

**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

**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.43, AS AMENDED**

**FACTUM OF THE RESPONDENTS**

May 24, 2024

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**AND TO: SERVICE LIST**

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**FACTUM OF THE RESPONDENTS**

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**PART I – OVERVIEW**

1. The Receiver, Albert Gelman Inc. (the “**Receiver**”), brings this motion seeking an order, *inter alia*, to increase the Receiver’s borrowing limit to \$31,500,000.00 and to disclaim 28 agreements of purchase and sale (the “**28 Purchase Agreements**”) entered into between the Respondent, Jefferson Properties Limited Partnership (the “**JPLP**”) and the home purchases of the freehold townhomes in respect to the development property municipally located at 39, 53, and 67 Jefferson Side Road, Richmond Hill, Ontario (the “**Project**”).
2. The Respondents, 2011836 Ontario Corp. (“**201 Corp.**”) and JPLP (collectively the “**Jefferson Borrowers**”) oppose this motion absent transparent and complete disclosure from the

Receiver that the steps to be undertaken will lead to the completion of the Project without further delay. Since the appointment of the Receiver on December 21, 2023, there have been (and continue to be) serious delays to the Project's schedule (with little to no progress made), a multitude of liens registered on the Project and a loss of trades and suppliers providing their services at the Project.

3. The Receiver's request to disclaim 28 Purchase Agreements and increase the borrowing limit to 31,500,000.00, as outlined in the Supplemental Report to the Second Report dated May 1, 2024 (the "**Supplemental Second Report**"), is a further delay to the completion of the Project and to prioritize the interests of one creditor to the detriment of other relevant stakeholders.

4. Accordingly, it is respectfully submitted that the proposal suggested by the Receiver in its Supplemental Second Report is flawed, based on limited information and cost forecast (with little to no air of reality) and detrimental to the completion of the Project. Should this Honourable Court permit the Receiver's relief sought in its Amended Notice of Motion, other stakeholders of the Project will be negatively affected by its actions and conduct.

## **PART II – SUMMARY OF FACTS**

### ***Background***

5. At issue in this motion relates to the Receiver's purported actions and conduct (or lack thereof) in progressing the development of the Project. The Receiver seeks to disclaim 28 Purchase Agreements and increase the borrowing limit to 31,500,000.00 relying on its findings outlined in the Supplemental Second Report.

6. The Project is a land assembly composed of 3 properties totalling approximately 2.6 acres, with two adjoining parcels located along the south side of Jefferson Side Road, west of Yonge Street in Richmond Hill.<sup>1</sup>

7. The Project consists of 96 residential units in 9 blocks, including 60 stacked townhouses, 12 back-to-back and 24 regular townhouses, along with 197 parking spaces. At present, 79 units of the 96 have been sold to purchasers pursuant to agreements of purchase and sale. Of these, 51 of the stacked townhouse units and 28 of the freehold townhouse units were sold to purchasers by JPLP, by its general partner 201, pursuant to agreements of purchase and sale. The Project has not yet been completed.<sup>2</sup>

8. On December 21, 2023, the Receiver was appointed as receiver and manager of 201 Corp. and JPLP pursuant to the order of Justice Cavanagh.<sup>3</sup>

9. The Jefferson Borrowers response to the Receiver's motion is set out in the affidavit of Fengxi Fanshay Wang ("**Wang**") sworn on May 19, 2024, and the affidavit of Usha Lakshmi Naidu sworn on May 24, 2024, including that:

- a. To date, many of the major trades and suppliers operating within the Project have yet to receive updates from the Receiver or its new construction manager, Elevate Construction Management ("**Elevate**"), about the construction schedule, including but not limited to providing work schedules and quotas for supplies;<sup>4</sup>

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<sup>1</sup> Affidavit of Fengxi Fanshay Wang sworn March 2, 2024 ("**Wang March Affidavit**"), Responding Motion Record of the Respondents ("**RRR**"), Exhibit "A", p 21 at para 4.

<sup>2</sup> Ibid at para 4.

<sup>3</sup> Ibid at para 3.

<sup>4</sup> Affidavit of Fengxi Fanshay Wang sworn May 19, 2024 ("**Wang May Affidavit**"), RRR, Tab 1, pp 6-7 at para 5 (c).

- b. The Receiver's decision to replace the previous construction manager, Core Constructors Ltd. (“**Core**”), with Elevate (despite the Applicant/ Lender, Cameron Stephens Mortgage Capital Ltd. (“**CSMC**”), prior assurance to extend Core’s contract) has further deteriorated the completion of the construction schedule and the communications with the relevant third parties;<sup>5</sup>
  
- c. the Receiver continues to echo findings on safety and financial control as the reason for the temporary shutdown of the Project on January 24, 2024 - neither of which is accurate. Prior to the Receiver’s appointment of Elevate, the third-party company, Safex Workplace Safety Manager (“**Safex**”), had conducted weekly inspections at the site to ensure all operations met all applicable health and safety standards. At no time did these weekly reports indicate that the Project had critical issues requiring a shutdown;<sup>6</sup>
  
- d. Following the replacement of Core and the decision to shut down the Project, Mr. Wang furnished the Receiver with Safex reports showing the site's operations met all applicable health and safety standards. Mr. Wang also proposed segregating affected areas and making necessary fixes while allowing the unaffected parts of the site to continue development, being mindful of the existing delays to the development schedule. The Receiver did not respond to Mr. Wang's concerns and subsequently shut down the Project;<sup>7</sup>

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<sup>5</sup> Wang May Affidavit, RRR, Tab 1, p 7 at para 5 (d).

<sup>6</sup> Wang May Affidavit, RRR, Tab 1, p 7 at para 5 (f-g).

<sup>7</sup> Wang May Affidavit, RRR, Tab 1, p 8 at para 5 (h).

- e. the contention that the lack of financial control resulted in the decision to shut down the Project is inaccurate and has exposed the Project to substantial additional losses going forward. At all relevant times, the Receiver was provided with all appropriate financial reports and documentation on the second day of the appointment of Receivership, as requested. The Receiver also engaged in numerous communications with Core since September 2023, when Albert Gelman Inc. was engaged by CSMS as a financing consultant for the Project. Albert Gelman Inc. assisted CSMS in making payments directly to all trades for three consecutive months until its abrupt decision to terminate its engagement at the Project;<sup>8</sup>
  
- f. The Receiver and Elevate have yet to provide major trades and suppliers operating within the Project with updates about the construction schedule, including but not limited to providing work schedules and quotas for supplies. This lack of communication is and continues to cause direct irreparable harm to the viability of the Project;<sup>9</sup>
  
- g. the Receiver's decision to proceed with a construction tendering process is of further concern. Initiating a construction tendering process while many sub-trades and suppliers are still seeking information from the Receiver and Elevate will only lead to additional delays and costs. The tendering process lacks transparency and eliminates all existing trades and suppliers who are familiar with the project from the beginning of construction and have a vested interest, given their existing contracts

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<sup>8</sup> Wang May Affidavit, RRR, Tab 1, p 8 at para 5 (j).

<sup>9</sup> Wang May Affidavit, RRR, Tab 1, p 9 at para 5 (k).

and outstanding payments. The tendering process will likely result in the engagement of sub-trades and suppliers at higher costs than those currently present at the site;<sup>10</sup>

- h. the Receiver and Elevate, in suggesting an increased budget of \$23,392,533.00—significantly more (\$5,633,000.00) than previously presented by Core—are doing so without considering the support of the existing sub-trade parties currently operating at the Project;<sup>11</sup>
- i. there is no indication the updated budget accurately accounts for the cost factors of engaging new trades. As is the case, the Receiver has not contacted any construction subcontractors since its appointment up to the date of the Supplemental Second Report. The updated budget should include the support of existing sub-trades or, at the very least, provide a cost breakdown for engaging new trades, indicating that 70% of the budget is backed by subcontracts to ensure the viability of the completion of the Project;<sup>12</sup>
- j. the Project Budget, including its estimated revenues and costs, should be disclosed to allow relevant stakeholders to assess the costs needed to remedy the current construction status, the information used by the Receiver and Elevate in making that determination, and the rationale for seeking the increased borrowing limit to \$31,500,000.00. There is no breakdown from the Project Budget that funds will be

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<sup>10</sup> Wang May Affidavit, RRR, Tab 1, p 9 at para 5 (l-m).

<sup>11</sup> Wang May Affidavit, RRR, Tab 1, p 8 at para 5 (j).

<sup>12</sup> Wang May Affidavit, RRR, Tab 1, p 10 at para 5 (p).

allocated to address the multiple liens, which were registered upon the appointment of the Receiver;<sup>13</sup>

- k. the proposed construction schedule in the Supplemental Second Report is concerning. Before the Receiver's appointment, Core had provided a construction schedule that set out the completion dates for all blocks in the Project. In contrast, the information provided by the Receiver in proposing the construction schedule is vague and does not adequately explain the remaining steps or the actions undertaken by Elevate since its engagement—extending far beyond Core's timeline. It appears that almost all of the completed steps set forth in the Receiver's construction schedule were previously completed by the existing trades;<sup>14</sup>
- l. the Receiver's contention about the extra features requested by home buyers outlined is inaccurate and based on outdated information. At present, none of the freehold townhomes are to include rooftop hot tubs—this has been communicated to and confirmed by the purchasers. Regarding the installation of a central vacuum system, only one - not seven as alleged- of the freehold townhome buyers requires this. This, too, has been communicated and confirmed by the purchasers;<sup>15</sup>
- m. the Receiver's contention to disclaim 28 Purchase Agreements will not only unethically hurt innocent home purchasers but also financially damage the Project, as there is no assurance that the 28 freehold properties could be resold in the current market at any projected price. The Receiver's decision to proceed in this manner

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<sup>13</sup> Wang May Affidavit, RRR, Tab 1, p 11 at para 5 (q).

<sup>14</sup> Wang May Affidavit, RRR, Tab 1, p 11 at para 5 (r).

<sup>15</sup> Wang May Affidavit, RRR, Tab 1, p 11 at para 5 (s).



appears to be based on the analysis of CSMC, who is neither a sales broker nor a qualified market expert. Furthermore, CSMC has a conflict of interest with all balanced stakeholders who rely on the completion of the project and the delivery of homes to existing APS holders;<sup>16</sup>

- n. the Receiver's contention to rely solely on CSMC financing to complete the Project is inappropriate and unjustifiable considering the circumstances. As the court-appointed Receiver, it has the authority to borrow from any source it deems necessary to secure better rates and costs. The Receiver should also collaborate with all stakeholders to determine a comprehensive Project budget rather than relying exclusively on CSMC. CSMC has changed its lending position multiple times, both before and after the appointment of the Receivership, and these changes have been detrimental to the Project. The Receiver's suggestion that there are no other funding sources if it does not follow CSMC's request to disclaim 28 Purchase Agreements is inappropriate and unjustifiable. CSMC has not issued a commitment letter ensuring that it will continue funding the Project until its completion;<sup>17</sup>
- o. this lack of assurance raises the likelihood that CSMC could change its position again if the 28 Purchase Agreements are disclaimed, as it has done many times before; and<sup>18</sup>
- p. Furthermore, the non-party, UBS Holdings Ltd., which holds 100 LP units in JLPL, proposes that it is prepared to secure the services of the construction manager, who

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<sup>16</sup> Wang May Affidavit, RRR, Tab 1, pp 12-13 at para 5 (v).

<sup>17</sup> Wang May Affidavit, RRR, Tab 1, p 13 at para 5 (w).

<sup>18</sup> Ibid.

will provide a performance and cost overrun bond in the sum of \$15,000,000.00 to complete the Project.<sup>19</sup>

### **PART III – ISSUES AND THE LAW**

10. This motion raises the following issues:

Issue 1: Should this Honourable Court disclaim the 28 Purchase Agreements?

Issue 2: Should this Honourable Court increase the Receiver's Borrowing Limit?

***Issue 1: The 28 Purchase Agreements Should not be Disclaimed***

11. It is trite law that a receiver, with leave of the Court, may seek to disclaim agreements of the debtor where it is deemed appropriate in the circumstances.<sup>20</sup>

12. In the decision of [Romspen Investment Corporation v Horseshoe Valley Lands Ltd.](#), Justice Wilton-Siegel, writing for the court, lists the following non-exhaustive factors to be considered by the Court in determining whether a disclaimer by a receiver, stating:

[28] First, I agree that, in making its determination on the Receiver's disclaimer motion, a court will have regard to other considerations in addition to the absence of any legal duty or obligation of Romspen in favour of Lotco. Specifically, the right of the Receiver to disclaim Lotco's interest will depend upon, among other things, the nature of Lotco's interest (i.e. whether it is contractual or proprietary), the relative priorities of the Romspen Mortgage, the evidence regarding the equity in the Lots, and the operation of the doctrine of marshalling, if applicable.

....

[31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver

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<sup>19</sup> Affidavit of Usha Lakshmi Naidu sworn May 24, 2024, Supplementary Responding Motion Record of the Respondents ("RRR"), Tab 1, p 5-6 at paras 8-12

<sup>20</sup> [Forjay Management Ltd v 0981478 BC Ltd, 2018 BCSC 527 \(CanLII\)](#) at para 36-39.

should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party.”<sup>21</sup>

13. It is also trite law that when a receiver applies to the Court for an order to disclaim an agreement, the receiver must act reasonably and exercise good business sense. The receiver should review the contract in some detail, make appropriate investigations and inquiries, including conferring with the principals of the debtor and others in the industry to see if there is any merit in performing the contract for all the stakeholders since, if the contract is terminated, the other party has a claim in damages against the debtor.<sup>22</sup>

14. In the British Columbia decision of [\*IMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.\*](#), Justice Burnyeat, writing for the Court, states:

53 ... In this regard, the learned author of *Bennett on Receiverships*, 2<sup>nd</sup> Ed. (Toronto — Carswell) states:

In a court-appointed receivership, 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. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. (at p. 341)

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts 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...<sup>23</sup>

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<sup>21</sup> [2017 ONSC 426 at paras 28 and 31.](#)

<sup>22</sup> [Bank of Montreal v Smith, 2021 SKQB 47 \(CanLII\), at para 14.](#)

<sup>23</sup> [2008 BCSC 897 \(CanLII\) at para 53.](#)

15. Similarly, the Court of Appeal in [Ravelston Corp. \(Re\)](#), states:

[40] . . . 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. . . . 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...<sup>24</sup>

16. The receiver owes a duty of care to preserve the goodwill to the debtor in receivership, not just to the creditors.<sup>25</sup>

17. In the present case, the Receiver's rationale to disclaim the 28 Purchase Agreements centers around the argument that CSMC will not continue to fund the Project unless the Receiver takes such action. In its Supplemental Second Report, the Receiver emphasizes the presence of extra features stipulated in purchase agreements as primary challenges to completing the Project.

18. In contrast, the Jefferson Borrowers submit that the actions (or inaction) and conduct of the Receiver and Elevate in managing the Project are contrary to the best interest of all stakeholders. For the past five months, the Receiver has been silent about the construction schedule, leaving many existing trades and purchasers in the dark, which, in effect, has caused irreparable harm to the Project.<sup>26</sup>

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<sup>24</sup> [2005 CanLII 63802 \(ON CA\) at para 40.](#)

<sup>25</sup> [iMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd. 2008 BCSC 897 \(CanLII\) at para 56.](#)

<sup>26</sup> Affidavit of Fengxi Fansay Wang sworn April 1, 2024, RRR, Exhibit "A", p 300 at para 8; pp 305-308.

19. The Receiver's recent contention that the disclaiming of the 28 Purchase Agreements is a necessary requirement will, in fact, have a detrimental effect on the Jefferson Borrowers' goodwill, leading to reputational damage.

20. At present, it remains unclear what investigations and inquiries the Receiver conducted to determine whether the extra features, which are alleged to be a primary challenge to completing the Project, were requirements of the agreements.

21. Similarly, it is uncertain what investigations and inquiries the Receiver made to the Jefferson Borrowers or the purchasers of these agreements regarding the necessity of rooftop hot tubs and a central vacuum system for the construction of these freehold units. Had these investigations or inquiries been conducted, the Receiver would have discovered that none of the freehold townhomes were supposed to include rooftop hot tubs, and only one, not seven as alleged, of the freehold townhome buyers required the installation of a central vacuum system.

22. There is a significant concern regarding the Receiver's sole reliance on CSMC's assurance to fund the Project only after the 28 Purchase Agreements are disclaimed. Currently, there is nothing to suggest that there are no other funding sources available to complete the Project if the Receiver does not comply with CSMC's request to disclaim these agreements. It is unclear whether CSMC has provided a commitment letter ensuring that it will continue funding the Project until its completion.

23. Contrarily, a proposal has been suggested to CSMC in an attempt to complete the Project without the need to disclaim 28 Purchase Agreements- which has yet to be considered by the Receiver.

24. Furthermore, there is no assurance that the 28 freehold properties could be resold in the current market at any projected price above the market rate. While the Receiver relies on the confidential appraisals of Cushman & Wakefield and CBRE Limited, these appraisals have not been disclosed to allow relevant stakeholders to assess their veracity.

25. The Receiver has not made any effort to collaborate with the debtor to determine a comprehensive Project budget, which would address all concerns rather than relying exclusively on CSMC's forecast. In fact, the affidavit of the non-party, Joseph Bozzo of Spectrum Realty Services Inc., Brokerage, sworn May 21, 2024, indicates that the suggested 2024 prices of the 28 freehold properties may not differ substantially from the market rate. Mr. Bozzo further testifies that both Cushman & Wakefield and CBRE Limited are commercial real estate services firms and do not provide residential real estate services.<sup>27</sup>

26. There is further concern that if the Receiver proceeds as suggested by CSMC, CSMC may change its position if the 28 Purchase Agreements are disclaimed, as it has done previously. As a result, this approach will have an additional detrimental effect on the goodwill of the Jefferson Borrowers, resulting in further delays to the Project. CSMC previously suggested that the appointment of the Receiver on the Project would lead to a smooth transition, claiming it intended to utilize the services of Core and the existing trades to complete the Project. However, this did not happen. The project has been stalled, and there has been no communication with existing trades since it shut down in January 2024. CSMC previously indicated it required the appointment of the Receiver to address imminent liens, yet liens have since been registered on the Project.

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<sup>27</sup> Affidavit of Joseph Bozzo sworn May 21, 2024, p 10 at para 36-37; Exhibit K, p 76.

***Issue 2: The Receiver's Borrowing Limit Should Not be Increased***

27. It is respectfully submitted that the Receiver's borrowing limit should not be increased absent clear and unequivocal evidence that the updated Project Budget, included as a confidential document in the Supplemental Second Report, has the support of existing sub-trades or, at the very least, provides a cost breakdown for engaging new trades, whereby 70 percent of the budget accounts for the costs of engaging these subcontractors.

28. The increase in the borrowing limit cannot be assessed without all backup documentation, such as confirmation from subcontractors, sales brokers, and a firm commitment from the lender(s) being disclosed. The existing trades who have contracts with the project should be involved in creating the budget and construction schedule.

29. It is further submitted the Project Budget, including its estimated revenues and costs, should be disclosed to allow relevant stakeholders to assess the costs needed to remedy the current construction status, the information used by the Receiver and Elevate in making that determination, and the rationale for seeking the increased borrowing limit.

30. In the present case, it is unclear what, if any, progress will occur on the Project if the borrowing limit is increased. As it stands, the Receiver has yet to contact the existing subcontractors operating on the Project since its decision to shut down the Project, which has significantly deteriorated the Project.

31. There is no breakdown in the Project Budget indicating that the increased borrowing limit will allocate funds to address the multiple liens that were registered upon the appointment of the Receiver.

**PART IV – ORDER REQUESTED**

32. For all of the foregoing reasons, the Respondents request the dismissal of the Receiver's motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this May 24, 2024



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Lawyers for the Respondents



**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

<b>TAB</b>	<b>DESCRIPTION</b>
1.	<a href="#"><i>Bank of Montreal v Smith, 2021 SKQB 47 (CanLII)</i></a>
2.	<a href="#"><i>cIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd, 2005 CanLII 63802 (ON CA)</i></a>
3.	<a href="#"><i>Forjay Management Ltd v 0981478 BC Ltd, 2018 BCSC 527 (CanLII)</i></a>
4.	<a href="#"><i>Ravelston Corp. (Re, 2005 CanLII 63802 (ON CA)</i></a>
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RCP-E 4C (May 1, 2016)