

**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

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

May 22, 2024

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PART I. OVERVIEW

1. Albert Gelman Inc. (“**AGI**”), the receiver and manager (in such capacity, the “**Receiver**”) of 2011836 Ontario Corp. (“**201**”) and Jefferson Properties Limited Partnership (“**JPLP**” and, together with 201, the “**Debtors**”) seeks an order to, among other things:
 - (a) authorize the Receiver to terminate and disclaim the 28 agreements of purchase and sale entered into between the Debtors and home buyers of the Freehold Towns (as defined below); and
 - (b) increase the Receiver’s Borrowing Limit in order to fund the remaining work necessary to complete the Project.
2. The Receiver was appointed pursuant to the order of Justice Cavanagh dated December 21, 2023 (the “**Appointment Order**”).
3. At the time of the appointment, the Debtors were in the midst of constructing a residential development project called Richmond Hill Grace (the “**Project**”) on the Debtors’ real property (the “**Real Property**”).
4. As described in detail in the Second Report (as defined below), the Project was poorly managed and the Receiver faced, and continues to face, significant challenges with the construction of the Project including deficiencies, delays and escalating costs.
5. In or around late-March 2024, because of mounting concerns with the Project, Cameron Stephens Mortgage Capital Ltd. (“**CS**”) advised the Receiver that it would only

fund the completion of the Project if the Receiver disclaimed the 28 Freehold APSs (as defined below) that had been entered into between the Debtors and home buyers.

6. In light of this position by CS, the Receiver's view is that the disclaimer of the Freehold APSs is in the best interest of the Debtors' stakeholders as a whole.

7. Without the disclaimer of the Freehold APSs (as defined below), the Receiver would very likely be unable to complete the Project and would be forced to sell the Project on an "as-is, where-is" basis. This would not only significantly diminish the value of the Debtors' estate but would very likely require the disclaimer of all agreements of purchase and sale agreed by the Debtors' in respect of the Project, in any event.

8. The Receiver also seeks the following ancillary relief on this motion:

(a) the approval of its activities as set out in the Second Report, dated February 26, 2024 (the "**Second Report**"), the First Supplemental Report to the Second Report, date May 1, 2024 (the "**First Supplemental Report**") and the Second Supplemental Report to the Second Report, dated May 17, 2024 (the "**Second Supplemental Report**");

(b) the approval of the fees of both the Receiver and its legal counsel;

(c) the approval of the Receiver's interim statement of receipts and disbursements (the "**Interim SRD**"); and

(d) an order sealing certain Confidential Appendices "F," "G," "H" and "I" (the "**Confidential Appendices**") to the First Supplemental Report until the Project is complete and all of the Units (as defined below) are sold.

PART II. FACTS

A. Background

9. On December 21, 2023 (the “**Appointment Date**”), Justice Cavanagh appointed AGI as receiver and manager of the Debtors.¹ JPLP is a limited partnership established for the purpose of constructing the Project located on the Real Property, which is municipally known as 39, 53 and 67 Jefferson Side Road, Richmond Hill, Ontario. 201 is the general partner of JPLP.²

10. The Project consists of 96 residential units, being 60 stacked condominium townhome units (the “**Condos**”) and 36 freehold townhome units (the “**Freehold Towns**”) and, together with the Condos, the “**Units**”). Construction of the Project is approximately 60% to 70% complete.³

11. Before the appointment of the Receiver, JPLP, by its general partner 201, entered into 51 agreements of purchase and sale with respect to the Condos (the “**Condo APSs**”) and 28 agreements of purchase and sale with respect to the Freehold Towns (the “**Freehold APSs**”) and, together with the Condo APSs, the “**Existing APSs**”).

B. The Receiver Halts Construction

12. Following its appointment on the Appointment Date, the Receiver determined that stakeholder value would be maximized by completing of the Project.⁴ Accordingly, the Receiver began to assess the state and feasibility of the Project.

¹ Appointment Order, December 21, 2023 ([E1365](#)).

² First Supplemental Report at para. 1 ([E1730](#)).

³ Second Report at para. 3 ([E1340](#)); First Supplemental Report at paras. 22-23 ([E1734](#)).

⁴ Second Report at para. 52-53 ([E1349](#)).

13. Upon review of the Project with its construction consultant, the Receiver determined that there were substantial construction, health and safety and recordkeeping deficiencies with the Project. Following this discovery, the Receiver shut down the Project on January 24, 2024⁵ and initiated a thorough assessment of the management of the Project.⁶

14. As part of this assessment, the Receiver obtained a report (the “**Glynn Report**”) by Glynn Group Incorporated (“**Glynn**”), a chartered quantity surveyor, that assessed the cost to complete the Project at \$23,000,000.⁷ This was approximately \$5 million (or 28%) more than the prior budget for the Project prepared by the Debtors.

15. The Receiver also determined that it would not renew the contract of the Project’s then construction manager, Core Constructors (“**Core**”), because of its failure to properly control costs, lack of governance, poor communication, flawed recordkeeping practices and the commercially unreasonable compensation Core requested to renew its contract.⁸

16. Finally, the Receiver determined that it was not sensible to restart construction until there was an appropriate plan in place to properly estimate and contain costs, address deficiencies and establish realistic timelines for the completion of the Project.⁹

⁵ Second Report at paras. 82-83 ([E1357](#)).

⁶ Second Report at paras. 60-73 ([E1351](#)).

⁷ Second Report at paras. 85-88 ([E1358](#)). See also First Report of the Receiver, January 29, 2024 at paras. 6-20 (the “**First Report**”) ([E1669](#)). The Glynn Report was filed with this Court as a confidential appendix to the First Report and sealed by order of Justice Steele.

⁸ First Supplementary Report to the First Report, January 28, 2024 at para. 9 ([E1709](#)).

⁹ First Supplemental Report at paras. 50-53 ([E1743](#)).

C. Increases to Borrowing Limit

17. Under the Appointment Order, the Receiver was initially empowered to borrow \$7,000,000 (the “**Borrowing Limit**”).¹⁰

18. On February 2, 2024, Justice Steele granted an order increasing the Borrowing Limit to \$9,500,000 and sealing the Glynn Report.¹¹

19. On February 26, 2024, the Receiver served a notice of motion seeking a further increase to the Borrowing Limit from \$9,500,000 to \$20,000,000. The return of this motion was ultimately scheduled for March 4, 2024.¹²

20. On March 3, 2024, Fansey Wang, the principal of the Debtors, served an affidavit opposing the increase to the Borrowing Limit sought by the Receiver at the March 4, 2024 motion.¹³ While Mr. Wang took issue with, among other things, the new cost-to-complete estimates obtained by the Receiver, it was under Mr. Wang’s management that the Project experienced significant financial and operational distress in the first place.

21. On March 4, 2024, Justice Steele granted an order increasing the Borrowing Limit to \$11,500,000 which was the minimum estimated amount required by the Receiver at the time. The balance of the Receiver’s motion was adjourned to March 18, 2024.¹⁴

¹⁰ Appointment Order, s. 20 ([E1683](#)).

¹¹ Order of Steele J, February 2, 2024 ([E1387](#)).

¹² Notice of Motion of the Receiver, February 26, 2024 ([E1330](#)).

¹³ Affidavit of Fansey Wang, sworn March 3, 2024, Appendix M to the First Supplemental Report ([E1884](#)).

¹⁴ [Order of Steele J, March 4, 2024](#).

D. Second Glynn Report and Revised Project Budget

22. On March 11, 2024, Glynn delivered an updated report detailing the projected cost to complete the Project (the “**Second Glynn Report**”), which re-affirmed Glynn’s estimate that the cost to complete the Project was approximately \$23 million.¹⁵

23. In light of the Receiver’s receipt of the Second Glynn Report, the Receiver sought an adjournment of the March 18, 2024 hearing to provide it with time to conduct a full assessment of the Second Glynn Report and report to the Court about the same. On March 18, 2024, Justice Black granted an adjournment *sine die* of the March 18, 2024 hearing. This adjourned hearing was eventually scheduled for May 3, 2024.¹⁶

24. Following its review of the Second Glynn Report, CS advised the Receiver that, based on the increased cost-to-complete and risk inherent in the Project, CS would only fund the completion of the Project if the Receiver disclaimed the 28 Freehold APSs.¹⁷

25. On April 18, 2024, the Receiver received a further revised budget for the Project (the “**Revised Project Budget**”) which was prepared by CS in consultation with Glynn and the Receiver’s construction manager, Elevate Construction Management (“**Elevate**”). The Revised Project Budget considers the projected Project revenue if the Freehold APSs were to be disclaimed and all of the Freehold Towns were sold at current market value.¹⁸

¹⁵ Second Glynn Report, p. 7, Confidential Appendix F to the First Supplemental Report ([E1872](#)); First Supplemental Report, para. 42 ([E1741](#)).

¹⁶ [Endorsement of Black J, March 18, 2024](#).

¹⁷ First Supplemental Report, paras. 65-68 ([E1746](#)).

¹⁸ See para. 7 of Confidential Appendix I to the First Supplemental Report; First Supplemental Report at paras. 38-47 ([E1740](#)).

26. Per the Revised Project Budget, the disclaimer of the Freehold APSs will result in substantially more revenue for the Project than the performance of the Freehold APSs.¹⁹

27. In light of the Receiver's receipt of the Revised Project Budget, the Receiver required additional time to conduct due diligence on its findings and report to the Court regarding the same. Accordingly, the Receiver obtained a further adjournment of the May 3, 2024 hearing to May 27, 2024.

E. The Appraisals

28. The Receiver has obtained professional appraisals of the value of the Project from CBRE and Cushman Wakefield effective February 2, 2024 and March 12, 2024, respectively (the "**Appraisals**").²⁰ The Appraisals assessed the value of the Project on an "as-is, where-is" basis (i.e. if the Project was sold in its current, partially constructed form) and the value of the Units on an "as complete basis" (if the Units were completed and sold at current market value).

29. According to the Appraisals, (1) if the Project were sold on an as-is, where-is basis, the likely outcome would be a significant loss for CS with no recovery for any other creditor and (2) the current market value of the Freehold Towns is substantially higher than the price at which the Freehold Towns were sold under the Freehold APSs.²¹

¹⁹ See para. 6 of Confidential Appendix I to the First Supplemental Report.

²⁰ Confidential Appendices G and H to the First Supplemental Report.

²¹ See the estimated market value of the Freehold Towns at p. 7 of Confidential Appendix G to the First Supplemental Report as compared to the average sale price under the Freehold APSs at para. 5 to Confidential Appendix I to the First Supplemental Report.

F. Receiver's Opinion

30. The Receiver is of the opinion that the disclaimer of the 28 Freehold APSs is, in all the circumstances, in the best interests of the Debtors' stakeholders as a whole given (1) CS's position that it will only fund the Project if the Receiver disclaims the Freehold APSs, (2) CS being the only known feasible source of funding to complete the Project, (3) the significant losses to all stakeholders that would flow from an as-is, where-is sale of the Project and (4) the fact that, were the Project to be sold on an as-is, where-is basis, all of the Freehold APSs and the Condo APSs would likely need to be disclaimed to allow a purchaser to take advantage of current market pricing.²²

G. Status of Project and Funding

31. Since the commencement of these proceedings, the Receiver has borrowed \$9,500,000, the majority of which has been used to fund the construction of the Project. Approximately \$2.7 million is currently being held in the Receiver's trust account.²³ If the Receiver obtains approval to disclaim the Freehold APSs, CS has agreed to fund the additional \$20,000,000 in borrowings required to complete the Project.²⁴

PART III. STATEMENT OF ISSUES

32. This motion raises the following issues of law:

- (a) Whether this Court should authorize the Receiver to terminate and disclaim the Freehold APSs;

²² First Supplemental Report at paras. 69-80 ([E1746](#)).

²³ Interim SRD, Appendix R to the First Supplemental Report ([E2263](#)).

²⁴ First Supplemental Report at para. 88 ([E1750](#)).

- (b) Whether this Court should approve the increase to the Receiver's Borrowing Limit to \$31,500,000;
- (c) Whether this Court should approve the activities of the Receiver as set out in the Reports, the professional fees of the Receiver and its legal counsel and the Interim SRD; and
- (d) Whether this Court should grant a sealing order in respect of the Confidential Appendices.

33. The Receiver submits that these issues should all be answered 'yes.'

PART IV. LAW

A. This Court should authorize the Receiver to disclaim the Freehold APSs

34. The Court's jurisdiction to direct a receiver to disclaim agreements of purchase and sale in the context of real property developments is well established and has been authorized by this court many times.²⁵ Indeed, disclaimers are an important tool by which a receiver can maximize the value of the assets of the estate for the benefit of a debtor's stakeholders as a whole.²⁶

²⁵ *Forjay Management Ltd v 0981478 BC Ltd*, [2018 BCSC 527](#) at [paras 131-132](#) [*"Forjay Management"*]; *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd*, [2020 BCSC 1013](#) at [para. 57](#) [*"Peoples Trust"*]; *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd*, [2012 ONSC 4816](#) at [paras. 31-38](#) [*"Firm Capital"*]; *bclMC Construction Fund Corp. v Chandler Home Street Ventures Ltd*, [2008 BCSC 897](#) at [paras. 54-58](#); *Dorr Capital Corp. v. Stateview Homes (BEA Towns) Inc.*, CV-23-00698637-00CL, CV-23-00698632-00CL and CV-23-00699067-00CL ([Endorsement of Justice Penny, March 19, 2024](#)); *Kingsett Mortgage Corporation and Dorr Capital Corporation v. Stateview Homes (Minu Towns) Inc.*, CV-23-00698576-00CL ([Endorsement of Justice Cavanagh, September 14, 2023](#)); *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) Inc.*, CV-23-00700356-00CL ([Endorsement of Justice Conway, August 18, 2023](#)) see also, *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#), s [243\(1\)\(c\)](#) (*"BIA"*).

²⁶ *Forjay Management* at [para. 36](#); *Peoples Trust* at [para. 25](#).

35. The considerations for determining whether a Court should authorize a receiver to disclaim pre-sale purchase agreements were set out by Justice Fitzpatrick of the Supreme Court of British Columbia in *Forjay Management* as follows:

- (a) the respective legal priority positions as between the competing interests;
- (b) whether a disclaimer would enhance the value of the assets, and, if so, whether a failure to disclaim would amount to a preference in favour of one party; and
- (c) if a preference would arise, whether the party seeking to avoid a disclaimer has established that the equities support that result.²⁷

36. When applied to the circumstances of this case, these factors strongly support the authorization of the Receiver to disclaim the Freehold APSs.

1. The Freehold Purchasers interest in the Freehold Towns is subordinate to that of the secured lenders

37. The Freehold APSs contain the following express acknowledgment that the Freehold Purchasers subordinate and postpones their agreement of purchase and sale to any mortgages or construction financing of the Debtors and any advances thereunder;

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.²⁸

²⁷ *Forjay Management* at [paras. 41-44](#).

²⁸ Second Supplemental Report at para. 9 ([E2278](#)).

38. Further, the Freehold Purchasers agreed to forbear from registering the Freehold APSs on title to the Property.²⁹

39. The above noted language in the APS clearly establishes that:

- (a) The Freehold APSs were not intended to convey a proprietary interest in the Real Property to the Freehold Purchasers; and
- (b) The Debtors' secured lenders have priority over the Freehold Purchasers' rights under the Freehold APSs.

40. Similar language has been relied upon by Courts to determine that purchasers of property under agreements of purchase and sale are subordinate in interest to secured lenders, for the purpose of terminating their agreements in the context of a receivership.³⁰

2. Disclaiming the Freehold APSs would enhance the value of the Debtors' estate

41. The Receiver has determined that disclaiming the Freehold APSs and completing the Project will result in greater value for the Debtors' estate than either:

- (a) An as-is, where-is sale of the Project; or
- (b) The performance of all of the Freehold APSs and Condo APSs.

42. JPLP contends that the "Receiver's decision to proceed in this manner appears to be based on the analysis of [CS], who is neither a sales broker nor a qualified market

²⁹ Example Freehold APS, s. 36(a), Appendix A to the Second Supplemental Report ([E2309](#))

³⁰ *Firm Capital* at [para.10](#).

expert.”³¹ However, this statement ignores the detailed information contained in the First Supplemental Report. The Receiver’s conclusion that the Freehold APSs are below the current market value for the Freehold Towns is supported by the Appraisals, which were conducted by professional appraisers. In these circumstances, the Receiver’s business judgment is entitled to considerable deference.³²

(a) Comparison to an ‘as-is, where-is’ sale

43. The Receiver has commissioned two appraisals from professional appraisers to determine the likely value of the Project in an as-is, where-is sale.

44. As set out in the Appraisals and Confidential Appendix I, an as-is, where-is sale would lead to a multi-million-dollar loss for the senior secured lender, as compared to a scenario where the Receiver disclaims the Freehold APSs and completes the Project.

(b) Comparison to the performance of all Existing APSs

45. The analysis contained in Confidential Appendix I establishes that the disclaimer of the Freehold APSs will likely lead to increased Project revenue as compared to the performance of the Freehold APSs.

46. Not only is the current market value of the Freehold Towns higher than the prices at which the Freehold Towns were sold under the Freehold APSs,³³ but several of the Freehold APSs contemplate impractical “extras” such as rooftop jacuzzies and central vacuum systems which are incompatible with the existing Freehold Towns structure. For

³¹ Affidavit of Fansey Wang, sworn May 19, 2024, para. 5(v) (the “**May Wang Affidavit**”), Respondent’s Motion Record (“**RMR**”), Tab 1 ([B-1-921](#)).

³² *Peoples Trust* at [para. 47](#).

³³ See the estimated market value of the Freehold Towns at p. 7 of Confidential Appendix G to the First Supplemental Report as compared to the average sale price under the Freehold APSs at para. 5 to Confidential Appendix I to the First Supplemental Report

several Freehold Towns, performing these “extras” would be cost prohibitive as they would require the partial demolition and reconstruction of the units.³⁴

47. Without the disclaimer of the Freehold APSs, the Receiver will be left with no choice but to sell the Project on an as-is, where-is basis which, as set out above, would result in substantial losses to the senior secured lender and would likely require the disclaimer of all the Existing APSs (including the Freehold APSs) in any event.

48. Even where there is some uncertainty about the prospective market value of real property that is the subject of an agreement of purchase and sale, courts ought to defer to the business judgment of a receiver that the disclaimer will enhance the value of the debtor’s estate.³⁵

49. That said, there is no such uncertainty here. This is not a situation where the Receiver is passing up the certainty of existing agreements of purchase and sale for the mere chance at higher revenue. Rather, this is a situation where it will very likely not be feasible for the Receiver to complete the Project and perform any of the Existing APSs without the disclaimer – this would be a disastrous outcome for the value of the Debtors’ estate and all the stakeholders.

3. Avoiding disclaimer would be detrimental to all stakeholders

50. As set out in the First Supplemental Report, the disclaimer of the Freehold APSs will result in a loss to Freehold Purchasers of their deposit to the extent those deposits are not covered by Tarion’s statutory warranty. The Receiver has calculated that the

³⁴ First Supplemental Report at para. 71 ([E1747](#)).

³⁵ *Peoples Trust* at [paras. 43-50](#).

Freehold Purchasers will lose, on average, deposits of approximately \$45,000 under the Freehold APSs.³⁶ The real estate brokers that sold the Freehold Towns on behalf of the Debtors also estimate that they will lose approximately \$1.4 million in commission if the Freehold APSs are disclaimed.³⁷

51. While this is an unfortunate outcome, it must be remembered that the Receiver has an obligation to take into account, and balance between, the interests of all the Debtors' stakeholders. As Justice Doherty recognized:

Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.³⁸

52. In these circumstances, disclaimer of the Freehold APSs is the best course of action.

53. First, while disclaimer of the Freehold APSs will have a negative impact on the Freehold Purchasers, this does not justify overriding the secured lender's legal priority and giving the Freehold Purchasers a preference that they would not otherwise enjoy.³⁹

Indeed:

³⁶ See paras. 84-85 of the First Supplemental Report ([E1749](#)).

³⁷ Affidavit of Joseph Bozzo, sworn May 21, 2024 (the "**Bozzo Affidavit**"), at para. 30 ([F8](#)). Though, as suggested in the Bozzo Affidavit at para. 7 ([F3](#)), this only represents half of the realtors' commissions for the Freehold Towns – with the other half already having been paid to them.

³⁸ *Ravelston Corp. (Re)*, [2005 CanLII 63802](#) at [para. 40](#) (ON CA) [*"Ravelston"*].

³⁹ *Forjay* at [para. 131](#).

- (a) There is risk inherent in pre-construction contracts – this risk was made explicit to the Freehold Purchasers in the Freehold APSs;⁴⁰
- (b) The Freehold Purchasers explicitly agreed that their interests in the Real Property would be subordinate to the secured lenders;⁴¹
- (c) The Freehold Purchasers will recover most of their deposits through Tarion’s warranty program;⁴²
- (d) The Receiver intends to mitigate the losses to Freehold Purchasers by working with CS to potentially offer Freehold Purchasers a right of first refusal on new agreements of purchase and sale for the Freehold Towns.⁴³

54. Second, without the disclaimer of the Freehold APSs, the Receiver will likely not be able to complete the Project, to the detriment of virtually all stakeholders, including:

- (a) The Condo Purchasers, who will lose the benefit of the Condo APSs;
- (b) Berkley Insurance, who has insured the deposits of the Condo Purchasers that have been injected into the Project;
- (c) The Project’s real estate brokers, who stand to lose their closing commission from the Condos – being approximately \$2.2 million;⁴⁴ and

⁴⁰ See warning contained in the Freehold APS attached as Appendix A to the Second Supplemental Report ([E2282](#)); *Forjay* at [paras. 104-107](#).

⁴¹ Second Supplemental Report at para. 9 ([E2278](#)).

⁴² Appendix L to the First Supplemental Report ([E1881](#)).

⁴³ First Supplemental Report at para. 86 ([E1750](#)).

⁴⁴ Bozzo Affidavit at para. 14 ([F4](#)).

- (d) The secured lenders, who would likely suffer a substantial loss relative to an outcome where the Receiver disclaimed the Freehold APSs and completed the Project.

55. Third, it is relevant that none of the Freehold Towns is complete. In these circumstances, a refusal by the Court to authorize the disclaimer of the Freehold APSs would amount to an order for specific performance against the Receiver.⁴⁵ The case law is clear that a receiver should not be put in such a position.⁴⁶

56. In *Firm Capital*, the court-appointed receiver of a real estate developer sought an order vesting out pre-sale condominium purchase agreements to facilitate a sales process. Justice Morawetz (as he then was) accepted the receiver's submission that a refusal to vest out these purchase agreements would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence."⁴⁷As Justice Morawetz observed, "the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing."⁴⁸

57. Accordingly, unless the Receiver is authorized to disclaim the Freehold APSs, the Receiver would effectively be directed to borrow millions of dollars from CS to fund the

⁴⁵ *Firm Capital* at [para. 28](#).

⁴⁶ *Forjay* at [paras. 83-84](#) citing *Firm Capital* at [paras. 28-29](#).

⁴⁷ *Firm Capital* at [para. 28](#).

⁴⁸ *Firm Capital* at [para. 29](#).

completion of the construction of the Freehold Towns. Such an outcome would be inconsistent with the principles established in the case law.

58. In all, the failure by the Receiver to disclaim the Freehold APSs would occasion significant harm to the Debtors' priority stakeholders and impair the overall recoveries in the receivership to the detriment of the estate as a whole. In the Receiver's view, this harm outweighs that which would be caused to the Freehold Purchasers by the disclaimer of the Freehold APSs. Equity therefore does not support refusal of the Receiver's request to authorize its disclaimer of the Freehold APSs.

B. The Increased Borrowing Limit Should be Approved

59. Subsection 243(1) of the *BIA* allows a court to appoint a receiver to, among other things, "take any action that the court considers advisable." This provision has been interpreted by courts to give "judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court ordered receivership," including by authorizing borrowing by receivers.⁴⁹

60. Paragraph 20 of the Appointment Order provides that the Borrowing Limit may be increased if so authorized by further Court order.⁵⁰

61. Courts routinely increase receivers' authorized borrowing limit where the receiver must fund work for the benefit of the Debtors' estate.⁵¹

⁴⁹ *BIA*, s. 243(1)(c). See also *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, [2021 ABCA 226](#) at [para. 20](#) and *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, [2023 ONSC 5881](#) at [paras. 54-55](#).

⁵⁰ Appointment Order, s. 20 ([E1683](#)).

⁵¹ *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#) at [paras. 48-52](#); *Royal Bank of Canada v. 2668144 Ontario Inc. et al.*, 2024 ONSC 1680 at paras. 5-7, Book of Authorities of the Receiver, Tab 1, p. 6.

62. The approximately \$2.7 million currently being held in the Receiver's trust account is not sufficient to fund the completion of the Project, which is projected to cost (at least) \$23,000,000, as per the Glynn Report and the Second Glynn Report.

63. While entities and persons related to the Debtors have advised the Receiver that they are attempting to re-finance the Project, the Receiver has yet to receive any viable term sheets or offers.⁵² In the absence of any alternative to fund the completion of the Project, approving the requested increase to the Borrowing Limit is the only way to complete the Project and thereby maximize stakeholder benefit.

C. *The Activities, Fees and Interim SRD of the Receiver, and the Fees of its Legal Counsel, Should be Approved*

64. The Receiver submits that the fees and disbursements of the Receiver and those of its legal counsel should be approved because the Receiver and its counsel engaged diligently since the date of the Appointment Order to, among other things:⁵³

- (a) Respond to extensive correspondence and requests for information from the Debtors' and their principal, Mr. Wang, as well as other stakeholders;⁵⁴
- (b) Work with its construction consultant to carry out a comprehensive assessment of the Project which included identifying health and safety issues on the site and reviewing the records of the Debtors' concerning the

⁵² First Supplemental Report, paras. 97-101 ([E1752](#)).

⁵³ See *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at [paras. 33-35](#) for a description of the factors that Courts will consider in determining whether a Receiver's accounts are fair and reasonable.

⁵⁴ Second Supplementary Report to the First Report, February 1, 2024, paras. 9-23 ([E2416](#)); Second Report at paras. 26-49 ([E1344](#)).

Project, which contained significant gaps and identifying construction deficiencies in the Project;⁵⁵

- (c) Retain a new construction manager to complete the Project;⁵⁶
- (d) Manage the review and remediation of health and safety issues;⁵⁷
- (e) Establish a new process for the review and payment of invoices submitted by trades and suppliers to replace the inadequate recordkeeping processes that prevailed before the Appointment Date;⁵⁸
- (f) Commission appraisals of the Project;⁵⁹
- (g) Engage in tendering processes for prospective trades and suppliers;⁶⁰
- (h) Commission the Glynn Report and the Second Glynn Report;⁶¹ and
- (i) Review the invoices and contracts of trades and suppliers.⁶²

65. The fees and disbursements of the Receiver and its counsel were incurred at each respective party's standard rates and charges as set out in their respective fee affidavits. Given the complicated nature of Project's prospective completion and the significant

⁵⁵ Second Report at paras. 60-73 ([E1351](#)); First Supplemental Report at paras. 30-36 ([E1736](#)).

⁵⁶ Second Report at paras. 79-81 ([E1356](#)).

⁵⁷ Second Report at paras. 82-84 ([E1357](#)).

⁵⁸ Second Report at para. 84(c) ([E1357](#)).

⁵⁹ First Supplemental Report, paras. 61-64 ([E1745](#)).

⁶⁰ First Supplemental Report, paras. 36-37 ([E1737](#)).

⁶¹ Second Report at paras. 85-88 ([E1358](#)); First Supplemental Report, paras. 38-60 ([E1740](#)).

⁶² Second Report at paras. 91-93, 97 ([E1359](#)).

issues with the management of the construction up to the Appointment Date, these fees and disbursements are fair, reasonable and justified in the circumstances.⁶³

66. JPLP opposes the conduct of this receivership and the Receiver's proposed course of action as set out in the Second Report and First Supplemental Report. However, the law is clear that Courts should defer to the reasonable exercise of business judgment by court appointed receivers.⁶⁴

67. As set out above, the Receiver's conduct to date and proposed course of action going forward are the product of diligent analysis and consultation. Accordingly, even if JPLP had a reasonable alternative course of action to that proposed by the Receiver, the Court should nevertheless defer to the business judgment of the Receiver. In this case, however, JPLP has no such reasonable alternative - its opposition to the relief sought by the Receiver on this motion is unsubstantiated and incoherent. In particular:

- (a) JPLP has criticized the Receiver for "delaying" construction on the Project while simultaneously opposing the Receiver's request for authority to increase the Borrowing Limit on the basis that it is premature to increase the Borrowing Limit in the absence of additional budgetary due diligence.⁶⁵ Needless to say, the Receiver will not be able to access funds to complete the Project without the requested Increase to the Borrowing Limit;

⁶³ Affidavit of Bryan Gelman, sworn February 26, 2024, Appendix P to the Second Report ([E1576](#)); Affidavit of Beatrice Loschiavo, sworn February 26, 2024, Appendix Q to the Second Report ([E1631](#)); Affidavit of Bryan Gelman, sworn April 29, 2024, Appendix B to the Second Supplemental Report ([E2344](#)); Affidavit of Beatrice Loschiavo, sworn April 25, 2024, Appendix Q to the First Supplemental Report ([E2240](#))

⁶⁴ *Ravelston* at [para. 40](#).

⁶⁵ Affidavit of Fansey Wang, sworn April 1, 2024 at para. 4-6 Exhibit A to the May Wang Affidavit, RMR, Tab 1 at p. 299 ([B-1-1208](#)); May Wang Affidavit at paras. 5(b) and 5(c), RMR, Tab 1 at p. 6 ([B-1-915](#)).

- (b) The Receiver’s “delay” in completing the Project is a result of the need to address the Project’s extensive and well-documented health, safety, record-keeping, cost control and construction deficiency issues that existed on site at the time of the Receiver’s appointment. Mr. Wang has offered bald denials of the suggestion that JPLP improperly managed the Project, relying on, for example, the fact that JPLP’s workplace safety manager never indicated that the Project had critical safety issues requiring a shutdown.⁶⁶ These bald statements are contradicted by the detailed analysis in the First Report, Second Report and First Supplemental Report, all of which summarize the extensive governance issues with the Project;
- (c) Mr. Wang disagrees that the cost to complete the Project will be the approximately \$23 million projected by Glynn, a chartered quantity surveyor. Simply put, there is no reason to prefer this opinion over Glynn:
- (i) Mr. Wang’s view that Glynn’s budget is incorrect is based on a budget prepared by Core,⁶⁷ the previous construction manager. Core has not been involved with the Project since January 2024;⁶⁸
- (ii) The Project has a number of construction deficiency and workmanship quality issues which will require remediation – Core’s budget does not account for these;⁶⁹ and

⁶⁶ May Wang Affidavit at paras. 5(f), (g), (i) and (j) ([B-1-916](#)).

⁶⁷ May Wang Affidavit at para. 5(o), RMR, Tab 1, p. 10 ([B-1-919](#)); Core Cost to Complete Budget, Exhibit F, RMR, Tab 1, p. 346 ([B-1-1255](#)).

⁶⁸ Supplementary report to the First Report of the Receiver, January 28, 2024, at para 8(a) ([E1708](#)).

⁶⁹ First Supplemental Report, para. 44 ([E1742](#)).

- (iii) Many trade contract prices were based on time and materials rather than a defined scope of work with a fixed or unit price. This hampered the ability of Core to forecast or manage costs effectively (and necessitated, in part, the Receiver getting new cost estimates);⁷⁰

- (d) JPLP has proposed that the Receiver complete the Project by replacing its current construction manager, Elevate, with Grove Management Inc. (“**Grove**”). The only evidence before the Court concerning Grove’s ability to complete the Project is a letter⁷¹ from Grove estimating that it could complete the Project in nine months at the cost of approximately \$14 million (the “**Grove Letter**”). This estimate is unsupported by any analysis and, further, the Grove Letter notes that its estimate is contingent on “a thorough review of the existing contracts, the site conditions and the quality of the work.” Accordingly, this Court should give no weight to the cost or scheduling estimate contained in the Grove Letter⁷²; and

- (e) In the alternative to retaining Grove, JPLP’s position is that the Receiver should complete the Project using existing trades and “negotiating better terms with these trades,” which would “benefit all stakeholders”⁷³ The Court should give no weight to this suggestion. First, Mr. Wang’s opinion that “negotiating better terms” with the Project’s existing trades and suppliers

⁷⁰ First Supplemental Report, para. 43(c) ([E1742](#)).

⁷¹ Letter from Michael Stuart, March 27, 2024, Exhibit E to the Affidavit of Fansey Wang, sworn April 1, 2024, Exhibit A to the May Wang Affidavit, RMR, Tab 1, p. 322 ([B-1-1231](#)).

⁷² The Receiver notes that Grove has not signed a Non-Disclosure Agreement. The Receiver is concerned, therefore, that to the extent Grove has obtained confidential non-public information about the Project, Mr. Wang has improperly provided that information to Grove.

⁷³ May Wang Affidavit, para. 5(z), RMR, Tab 1, p. 14 ([B-1-923](#)).

would “benefit all stakeholders” is not a realistic substitute to the Receiver’s comprehensive plan to conduct a competitive tendering process to ensure that costs are minimized. Second, the Receiver has observed that most of the trades operated without fixed price contracts and instead had time and material-based agreements. This introduced a significant degree of cost uncertainty and risk to the Project. Further, there are several major construction deficiencies with the work done on the Project to date.

68. Finally, the Receiver seeks approval of the Interim SRD. The Receiver has received and paid monies on behalf of the Debtors for the benefit of all stakeholders, and with a view to completing the Project, as set out in the Interim SRD and Second Report. Accordingly, this Court should approve the Interim SRD.

D. Sealing Order

69. As noted above, the Receiver seeks an Order sealing the Confidential Appendices pending the completion of the Project and the sale of all of the Units. The Confidential Appendices consist of the Appraisals, the Second Glynn Report and a summary of budgetary information concerning the Project.

70. Sealing these materials is necessary to ensure that the Receiver can maximize the value of the Units for the benefit of all stakeholders.⁷⁴

71. In *Sierra Club*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where (i) the order is necessary to prevent a serious

⁷⁴ *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#) at [paras. 32-34](#).

risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.⁷⁵

72. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a party requesting that a court exercise its discretion in a way that limits the ‘open court’ presumption must establish that: (i) the openness poses a risk to an important interest to the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.⁷⁶

73. In the insolvency context, when assets are contemplated to be sold pursuant to a court process, it is common to seal bids and other commercially sensitive material, such as sale price and details of competing offers, in the event that a further listing is required should the contemplated proposed transaction not close.⁷⁷

74. In this case, the disclosure of commercially sensitive information set out in the Confidential Appendices would likely have a detrimental impact on any future sale efforts of the Receiver as well as the tendering process for trades. The Receiver submits that there is no other reasonable way to preserve and ensure the viability and integrity of any future marketing and sale process. The benefits of the protective order outweigh any deleterious impact on the “open court” principle. No stakeholder will be materially prejudiced by the proposed sealing order.

⁷⁵ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) at [para. 53](#) (“**Sierra Club**”).

⁷⁶ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at [para. 38](#).

⁷⁷ *Romspen Investment Corporation v Hargate Properties Inc.*, [2012 ABQB 412](#) at [paras 2, 11](#) and [13](#).

75. Finally, the proposed sealing order embodies the principle of proportionality. The Receiver is only seeking a sealing order for a limited time: until the Project is complete and all of the Units are sold.

76. JPLP opposes the requested sealing order on the view that the Project's budget should be disclosed to relevant stakeholders to allow them to assess the rationale for the requested increase to the Borrowing Limit.⁷⁸ The refusal of the Sealing Order on this basis would be disproportionate.

77. The Receiver is prepared to share the Confidential Appendices with stakeholders who sign an appropriate non-disclosure agreement. On this basis, the Receiver disclosed the Glynn Report to JPLP,⁷⁹ which was also sealed by order of Justice Steele.

PART IV – ORDER REQUESTED

78. The Receiver requests that this Court make an order in the form of the draft order included in the Receiver's Supplemental Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd of May, 2024.



Jeff Larry / Ryan Shah

⁷⁸ May Wang Affidavit at para. 5(q), RMR, Tab 1, pp. 11-12 ([B-1-920](#)).

⁷⁹ First Report at para. 20 ([E1671](#)).

SCHEDULE "A"

1. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#).
2. *BCIMC Construction Fund Corp. v Chandler Home Street Ventures Ltd*, [2008 BCSC 897](#).
3. *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, [2021 ABCA 226](#).
4. *Door Capital Corp. v. Stateview Homes (BEA Towns) Inc.*, CV-23-00698637-00CL, CV-23-00698632-00CL and CV-23-00699067-00CL ([Endorsement of Justice Penny, March 19, 2024](#)).
5. *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) Inc.*, CV-23-00700356-00CL ([Endorsement of Justice Conway, August 18, 2023](#)).
6. *Firm Capital Mortgage Fund Inc v 2012241 Ontario Ltd*, [2012 ONSC 4816](#).
7. *Forjay Management Ltd v 0981478 BC Ltd*, [2018 BCSC 527](#).
8. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc*, [2014 ONSC 1173](#).
9. *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, [2023 ONSC 5881](#).
10. *Kingsett Mortgage Corporation and Dorr Capital Corporation v. Stateview Homes (Minu Towns) Inc.*, CV-23-00698576-00CL ([Endorsement of Justice Cavanagh, September 14, 2023](#)).

11. *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, [2014 BCSC 1855](#).
12. *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd.*, [2020 BCSC 1013](#).
13. *Ravelston Corp. (Re)*, [2005 CanLII 63802 \(ON CA\)](#).
14. *Romspen Investment Corporation v Hargate Properties Inc.*, [2012 ABQB 412](#).
15. *Royal Bank of Canada v. 2668144 Ontario Inc. et al.*, 2024 ONSC 1680.
16. *Sherman Estate v. Donovan*, [2021 SCC 25](#).
17. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#).

SCHEDULE “B”

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

Court may appoint receiver

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

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

**CAMERON STEPHENS MORTGAGE
CAPITAL LTD.**

Applicant

and **2011836 ONTARIO CORP., et al.**

Respondents

Court File No. CV-23-00710795-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
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**
Proceeding commenced at Toronto

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

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