims the Agreement, Lee would only be entitled to a maximum of \$100,000.00 in compensation from TARION assuming his deposit protection claim is approved leaving Lee with a potential loss of \$70,000.00.⁶

PART III. ISSUES AND ARGUMENT

9. Lee raises the following two issues:
 - a. Are Lee’s Deposit and the other deposits submitted to the Vendor pursuant to agreements of purchase and sale of the Freehold Towns trust funds pursuant to the Condominium Act?

³ Paragraph 6, Lee Affidavit

⁴ Paragraph 7, Lee Affidavit

⁵ Second Report of the Receiver, February 26, 2024 (“Second Report”) at para. 44

⁶ Paragraph 12, Lee Affidavit.

- b. If the deposits are trust funds, do the purchaser's deposits have priority over the claims of secured and unsecured creditors?
10. Lee respectfully submits that both these questions should be answered in the affirmative.
- A. The deposits are trust funds pursuant to s.81(1) of the Condominium Act.**
11. There is a general establishment of a trust for deposits pursuant to [s.81\(1\)](#) of Part V of the Condominium Act which establishes that a vendor shall ensure all deposits received together with interest earned on it with respect to the purchase of a "proposed unit" (a defined term pursuant to the Condominium Act) be held by a trustee save and except funds that are occupancy fees and money received on account of the purchase of personal property.⁷
12. Part V and, in particular, s.81(1) of the Condominium Act presumptively apply to common elements condominium corporations and POTLs pursuant to [s.138\(4\)](#) of the Condominium Act which establishes rules for interpretation of the Condominium as it pertains to common elements condominium corporations. In particular, s.138(4) establishes that subject to Part X of the Condominium Act and the regulations, Part V of the Condominium Act applies to common elements condominium corporations with references to "proposed unit" to be deemed to be references to "proposed common interest in the corporation".⁸
13. Neither Part X of the Condominium Act nor its regulations explicitly state that s.81(1) is inapplicable to common elements condominium corporations. [Sections 45](#) and 46 of [O.](#)

⁷ *Condominium Act*, 1998, SO 1998, c 19 ("Condominium Act"). Interest is at the rate of 2% less than the "bank rate" pursuant to [s.82](#) of the Condominium Act and [Section 19\(2\)](#) of O. Reg 48/01.

⁸ *Ibid.*

[Reg 48/01](#) modifies the type of security that may be required for the release of deposits, but it does not exempt compliance with s.81(1) of the Condominium Act.⁹

14. The Agreement demonstrates the Vendor's understanding of its obligations to comply with Part V of the Condominium Act since the Agreement contained clauses for compliance and rights and privileges in favour of the Vendor in accordance with multiple sections of Part V of the Condominium Act including but not limited to: Sections 71 to 77 concerning disclosure and rescission rights, and Section 80 concerning occupancy rights and the payment of occupancy fees by the purchaser.¹⁰
15. TARION's classification of POTLs as a freehold property with respect to deposit protection under the new home warranty plan should not have any bearing on the interpretation of s.81(1) of the Condominium Act. TARION's classification is based on the definition of a "[home](#)" in the *Ontario New Home Warranties Plan Act*¹¹, and TARION's interpretation does not conflict nor is it mutually exclusive with the application of s.81(1) to common elements condominium corporations pursuant to the Condominium Act.
16. In contravention of s.81(1) of the Condominium Act, the Vendor did not, upon receipt of deposits, remit such funds to an approved trustee. A primary purpose of the Condominium Act is consumer protection and a generous interpretation in favour of the consumer would conclude that the deposits paid by the innocent purchasers of the

⁹ Condominium Act regulation, General, O Reg 48/01

¹⁰ *Supra* note 2. See also s.10 of the Sample Agreement.

¹¹ R.S.O. 1990, c. O.31. The limits to the compensation fund for claims with respect to deposit protection are contained in [s.6](#) of R.R.O. 1990, Reg. 892: Administration of the Plan, a regulation made under the *Ontario New Home Warranties Plan Act*.

Freehold Towns, notwithstanding the Vendor's non-compliance with the Condominium Act, continue to be trust funds.¹²

B. As trust property, the deposits should have priority over secured creditors.

17. Section [67\(1\)\(a\)](#) of the *Bankruptcy and Insolvency Act* states that property held in trust should not be divisible among the debtors' creditors.¹³
18. The deposits can be traced to the construction and development of the project and the purchasers are entitled to a declaration that the debtors are holding the improvements and other assets as a trustee for the purchasers in an amount equivalent to the deposits plus interest in accordance with the Condominium Act.

PART IV. ORDER REQUESTED

19. Lee requests that this Court deny the Receiver's request to allow the termination and disclaimer of the 28 agreements of purchase and sale entered into by the Vendor and the home buyers in respect of the Freehold Towns.
20. In the alternative, Lee requests that this Court grants the Receiver's request to allow the termination and disclaimer of the 28 agreements of purchase and sale entered into by the Vendor and the home buyers in respect of the Freehold Towns upon the following condition:
 - a. The Deposit (or all deposits submitted by purchasers of the Freehold Towns) shall be repaid to the purchasers with interest in accordance with the Condominium Act

¹² *Harvey v. Talon International Inc.*, [2017 ONCA 267](#) at para. 61-63.

¹³ R.S.C., 1985, C. B-3.

(subject to deductions for any amount successfully claimed by the purchaser from TARION) upon termination and disclaimer of the purchaser's agreement.

21. Lee further requests that this Court declares that:

- a. the Deposit (or all deposits submitted by purchasers of the Freehold Towns) and interest thereon constitute trust funds and are not subject to distribution to any creditors; and
- b. the improvements made on or upon the Real Property (as defined by Schedule "A" of the Order of Justice Cavanagh dated December 21, 2023) constitute property held in trust by the debtor for the purchasers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2024.

Tony Pak

Tony Ka Chu. Pak

SCHEDULE "A"

1. *Harvey v. Talon International Inc.*, [2017 ONCA 267](#).

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).

Interest

82 (1) The declarant shall pay interest at the prescribed rate to the purchaser on all money that a person pays on account of the purchase price of a proposed unit or that the declarant credits to the purchase price of a proposed unit. 1998, c. 19, s. 82 (1).

Money released from trust

(2) The interest is payable on the money even if, under clause 81 (7) (b), the declarant provides security of a prescribed class for the money. 1998, c. 19, s. 82 (2).

Calculation

(3) The interest shall be calculated from the day the person pays the money received until the day the proposed unit is available for possession or occupancy in accordance with the purchaser's agreement of purchase and sale with the declarant. 1998, c. 19, s. 82 (3).

Terminated agreements

(7) If an agreement of purchase and sale provides that a purchaser is entitled to a return of money paid under the agreement upon termination of the agreement and the agreement is terminated, the declarant shall pay interest at the prescribed rate to the purchaser on the money returned. 1998, c. 19, s. 82 (7).

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).

O. Reg. 48/01: General under Condominium Act, 1998, S.O. 1998, c.19

Security

45. (1) [Subsection 20 \(2\)](#) and [section 22](#) do not apply to a common elements condominium corporation. O. Reg. 48/01, s. 45 (1).

(2) The following class is prescribed as security for the purpose of [clause 81 \(7\)](#) (b) of the [Act](#): policies that insure against the loss of payments described in [subsection 81 \(1\)](#) of the Act and the interest payable by the declarant on the payments, that meet the requirements of [section 21](#) and that are in effect. O. Reg. 48/01, s. 45 (2).

Insurance policies

46. (1) [Subsections 21 \(2\)](#) and [\(8\)](#) do not apply to a common elements condominium corporation. O. Reg. 48/01, s. 46 (1).

(2) In the case of a common elements condominium corporation, the trustee or the declarant's solicitor, as the case may be, shall hold the policy in trust for the beneficiary until the insurer is no longer liable under it in accordance with subsection (3). O. Reg. 48/01, s. 46 (2).

(3) In the case of a common elements condominium corporation, an insurer shall remain liable under a policy until,

- (a) the declarant delivers to the beneficiary a deed in registerable form to the common interest in the corporation, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in [subsection 81 \(1\)](#) of the [Act](#);
- (b) the declarant pays the beneficiary all money paid under [subsection 81 \(1\)](#) of the [Act](#) and interest on it payable by the declarant under the [Act](#);
- (c) the insurer pays the beneficiary the amount of the loss;
- (d) the common interest, in respect of which the beneficiary or a person on the beneficiary's behalf has made a payment described in [subsection 81 \(1\)](#) of the [Act](#), has attached to the beneficiary's parcel of tied land;
- (e) the beneficiary acknowledges in writing that,
 - (i) the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under [subsection 81 \(1\)](#) of the [Act](#) in respect of a proposed common interest in the corporation and the interest payable on the payments by the declarant, and
 - (ii) the insurer is no longer liable under the policy; or
- (f) a court of competent jurisdiction has made a final determination that the beneficiary is not entitled to the payments made by or on behalf of the beneficiary under [subsection 81 \(1\)](#) of the [Act](#) in respect of a proposed common interest in the corporation and the interest payable on the payments by the declarant. O. Reg. 48/01, s. 46 (3).

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;

(3) 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 an owner out of the guarantee fund in respect of a claim made under subsection 14 (3), (4) or (5.0.3) of the Act is,

(a) \$100,000 if the claim relates to a purchase agreement, or a construction contract, entered into before September 1, 2004 and under which the home has a date of possession before July 1, 2006;

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

Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

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