



FORCE FILED

Amended pursuant to Supreme Court Civil Rule 6-1(1)(a)  
Originally filed April 12, 2023

No. H220369  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

PLW INVESTMENT LTD.

PETITIONER

AND:

1025332 B.C. LTD., 1025334 B.C. LTD., 1025336 B.C. LTD.,  
CHONGYE DEVELOPMENTS LTD., WASHINGTON  
PROPERTIES (POINT GREY) INC., WASHINGTON  
PROPERTIES (QEP) INC., LUCKY FIVE INVESTMENTS  
LTD., 1094321 B.C. LTD., PRARDA DEVELOPMENTS  
CORPORATION, 1256306 B.C. LTD., 1256319 B.C. LTD.,  
AMY BARSHA WASHINGTON (a.k.a. FENGYUN SHAO),  
EDISON WASHINGTON (a.k.a. QIANG WANG), LINDA  
WASHINGTON, 35 PARK PARKING INC. and EARLSTON  
MORTGAGE CORP.

RESPONDENTS

**AMENDED NOTICE OF APPLICATION**

**Name of applicants:** 1025332 B.C. LTD., 1025334 B.C. LTD., 1025336 B.C. LTD., CHONGYE DEVELOPMENTS LTD., WASHINGTON PROPERTIES (POINT GREY) INC., WASHINGTON PROPERTIES (QEP) INC., LUCKY FIVE INVESTMENTS LTD., 1094321 B.C. LTD., PRARDA DEVELOPMENTS CORPORATION, ~~1256306 B.C. LTD., 1256319 B.C. LTD.,~~ AMY BARSHA WASHINGTON (a.k.a. FENGYUN SHAO), EDISON WASHINGTON (a.k.a. QIANG WANG), LINDA WASHINGTON and 35 PARK PARKING INC. (the "Applicants")

To: The Petitioner

And To: Jordan Schultz, counsel for Alvarez & Marsal Canada Inc., in its capacity as Receiver

And To: Eamonn Watson, counsel for Earlston Mortgage Corp.

TAKE NOTICE that an application will be made by the Applicants to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia on April 25, 2023, at 9:45 am for the orders set out in Part 1 below.

**PART 1: ORDERS SOUGHT**

1. An Order that the Receiver, Alvarez & Marsal Canada Inc. (the “**Receiver**”) appointed pursuant to the Order of the Honourable Mr. Justice Giaschi (the “**Receivership Order**”) pronounced and entered on October 27, 2022, be discharged;
2. Alternatively, an Order that the Receivership Order be further stayed from the date of this Order until October 31, 2023, or such other date as may be specified by further order of this Honourable Court (the “**Stay Period**”).
3. An Order that:
  - (a) The Receiver, in its capacity as receiver and manager of the Property (as that term is defined in the Receivership Order), shall take no further steps in relation to the fulfilment of its duties or the exercise of its powers under the Receivership Order.
  - (b) Notwithstanding the foregoing, all protections afforded the Receiver under the Receivership Order (including without limitation paragraphs 7, 9, 17, 18 and 19 thereof), the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and any applicable law shall continue to apply, including with respect to any acts of the Receiver prior to the date of this order.
  - (c) the Receiver shall incur no liability or obligation as a result of it taking no further steps in relation to the fulfilment of its duties or the exercise of its powers following the date of this Order or during the Stay Period, as applicable.
4. Costs of this application;
5. Such other relief as this Honourable Court may deem just.

## **PART 2: FACTUAL BASIS**

### *Strata Lots 60 and 163 of the QEP Project*

1. In or about August 2011, the Applicant, Amy Bartha Washington, acquired approximately 10 single-family contiguous lots on Cambie Street in Vancouver between 35<sup>th</sup> and 37<sup>th</sup> Avenues. The beneficial interest in those lots was ultimately transferred by Ms Washington to the Applicant, Washington Properties (QEP) Inc. (“**QEP**”) for the purposes of the development and construction of a residential project comprising three separate buildings, together having 183 number of individual dwelling units. Those buildings were subsequently stratified, creating 183 residential strata lots (the “**QEP Project**” or the “**Project**”).
2. Construction on the QEP Project commenced in October 2015, at which time a related company was completing another project on 41<sup>st</sup> Avenue between Cambie and Oak, known as “**41 West**”.

3. Both QEP Project and 41 West (together, the “**Projects**”) were successful in that virtually all of the units were sold in presales, that is, to purchasers prior to the commencement of construction of either Project.
4. At all material times, the Petitioner was well aware, having been advised by the Applicants, that strata lots 60 and 163 within the (“**SLs 60 and 163**”) of the QEP Project had been previously sold to arm’s-length buyers, named respectively Pei Xia Zhang and Jian Qian, to pay off loans previously raised to inject equity into the QEP Project of which they are part.
5. In and after May 2020, the Petitioner gave assurances to and covenanted with the Applicants that, upon the arrangements being documented for the Petitioner to advance further funds and assume certain loan agreements with prior lenders (collectively, the “**Take-Out Loan**”), the Petitioner would formally disclaim any interest in SLs 60 and 163 and would allow the Applicants to transfer SLs 60 and 163 free and clear to the arm’s-length buyers thereof.
6. Based on the Petitioner’s assurances and covenant as aforesaid, the Applicants executed all requested Take-Out Loan documentation. However, the Petitioner then declined to release its purported security (the “**Purported 60/163 Security**”) so as to permit the transfer of SLs 60 and 163 to their arm’s-length buyers, stating instead that the Petitioner would defer the disclaimer until the sale of certain further lands over which the Petitioner had a security interest.

*Receivership Order was obtained on false pretences*

7. On October 24, 2022 the Applicants provided a version of their Petition Response herein to the Petitioner’s counsel for inclusion in the Petitioner’s materials supporting its claim for appointment of a Receiver. The Applicants thereupon advised that they would be objecting on stated grounds to the appointment of a Receiver.
8. At the time, the Respondents’ total outstanding indebtedness to PLW, as set out in paras. 32, 36 and 37 of its Petition, was approximately \$71,800,000; whereas PLW had access to approximately \$98,000,000 in equity based on assessed value and after considering the indebtedness to other prior lenders and GST due to Canada Revenue Agency. This calculation of equity excludes the values of SL’s 60 and 163.
9. The Petitioner then gave assurances to and covenanted with the Applicants that, if the Applicants would agree *not* to oppose the appointment of a Receiver, the Petitioner would formally disclaim their Purported 60/163 Security so as to allow the Applicants to transfer SLs 60 and 163 to the arm’s-length buyers thereof free and clear of all encumbrances.
10. During these discussions, the Petitioner assured the Applicants that if we they would agree to the Receivership the Petitioner would finally allow SLs 60 and 163 to be immediately

discharged from all security so they could be transferred with clear title to their buyers, Ms Zhang and Ms Qian.

11. Based on the Petitioner's assurances and covenant as aforesaid, the Applicants agreed *not* to oppose the appointment of a Receiver. The Order of Justice Giaschi was made and entered on October 27, 2022 without opposition.
12. Subsequently and despite repeated requests, the Petitioner has again failed to release the Purported 60/163 Security so as to permit the transfer of SLs 60 and 163 to their arm's-length buyers, Ms Zhang and Ms Qian, pending the sale of yet further lands over which the Petition holds security.

*Petitioner's frustration of fair market value sales*

13. While the Receivership Order was stayed, PLW has embarked upon extreme practices to frustrate the Respondents' efforts to sell properties over which PLW holds a secured interest (the "**PLW Secured Properties**") to arm's-length buyers at fair market value.
14. On or about March 8, 2023, the Petitioner, without any valid reason, refused to complete the sale of Unit B505 in the QEP Project, under a contract that it had entered into as registered owner.
15. The Petitioner has since, without any valid reason, refused to approve transactions with arm's-length buyers, at fair market value, of five other strata lots within the QEP Project.
16. In addition, the Petitioner has also, without any valid reason, refused to approve the sale of 835 Eyremount, West Vancouver, BC, for its fair market value.
17. The Petitioner abused its power to release security in an effort to frustrate valid deals and place itself in a position to cause the Respondent Amy Washington to file for personal bankruptcy and to cause the re-appointment of a Receiver herein.
18. The foregoing are continuing scorched-earth tactics employed by the Petitioner in bad faith.

*Receiver not warranted at this time*

19. Although the appointment of a Receiver may be available to secured creditors where provided for in their security documents, it is a discretionary tool having regard to all the circumstances of this case.
20. The Petitioner has put in place a number of effective mechanisms to ensure its security interests are respected and that the PLW Secured Properties are sold in an effective and professional manner, with full information and approval being provided to the Petitioner throughout, and its consent secured before any of the properties are sold.

21. In the case at bar, the imposition of a Receiver at this time is without a valid rationale, and is being urged by the Petitioner as a means of exerting leverage upon and/or punishing the Petitioner, without having established that there would be a genuine benefit to recovery.
22. The lifting of the current stay of Receivership will cause an enormous unnecessary expense and these Petition Respondents' equity will thereby be unnecessarily eroded.

*Inequitable to allow re-appointment of Receiver*

23. Under all the circumstances as set out herein, it would be inequitable for this Honourable Court to permit the Petitioner to cause the reinstatement of the Receiver following its initial stay period.
24. On these grounds set out above and given these Respondents' ongoing good faith efforts to market and the properties at fair market value, the Court should not exercise its discretion to allow a Receivership, or if the stay has been lifted, the Receiver ought to be discharged or further stayed.

**PART 3: LEGAL BASIS**

1. The appointment by the Court of a Receiver may be made where it is just or convenient to do so. There is competing authority whether the Court should exercise its discretion not to make such an appointment only where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made; or whether the appointment must be established by the Petitioner on the facts.

*United Savings Credit Union v. F & R Brokers Inc. et al* , 2003 BCSC 640, at paras. 17, 19; *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (S.C.) per Huddart J.; *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477

2. If the established procedures for foreclosure and judicial sale are accepted as serving the ends of justice, it follows that it would be unjust to allow mortgagees to revive the contractual remedy without it being tempered by the power of the court to allow time to the mortgagor and puisne encumbrancers. The original power of sale was a harsh and summary one. It was a remedy violently at odds with the expectation, now generally held by those having an interest in property, that they cannot lose that interest without notice.

*South West Marine Estates Ltd. v. Bank of B. C. (1985)*, 65 B.C.L.R. 328 (C.A.) per Esson J.A., cited with approval in *IMOR Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899 at para. 17 per Burnyeat J.

3. It is the policy of the law, wherever possible, to treat similar problems in the same way and to avoid technical procedural differences in such matters. This conclusion is supported by the addition to the Law and Equity Act which requires realization on Agreements for Sale

to be treated the same way as the foreclosure of a mortgage. If the exercise of a power of sale in a conventional mortgage is subject to the control of the Court's conscience by the imposition of principles analogous to foreclosure proceedings, then the same principle applies to the exercise of a power of sale in a debenture.

*Royal Bank of Canada v. Camex Canada Corp. (1985), 63 B.C.L.R. 125 (S.C.), per McEachern C.J.S.C., as he then was, cited with approval in IMOR, supra, at para. 18.*

4. In order that there can be commercial certainty and in order that the procedures relating to the enforcement of agreements for sale, mortgages and debentures can be dealt with in a consistent manner, the Court will be called upon in all of these enforcement proceedings to set a redemption period in accordance with the equities existing relating to the value of the property and to the debt owing under the security that is being enforced. If the position of the party enforcing the security is secured by the value of the property charged, then the usual redemption period of six months will apply. If not, a shorter redemption period will be ordered rather than the "usual" six months... The question is whether the lender has shown that its position is in jeopardy so that something less than a six-month redemption period is appropriate.

*Imor, supra, at paras. 23-24.*

5. No special circumstances exist that the petitioner should have an order for sale without regard to an appropriate redemption period.

*Textron Financial Canada Limited v. Chetwynd Motels Ltd., 2010 BCSC 477*

6. In circumstances in which the Petitioner has repeatedly acted in bad faith, obtaining the Receivership Order under false pretenses and the Court ought not to exercise its discretion in favour of continuing the Receivership herein.

#### **PART 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Amy Bartha Washington sworn April 10, 2023.
2. Order of the Honourable Mr. Justice Giaschi pronounced and entered on October 27, 2022.

The applicant estimates that the application will take 45 minutes.

- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master.

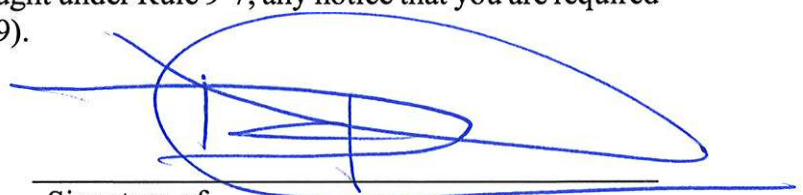
**TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION:** If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,

- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Original Date: April 11, 2023

Amended: April 20, 2023



Signature of

☐ applicant ☒ lawyer for applicants

*Dan Parlow*

This NOTICE OF APPLICATION is prepared by Dan Parlow of the law firm of Kornfeld LLP whose place of business is 1100 – 505 Burrard Street, Vancouver, BC, V7X 1M5, Telephone: 604-331-8300, Direct: 604-331-8337, Email: [dparlow@kornfeldllp.com](mailto:dparlow@kornfeldllp.com).

**To be completed by the court only:**

**Order made**

☐ **in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this notice of application**

☐ **with the following variations and additional terms:**

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**Date** \_\_\_\_\_

**Signature of ☐ Judge ☐ Master**

## **APPENDIX**

**THIS APPLICATION INVOLVES THE FOLLOWING:**

☐ **discovery: comply with demand for documents**



- ☐ **discovery: production of additional documents**
- ☐ **other matter concerning oral discovery**
- ☐ **extend oral discovery**
- ☐ **other matter concerning oral discovery**
- ☐ **amend pleadings**
- ☐ **add/change parties**
- ☐ **summary judgment**
- ☐ **summary trial**
- ☐ **service**
- ☐ **mediation**
- ☐ **adjournments**
- ☐ **proceedings at trial**
- ☐ **case plan orders: amend**
- ☐ **case plan orders: other**
- ☐ **experts**
- ☒ **none of the above**