Clerk's stamp:

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Dec. 10, 2020
Justice Eidsvik

COURT FILE NO.	1801-04745
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**HILLSBORO VENTURES INC.**
DEFENDANT	**CEANA DEVELOPMENT SUNRIDGE INC.**
PLAINTIFFS BY COUNTERCLAIM	**CEANA DEVELOPMENT SUNRIDGE INC., BAHADUR (BOB) GAIDHAR AND YASMIN GAIDHAR**
DEFENDANTS BY COUNTERCLAIM	**HILLSBORO VENTURES INC., NEOTRIC ENTERPRISES INC., KEITH FERREL AND BORDEN LADNER GERVAIS LLP**
DOCUMENT	**WRITTEN SUBMISSIONS OF THE APPLICANT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15th Floor, 850 – 2nd Street SW Calgary, Alberta T2P 0R8 Attn: Derek Pontin / John Regush Ph. (403) 268-6301 / 7086 Fx. (403) 268-3100 File No.: 559316-3

Written Submissions of the Applicant in respect of an application to be heard by the Honourable Madam Justice Eidsvik at 9:30 a.m. on December 10, 2020

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I. INTRODUCTION

Overview

1. The Plaintiff, Hillsboro Ventures Inc. ("**HVI**"), is a mortgage lender to Ceana Development Sunridge Inc. ("**Ceana Sunridge**"). HVI is a part of the Hillsboro Group of Companies. Hillsboro Enterprises Inc. ("**HEI**") and Neotric Enterprises Inc. ("**Neotric**") are companies related to HVI (collectively, "**Hillsboro**").

2. The mortgage facilities were arranged with Ceana Sunridge for the purpose of development and construction by Ceana Sunridge of a commercial condominium project (the "**Project**").

3. Ceana Sunridge is in receivership as a result of a Receivership Order made July 3, 2019 and amended and restated June 17, 2020.

4. The Plaintiff's Application is for an Order for Sale to Plaintiff, vending the Project to Hillsboro. Hillsboro is offering a price much greater than market value. The indebtedness owing to Hillsboro significantly exceeds any possible market recovery from the Project.

5. The Project is comprised of two phases. It is at an ideal juncture for transition, with the first phase being imminently complete. Continuation of the development of the Project by the Receiver, beyond Phase 1, is unnecessary and will be significantly prejudicial to Hillsboro.

Application Record

6. This Application was first heard on November 2, 2020 and adjourned. A scheduling Order was made on November 13, 2020 and materials have been filed by several parties.

7. Interested parties can be grouped as follows (not in any specific Order):

   (a) Bob Gaidhar, the principal of Ceana Sunridge;

   (b) the Receiver;

   (c) Hillsboro – second, third and fourth mortgagee, the principal of which is Keith Ferrel;

   (d) Connect First Credit Union ("**Connect First**"), the first mortgage holder;

   (e) subordinate lien holders, generally with builders' liens and caveats subordinate to Hillsboro's mortgages; and

(f) unit purchasers, seeking variously to either complete sales, get deposits back, or establish trust claims against the Project.

8. Despite the volume of material filed, the competing interests in this Application are straightforward. There are only a limited number of legal arguments to address, and the issues principally fall to basic mortgage priorities.

9. Hillsboro herein responds plainly to each of the competing arguments. It is respectfully submitted there is no legal or equitable basis for opposition to its Application.

10. Caselines page references have been included in the footnotes, throughout.

II. FACTS

a) Project Financing

Pre-Receivership Financing and Purchaser Deposits

11. Ceana Sunridge was incorporated in April 2015 and the Project lands acquired in May 2016[1].

12. Ceana Sunridge pre-sold condo units and solicited investors to enter joint venture agreements and acquire non-voting shares, principally in 2015, 2016 and 2017. Various amounts were received from unit purchasers and investors between 2015 and 2017.

13. In 2017, Hillsboro extended financing to Ceana Sunridge by way of three mortgage facilities. Connect First extended financing in 2017 as well. Hillsboro and Connect First are registered mortgagees on title to the Project lands.[2]

14. The mortgage facilities of Hillsboro are described in detail in Mr. Ferrel's affidavits.[3] The mortgage facility of Connect First is described in the Affidavit of Mr. Kunle Popoola.[4]

15. The Receiver has conducted a "sources and uses" analysis for the bank accounts of Ceana Sunridge (the "**Sources and Uses Analysis**").[5] The Sources and Uses Analysis shows all cash

[1] **Caselines page F181 -** Third Report of the Receiver dated September 14, 2020 **[Receiver's Third Report]** at Appendix "D" (see land title).
[2] **F181 -** Receiver's Third Report, at Appendix "D" (see land title).
[3] **D1 -** Affidavit of Keith Ferrel No 2, sworn June 21, 2019 at para 7 **[Ferrel Affidavit No 2]**;
D486 - Affidavit of Keith Ferrel sworn October 26, 2020 at para 10 **[Ferrel Affidavit No 4]**.
[4] **D845 -** Affidavit of Kunle Popoola sworn October 30, 2020.
[5] **F190 -** Receiver's Third Report at Appendix "F".

inflows and outflows from the two Ceana Sunridge bank accounts. Bob Gaidhar confirmed in cross-examination there were no other deposit accounts held by Ceana Sunridge.[6]

16. Several purchasers assert a priority ahead of the registered mortgages. They raise trust arguments, addressed herein, as none of those purchasers were registered encumbrance holders at the time of the mortgage advances.

17. The purchaser deposit claims fall into two buckets. The first bucket is purchaser deposits that were paid to Ceana Sunridge and spent by Ceana Sunridge prior to receivership (the "**Missing Deposits**"). Upon the Receiver's appointment, Ceana Sunridge had approximately $1,091 in cash in its accounts.[7] The Missing Deposits were/are gone.

18. The second bucket is purchaser deposits that were paid to Ceana Sunridge's legal counsel (KH Dunkley) prior to receivership and held in trust. Those trust funds presently equate to $992,376.25 (the "**Disputed Deposits**"). The Disputed Deposits were transferred from KH Dunkley to the Receiver's legal counsel (Torys LLP) upon receivership. The Disputed Deposits continue to be held in trust by Torys LLP.

19. There is a dispute as to who is entitled to the Disputed Deposits. Part of the Disputed Deposits was paid into trust by purchasers. Part of the Disputed Deposits was paid into trust by Hillsboro.

20. Importantly, this Application is *without prejudice* to claims over the Disputed Deposits. The Disputed Deposits will continue to be held in trust until further court order.

21. The Application of Hillsboro is *with prejudice* to claimants of Missing Deposits. Those claims (principally trust claims) are addressed herein and opposed as well by Connect First.

Post-Receivership Financing

22. As noted above, Ceana Sunridge had no cash upon the Receiver's appointment. The Receiver has borrowed funds from Hillsboro to complete the construction of the first phase of the Project.

23. As of November 1, 2020, the Receiver's borrowings under Receiver's Certificates totaled $4,762,334, owing to Hillsboro.[8] Hillsboro has since loaned to the Receiver an additional $1,000,000[9]. Some of the Receiver's borrowings were loaned by a party other than the Plaintiff. To avoid any uncertainty, all Receiver's Certificates and mortgage indebtedness have been

[6] **D1283-D1285 -** Transcript of Oral Questioning of Bahadur Gaidhar (on Affidavits affirmed October 30, 2020 and November 23, 2020) [**Gaidhar Transcript**], at pp 16-18.
[7] **F161 -** Receiver's Third Report, at p 26 – Interim Statement of Receipts and Disbursements.
[8] **F254 -** Fourth Report of the Receiver dated October 30, 2020 [**Receiver's Fourth Report**] at para 27.
[9] Hillsboro understands this will be described in the Receiver's anticipated Fifth Report.

assigned to HEI and an Assignment of Action, Receiver's Certificates and Indebtedness has been filed in this Action.[10]

b) <u>Project Status</u>

24. The financing extended by Connect First and Hillsboro was to be used in connection with the development of the Project. The Project is an estimated 45,000 square foot commercial retail development located on approximately 3.45 acres of land. When completed, it was initially contemplated the Project would consist of five (5) individual buildings, referred to as A, B, C, D, and E, to be completed in two phases.[11]

25. Ceana Sunridge defaulted on its loan agreements and related security.[12] Hillsboro demanded repayment of the indebtedness. Ceana Sunridge was unable to repay the loan or progress construction of the Project. To advance the stalled Project and protect its interests, Hillsboro sought the appointment of the Receiver.

26. The Receivership was appropriate and necessary at the time, based on the need to initiate and facilitate construction of Buildings A-D ("**Phase 1**") of the Project.[13] The Receiver was duly appointed.[14]

27. At the time of the Receiver's appointment, the Project had been stalled for over 1.5 years and was approximately 20-25% complete.[15] With the Receiver's oversight, significant progress was made on Phase 1.

28. Presently, the construction of Phase 1 is more than 90% complete and will shortly be finished.[16] This merits the timing of this Application.

29. The Receiver has done limited work in respect of the remainder of the Project, referred to "**Phase 2**". What was initially Building E was redesigned to be three separate, one-story buildings (referred to as Buildings E, F, and G).[17] The completion Phase 2 is not required to complete Phase 1.[18]

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[10] Assignment of Action, Receiver's Certificates and Indebtedness **<u>TAB 1 hereto</u>**.
D487 - See also, Ferrel Affidavit No 4 at para 10.
[11] **F5 -** First Report of the Receiver dated October 22, 2019 **[Receiver's First Report]** at paras 8 and 9;
F40 - Second Report of the Receiver dated June 8, 2020 **[Receiver's Second Report]** at para 21.
[12] **D331 -** Affidavit of Keith Ferrel sworn January 13, 2020 at para 9 **[Ferrel Affidavit No 3]**.
[13] **D488 -** Ferrel Affidavit No 4 at paras 13 and 14.
[14] **E1 -** Order of the Honourable Madam Justice B.E.C. Romaine pronounced July 3, 2019 in Court of Queen's Bench of Alberta Action No. 1801-04745 **[Receivership Order]**.
[15] **F5 -** Receiver's First Report at para 9.
[16] **D488** - **Ferrel** Affidavit No 4 at para 14.
F4 - Receiver's Fourth Report, dated October 30, 2020.
[17] **F39 and F40** - Receiver's Second Report at paras 19, 21.
[18] **F15** - Receiver's First Report at para 42.

30. Phase 2 has not been constructed, with the exception of an existing foundation in place for Building E only.[19] It is at "permitting stage".

31. Project financing will soon be required and construction for Phase 2 would be expected to begin shortly.[20] The only party with an interest in Phase 2 is Hillsboro. It is an ideal juncture to take the Project out of receivership, concurrently with the completion of Phase 1, before the costs of development of Phase 2 begin to be incurred.

c) Hillsboro's Bid Proposal

32. Hillsboro proposes to acquire the Project by way of a vesting order or Order for Sale to Plaintiff (the "**Transaction**"). The form of Order proposed is attached as Schedule "D" to Hillsboro's application.[21]

33. The consideration offered by Hillsboro is an aggregate amount of $17,662,335, comprised as follows:

Cash Deposit:	$3,000,000
Credit Bid (Receiver's Borrowing Certificates):	$4,762,335
Credit Bid (Receiver's Borrowing Certificate Nov 25/20):	$1,000,000[22]
Credit Bid (Mortgage Facility Indebtedness):	$5,000,000
Assumption of Connect Indebtedness (est.):	$3,900,000
Aggregate Purchase Price:	**$17,662,335**

34. From the Cash Deposit, approx. $1,600,000 will be used to fund estimated costs to complete construction of Phase 1. Approximately $900,000 is to be set aside for payment of outstanding professional fees and possible contingencies associated with Project completion. $500,000 is to be applied on account of the indebtedness to Connect First.[23]

35. The balance of Ceana's indebtedness to Connect First (the "**Connect Indebtedness**"), which is estimated to be $3,853,131 (after the $500,000 payment) will be assumed by Hillsboro upon the title transfer. Connect First would prefer the Project to remain in receivership and avoid the land transfer to Hillsboro, but, respectfully, they have no legal basis to oppose the Application.

[19] **F38** - Receiver's Second Report at para 16(d).
[20] **D488** - Ferrel Affidavit No 4 at paras 4 and 14.
[21] See Caselines **C136.**
[22] After the last evidence was filed regarding the Receiver's Borrowings, Hillsboro has loaned a further $1,000,000 to the Receiver under its borrowing Certificates.
[23] **D492** - Ferrel Affidavit No 4 at para 38.

36. To date, Hillsboro has advanced a total principal sum of $5,495,435 to the Receiver pursuant to Receiver's Borrowing Certificates as construction financing for Phase 1.[24] This amount, plus accrued interest (more than $300,000), is secured by the Receiver's Borrowing Charge over the Project, subordinate only to the Connect Indebtedness and the Receiver's Charge. This will be paid by way of offset as a part of the Purchase Price.[25]

37. Ceana's indebtedness to Hillsboro under its mortgages is $11,919,265 (as of October 31, 2020, the "**Hillsboro Indebtedness**"). The Receiver has reviewed in detail and confirmed the amount of the Hillsboro Indebtedness; the Receiver has reviewed and received an independent legal opinion as to the validity and priority of Hillsboro's security.[26]

38. The Purchase Price includes an offset of $5,000,000 of the Hillsboro Indebtedness (the "**Mortgage Offset**"). The precise Mortgage Offset will be subject to small adjustments at time of closing (accounting for accrued interest on Receiver's Certificates, Connect First indebtedness, etc.), but will be essentially the balance as set out. The amount owing to Hillsboro, after the Mortgage Offset is applied, will be its deficiency claim.[27]

39. Bob Gaidhar disputes the amount of the Hillsboro Indebtedness. In the face of Hillsboro's evidence, the detailed accounting provided therein, and the Receiver's review and confirmation of Hillsboro's indebtedness, Mr. Gaidhar's unfounded assertions should respectfully be dismissed.

40. In any event, Mr. Gaidhar's evidence confirms that Hillsboro advanced at least $4,362,085 to the Project in 2017.[28] If that were true, Hillsboro would be owed more than the Mortgage Offset ($4,362,085, plus interest over the past three years, exceeds $7.0 million), and any opposition by Bob Gaidhar to the Mortgage Offset is accordingly baseless.

41. The matter of Hillsboro's deficiency claim is not a part of this Application. The draft Order provided seeks to adjourn the issue of quantum of Hillsboro's deficiency, which can be determined by a later application on notice to the affected parties.

42. An appraisal of the Project was completed by Altus Group on August 25, 2020 (the "**Appraisal**").[29] The Aggregate Purchase Price of $17.6 million significantly exceeds the market value of the Project. The Appraisal assesses the value of the Project on the basis of Phase 1 "as

[24] **D491** - Ferrel Affidavit No 4 at para 30.
[25] **D491** - Ferrel Affidavit No 4 at para 30.
[26] **D487** - Ferrel Affidavit No 4 at paras 8, 9
F17 - Receiver's First Report at para 47
F251-253 - Receiver's Fourth Report at paras 18-22.
[27] **D495** - Ferrel Affidavit No 4 at para 51.
[28] **D1039** - Affidavit of Bob Gaidhar affirmed November 23, 2020, at para 24
[29] Confidential Supplemental Affidavit of Keith Ferrel sworn October 26, 2020 at paras 3 and 4 [**Confidential Ferrel Affidavit**].

completed". The Appraisal therefore provides a higher value than the actual present market value, as there is still work to be done and paid for by Hillsboro.

43. Given there is final work to be completed on Phase 1, and to ensure the least disruption to the Project, Hillsboro is seeking assignment from the Receiver of certain operative contracts that will see to the orderly completion of Phase 1 of the Project (the "**Operative Agreements**").[30] The Transaction is conditioned on these assignments and the Receiver will control that part of the transition of the Project to Hillsboro.

44. Hillsboro is also seeking assignment of existing purchase contracts, for purchasers that have confirmed with the Receiver their intention to complete the purchase of their units.[31] Hillsboro has a general security interest in all Project Agreements of Ceana Sunridge and is entitled to these assignments under its security. Moreover, it is discussed below that purchase agreements are assignable in any case under the Alberta *Land Titles Act*.

45. The Transaction will close upon the Receiver filing a Receiver's Closing Certificate, as set out in the draft Order provided. This ensures the transfer will only occur upon the Receiver's satisfaction that necessary closing conditions have been met. This assures a careful and efficient transition of the Project from the Receiver to Hillsboro.

III. ISSUES

46. Hillsboro's position in respect of the issues discussed herein is as follows:

    (a) As a procedural item, it is appropriate the stay in the Receivership (the "**Stay**") be lifted for this Application to proceed.

    (b) The Transaction is reasonable, does not prejudice the rights of any stakeholder, and should be approved.

47. If the Transaction is denied, the Project will remain in receivership. This would be specifically and exclusively prejudicial to Hillsboro, who is the sole creditor bearing all of the expense of the priority claims and professional costs.

48. There is no legal or equitable bar to Hillsboro's Application.

[30] **D492-D493** - Ferrel Affidavit No 4 at paras 40-44.
[31] **D493** - Ferrel Affidavit No 4 at para 42.

IV. LAW AND ARGUMENT

a) The Stay Should be Lifted

49. The test for lifting a stay of proceedings instituted in a receivership was recently articulated by this Honourable Court:

> … the test for lifting a stay imposed pursuant to a receivership order focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.
>
> Guidance can be drawn from the provisions of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in a receivership should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.J. No. 1189 (Ont. C.A.).
>
> Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma*, at para 3.
>
> In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at paras 18-19. The mere fact that a party is not entitled to exercise a contractual right for which it has bargained is not a sufficient reason to lift the stay. In that respect, the prejudice to the applicant is no different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.[32]

50. Principally, Hillsboro is contractually entitled under its mortgages to seek foreclosure and sale to plaintiff. More materially, Hillsboro is uniquely the only party with an economic interest in the Project that is affected by this Application.

51. Hillsboro is the fulcrum creditor in these receivership proceedings. If the Transaction is approved, parties in priority to Hillsboro will be unaffected; parties subordinate to Hillsboro will be foreclosed.

52. Parties subordinate to Hillsboro have no economic stake in the Project. Whether the Project is sold now to Hillsboro or later by the Receiver, Hillsboro's deficiency is in the multi-millions of dollars. Subordinate parties have no possibility of recovery.[33]

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[32] ***Alberta Energy Regulator v Lexin Resources Ltd***, 2019 ABQB 23 at paras 13-16, 69 CBR (6th) 39. **TAB 2**
[33] Confidential Ferrel Affidavit at para 11.

53. If the receivership continues, Hillsboro will have to pay for it.[34] Connect First prefers the receivership continue, but they don't have to pay for it. No other party has to bear any of that cost. This would be demonstrably unfair to Hillsboro.

54. Professional fees in the Receivership to date are approximately $1 million.[35] This does not include Hillsboro's own legal costs. For so long as Hillsboro's indebtedness and the Connect Indebtedness are unserviced, interest accruals continue to erode only Hillsboro's position. Connect is very well secured, so all deficiency amounts accrue solely to Hillsboro's account.[36]

55. The appointment of the Receiver was just and convenient when it occurred. The Receiver corrected Ceana Sunridge's complete inability to advance the development of Phase 1 of the Project. It is now a logical juncture for the Project to be taken out of receivership. Hillsboro is the only interested party in Phase 2, Phase 2 has not yet been commenced, the Receiver will need to borrow further to fund construction of Phase 2 (for Hillsboro's sole benefit), and Hillsboro exclusively will be the party that bears all of the financial burden.

56. Hillsboro's proposal provides the necessary assurances (cash to close, assumption of the Operative Agreements and assumption of purchaser contracts) to ensure the completion and closing of Phase 1. Lifting of the Stay will not prejudice any party, and conversely declining to lift the Stay will specifically and materially prejudice Hillsboro.

57. In the circumstances, it is respectfully submitted it is just and equitable that the Stay be lifted *nunc pro tunc* for the matter of this Application to be heard and granted.

b) <u>The Transaction is Reasonable, Appropriate, and has no Lawful Impediment</u>

58. The Transaction will see Hillsboro acquire the Project for consideration greatly in excess of fair market value.

59. There is benefit to any other stakeholder if the Project remains in receivership at Hillsboro's ongoing expense.

60. Despite these prevailing factors, a number of stakeholders are opposed to Hillsboro's application. These parties (generally speaking) are: Bob Gaidhar; subordinate creditors (builders' liens and caveat holders subordinate to Hillsboro's mortgages); Connect First; unit purchasers and joint venturers.

[34] **D495** - Ferrel Affidavit No 4 at para 54.
[35] **D487** - Ferrel Affidavit No 4 at para 11.
[36] **D489** - Ferrel Affidavit No 4 at para 21.

61. Each of the opposing arguments is herein simply responded to.

i. Bob Gaidhar

62. Bob Gaidhar has filed materials opposing the Application. He has taken issue with Hillsboro's accounting and its postponement of its first mortgage to its second and third mortgages.

The Hillsboro Indebtedness

63. Bob Gaidhar's materials allege Hillsboro has not provided an accounting and is claiming indebtedness that exceeds actual advances.

64. Bob Gaidhar's arguments suggest reserve payments for interest, fees as set out in the Commitment Letters and forbearance agreement, and other perfectly legitimate amounts are not proper charges or debts due. These allegations are not substantiated.

65. The salient facts are as follows:

(a) Hillsboro's detailed accounting was provided to and reviewed by Bob Gaidhar in September of 2018;[37]

(b) Bob Gaidhar conducted what he calls a "forensic accounting" in respect of Hillsboro's accounting;[38]

(c) Bob Gaidhar's forensic accountant is his daughter (Ms. Bhanji), who is an unpaid investor and creditor of the Project;[39] and

(d) the Receiver has reviewed Hillsboro's accounting in detail, and confirmed that all monies claimed by Hillsboro are monies advanced and accounted for.[40]

66. The evidence of Hillsboro, and the Receiver's reporting, shows Hillsboro made advances and is currently owed more than $11.9 million by Ceana Sunridge.

67. The Receiver is a Court officer and conducted its review independently from any party. Hillsboro agrees with the Receiver's review of the accounting.

68. Bob Gaidhar's accounting through Ms. Bhanji is not independent or unbiased.

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[37] **D1277** - Gaidhar Transcript, at p 10.
[38] **D764, D794-D826** - Affidavit of Bob Gaidhar affirmed October 30, 2020, at para 13 and Exhibit "D".
D1282 - Gaidhar Transcript, at p 15.
[39] **D1277-D1282 and D1318** - Gaidhar Transcript, at pp 10-15, and 51.
[40] **F251-F253** - Receiver's Fourth Report at paras 18-22.

69. In any case, as noted above, the Mortgage Offset amount is the only amount that needs to be proven as a part of Hillsboro's bid proposal. Bob Gaidhar has admitted Hillsboro advanced at least the Mortgage Offset amount.

70. The balance of the indebtedness to Hillsboro (i.e., the quantum of its deficiency) will be set over to be determined at a later application.

The Postponement of the Hillsboro Mortgages

71. Bob Gaidhar's materials make specious allegations that Hillsboro postponed its first mortgage to its second and third mortgages "without notice" to Ceana Sunridge.

72. The mortgage Commitment Letters, each signed by Bob Gaidhar, clearly stated the mortgage postponements would occur as a part of each financing.[41] There is nothing unannounced or improper about the Hillsboro mortgage postponements.

ii. Subordinate Creditors

73. The title to the Project lands discloses a number of registered liens and similar encumbrances. These are all subordinate to Connect and Hillsboro, the Receiver's Charge and the Receiver's Borrowing Charge.

74. Several subordinate creditors have opposed Hillsboro's application. It is an unfortunate reality that these claimants have no financial stake in the Project. The Project is simply not worth enough to pay out Hillsboro, and therefore anyone behind Hillsboro.

75. There is no basis for subordinate creditors to raise any objection to this application as there is no scenario in which they could see recovery.

iii. Connect First

A Mortgagee Cannot Restrict Alienation of Property

76. Connect First is the first mortgage lender to Ceana. In foreclosure, a senior creditor is not a party to the action as they are not the subject of any compromise:

> It is never necessary to join as a party defendant a person whose interest it is not desired to extinguish of affect. For example, when suing on a second mortgage, the holder of the first mortgage will not be made a defendant, as any dealings with the land must be subject to his claim.[42]

[41] **D94 and D158 -** Ferrel Affidavit No 2 at Exhibits B-1 and C-1.
[42] Mortgage Actions in Alberta, F Price & M Trussler (1985: Carswell) at 42 (with emphasis added). **TAB 3**

77. Hillsboro will assume the Connect First indebtedness upon taking title. Connect First will continue to be secured against the Project. Connect First suffers no legal or financial prejudice as a result of Hillsboro's application.

78. Connect First has objected to Hillsboro's application on the basis of preference; they prefer to deal with the Receiver over Hillsboro. Connect First has filed two affidavits. Respectfully, Connect First does raise any legal ground for objection, just preference.

79. At law, a mortgage holder cannot restrict the transfer of mortgaged title. Restrictions on the alienability of a mortgagor's interest have long been found repugnant:

> I agree with the trial judge that a mortgagor's equity of redemption is an interest in land which he may convey, devise, lease or mortgage like any other interest in land and neither the common law nor equity allows restraints on the alienation of that interest. [43]

80. Moreover, by the terms of the Connect First mortgage, the title may be transferred; there is no requirement that Connect First must consent.[44]

There is No Risk and No Financial Prejudice to Connect First

81. Connect First would prefer the Receiver builds out Phase 2, but would share none of that cost. That cost would be entirely upon Hillsboro. This would be manifestly unfair.

82. Connect First has no risk in the proposed transfer. The Project's appraised value is an order of magnitude greater than the Connect Indebtedness. This is observed in the Confidential Ferrel Affidavit, where the value is evident.

83. Further, a significant portion of Phase 1 of the Project has already been pre-sold. Proceeds from the sales will be significantly greater than what Connect First is owed, and will be first applied against the Connect Indebtedness. All other priority costs are being paid from the cash component on closing the Transaction.[45]

84. After completion of the Transaction, the loan to value ratio of the Connect Indebtedness will be well below normal lending parameters.[46] The Connect Indebtedness is sufficiently low, in relation

[43] ***Canada Permanent Trust Co. v. King's Bridge Apartments Ltd.*** (1983), 48 Nfld & PEIR 345 at para 8, 8 D.L.R. (4th) 152, 1983 (NFLD CA) (with emphasis added). **TAB 4**
[44] **D1237** - Affidavit of Kunle Popoola sworn November 25, 2020, at para 27 of Exhibit "3".
[45] **D491 and D492** - Ferrel Affidavit No 4 at paras 33 and 36.
[46] Ferrel Confidential Affidavit at para 5.

to the Project value (regardless of the pre-sales), that Connect would have no risk in the transfer.[47]

Prejudice Outweighs Preference

85. In response to the Affidavit served by Connect First on October 30, 2020, Connect First states the transfer to Hillsboro may or could cause delays, disruption, risk and uncertainty. There is no evidence to support these bare speculations.

86. The fact is Hillsboro will be taking assignment of the Operative Contracts. The prime construction contract with EFC and the sales/marketing agreement with Barclay Street will continue. These are a condition of the Receiver's Closing Certificate. There is no credible basis to think there would be a disruption to construction and sales, which will continue under existing parameters.

87. If the Application is granted, Connect First will continue to maintain its secured position and will have a new solvent counterparty to its mortgage. As a condition to the closing, cash will be tendered into escrow and the Operative Contracts will be assigned. The timing coincides with the completion of Phase 1, a natural and logical juncture for the Project to transact.

88. If the Application is not granted, Hillsboro will continue to solely carry the financial burden of the receivership (professional costs, interest costs, construction costs). So long as the receivership continues, Hillsboro is the only party with increasing risk and financial detriment.

89. The receivership has logically exhausted its primary purpose, with the completion of Phase 1, and no party faces any real prejudice, other than Hillsboro, in the outcome of this Application.

90. On a balance of factors, it is respectfully submitted the preferences of Connect First can only be weighed against prejudice to Hillsboro, and mere preference cannot prevail.

iv. <u>Purchasers</u>

91. Various unit purchasers have signed agreements with Ceana Sunridge. Many or all of these purchasers paid amounts to Ceana Sunridge. Most of these parties signed joint venture participation agreements with Ceana Sunridge and provided funds to Ceana Sunridge in that connection.[48] The various parties can be grouped as follows:

(a) purchasers that want to close, with deposits currently held in trust;

[47] **D491 and D492** - Ferrel Affidavit No 4 at para 35.
[48] **F44-F46 -** Receiver's Second Report at paras 37-44.

(b) purchasers that do not want to close, with deposits currently held in trust; and

(c) purchasers with Missing Deposits.

Purchasers Seeking to Complete their Unit Purchase Contracts

92. A summary of the unit purchasers that have advised the Receiver they wish to close on the purchase/sale of their commercial units is as follows:

Purchaser	**CRU**	**Deposit**	**Notes**
Paul Ng	4	Yes	Receiver's Second Report and Third Report confirms Mr. Ng intends to complete the purchase, and has an undisputed deposit in trust with the Receiver's counsel.[49]
2035043 Alberta Ltd.	5A 5B 6	Yes	Receiver's Second Report and Third Report confirms 2035043 Alberta Ltd. intends to complete the purchase, and has an undisputed deposit is trust with the Receiver's counsel.[50]
1989207 Alberta Ltd.	9 or 10	Yes*	Receiver's Second Report confirms 1989207 Alberta Ltd. intends to complete the purchase.[51] 1989207 Alberta Ltd. has a Disputed Deposit (as defined above) held in trust with the Receiver's counsel.
Central Halal Meats Ltd.	9 or 13	Yes*	Receiver's Second Report confirms Central Halal Meats Ltd. intends to complete the purchase.[52] Central Halal Meats Ltd. has a Disputed Deposit held in trust with the Receiver's counsel.
Eureka Prescriptions Inc.	7A 7B	Yes*	Receiver's Second Report confirms Eureka Prescriptions Inc. intends to complete the purchase.[53] Eureka Prescriptions Inc. has a Disputed Deposit held in trust with the Receiver's counsel.

*Denotes a Disputed Deposit (as defined above).

93. Hillsboro will take assignment of the purchase contracts of Paul Ng and 2035043 Alberta Ltd. and will hold those purchaser deposits in trust in accordance with the terms of the *Condominium Property Act*. Hillsboro will close the purchase/sale of those units in due course. The proceeds, in excess of $3.1 million[54], will reduce the Connect First indebtedness.

[49] **F45 -** Receiver's Second Report at p17.
F152 - Receiver's Third Report at p17.
[50] **F45 -** Receiver's Second Report at p17.
F152 - Receiver's Third Report at p17.
[51] **F45 -** Receiver's Second Report at p17.
[52] **F45 -** Receiver's Second Report at p17.
[53] **F45 -** Receiver's Second Report at p17.
[54] Ferrel Confidential Affidavit at para 6 (see unit pricing and deposits).

94. The Alberta *Land Titles Act* provides that any contract for the purchase of any land or interest in land is assignable, even if contrary terms are contained in the purchase contract:[55]

> 154(1) Any contract in writing for the sale and purchase of any land, mortgage or encumbrance is assignable notwithstanding anything to the contrary contained in it, and any assignment of any such contract operates according to its terms to transfer to the assignee mentioned in it all the right, title and interest of the assignor both at law and in equity, subject to the conditions and stipulations contained in the assignment.

95. There is no restriction on assignment of the purchaser contracts to Hillsboro, where the purchasers have indicated they wish to complete their unit sales.

96. 1989207 Alberta Ltd. and Central Halal Meats Ltd. have retained counsel, but have not filed Affidavits in this matter. Eureka Prescriptions Inc. has retained counsel and has filed an Affidavit in this matter.[56] Those three parties have indicated they wish to close their purchases, but they have Disputed Deposits.

97. Hillsboro seeks to take assignment of these purchase contracts along with the others that have confirmed their willingness to complete. Hillsboro will also take assignment of the Disputed Deposits. Hillsboro (or its counsel) will specifically hold the Disputed Deposits in trust under the *Condominium Property Act* and in any case *without prejudice* to the affected parties' claims to the Disputed Deposits.

98. Once the parties' respective rights to the Disputed Deposits are determined by further Court Order, the parties' will either know or determine their respective rights and obligations to complete the unit purchases. Importantly, those issues are not a part of this Application and will be more simply dealt with in a later summary application.

99. In short, the purchasers claiming the Disputed Deposits are not prejudiced by this Application.

Purchasers Seeking Return of their Deposits

100. Two purchasers have advised the Receiver they do not wish to close their unit sales and are seeking return of their deposits.

101. Karim Sharifat deposited $127,751.25 with Ceana Sunridge's counsel at the time of entering his purchase contract (the "**Sharifat Deposit**").[57] The Sharifat Deposit is not a Disputed Deposit.[58]

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[55] *Land Titles Act*, RSA 2000 c L-4 at s154.
[56] **D9** - Affidavit of Andrew Uwubanmwen sworn October 30, 2020.
[57] **D12** - Affidavit of Karim Sharifat sworn November 12, 2020.
[58] **F48** - Receiver's Second Report at para 50.

Hillsboro has no issue and takes no position with respect to the release of the Sharifat Deposit back to Karim Sharifat.

102. Mounir Alein deposited $76,000 directly with Ceana Sunridge in 2015.[59] Mounir Alein has retained counsel and demanded return of his deposit.[60]

103. Mounir Alein has filed an Application and Affidavit, seeking to establish a trust claim against the Project lands.

104. The deposit currently held by the Receiver's counsel for Mounir Alein is a Disputed Deposit. Hillsboro disputes Mounir's Alein's right to claim repayment of that deposit.

105. As described above, Hillsboro's Application is *without prejudice* to Disputed Deposits. Mounir Alein's entitlement to the Disputed Deposit will be determined at a later date, along with the balance of the Disputed Deposits.

106. Mounir Alein is not prejudiced by this Application.

Purchasers with Missing Deposits

107. In the Receiver's Third Report, the Sources and Uses Analysis shows the cash inflows that resulted from various purchaser deposits being paid to Ceana Sunridge.[61]

108. Upon the Receiver's appointment, there was only $1,091 in the Ceana Sunridge bank accounts.[62]

109. Only the purchaser deposits currently held in trust at Torys LLP are accounted for; all other purchaser deposits (the Missing Deposits) were expended by Ceana Sunridge prior to receivership.

110. The following purchasers have filed materials making trust claims in respect of their missing deposits:

Purchaser	**Amount of Claim**	**Filed Materials**
1785337 Alberta Ltd. ("**178**")	$457,487.50	Affidavit of Rahul Kapoor sworn June 24, 2020 (the "**Kapoor Affidavit**")
Mandeep Mavi and Sukhdeep Dhaliwal ("**Mavi and Dhaliwal**")	$438,465.63	Affidavit of Sukhdeep Dhaliwal sworn October 28, 2020 (the "**Dhaliwal Affidavit**")

[59] **F190-F198 -** Receiver's Third Report (Appendix "F" – Sources and Uses Analysis – Exhibit 2 – Purchaser Deposits)
[60] **F48** - Receiver's Second Report at para 50.
[61] **F190-F198 -** Receiver's Third Report (Appendix "F" – Sources and Uses Analysis – Exhibit 2 – Purchaser Deposits)
[62] **F19** - Receiver's First Report at para 57.

1695411 Alberta Ltd. ("**169**")	$113,000	Affidavit of Jasbir Mundi sworn November 23, 2020 (the "**Mundi Affidavit**")
CECA Holding Co. Ltd. ("**CECA**")	$310,000	Affidavit of Emmanuel Aladi sworn November 20, 2020 (the "**Aladi Affidavit**")

111. These claims all have the same footing and, respectfully, all fail on the same basis in law and fact.

Purchaser Trust Claims are Expressly Subordinate to Registered Mortgage Interests

112. The trust argument made by the purchasers with Missing Deposits is not novel. This issue has been squarely addressed by this Honourable Court. The leading case is *1864684 Alberta Ltd. v 1693737 Alberta Inc*.[63]

113. That case is factually indistinguishable from the case at bar. In *1864684 Alberta Ltd.*, condo unit purchasers, lienholders, a caveat holder and a mortgagee all disputed priority to sale proceeds arising from the sale of a commercial condominium project in receivership. The unit purchasers had provided trust deposits to the developer and the developer had disbursed the same in breach of trust.

114. The parties in that case agreed that the developer had used the purchase deposits to fund the development of the project. On that basis, the deposit funds would be "traceable" into the project. The project failed and was sold in receivership. The project was the only asset of the company.

115. The Court framed and determined the issue as follows:[64]

> Does the trust claim being advanced by the Purchasers, based upon the foregoing assumptions, have priority over the registrations on title to the Land?
>
> For the reasons that follow, the answer is No.

116. The purchasers argued both statutory and common law trusts. This Honourable Court rejected both arguments. The law is grounded in the Alberta *Land Titles Act* and *Condominium Property Act*. The Court stated:

> The Purchasers argue that s 14(3) of the *Condominium Property Act* impresses a trust on the Deposits so that the Deposits never became the

[63] ***1864684 Alberta Ltd. v 1693737 Alberta Inc*.,** 2016 ABQB 371 at paras 37 and 38, [2016] 12 WWR 412. **[*1864684 Alberta Ltd.*] TAB 5**
[64] ***1864684 Alberta Ltd*.** at paras 10 and 11, with emphasis added.

> property of the Developer. As such, the Proceeds are not property available for distribution to other creditors. In support of this position, the Purchasers rely on the recent Court of Appeal decision in *Iona Contractors*.
>
> The Purchasers also argue that the three-fold common law requirement for the creation of a trust (intention, certainty of object, and certainty of subject matter) is made out in these circumstances. As the trust monies were wrongfully used to develop the Land, the Purchasers argue that they are entitled to a continuing beneficial interest not merely in the trust property but in the proceeds thereof. They rely on *Ward-Price v Mariners Haven Inc*, 57 OR (3d) 410, 2001 OJ No 1711, for this proposition.
>
> Relying on J*apan Canada Oil Sands Ltd v Stoney Mountain Steel Corp*, 290 AR 251, [2001] AJ 533, the Purchasers argue that their interest, created by a statutory trust, is superior to and defeats secured creditors such as the Lienholders, the Caveat Holder and the Mortgagee.
>
> This application engages the interpretation and interplay of two provincial legislative regimes: (1) the consumer protection regime under the *Condominium Property Act* and (2) the Torrens land registry regime (which also fosters elements of consumer protection) under the *Land Titles Act*… [65]

117. This Honourable Court unequivocally stated that the trust claims of the purchasers were subordinate to the registered mortgages and other prior interests:

> The Alberta Legislature, in s 203 of the *Land Titles Act*, has chosen expressly to recognize the priority of registered encumbrances over unregistered trust claims.
>
> Section 203 states:
>
> > 203(1) In this section,
> >
> > (a) “interest” includes any estate or interest in land;
> >
> > (b) “owner” means
> >
> > (i) the owner of an interest in whose name a certificate of title has been granted,
> >
> > (ii) the owner of any other registered interest in whose name the interest is registered, or
> >
> > (iii) the caveator or transferee of a caveat in whose name the caveat is registered.
> >
> > (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,

[65] ***1864684 Alberta Ltd.*** at paras 16-19.

> (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
>
> (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.
>
> ...
>
> Thus, the priority of interests, registered and unregistered, attached to a piece of land are to be determined in accordance with the *Land Titles Act*, except as they may be repealed, altered or modified by another statute, such as is argued in this case, the *Condominium Property Act*. [66]

118. The Court reviewed the *Condominium Property Act*, and cited the fact the developer violated the trust under that act:

> The Developer violated *Condominium Property Act* s 14(3) and used the Deposits to pay costs associated with the development of the Land, including building costs. In doing so, the Developer breached the statutory trust. However, the Deposits ceased to be deposits when they were co-mingled with other funds and activities used to improve the Land. The Deposits were no longer uniquely identifiable and became inseparable from other funds and activities that added value to the Land, such as the work efforts undertaken by the Lienholders. Any trust interest associated with the Deposits became an interest in land subject to the *Land Titles Act* regime.
>
> As discussed above, the *Land Titles Act* requires the registration of interests in land in order to gain priority over others also claiming interests. It follows that the priority of the Deposits, which were capable of becoming registered interests in land, must have their priority dealt with according to the *Land Titles Act*. [67]

119. The Court determined that the trust claims advanced by the Purchasers could not be sustained over prior registrations on title:[68]

> Section 203(a) is clear that the Lienholders and the Caveat Holder were not required, for the purpose of obtaining priority for their interest, to inquire into how the purchase money for the Land was sourced or

[66] ***1864684 Alberta Ltd.*** at paras 39-41, underlining added.
[67] ***1864684 Alberta Ltd.*** at paras 47 and 48.
[68] ***1864684 Alberta Ltd.*** at paras 54 and 55.

> applied. They were also not affected by notice of any trust interest in the Land that was not registered by instrument, any rule of law or equity to the contrary notwithstanding.
>
> The legislative intent is to ensure that persons seeking to acquire new interests in land can rely on the existing title with no need to make any further inquiries about competing claims, title defects or equitable unregistered claims. In accordance with the *Land Titles Act* registry system, registered interests take priority by date of registration and therefore take priority over any unregistered interests. Thus, absent fraud as set out in the *Land Titles Act* (which fraud is neither alleged nor proven), the Purchasers' unregistered trust claims do not create an interest in land that would take priority over registered encumbrances. To do so would contradict the plain words of ss 14, 56 and 203 of the *Land Titles Act*.

120. It can be added that there is no possible duty or duty of care that could be owed by Hillsboro, as a construction lender, to the unit purchasers. This is not only clear under the express wording of s. 203 of the *Land Titles Act*, but has been affirmed by the Alberta Court of Appeal as follows:[69]

> The appellants contend that an interim financier owes a duty of care to the purchasers of a condominium unit in a project financed by it to enforce the lending agreements between the financier and the developer of the project. To date, Canadian courts have not recognized the existence of such a duty of care…
>
> …
>
> I have concluded that the chambers judge was correct in determining that a construction lender does not owe a duty of care to the purchasers of units in a condominium project which it is financing or to the condominium corporation. Difficulties arise at both stages of the *Anns* analysis, making the recognition of a duty of care in these circumstances legally unmanageable and commercially unreasonable.

121. This reflects commercial realities. Construction financing is generally predicated upon an equity commitment of the developer and a budget. In Hillsboro's case, this is set out in the Commitment Letters.[70]

122. Pre-sales and joint venture arrangements are a common inducement and often required as a pre-requisite for lenders. It is expressly not the obligation of a mortgage lender to look deeper than the title against which they lend. If that were the case, it would be impossible for lenders in construction or any other real estate loan scenario to enter financing arrangements with any certainty. This would defeat Torrens principles.

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[69] ***Condominium Corporation No. 0321365 v MCAP Financial Corporation***, 2012 ABCA 26 at paras 48, 50, [2012] 6 WWR 42 leave to appeal to SCC refused 553 AR 399 (note). **["*MCAP*"] TAB 6**

[70] **D7, D94 and D158** Ferrel Affidavit No 2 at Exhibits A-1, B-1 and C-1.

123. In the result, purchasers whose deposits were spent by Ceana Sunridge have no possible priority to Hillsboro. Even if those funds could be traced into the Project (which the evidence does not support), the provisions of the *Land Titles Act* and *Condominium Property Act*, and applicable cases, are perfectly clear: a mortgage lender is not subject to any "trust or other interest that is not registered by instrument or caveat"[71] – there is accordingly no priority claim.

v. Evidentiary Support for Hillsboro's Position

124. The foregoing is clear; the law does not support a priority of any trust claim ahead of the Hillsboro mortgages. This stands regardless of whether the purchasers can trace their monies into the Project or not.

125. In any case, for completeness of the review, there are significant factual deficiencies to the purchasers' claims.

1785337 Alberta Ltd.

126. 178 claims $457,487.50 in total missing deposits.[72]

127. The Receiver's Sources and Uses analysis shows $417,487.50 was paid into the Ceana Sunridge bank accounts.[73] The Kapoor Affidavit shows the other $40,000 was not paid to Ceana Sunridge, but was paid to Ceana Developments Inc.[74]

128. The monies received by Ceana Sunridge from 178 were not held in trust by KH Dunkley and remitted to Torys LLP.[75] The monies remitted to Torys are only the Disputed Purchaser Deposits, described above. The missing monies can only have been dissipated by Ceana Sunridge prior to receivership.

129. 178 entered a joint venture agreement with Ceana Sunridge dated July 21, 2015 (each a "**JV Agreement**"), a purchase agreement with Ceana Sunridge dated August 1, 2015, and a further JV Agreement dated January 30, 2016.[76]

130. Under the JV Agreements, joint venturers acquired "Participating Interests" in the Project. Each Participating Interest is a fractional ownership interest in the Project.[77] This is equity participation.

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[71] *Land Titles Act*, s 203(2)(a).
[72] **D355** - Kapoor Affidavit at para 6.
[73] **F190-F198 -** Receiver's Third Report (Appendix "F" – Sources and Uses Analysis – Exhibit 2 – Purchaser Deposits).
[74] **D459** - Kapoor Affidavit at Exhibit "H" [page 106 of the PDF]
[75] **F45** - Receiver's Second Report at p17, showing composition of purchaser deposits.
[76] **D361-D444** - Kapoor Affidavit at Exhibits "A", "B" and "C".
[77] **D420-D426 -** See Articles 4 and 5 of the JV Agreement.

131. Joint venturers were to be specifically paid out of profits of the Project.[78] Joint venturers expressly subordinated to construction financing:

> Each of the Joint Venturers acknowledge that in satisfaction of these objectives, the Joint Venture will obtain the development financing that will be secured by a mortgage and charge over the property, assets and undertaking of the Joint Venture including the Lands (the **Lender Security**). If necessary or required, Shotgun financing may be needed.
>
> Each of the Joint Venturers agree that any interests they have in the Joint Venture Assets, and any liens arising out of this Agreement, will for all purposes be postponed and ranked subordinate to the Lender Security and all amounts secured under the Lender Security at any time and from time to time, regardless of the date of registration of any charges.[79]

132. Joint venturers subscribed to non-voting Class "C" common shares in equivalent proportion to their joint venture interests.[80]

133. In the case of 178, two share subscriptions were completed, one for $317,000 and one for $100,000, reflecting the $417,000 paid to Ceana Sunridge.[81]

134. The signature page for the 178 JV Agreement includes a hand-written notation. This suggests that Ceana Sunridge agreed to reduce the 178 unit purchase price by the amount of the joint venture contribution. This reflects a discount, not a trust arrangement.[82]

135. It is well-established that a trust requires three legal certainties.[83] The evidence here demonstrates a failure of each of the certainties of intention, subject matter and object.

136. *Certainty of Intention* – the evidence shows the purchaser funds were consideration for the acquisition of shares. Funds cannot be used as consideration and at the same time be settled into trust.

137. *Certainty of Subject Matter* – for a trust to be and remain constituted, the subject matter must be identifiable. The funds that were paid into the general account of Ceana Sunridge were never segregated. There is no evidence as to where those funds were ultimately disbursed. In fact, more than $3.4 million dollars was paid out by Ceana Sunridge to Bob Gaidhar and companies

[78] **D420-D426 -** See Articles 4 and 5 of the JV Agreement.
[79] **D422-D423 -** See Articles 5.4 and 5.5(b) of the JV Agreement, with emphasis added.
[80] **D427-D428 -** Article 7.2 of the JV Agreement.
[81] **D444, D455 and D456 -** Schedule B to the JV Agreement.
[82] **D442 –** JV Agreement, signature page.
[83] ***Jin v Ren***, 2015 ABQB 115, at para 22 (aff'd 2016 ABCA 80) **TAB 7**

directly related to Bob Gaidhar, prior to receivership. There is no possible tracing of these funds, into the Project or otherwise.[84]

138. *Certainty of Object* – "there must be no uncertainty as to whether a person is actually a beneficiary". It is respectfully submitted the unit purchaser could not subscribe for shares and at the same time expect its funds to be held to its benefit. The purchaser could not reasonably expect to have both the money and the benefit too.

Mavi and Dhaliwal

139. Mavi and Dhaliwal claim $438,465.63 in missing deposits.[85]

140. $374,711.13 was paid by Mavi and Dhaliwal to Ceana Sunridge. $63,754.50 was paid to Ceana Developments Inc.[86]

141. Mavi and Dhaliwal confirm they entered a JV Agreement on December 9, 2015.[87]

142. The Dhaliwal Affidavit attaches a letter from Ceana Sunridge confirming that $334,711.13 was invested in the Project and enclosing a share certificate in the name of Dhaliwal, Mavi and Rajinder Mavi.[88]

143. For the same reasons above, it is submitted any trust claim must fail. A trust was never constituted, the JV Agreement confirms this was an equity investment, and no trust property can be identified or traced at this time.

1695411 Alberta Ltd.

144. 169 claims $113,000 in total missing deposits.[89]

145. Only $80,000 was paid into a Ceana Sunridge bank account.[90] The remainder is not evident on the record.

146. The 169 trust claim fails principally for the reasons set out above: the trust funds were never set aside or segregated for the benefit of the purchaser and there is no evidence supporting that the trust property could be traced or followed.

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[84] **F190-F198 -** Receiver's Third Report (Appendix "F" – Sources and Uses Analysis – Exhibit 11 – Related Party Payments, Exhibit 14 – Bob Gaidhar, and Exhibit 18 – Bollywood Entertainment Productions)
[85] **D629** - Dhaliwal Affidavit at para 7.
[86] **D685** - Dhaliwal Affidavit at Exhibit "D" [page 58 of the PDF]
[87] **D629** - Dhaliwal Affidavit at para 4.
[88] **D687 and D688** - Dhaliwal Affidavit at Exhibit "D" [page 60-61 of the PDF]
[89] **D1169** - Mundi Affidavit at para 4.
[90] **F190-F198 -** Receiver's Third Report (Appendix "F" – Sources and Uses Analysis – Exhibit 2 – Purchaser Deposits).

CECA

147. CECA claims $310,000 in total missing deposits.[91]

148. CECA signed two JV Agreements, subscribing for shares in Ceana Sunridge for the whole amount of its payments. The foregoing grounds are repeated for why this claim fails.

149. CECA additionally raises a claim of unjust enrichment against Hillsboro.[92]

150. Hillsboro was not enriched by CECA's actions. Hillsboro received none of CECA's investment. There is no corresponding deprivation. Hillsboro is facing a very large deficiency.

151. There is a juristic reason for CECA's loss – it signed JV Agreements with Ceana Sunridge before handing its money over. It is respectfully submitted the grounds of unjust enrichment cannot be established.

Evidence of Bob Gaidhar

152. Bob Gaidhar has filed several affidavits in this action. He was cross-examined by Hillsboro on his Affidavits of October 30, 2020 and November 23, 2020.

153. The Affidavit of Bob Gaidhar sworn November 23, 2020 states that "all deposit monies were used in the development of the Project", and further "The funds were not used for any purpose outside of the Project".[93] There is no substantiation for these statements provided.

154. These statements specifically conflict with the cash inflows and outflows from Ceana's bank accounts.[94] Hillsboro sought to question Mr. Gaidhar on these statements.

155. In cross-examination, Mr. Gaidhar's counsel refused to allow questioning of Mr. Gaidhar on those express representations, notwithstanding these are direct statements made by Mr. Gaidhar in his Affidavit.[95]

156. It is respectfully submitted this seriously undermines the credibility of Mr. Gaidhar's evidence on the point, which in any case is directly contradicted by the Receiver's independent Sources and Uses Analysis.

[91] **D878** - Aladi Affidavit at para 11.
[92] **D878** - Aladi Affidavit at para 13.
[93] **D1041** - Affidavit of Bob Gaidhar sworn November 23, 2020, at paras 30-31.
[94] **F190-F198 -** Receiver's Third Report (Appendix "F" – Sources and Uses Analysis)
[95] **D1302-D1306** - Gaidhar Transcript at pp 35-39.

157. In examination, Bob Gaidhar testified he is entitled to a “management fee” equivalent to 25% of gross sales for the Project. Mr. Gaidhar gave an undertaking to provide a copy of the management agreement, but the same has not yet been filed.[96]

158. Mr. Gaidhar was paying himself and certain of his related companies from cash available prior to receivership, describing the same as prepayment of his management fee. The Project was in fledgling stages at the time. Mr. Gaidhar intentionally did not advise Hillsboro and Connect First of the management fee at the time the financing was arranged:

> Q. MR. PONTIN: I'll return you to this management agreement that you say you have, Mr. Gaidhar, with Ceana Sunridge. When was that executed?
>
> A. When the Sunridge land was bought, in 2015. I don't remember the date exactly.
>
> Q. And it was drafted and executed at that time?
>
> A. Yes.
>
> Q. Was that ever disclosed to the mortgage financing parties, Hillsboro and Connect?
>
> A. I didn't find it relevant to disclose it to them.
>
> Q. You did or did not?
>
> A. I did not, because that was my way of doing business.[97]

159. Mr. Gaidhar was questioned as to whether he used the mortgage financing to pay his management fee, notwithstanding his intentional concealment of this from the lenders, and would not provide a clear answer:

> Q. Did you use any of the moneys paid to Ceana Sunridge by Hillsboro for payment of fees under the management agreement?
>
> A. You're asking me a really hard question. The money kept on coming in from wherever it could, and whenever I could I withdraw. So I can't particular tell you exactly.[98]

160. Mr. Gaidhar was asked whether purchaser monies could have paid management fees. He again would not provide a clear answer:

> Q. And was that the same for the purchaser deposit moneys, they were used for whatever payments were necessary at any time?

[96] **D1308** - Gaidhar Transcript at p 41.
[97] **D1316-D1317** - Gaidhar Transcript at pp 49-50.
[98] **D1317** - Gaidhar Transcript at p 50.

> A. Purchaser's money were used in the project. And even if they were, I had to write on my -- what you call, on my management fees.
>
> Q. So it's possible that management fees were paid with purchaser deposits?
>
> A. Well, not -- I can't say purchaser's deposit as such, but all the income that came in, obviously that was going to be used up for the project in any way.[99]

161. The evident truth is Bob Gaidhar was siphoning money from all sources of revenue for the Project, justifying these payments on the basis it would balance out upon completion and reflect a number that was not more than his 25% management fee. This demonstrates a complete disregard for the lenders, purchasers and other stakeholders.

162. More pertinently, as a result of Bob Gaidhar's actions, it is not possible to trace the unit purchaser funds into the Project, as the same were intermingled and would have been applied variously (as identified in the Receiver's Sources and Uses Analysis), including in the manner of payments to Mr. Gaidhar personally and his related companies.

vi. Closing Details

163. At its core, Hillsboro is seeking an Order for sale to plaintiff for a secured property where it faces a significant deficiency. This is a common application in foreclosure proceedings.

164. Hillsboro has carefully considered the mechanics of closing the Transaction and set out various conditions in its proposed form of Order.

165. In the proposed Order, the Receiver maintains control of the transfer process. This is dependent upon the Receiver filing its Receiver's Closing Certificate. The Receiver will only do that once it is satisfied of the requisite conditions being met. One of the conditions is a satisfactory escrow for the $3 million closing cash payment. Another is the assignment of the Operative Agreements. This mitigates any closing risk for the Receiver, Connect First and Hillsboro.

166. Hillsboro is not seeking discharge of the Receiver. The Receiver will presumably seek its own discharge upon completion of the administration, which is anticipated would happen shortly after the Transaction closes.

167. Upon closing, all subordinate interests to Hillsboro will be discharged. This is no different than any other foreclosure or vesting scenario. Those interests are below Hillsboro and have no possibility of recovery in any scenario.

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[99] **D1317-D1318** - Gaidhar Transcript at pp 50-51.

168. Upon completing the Transaction, Hillsboro's charges will remain against the property. It is Hillsboro's express intention that the Transaction will not cause a merger of its mortgages.[100] Hillsboro is entitled to avoid such a merger, upon its election:

> At common law , when a mortgage on land and the ownership of land subject to the mortgage became united in the same person, the result was merger: *Standard Trust Co. v. Panstar Developments Inc.*, 1993 CarswellBC 738 (B.C. S.C.) at para 25. However, section 62 of the *Law of Property Act* provides that "[t]here is no merger by operation of law only of any estate the beneficial interest in which would not be merged or extinguished in equity".
>
> Equity requires the court to look at the intention of the parties. It presumes that there is no merger where it is in the owner's interest that the two states should not merge: *Yarley (China) Developments Co. v. Amber Equities Inc.*, [1996] 10 W.W.R. 479 (Alta. Q.B.) at paras 107-108.[101]

169. The proposed Order preserves Hillsboro's deficiency claim, but directs the quantum of that claim to be determined by further Order. As noted above, to the extent there is any uncertainty as to the quantum of Hillsboro's indebtedness, the matter has no bearing on the current application. Any disputed amount would relate only to Hillsboro's deficiency claim, which will be determined at a later date.

V. CONCLUSION

170. The within application boils down to straight-forward concepts. The foregoing, and the evidentiary record in this case, confirms for this Honourable Court:

- Hillsboro is a mortgage lender to Ceana Sunridge and lender to the Receiver under its Receiver's Certificates.
- Hillsboro's security entitles it to foreclose and its indebtedness far exceeds the Project value.
- The first phase of the Project is virtually complete. The timing of this Application is to coincide with completion and purchaser possession of units.
- Hillsboro will contribute cash into escrow to remove and closing risk. That will cover final construction on Phase 1, the Receiver and its counsel fees, substantial reduction to the Connect First mortgage, and any contingencies that may arise in closing the Transaction.

[100] **D495** - Ferrel Affidavit No 4 at para 52.
[101] ***Crossroads-DMD Mortgage Investment Corporation v. Sun Country Mortgage Investment Corporation***, 2019 ABQB 733 at paras 48 and 49, 2 Alta LR (7th) 377. **TAB 8**

- The foregoing is premised on the fact the receivership has exhausted its purpose and is no longer just or equitable. Hillsboro is the only financially affected stakeholder. The first mortgagee is very well secured and has no exposure. It cannot legally restrict a transfer. The subordinate claims are so far “out of the money” they have no possible recovery. So long as the Receivership continues, Hillsboro bears 100% of the cost and risk on all fronts. Hillsboro is uniquely prejudiced as there is no other party with an affected financial stake in this receivership.

- The assignment of the Operative Agreements ensures stability through transition.

- The assignment of the unit purchaser agreements ensures no loss of value for Hillsboro and Connect First. Purchasers with more than $3.1 million in pre-sales have deposits in trust and have confirmed their willingness to close. The law provides no objection to an assignment of a unit purchase contract can be sustained.

- The purchasers who make trust claims cannot succeed. The law is clear in respect of these claims. Moreover, the facts of each trust claim are the same – the trusts were never properly constituted and the funds cannot presently be traced.

171. It is respectfully submitted there is no legal or equitable impediment to Hillsboro’s application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 2nd day of December, 2020.

DENTONS CANADA LLP

DocuSigned by:

156B6CBFCA0D47B...

per: Derek Pontin

VI. TABLE OF AUTHORITIES

Tab	Authority
1.	Assignment of Action, Receiver's Certificates and Indebtedness, filed.
2.	***Alberta Energy Regulator v Lexin Resources Ltd***, 2019 ABQB 23, 69 CBR (6th) 39.
3.	Francis CR Price & Marguerite J Trussler, *Mortgage Actions in Alberta* (Calgary, AB: Carswell Legal Publications, 1950).
4.	***Canada Permanent Trust Co. v. King's Bridge Apartments Ltd.*** (1983), 48 Nfld & PEIR 345, 8 D.L.R. (4th) 152, 1983 (NFLD CA)
5.	***1864684 Alberta Ltd. v 1693737 Alberta Inc*.,** 2016 ABQB 371, [2016] 12 WWR 412.
6.	***Condominium Corporation No. 0321365 v MCAP Financial Corporation***, 2012 ABCA 26, [2012] 6 WWR 42 leave to appeal to SCC refused 553 AR 399 (note)
7.	***Jin v Ren***, 2015 ABQB 115 (aff'd) 2016 ABCA 80.
8.	***Crossroads-DMD Mortgage Investment Corporation v. Sun Country Mortgage Investment Corporation***, 2019 ABQB 733, 2 Alta LR (7^{th}) 377.

Tab 1

ENTERED

Clerk's Stamp:

JUDICIAL CENTRE OF CALGARY
FILED
Nov 25, 2020
AC
by Email
CLERK OF THE COURT

COURT FILE NUMBER	1801-04745
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**HILLSBORO VENTURES INC.**
DEFENDANTS	**CEANA DEVELOPMENT SUNRIDGE INC.**
DOCUMENT	**ASSIGNMENT OF ACTION, RECEIVER'S CERTIFICATES AND INDEBTEDNESS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15th Floor, 850 - 2nd Street S.W. Calgary, Alberta T2P 0R8 Attention: Derek Pontin Ph. (403) 268-6301 Fx. (403) 268-3100 File No.: 559316-3

120425

COM Dec 10 2020
J. Eidsvik

ASSIGNMENT OF ACTION, RECEIVER'S CERTIFICATES AND INDEBTEDNESS

WHEREAS the Plaintiff ("**HVI**") has commenced this Action 1801-04745 (the "**Action**") in connection with enforcement of its mortgage interests and recovery of indebtedness owing to the Plaintiff by the Defendant ("**Ceana Sunridge**").

AND WHEREAS a Receivership Order has been filed in the Action, as amended and restated (the "**Receivership Order**"), by which Alvarez & Marsal Inc. was appointed as receiver and manager (the "**Receiver**") of Ceana Sunridge.

AND WHEREAS the Receiver is empowered to borrow funds and to issue Receiver's Certificates under the Receivership Order, which amounts (plus interest) are secured by the Receiver's Borrowings Charge (as defined in the Receivership Order).

AND WHEREAS the Receiver has borrowed funds from and issued Receiver's Certificates to Hillsboro Enterprises Inc. ("**HEI**") and Neotric Enterprises Inc. ("**NEI**").

AND WHEREAS, effective August 1, 2018, HVI assigned to HEI all its rights, title and interest in and to the Action and the mortgages and related indebtedness of Ceana Sunridge to HVI (collectively, the "**HVI Rights**");

AND WHEREAS NEI (together with HVI, referred to as the "**Assignor**") wishes to assign to HEI all its rights, title and interest in and to all Receiver's Certificates and related indebtedness held by NEI, including without limitation the benefit of the Receiver's Borrowings Charge (collectively, the "**NEI Rights**").

NOW THEREFORE, THIS DEED WITNESSETH THAT in consideration of the agreements between the parties, the premises therein and herein, and the sum of Two Dollars ($2.00) of the lawful currency of Canada plus such other amounts as the parties may have agreed, the receipt and sufficiency of which is hereby acknowledged by the Assignor, the Assignor does hereby transfer and assign to HEI, its successors or assigns, all of the NEI Rights and HVI Rights, and all benefits, applicable interest and advantages to be derived therefrom, whether at law or in equity or otherwise, to the extent not already otherwise assigned, **TO HAVE AND TO HOLD** the same unto HEI absolutely.

AND the Assignor hereby covenants with HEI, its successors and assigns, that it has good and proper right to assign the NEI Rights and HVI Rights, and all benefits, applicable interest and advantages to be derived therefrom.

AND the Assignor hereby covenants that it shall, upon request, make, do, execute, or cause to be made, done or executed, all such further and other lawful acts, deeds, things, devices and assurances whatsoever to give full force and effect to this Assignment.

IN WITNESS WHEREOF, the Assignor has caused this Assignment to be signed by its proper officers, duly authorized in that behalf, to be effective the 17 day of October, 2020 November

HILLSBORO VENTURES INC.

Per: _____
I am duly authorized to sign on behalf of and bind the Assignor.

NEOTRIC ENTERPRISES INC.

Per: _____
I am duly authorized to sign on behalf of and bind the Assignor.

Tab 2

2019 ABQB 23
Alberta Court of Queen's Bench

Alberta Energy Regulator v. Lexin Resources Ltd

2019 CarswellAlta 73, 2019 ABQB 23, [2019] A.W.L.D. 784, 301 A.C.W.S. (3d) 242, 69 C.B.R. (6th) 39

Alberta Energy Regulator (Plaintiff) and Lexin Resources Ltd., 1051393 B.C. Ltd., 0989 Resource Partnership, LR Processing Ltd., and LR Processing Partnership (Defendants)

B.E. Romaine J.

Judgment: January 14, 2019
Docket: Calgary 1701-03460

Counsel: James Hanley, for Midstream Canada Ltd
Robin Gurofsky, Garrett Finegan, for Receiver Grant Thornton
David LeGeyt, for MFC Energy Finance Inc.
Francco P. De Luca, for Alberta Energy Regulator
Richard Billington, Q.C., for Young Energy

***B.E. Romaine J.*:**

I. Introduction

1 Midstream Canada Ltd applied to lift the stay of proceedings in the receivership of Lexin Resources Ltd, 1051393 BC Ltd, 0989 Resource Partnership, LR Processing Ltd and LR Processing Partnership (collectively, Lexin) in order to allow Midstream to assume operatorship of certain gas facilities and gathering systems. I denied the application on the basis that, in the circumstances of this receivership, the prejudice to the Receiver of lifting the stay far outweighs the prejudice to Midstream, and it was not equitable to lift the stay for other reasons. These are my reasons.

II. Relevant Facts

2 Originally, Midstream applied to lift the stay imposed under the receivership order with respect to three gas facilities and gathering systems (the Facilities) and 21 wells in which Midstream and Lexin have various interests. However, when the application was argued, Midstream proceeded only on the basis of the Facilities.

3 The wells and Facilities were shut-in pursuant to an Alberta Energy Regulator order dated February 15, 2017. At that time, the wells and facilities were co-owned by Lexin and Exxon Mobil Energy Canada and operated by Lexin.

4 Exxon did not apply to lift the stay imposed by the receivership order. On December 21, 2017, Midstream agreed to purchase Exxon's interest in the wells and Facilities. This sale closed on February 1, 2018. It included not only Exxon's interest in the 21 wells jointly owned with Lexin, but also 32 additional wells in which Lexin has no interest.

5 Midstream has applied to the Alberta Energy Regulator for approval of the transfer of the Exxon well licenses, but had not yet obtained such approval at the time this application was heard.

6 The three Facilities at issue are:

a) the Hooker Gas Gathering System, in which Lexin owns a 75% interest;

b) the Hooker East Compression and Gas Gathering System, in which Lexin owns a 75% interest in three of the four functional units and a 50% interest in the fourth functional unit, and therefore a 68.75% overall interest in the system; and

c) the South East Hooker Compression and Gas Gathering System, in which Lexin owns an approximately 45% interest.

7 The receivership order imposing the stay was granted on March 20, 2017. Since July, 2017, the Receiver has been marketing Lexin's assets, including the wells and Facilities in issue. The marketing materials specify that Lexin is the operator of the wells and Facilities. The sales process has been extended a number of times, due in part to complications arising from an unrelated claim.

8 On May 3, 2018, Midstream filed its application to lift the stay.

9 While Midstream may be entitled by reason of its majority ownership to assert operatorship of the South East Hooker Facility, it requires the operatorship of all three Facilities in order to commerce moving product to market from the 32 wells in which Lexin has no interest.

10 The Facilities are governed by Construction, Ownership and Operation Agreements (the CO&O Agreements) that are materially identical with respect to the provisions relevant to this application.

11 These CO&O Agreements adopt the standard form model Petroleum Joint Venture Association 1999 Standard Operating Procedure (the 1999 PJVA).

III. The Issue

12 The issue is whether it is appropriate to lift the stay in the circumstances of this receivership and with reference to Midstream's contractual rights.

IV. Analysis

13 A. The Test for Lifting the Stay.

As noted in *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at paras 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)), the test for lifting a stay imposed pursuant to a receivership order focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.

14 Guidance can be drawn from the provisions of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in a receivership should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.J. No. 1189 (Ont. C.A.) .

15 Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma* , at para 3.

16 In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at paras 18-19. The mere fact that a party is not entitled to exercise a contractual right for which it has bargained is not a sufficient reason to lift the stay. In that respect, the prejudice to the applicant is no different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

17 Since the Court's decision in *Alignvest*, there have been at lease two decisions that have caused some uncertainty about the test to be applied to such applications in the context of operatorship of oil and gas assets.

Tab 3

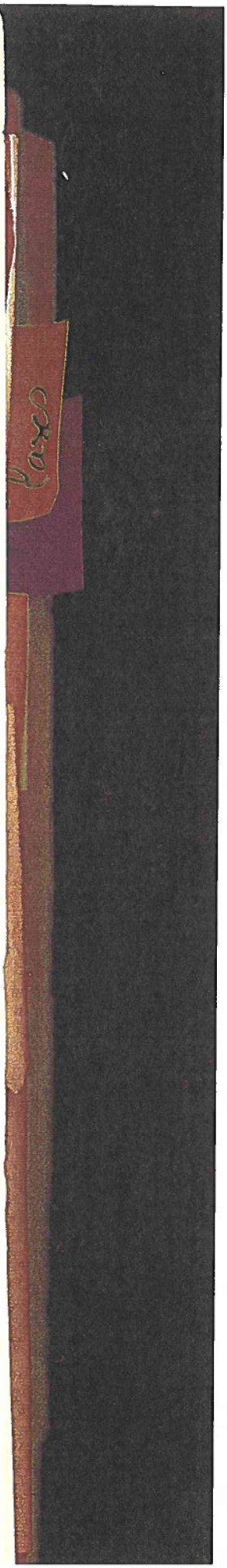
Mortgage Actions in Alberta

The Law and Practice in Actions upon Mortgages and Collateral Security and Agreements for Sale of Land

Francis C.R. Price, Bt.,
LL.B. (Hons.), LL.M.

Marguerite J. Trussler
B.A., LL.B., LL.M.

1985



2. DEFENDANTS

(a) Generally

All persons who have any interest in the equity of redemption and who have a right to redeem must be made defendants in the foreclosure action,[59] with the exception of prior and subsequent encumbrancers. They are generally *not* made defendants to a mortgage foreclosure action, nor to a specific performance action in the case of an agreement for sale, unless they are actually in possession of the land, or unless some special form of relief is being sought against them. A subpurchaser under a subsequent agreement for sale should be added as a defendant to a specific performance action on the prior agreement for sale,[60] but perhaps does not need to be added as a party where the agreement for sale to which he is not a party is cancelled,[61] particularly if that cancellation is effected extra-judicially.

It is never necessary to join as a party defendant a person whose interest it is not desired to extinguish or affect. For example, when suing on a second mortgage, the holder of the first mortgage will not be made a defendant, as any dealings with the land must be subject to his claim. Also, in the case of a tax notification the taxing authority will not be joined as a party, the taxes being a paramount charge.[62] On the other hand, where a party who should be a plaintiff cannot or will not be joined as such, he must be added as a defendant.[63]

It is the duty of the plaintiff to see that all proper and necessary parties are before the Court.[64] Failure to do so may render the plaintiff liable for costs of any application to add parties or to amend.[65] It is essential that the mortgagee review the instruments filed against the title at the time he commences the action.[66] Only

59 *Henley v. Stone* (1840), 49 E.R. 139 (Rolls Ct.); *Home Bldg. & Savings Assn. v. Pringle* (1913), 5 O.W.N. 226 (C.A.); *Coote on Mortgages*, 8th ed., p. 1036; *Crawford v. Meldrum* (1872), 19 Gr. 165 (Ch.); *Nor. Trusts Co. v. Naismith*, [1926] 2 W.W.R. 127 at 128 (Alta. S.C.); *Allison v. Rent*, [1926] 1 D.L.R. 885 at 888 (N.S.C.A.); See also the discussion by Funduk M.C. in *Wasyl Hldg. Ltd. v. Allarie* (1981), 31 A.R. 275 at 300-303, on who are *necessary* parties and on the power of the Court to add them.

60 *Hobart v. Zalondek*, [1923] 3 W.W.R. 246 (Man. C.A.).

61 *Travis-Barker v. Reed*, [1923] 3 W.W.R. 451 at 452-53 (S.C.C.), *per* Duff J.

62 Municipal Taxation Act, R.S.A. 1980, c. M-31, s. 124; Land Titles Act, R.S.A. 1980, c. L-5, s. 65(1)(*b*); L.Y. Cairns, "Foreclosure of Land Mortgages in Alberta by Way of Court Procedure" (1936-38), 2 Alta. L.Q. 193 at 197, cited by Funduk M.C. in *Wasyl Hldg. Ltd. v. Allarie*, *supra*, note 59 at 306.

63 See cases cited at note 2, *supra*.

64 *Paterson v. Holland* (1860), 8 Gr. 238 (Ch.); *Portman v. Paul* (1864), 10 Gr. 458 (Ch.); *Joseph v. Haffner* (1881), 29 Gr. 421 (Ch.). Although note R. 48, which would appear to give the plaintiff the option to join "all *or* any" of the parties liable on a contract.

65 *Ibid.*

66 *Wil-Fran Hldg. Ltd. v. Dial Hldg. Ltd.*, unreported, 28th April 1982, Alta. Q.B. No. 8103-29253, *per* Funduk M.C.

Tab 4

1983 CarswellNfld 109
Supreme Court of Newfoundland, Court of Appeal

Canada Permanent Trust Co. v. King's Bridge Apartments Ltd.

1983 CarswellNfld 109, 142 A.P.R. 345, 25 A.C.W.S. (2d) 430, 48 Nfld. & P.E.I.R. 345, 8 D.L.R. (4th) 152

Canada Permanent Trust Company Plaintiff-Appellant v. King's Bridge Apartments Limited First Defendant-Respondent and King's Bridge Realty Company Limited Second Defendant-Respondent and Thomas Collingwood and Seamus O'Regan Third Defendant-Respondents and King's Bridge Limited Fourth Defendant-Respondent

Mifflin, C.J.N., Morgan and Mahoney, JJ.A.

Judgment: November 23, 1983

Judgment of the Court delivered by *Morgan, J.A.*:

1 This appeal is taken from the Order of Noel, J. dated May 7, 1982, wherein he dismissed the application of Canada Permanent Trust Company, ("the appellant"), for an account to be taken as to what monies were due and owing the appellant as Trustee under a certain Debenture and for an order of foreclosure or sale of the mortgaged premises or for such other remedy as the Court might deem fit.

2 The relevant facts are that King's Bridge Apartments Limited, the first respondent, as mortgagor, and Thomas Collingwood and Seamus O'Regan, the third respondents, as guarantors, executed a mortgage of certain lands and premises to King's Bridge Realty Company Limited, the second respondent, as mortgagee. The mortgage was subsequently assigned and transferred by the mortgagee to the appellant under a deed of trust. Subsequently the mortgagor transferred its interest in the mortgaged property to King's Bridge Limited, the fourth respondent, without the consent of the appellant, as required by the mortgage deed. The appellant contended that the transfer by the mortgagor, without the appellant's consent, constituted a default under the mortgage and claimed foreclosure or sale. The relevant provision in the mortgage on which the appellant relied reads:

> *AND* the Mortgagor hereby covenants and agrees with the Mortgagee that it, the Mortgagor, shall not, without the written consent of the Mortgagee, sell, assign, convey, transfer, mortgage or encumber in any manner whatsoever the mortgaged premises, in whole or in part the mortgaged premises during the term of this mortgage;

3 There were other covenants respecting the use of the mortgaged premises, the payment of taxes, rates and assessments, the liability of the mortgagor for waste as well as covenants respecting insurance. The mortgage also contains the following proviso:

> *PROVIDED* that in default of the payment of any instalment of interest hereby secured or on breach of any covenant or proviso herein contained or if waste be committed or suffered on the mortgaged premises the whole of the principal sum and other monies, if any, hereby secured, remaining unpaid shall become, without notice or demand, immediately due and payable but the Mortgagee may waive its right to call in the principal sum and shall not be therefore debarred from subsequently asserting and exercising its right to call in the principal sum by reason of such waiver or by reason of any future default.

4 The learned trial judge held that the covenant by the mortgagor not to sell, assign, or convey the mortgaged premises during the currency of the mortgage, without the mortgagee's consent, was an invalid restraint on alienation of property. He concluded:

> The covenant upon which the plaintiff relies is an unlawful restraint on the mortgagor's right to alienate its estate in the subject land and is void.

5 The learned trial judge referred to *Re Bahnson and Hazelwood* [1960] 23 D.L.R. (2nd) 76, as supportive of his conclusion. With respect, that case did not deal with the issue before him. In that case the mortgage contained the following provision and I quote: "In the event of sale before the herein mortgage has been discharged the said mortgagor must pay an amount agreeable to both parties of the existing mortgage and the new purchaser must be approved by the mortgagee herein."

6 The mortgagor had assigned his equity of redemption and at issue was the validity of the purchaser's title. In the court below the trial judge held the condition void. On appeal, the Court of Appeal dealt only with the mortgagee's prior approval as affecting the purchaser's title and the right of the mortgagor to convey. Aylesworth, J.A. speaking for the Court, stated at pp. 77-78:

> We, therefore, are in agreement with the Court of first instance with respect to the fact that that provision in the agreement cannot affect either the right of the vendor in this application to convey good title to the purchaser or the right of the purchaser to receive such title unaffected by the stipulation to which I have referred.
>
> It is further contended that the order goes beyond that which is required and with this we agree. Sufficient has been said to indicate to the parties the proper length to which the order should go to satisfy the needs in this transaction of the purchaser and the vendor. If the parties cannot agree upon the provision of the order in that respect a member of the Court may be spoken to. Save as to the direction to restrict the scope of the order so as to indicate that the vendor is at liberty to convey to the purchaser, his heirs, successors and assigns, a title completely free and clear from any effect of the said restriction and that the purchaser likewise is entitled to receive such a conveyance, the appeal is dismissed.

7 In that case the Court restricted the scope of its order to indicate that the proviso in question did not constitute a flaw on the purchaser's title to the equity of redemption. It refrained from commenting on the mortgagee's right to additional payment by reason of the sale.

8 I agree with the trial judge that a mortgagor's equity of redemption is an interest in land which he may convey, devise, lease or mortgage like any other interest in land and neither the common law nor equity allows restraints on the alienation of that interest. However that was not determinative of the issue before him.

9 It is not disputed here that the mortgagor effectively alienated its ownership of the mortgaged premises nor is it disputed that the purchaser, the fourth respondent, obtained a good title to the property, subject to the mortgage. The basis of the appellant's claim is that, when the mortgagor assigned its equity of redemption without the consent of the mortgagee, or its assigns, first had and obtained, the principal sum and interest, then due and owing, became payable at the option of the mortgagee and the mortgagee was then free to pursue its remedies at law if it so desired. The question for determination was the right of the mortgagee to demand accelerated payment of the principal sum and interest due under the mortgage upon the mortgagor's default under the covenant in question.

10 In my opinion the covenant on the part of the mortgagor not to alienate the property without the consent of the mortgagee should not be read in isolation, but in conjunction with the proviso that in the event of a breach of any of the covenants contained in the mortgage deed the principal sum and other monies then remaining unpaid would become payable. Undoubtedly a mortgagee's ultimate security is the mortgaged property but he is understandably interested in the financial position of the person or persons liable under the covenant to repay the principal sum and to meet the other financial obligation of taxes, insurance, repairs, etc.

11 The appellant cited *Briar Building Holdings Limited v. Bow West Holdings Limited et al*, [1981] 16 Alta. L.R. (2d) 42, as supporting his contention that a "due on sale" clause in a mortgage does not constitute a restraint on alienation of land.

12 In that case the Court of Queen's Bench of Alberta held valid a clause in a mortgage deed requiring that in the event the land was sold voluntarily or by operation of law, all monies owing under the mortgage immediately became due and payable. MacDonald, J. before whom the matter was heard referred to *Royal Bank v. Freeborn*, [1975] W.W.D. 84, a decision of the same Court, in which the mortgage in question provided that the monies secured became due if the mortgagor sold the mortgaged property to a purchaser not approved by the mortgagee. In *Royal Bank v. Freeborn* the trial judge stated:

It is, therefore, possible for a mortgagee to declare the whole amount of the mortgage due and payable when a transferee of land subject to mortgage is not acceptable to the mortgagee.

13 I agree with that statement and am of the opinion that, while the covenant not to alienate the mortgaged premises without the mortgagee's consent cannot, in any way, restrict the mortgagor's right to sell or otherwise part with possession of the mortgaged premises and to give the purchaser and/or assignee a good title, subject to the mortgage, nonetheless a proviso permitting an acceleration of the repayment of the principal sum and other monies payable under the indenture of mortgage is valid and is enforceable at the option of the mortgagee.

14 In the result the appeal is allowed and the order of the trial judge is set aside with costs.

Tab 5

2016 ABQB 371
Alberta Court of Queen's Bench

1864684 Alberta Ltd. v. 1693737 Alberta Inc.

2016 CarswellAlta 1359, 2016 ABQB 371, [2016] 12 W.W.R. 412, [2016] A.W.L.D. 3352,
268 A.C.W.S. (3d) 885, 39 C.B.R. (6th) 91, 39 Alta. L.R. (6th) 387, 56 C.L.R. (4th) 192

1864684 Alberta Ltd., Plaintiff and 1693737 Alberta Inc., Defendant

G.A. Campbell J.

Heard: June 9, 2016
Judgment: July 14, 2016
Docket: Calgary 1501-05062

Counsel: Douglas S. Nishimura, Nicole T. Taylor-Smith, Mohamed Amery, Norm Anderson, Colin Harris, for Applicant, Purchasers
Anthony L. Dekens, for Respondent, Kulwinder Sekhon
Yvonne M. Williamson, Adrianna Worman, Chris Williams, Jodi Fraser, James Wilde, Julie V. Shepard, for Respondent, Lienholders

***G.A. Campbell J.*:**

The Application

1 This application seeks the determination of creditors' entitlement to net sale proceeds (the "Proceeds") from the June 2015 sale of certain improved lands, located in Airdrie, Alberta (the "Land"). The Land consisted of a commercial condominium development that was being developed by 1693737 Alberta Ltd. (the "Developer"). The Land was sold in a court-supervised receivership. The Receiver paid the Proceeds into Court.

2 There are four classes of creditors that could claim entitlement to the Proceeds.

3 1753435 Alberta Ltd., 1713527 Alberta Ltd., Lorrin Baerg, Garth and Betty-Jo Hopfe, Storehouse Holdings Ltd. and John and Kris Bennett (collectively "the Purchasers") claim priority entitlement to the Proceeds over all other creditors. The Purchasers claim priority under a statutory trust created by s 14(3) of the *Condominium Property Act*, RSA 2000, c C-22. Their interests were registered against the title to the Land, albeit after several other interests had been registered.

4 Of the three remaining classes of creditors, two argue that priority to the Proceeds should be based on the order in which the interests were registered against title to the Land pursuant to the *Land Titles Act*, RSA 2000, c L-4.

5 Red Star Drywall Ltd., Abacus Construction Inc., Abacus Steel Inc., Tanas Concrete Industries Ltd., Defined Glass & Design Ltd., KDM Utilities Ltd. and Mid-West Contracting Ltd. (collectively "the Lienholders") claim priority entitlement to the Proceeds pursuant to their builders' liens (the "Builders' Liens") that were registered on the title to the Land.

6 Kulwinder Sekhon (the "Caveat Holder") argues that priority to the Proceeds should be determined based on the order in which the interests were registered against title to the Land pursuant to the *Land Titles Act*.

7 The fourth class of creditor, a Mortgagee, did not participate in this application.

Background

8 For the purpose of this application, the parties agreed to a common set of factual assumptions. The factual assumptions are as follows:

> 1. Under agreements for purchase and sale, the Purchasers paid deposits to the Developer to purchase condominium units to be constructed on the Land as contemplated by s 14(3) of the *Condominium Property Act* the ("Deposits"). The agreements expressly provided that the Deposits were to be used to purchase the Land and construction of a commercial condominium unit and project on the Land.
>
> 2. Deposits were paid both before and after builders' liens were registered on title to the Land.
>
> 3. All Builders' Lien claims are valid and enforceable as registered. In a separate action, pursuant to an application by the owner of the Land[], the lien fund was set.
>
> 4. The caveat re agreement charging land is valid and enforceable as registered.
>
> 5. The Developer did not hold the Deposits in a separate trust account as required by the *Condominium Property Act*.
>
> 6. The Developer used the Deposits to fund the construction of the Condominium Project on the Land[].
>
> 7. The Developer was unable to complete the project, a Receiver [of the Land] was appointed and the Land[][was] sold in the receivership.
>
> 8. The Receiver paid the net sale proceeds from the sale of the Land[].into Court.

9 The Developer itself was never assigned into or the subject of bankruptcy. The only asset of the Developer held in receivership by the Receiver was the Land. The Receiver did not sell any other property of the Developer.

The Issue

10 Although the parties in their briefs discussed the priority of the lien fund as a whole, the parties agree that the sole issue to be determined on this application is:

> Does the trust claim being advanced by the Purchasers, based upon the foregoing assumptions, have priority over the registrations on title to the Land?

11 For the reasons that follow, the answer is No.

The Lienholders' and Caveat Holder's Position

12 The Lienholders and Caveat Holder argue that the Proceeds currently being held by the Court stand in place of the Land sold by the Receiver. These Proceeds act as security for any validly registered encumbrance that existed against the Land prior to the receivership sale.

13 The Lienholders and the Caveat Holder contend that priority to the Proceeds should be determined in accordance with the order of registration of encumbrances filed against the title to the Land. Relying on *Romspen Investment Corp. v. Certified Financial Services & Mortgage Corp.*, 2014 ABCA 136, 240 A.C.W.S. (3d) 196 (Alta. C.A.), the Lienholders and the Caveat Holder argue that the legislative regimes set out in the *Land Titles Act*, the *Law of Property Act*, RSA 2000, c L-7 and the *Builders' Lien Act*, RSA 2000, c B-7, govern the priorities of the various claims against the Land (and subsequently the Proceeds), despite seemingly unfair or inequitable outcomes. Citing *Bank of Montreal v. 1323606 Alberta Ltd.*, 2013 ABQB 596, 571 A.R. 353 (Alta. Q.B.), these parties argue that the Torrens title registration system is meant to provide a clear and definite mechanism for evaluating the status of claims to interests in land. Registered interests take priority in the order they were registered, without any regard to unregistered interests. Allowing unregistered claims, such as the Purchasers' trust claim, to take priority over

registered interests would frustrate the purpose of the Torrens system, undermine the authoritative nature of the *Land Titles Act* and wreak havoc for commercial certainty in land dealings.

14 The Lienholders argue that the case relied on by the Purchasers, *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*, 2015 ABCA 240, 602 A.R. 295 (Alta. C.A.) [*Iona Contractors*], does not support the Purchasers' position. In their view, *Iona Contractors* deals with s 22 of the *Builder's Lien Act*, which *deems* the funds received from the owner to be trust funds in the hands of the recipient. In contrast, the Lienholders submit that s 14 of the *Condominium Property Act*, upon which the Purchasers rely, merely imposes an obligation upon a developer to hold purchase funds in trust in accordance with a purchase agreement. The Lienholders argue that s 14 does not *deem* a trust, but merely imposes an obligation to hold funds in trust.

15 In short, the Lienholders and the Caveat Holder submit that the interests that were registered on title to the Land at the time of its sale trump any unregistered interest the Purchasers may have by equity or statute.

The Purchasers' Position

16 The Purchasers argue that s 14(3) of the *Condominium Property Act* impresses a trust on the Deposits so that the Deposits never became the property of the Developer. As such, the Proceeds are not property available for distribution to other creditors. In support of this position, the Purchasers rely on the recent Court of Appeal decision in *Iona Contractors*.

17 The Purchasers also argue that the three-fold common law requirement for the creation of a trust (intention, certainty of object, and certainty of subject matter) is made out in these circumstances. As the trust monies were wrongfully used to develop the Land, the Purchasers argue that they are entitled to a continuing beneficial interest not merely in the trust property but in the proceeds thereof. They rely on *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410, [2001] O.J. No. 1711 (Ont. C.A.), for this proposition.

18 Relying on *Japan Canada Oil Sands Ltd. v. Stoney Mountain Steel Corp.* (2001), 290 A.R. 251, [2001] A.J. No. 533 (Alta. Q.B.), the Purchasers argue that their interest, created by a statutory trust, is superior to and defeats secured creditors such as the Lienholders, the Caveat Holder and the Mortgagee.

Applicable Law

19 This application engages the interpretation and interplay of two provincial legislative regimes: (1) the consumer protection regime under the *Condominium Property Act* and (2) the Torrens land registry regime (which also fosters elements of consumer protection) under the *Land Titles Act*. In addressing this issue, it is important to understand the legislative intent of each statute. While only a few provisions from both statutes are directly applicable to the present application, these provisions are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21, (1998), 154 D.L.R. (4th) 193 (S.C.C.).

20 The contextual method of statutory interpretation assumes that there is horizontal consistency between statutes. Horizontal consistency means an interpretation favouring harmony between statutes should prevail. Apparent conflicts should be resolved so as to re-establish that harmony (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed (Cowansville, Québec: Les Éditions Yvons Blais Inc., 1991) at 288). As Professor Sullivan states, "the provisions of related legislation are read in the context of the others and the presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act" (Ruth Sullivan, *Sullivan on the Construction of Statutes* 6th ed (Markham, Ontario: LexisNexus Canada, 2014) at 417).

21 I first discuss the legislative purpose of each statutory regime.

Consumer Protection under the Condominium Property Act

22 The *Condominium Property Act* is remedial consumer protection legislation designed to protect purchasers of condominiums before their purchased condominium is built, recognizing that condominium purchasers are generally not in

equal bargaining positions with developers. As our Court of Appeal explained in *Condominium Corp. No. 0321365 v. 970365 Alberta Ltd.*, 2012 ABCA 26 (Alta. C.A.) at paras 8-9, (2012), 519 A.R. 322 (Alta. C.A.) [*MCAP*]:

> The Legislature opted not to bar closing of purchase agreements where a unit or related common property is not substantially completed. Instead, the Legislature has sought to achieve its objective by statutorily mandating that developers hold back in trust from purchase proceeds sufficient funds to substantially complete sold units and their related common property. ...
>
> In enacting this package of legislation, the Legislature was alive to several economic and social realities. On the one hand, it did not want to prevent developers from securing, on reasonable terms, the financing required to build and complete condominium projects. On the other, it recognized that consumers needed to be protected from hit and run developers, who promise much but deliver little, whether because of ineptitude, negligence, greed or worse yet, fraud. Through this statutory regime, the Legislature has provided some reasonable assurance that what developers agree to provide, and purchasers agree to buy, will be completed as promised.

23 To protect condominium purchasers from these "hit and run" developers, s 14(3) of the *Condominium Property Act* creates a statutory trust and holdback provision that prohibits condominium developers from using condominium purchaser funds to develop the condominium. The legislative scheme requires the developer to hold purchase funds in trust until the certificate of title is issued to the condominium purchaser, unless the deposit money is paid out under one of the statutory exceptions.

24 The Legislature expressly provided exceptions to the statutory trust and holdback provision in s 14. These exceptions recognize the need to achieve a balance between two competing objectives: (1) protecting condominium purchasers' rights and (2) permitting developers to obtain the financing necessary to complete the construction of new condominium projects: see *MCAP*, McDonald J.A. dissenting on other grounds at paras 172 and 173.

25 These exceptions relieve a developer of its obligation to hold the purchase funds in trust. For example, s 14(10) of the *Condominium Property Act* allows for the purchase funds to not be held in trust if the Minister approves the purchase arrangement. Section 67(1) of the *Condominium Property Regulations*, Alta Reg 168/2000 outlines the requirements for such arrangements. Sections 14(4) and (5) of the *Condominium Property Act* require the developer to only hold sufficient funds in trust to substantially complete the condominium development. However, in the present circumstances, none of these exceptions apply.

26 To conclude, the *Condominium Property Act* is legislation enacted for specified parties, namely condominium purchasers, who are given certain rights and protections. The legislative regime set up under the *Condominium Property Act* obliges developers to hold money in trust that is paid to them by condominium purchasers. The purpose of this legislation is to ensure condominium purchasers are protected in respect of money paid until such time as one of the events stipulated in s 14 occur.

Certainty of Interest in Land Provided by The Torrens Land Registration System under the Land Titles Act

27 The Torrens land registration system as codified in the *Land Titles Act* was recently reviewed by Justice Toploinski in *Bank of Montreal v. 1323606 Alberta Ltd.*, 2013 ABQB 596 (Alta. Q.B.) at paras 21-30, (2013), 571 A.R. 353 (Alta. Q.B.):

> [21] In Alberta, interests in land are tracked by the Torrens title registration system.
>
> [22] The Torrens system provides for efficient management of land title by requiring that any legal interest in land be recorded in a registry operated by the Land Titles Office of the Service Alberta Department. It is designed to meet a simple policy goal - to provide a clear, definitive mechanism to evaluate the status of land.
>
> [23] This policy goal was explained by the Privy Council in *Gibbs v. Messer*, [1891] A.C. 248 at 254:
>
> > The main object of the Act, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. ...

[24] The Torrens system protects any person relying on the register ... and the rights afforded by it are substantive. [Citations deleted]

[25] Title as provided in a Torrens registry is absolute proof of ownership, with only limited exceptions. Justice Estey in *Canadian Pacific Railway Company v. Turta* (No. 2), 1954 CanLII 58 (SCC), [1954] SCR 427 at 443, [1954] 3 DLR 1 stated the principle in this manner:

> That one who is named as owner in an uncancelled certificate of title possesses an "indefeasible title against all the world", subject to fraud and certain specified exceptions, while one who contemplates the acquisition of land may ascertain the particulars of its title at the appropriate land titles office and deal with confidence, relying upon the information there disclosed. ...

[26] An acknowledged by-product of this approach to land title is that the Torrens system may, from time to time, impose hardships. This is particularly true when a person does not promptly register their title. Justice Estey continues:

> ... Moreover, it contemplates that those who acquire a registerable interest in land will, without delay, effect registration thereof and avoid possible prejudice. That such a system may from time to time impose hardships is obvious and, therefore, in addition to preserving actions against the wrongdoer, the legislature has provided an assurance fund out of which, in appropriate cases, compensation may be paid to those who suffer a loss.

[30] ... There is no legal obligation to investigate possible unregistered claims which may be attached to land. In *Sibley v. British Columbia (Registrar of Land Titles)*, [1981] B.C.J. No. 43 (B.C.S.C.), Selbie L.J.S.C. said this at para. 33:

> To the suggestion that the petitioners, personally or through their solicitor, should have, in effect, "double checked" the abandonment by contacting the party who put the Caveat on in the first place, I can only say that I know of no such duty on the part of a bona fide purchaser acting in good faith. That would be an intolerable burden to put on prospective purchasers — to investigate every known, suspected or rumoured, prior unregistered claim before entering into their contract. The law provides a procedure for the protection of claimants and they ignore those procedures at their peril. ...
>
> [Emphasis added]

To require otherwise frustrates the legislative intent of the Torrens system: *Szabo v. Janeil Enterprises Ltd.*, 2006 BCSC 502 (CanLII) at para. 40, 55 B.C.L.R. (4th) 188.

28 The Torrens registration system as codified in the *Land Titles Act* assures commercial certainty for those who deal with land. The system accepts that, in exchange for certainty of title, some meritorious claims to land may be defeated.

29 In addition to transferring title from one individual to another, various interests can be registered on title. Builders' liens, mortgages and caveats are among these registerable interests. Section 15 of the *Land Titles Act* states that:

> The Registrar shall keep each certificate of title and shall record on it the particulars of all instruments, caveats, ...and other matters by this Act required to be registered ... on the certificate of title...[Emphasis Added]

30 "Instruments" is given an extensive definition in s 1(k) of the *Land Titles Act*, and includes:

> a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, letters of administration, or an exemplification of letters of administration, mortgage or encumbrance [Emphasis Added]

31 Encumbrance is further defined by s 1(e) of the *Land Titles Act* as:

> any charge on land created or effected for any purpose whatever, inclusive of ... builders' liens, when authorized by statute, and executions against land, unless expressly distinguished

[Emphasis Added]

32 The *Builders' Lien Act* authorizes builders' liens to be registered according to the *Land Titles Act*. Therefore, builders' liens are incorporated into the Torrens registration system and individuals registering builders' liens on title are entitled to rely on the Torrens system as an accurate depiction of the land's title and the various interests affecting that land.

Analysis

33 When the Land was sold under the court-supervised receivership, it was subject to various encumbrances and interests registered on its title. The Proceeds are the net sale proceeds of the Land. Although in a different form, the Proceeds stand in place of the Land (*Nova Holdings Ltd. v. Western Factors Ltd.* (1964), 51 W.W.R. 385, 51 D.L.R. (2d) 235 (Alta. C.A.); *Builders' Lien Act*, RSA 2000, c B-7, s 54). The rights and priorities of the parties holding the encumbrances and registrations on the Land still apply; however, the security in this case has become the Proceeds instead of the Land.

34 The question is who is entitled to the Proceeds realized from the sale of the Land.

35 The *Land Titles Act* is a statute of general application to all lands situated in Alberta (*Hager v. United Sheet Metal Ltd.*, [1954] S.C.R. 384 (S.C.C.) at para 147, [1954] 3 D.L.R. 145 (S.C.C.)). As such, its provisions govern all dealings with land except as may be repealed, altered, or modified by another provincial statute.

36 The *Land Titles Act* provides a specific regime for determining priority of claims to interests in Land.

37 Priorities between claimants who claim against the same land was always recognized at equity. Incorporating these equitable principles, the Torrens land registry system of this province explicitly recognizes priorities by statute. Sections 14(3) and 56 of the *Land Titles Act* specifically address priorities of competing registrations against land. Section 14(3) makes the order of registration the order of priorities, providing that:

> 14(3) For the purposes of priority between mortgages, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

38 Section 56 states that:

> Instruments registered in respect of or affecting the same land have priority the one over the other according to section 14 and not according to the date of the execution.

39 The Alberta Legislature, in s 203 of the *Land Titles Act*, has chosen expressly to recognize the priority of registered encumbrances over unregistered trust claims.

40 Section 203 states:

> 203(1) In this section,
>
> (a) "interest" includes any estate or interest in land;
>
> (b) "owner" means
>
> (i) the owner of an interest in whose name a certificate of title has been granted,
>
> (ii) the owner of any other registered interest in whose name the interest is registered, or
>
> (iii) the caveator or transferee of a caveat in whose name the caveat is registered.
>
> (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,

(a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or

(b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

(3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

. . .

41 Thus, the priority of interests, registered and unregistered, attached to a piece of land are to be determined in accordance with the *Land Titles Act*, except as they may be repealed, altered or modified by another statute, such as is argued in this case, the *Condominium Property Act*.

42 It is of note that the *Law of Property Act* is consistent with the *Land Titles Act* in expressly legislating that a registered charge on land has priority over an unregistered charge on land: see *Law of Property Act*, s 64(2)(b).

43 As the *Land Titles Act* contains specific provisions for determining priority of interests in land, the question becomes whether the *Condominium Property Act* repeals, modifies, alters or ousts these provisions of the *Land Titles Act*.

44 Section 14(3) of the *Condominium Property Act* is engaged. It provides:

14(3) A developer shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

45 The *Condominium Property Act* restricts contractual freedoms in order to ensure consumer protection. Section 80 states that:

80(1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void.

46 Therefore, any contractual provision which purports to relieve a developer of its duty to hold purchase funds in trust is void. In this case, in violation of s 80(1), the agreement between the Developer and the Purchasers permitted the Developer to use the Deposits to develop the Land rather than hold the Deposits in trust.

47 The Developer violated *Condominium Property Act* s 14(3) and used the Deposits to pay costs associated with the development of the Land, including building costs. In doing so, the Developer breached the statutory trust. However, the Deposits ceased to be deposits when they were co-mingled with other funds and activities used to improve the Land. The Deposits were no longer uniquely identifiable and became inseparable from other funds and activities that added value to the Land, such as the work efforts undertaken by the Lienholders. Any trust interest associated with the Deposits became an interest in land subject to the *Land Titles Act* regime.

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

49 The *Condominium Property Act* is silent as to the effect of the *Land Titles Act* on a s 14(3) statutory trust interest and does not expressly provide that the trust interest is enforceable with priority without registration. While the *Condominium Property Act* expressly impresses a trust on deposit money, it does not do so on the condominium property itself nor does it specifically

exclude the operation of the *Land Titles Act* generally, or specifically, ss 14 and 203(a) of the *Land Titles Act*. That is, s 14 of the *Condominium Property Act* does not alter or modify the express indefeasibility or priority regime provisions of the *Land Titles Act.*

50 Contrary to the Purchasers' assertion, I do not find that the *Iona Contractors* decision helpful. The Purchasers argue that *Iona Contractors* establishes that a provincially created statutory trust takes priority over all creditors who have protected their claimed interest in land by registering their interests on title to the land. In my view, the factual differences between *Iona Contractors* and this case render that decision of no assistance to the Purchasers on this application. First, *Iona Contractors* does not address the land registry regime set up by the *Land Titles Act*, nor does it discuss the priority of an unregistered statutory trust over registered interests in land. Second, the decision was concerned with whether the provincial *Builder's Lien Act* was in operational conflict with the federal *Bankruptcy and Insolvency Act, RSC 1985, c B-3* for the purpose of determining whether the money held in a provincial statutory trust was to be included or excluded in the bankrupt's estate pursuant to paragraph 67(1)(a) of the *Bankruptcy and Insolvency Act*. This present application does not involve bankruptcy nor does it involve the interpretation of the *Bankruptcy and Insolvency Act*.

51 Similarly, the *Japan Canada Oil Sands Ltd. v. Stoney Mountain Steel Corp.* (2001), 290 A.R. 251, [2001] A.J. No. 533 (Alta. Q.B.) and *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410, [2001] O.J. No. 1711 (Ont. C.A.), decisions relied on by the Purchasers are distinguishable on the facts and issues and are of no assistance in determining the issue in this application.

52 In my view, the combined effect of ss 14, 56 and 203 of the *Land Titles Act* decides the issue.

53 The Lienholders and the Caveat Holder are persons who took an encumbrance, as defined by s 1(e) of the *Land Titles Act*, from the Developer, who was the owner of the Land. The Lienholders and the Caveat Holder added value to the Land; the Lienholders through their work efforts and the Caveat Holder through its alleged injection of cash. These parties were able to review the registrations on the title to the Land prior to making their decision to add value to the Land. They then registered their interests on the title to the Land, in order to establish the priority of their claims and protect their interest. That same option was open to the Purchasers.

54 Section 203(a) is clear that the Lienholders and the Caveat Holder were not required, for the purpose of obtaining priority for their interest, to inquire into how the purchase money for the Land was sourced or applied. They were also not affected by notice of any trust interest in the Land that was not registered by instrument, any rule of law or equity to the contrary notwithstanding.

55 The legislative intent is to ensure that persons seeking to acquire new interests in land can rely on the existing title with no need to make any further inquiries about competing claims, title defects or equitable unregistered claims. In accordance with the *Land Titles Act* registry system, registered interests take priority by date of registration and therefore take priority over any unregistered interests. Thus, absent fraud as set out in the *Land Titles Act* (which fraud is neither alleged nor proven), the Purchasers' unregistered trust claims do not create an interest in land that would take priority over registered encumbrances. To do so would contradict the plain words of ss 14, 56 and 203 of the *Land Titles Act*.

56 If the Legislature wished to give priority to an unregistered trust claim created by s 14(3) of the *Condominium Property Act* over registered interests on land notwithstanding the provisions of the *Land Titles Act* to the contrary, clear language would have been used. It did not do so. To suggest otherwise, would defeat the Legislature's intent in adopting the Torrens land registration system for determining priority of claims to interests in land and would undermine the commercial certainty created by our *Land Titles Act* registry system. In Alberta, all persons dealing with land are entitled to rely on the face of the certificate of title in determining the interests to that land. Absent fraud as set out in the *Land Titles Act*, priority created by registration should remain intact.

Conclusion

57 It appears that there are not sufficient funds to pay all the encumbrancers on the Land in full. Undoubtedly, and regrettably, the Purchasers and other holders of encumbrances who registered later in time stand to suffer from the actions of the Developer.

58 However, the Purchasers always had the right to protect the priority of their unregistered trust claim by registering their claim on title to the Land, which many Purchasers ultimately did, but only after other interests were registered on title to the Land. The Purchasers also retain their *in personam* right to seek a remedy from the Developer for breach of trust.

59 In conclusion, I find that the Purchasers' unregistered statutory trust claim does not take priority over the registered interests on the title to the Land. Instead, priority to the Proceeds is to be determined and set in accordance with registration under s 14(3) of the *Land Titles Act*.

Order accordingly.

Tab 6

2012 ABCA 26
Alberta Court of Appeal

Condominium Corp. No. 0321365 v. 970365 Alberta Ltd.

2012 CarswellAlta 58, 2012 ABCA 26, [2012] 6 W.W.R. 42, [2012] A.W.L.D. 1302, [2012] A.W.L.D. 1305, [2012] A.W.L.D. 1363, [2012] A.W.L.D. 1373, [2012] A.W.L.D. 1377, [2012] A.W.L.D. 1378, [2012] A.J. No. 69, 10 C.L.R. (4th) 229, 14 R.P.R. (5th) 184, 15 C.P.C. (7th) 297, 212 A.C.W.S. (3d) 857, 346 D.L.R. (4th) 291, 519 A.R. 322, 539 W.A.C. 322, 57 Alta. L.R. (5th) 1

Condominium Corporation No. 0321365, and an Unspecified Unit Holder, As Representative Plaintiff, Appellant (Plaintiff) and MCAP Financial Corporation, Respondent (Defendant) and 970365 Alberta Ltd., Dome Britannia Properties Inc., D. Marshall Project Management Ltd., Prairie Communities Corp., Joanne Wright, Michael Nowlan, Travis Henkel, Earth Tech Canada Inc., Hans Kneppers, John Cuthbert, Cuthbert Smith Consulting Inc., Residential Warranty Company of Canada Inc., Alberta Permit Pro Inc., Regional Municipality of Wood Buffalo, Gary Nissen, Archiasmo Architectural Works Limited, Macleod Dixon LLP, Burstall Winger LLP, David Marshall and Evan Welbourn, Not Parties to the Appeal (Defendants)

970365 Alberta Ltd., Dome Britannia Properties Inc., Prairie Communities Corp., Joanne Wright, Michael Nowlan, Travis Henkel, Earth Tech Canada Inc., Hans Kneppers, Kneppers Consultants Inc., Alberta Permit Pro Inc., Gary Nissen, Archiasmo Architectural Works Limited, David Marshall, Evan Welbourn, Real Estate Strategies Group Inc., David Bamber and Allan Penner, Not Parties to the Appeal (Third Parties)

Catherine Fraser C.J.A., Jack Watson, J.D. Bruce McDonald JJ.A.

Heard: September 13, 2011
Judgment: January 27, 2012
Docket: Calgary Appeal 1001-0308-AC

Proceedings: reversing in part *Condominium Corp. No. 0321365 v. 970365 Alberta Ltd.* (2010), 96 R.P.R. (4th) 238, 94 C.L.R. (3d) 23, 31 Alta. L.R. (5th) 230, 501 A.R. 323, 100 C.P.C. (6th) 24, [2011] 1 W.W.R. 495, 2010 CarswellAlta 1771, 2010 ABQB 573 (Alta. Q.B.)

Counsel: G. Vogeli, T. McDonald, for Appellant
R.H. Haggett, for Respondent

***Catherine Fraser C.J.A.*:**

I. Introduction

1 The appellant, Condominium Corporation No. 0321365 (Condo Corporation), owns the common property of a seven building condominium complex in Fort McMurray known as Alfred Penhorwood Place (Condo Project). The Condo Project consists of 168 units. Real Estate Strategies Group Inc. (RESG) was involved with and in some fashion assisted purchasers of 72 of the units in the Condo Project. Together with a representative plaintiff for the condominium unit holders, the Condo Corporation is suing a number of defendants for damages to remedy the alleged faulty design and construction of the Condo Project. The defendants include the developer of the Condo Project, 970365 Alberta Ltd. (970365) and the respondent, MCAP Financial Corporation (MCAP), which provided interim financing to 970365 for the Condo Project.

2 The appellants allege that the Condo Project, which they characterize as a "disaster", suffers from several serious problems. In particular, they assert that the Condo Project is sinking into the ground because the footings have failed and geotechnical standards for compaction and fill were not followed. They further allege that all roofs require replacement, that the wall system has failed resulting in extensive moisture penetration, and that the air quality and circulation are very poor and hazardous to health. They also allege that the units in the Condo Project and related common property were not substantially completed at the time of transfer of title to the units, and that this triggered certain statutory protections in favour of the purchasers under the *Condominium Property Act*, RSA 2000, c C-22 (*Act*).

3 MCAP applied under Rule 159(2) of the former *Alberta Rules of Court* (*Old Rules*) seeking a summary judgment dismissing all the appellants' claims against MCAP. Prior to hearing the summary judgment application, the chambers judge dealt with and granted, with the consent of counsel for MCAP, an outstanding application to amend the Statement of Claim. Once that was concluded and the amendment allowed, he dealt with the summary judgment application on the basis of the Amended Amended Statement of Claim. This is the proper procedure and one that ought to be followed as a matter of good practice. That is to say, outstanding applications to amend pleadings should be resolved prior to a chambers judge's considering a summary judgment application on its merits: *Elbow River Marketing Ltd. Partnership v. Canada Clean Fuels Inc.*, 2011 ABCA 258 (Alta. C.A.) at para 3.

4 After hearing MCAP's summary judgment application on its merits, the chambers judge granted summary judgment dismissing all claims against MCAP. It is from this decision that the appellants now appeal.

5 I have concluded that the appeal must be allowed in part. An inspection of undoubted law plus arguable or provable law shows that there are several material factual disputes interlocked with significant legal issues, all of which need to be tried. This is particularly so where, as here, the legal issues in dispute are unsettled or complex or intertwined with the facts: *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380, 401 A.R. 88 (Alta. C.A.) at para 11.

6 I stress that my purpose in reviewing the limited evidence and law I do is to demonstrate why there are genuine issues for trial and therefore why certain claims ought not to have been summarily dismissed. Accordingly, my analysis is not intended to provide a complete or balanced view of the contested facts nor foreshadow what may happen at trial. It is for a trial judge to consider the outstanding claims following a full hearing on the merits of the case. Further, for convenience of legal analysis, I discuss various areas of law separately along with certain key allegations of fact only relating to each. But the factual matrix is linked to all claims. Finally, I do not address the question of possible defences, causation, remedies, quantum of damages or mitigation with respect to any of the legal claims. These are separate issues and they too, depending on the outcome of the trial, are for the trial judge.

II. Relevant Legislation

7 To place in context background information and factual and legal issues in dispute, I must first set out the essential portions of the section of the *Act* primarily engaged on this appeal, namely s. 14, as well as s. 15:

> 14(1) For the purposes of this section,
>
> (a) "common property" includes facilities and property that are intended for common use by the owners notwithstanding that the facilities or property may be located in or comprise a unit or any part of a unit;
>
> (b) "cost consultant" means a person who meets the requirements of the regulations to be a cost consultant or is otherwise designated as a cost consultant pursuant to the regulations;
>
> (c) "developer" includes any person who, on behalf of a developer, ... receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement; ...
>
> (e) "substantially completed" means, subject to the regulations,

(i) in the case of a unit, when the unit is ready for its intended use, and

(ii) in the case of related common property, when the related common property is ready for its intended use.

(2) A reference in this section to "related common property" is, in relation to a unit, a reference to the following:

(a) the common property or a portion of the common property that is necessarily incidental to the completion of the unit;

(b) the common property or a portion of the common property that is necessarily incidental to the intended use of the unit;

(c) in the case of a unit other than a bare land unit, the common property or a portion of the common property consisting of

(i) utilities required to service the unit and the common property,

(ii) a facility providing for reasonable access to or entrance into the unit,

(iii) a facility providing for reasonable access to highways, municipal roads or streets,

(iv) waste removal facilities or other facilities for handling waste, and

(v) any other improvements or areas

(A) designated by the regulations, or

(B) required under any other Act or regulations,

that are necessarily incidental to the intended use of the unit;

(d) in the case of a unit other than a bare land unit, in addition to the common property referred to in clauses (a) to (c), any common property or any portion of the common property that has been represented in the purchase agreement by the developer as being or as going to be available for the use of the owner of the unit and, without limiting the generality of the foregoing, may include one or more of the following:

(i) roadways, parking areas and walkways;

(ii) fences or similar structures;

(iii) landscaped areas and site lighting; ....

(3) A developer shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

(4) Notwithstanding subsection (3), if a unit is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the cost of substantially completing the construction of the unit as determined by a cost consultant.

(5) Notwithstanding subsection (3), if the related common property is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay

for the proportionate cost of substantially completing the construction of the related common property as determined by a cost consultant ....

(10) Subject to subsection (11), this section does not apply in respect of money paid to a developer under a purchase agreement if that money is held, secured or otherwise dealt with under the provisions of a plan, agreement, scheme or arrangement approved by the Minister that provides for the receipt, handling and disbursing of all or a portion of that money or indemnifies against loss of all or a portion of that money or both....

(13) Where, with respect to a unit or related common property, or both,

(a) money is held in trust under this section ..., and

(b) the developer has not met the requirements under which that money is to be paid out of the trust or otherwise disbursed,

the corporation or an interested party may apply to the Court for an order for that money to be paid out for the purposes of substantially completing the unit or related common property, as the case may be, or to be used as directed by the Court....

(15) Once the unit or the related common property, or both, as the case may be, in respect of which money is being held in trust under this section are, as determined by a cost consultant, substantially completed, any money remaining in trust may be paid to the developer.

15 Section 14 does not apply if the purchaser does not perform the purchaser's obligations under the purchase agreement.

8 The purpose of s. 14 is clear. This is part of a package of remedial consumer protection legislation designed to protect purchasers buying condominium units off plan, that is before a condominium project has been built. The Legislature opted not to bar closing of purchase agreements where a unit or related common property is not substantially completed. Instead, the Legislature has sought to achieve its objective by statutorily mandating that developers hold back in trust from purchase proceeds sufficient funds to substantially complete sold units and their related common property. It has also imposed a duty of fair dealing on developers and purchasers "with respect to the entering into, performance and enforcement" of agreements: s. 11.

9 In enacting this package of legislation, the Legislature was alive to several economic and social realities. On the one hand, it did not want to prevent developers from securing, on reasonable terms, the financing required to build and complete condominium projects. On the other, it recognized that consumers needed to be protected from hit and run developers, who promise much but deliver little, whether because of ineptitude, negligence, greed or worse yet, fraud. Through this statutory regime, the Legislature has provided some reasonable assurance that what developers agree to provide, and purchasers agree to buy, will be completed as promised: see *Bare Land Condominium Plan 8820814 v. Birchwood Village Greens Ltd.*, 1998 ABQB 1023, 235 A.R. 217 (Alta. Q.B.) at paras 9-10.

10 The statutory trust and holdback provisions in s. 14 may be summarized as follows. If a unit in a condominium project or the related common property is not substantially completed at the time of transfer of title to the unit, then the developer is required to hold in trust sufficient monies to pay for the cost of substantially completing the construction of the unit *as determined by a cost consultant* plus monies sufficient to pay for the proportionate cost of substantially completing the construction of the related common property *as determined by a cost consultant*. Under s. 1(2)(c) of the *Condominium Property Regulation*, AR 168/2000, a cost consultant must act "at arm's length from the developer of the unit or common property". The Legislature also prohibited contracting out of these provisions: see s. 80(1) of the *Act* which provides that "... any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void".

11 The Legislature understood that it would not be sufficient to mandate that only the actual developer of the project be bound to comply with these provisions. To minimize the risk of purchase monies flowing out to third parties despite the statutory prohibitions, the Legislature expressly expanded the definition of "developer" under s. 14 of the *Act* to capture and include third parties receiving monies paid by purchasers of units in certain circumstances. Prior to 2000, "developer" was defined simply

45 I now turn to the three issues raised by this appeal.

A. The Duty of Care Issue

46 The appellants' position is that MCAP owed a duty to the appellants to take reasonable steps to ensure that 970365 complied with and satisfied the terms and conditions of the Commitment Letter. They contend that MCAP's alleged failure to do so was either negligence or negligent misrepresentation. They assert that the chambers judge erred in concluding that MCAP could not have owed a duty of care to the appellants on either ground in the circumstances of this case.

1. Why There is No Genuine Issue for Trial Based on the Claim in Negligence

47 To determine whether the appellants' claim in negligence against MCAP for failing to enforce the terms and conditions of the Commitment Letter should be summarily dismissed, the chambers judge was required to begin with this starting point. Is there a genuine issue about whether MCAP owed a duty of care in tort to the appellants?

48 The appellants contend that an interim financier owes a duty of care to the purchasers of a condominium unit in a project financed by it to enforce the lending agreements between the financier and the developer of the project. To date, Canadian courts have not recognized the existence of such a duty of care. In deciding whether the law of negligence should be extended to recognize this claimed duty, the chambers judge correctly turned to the two-part test set out by the House of Lords in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) as adopted and recast by the Supreme Court of Canada in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.) at pp 10-11 (the recast test being referred to as the *Anns* test). See also *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) at paras 25 and 29-39; *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.) at para 20; and *Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360 (S.C.C.) at para 14.

49 The first stage of the *Anns* test focusses on the relationship between the plaintiff and defendant. It contains two requirements: reasonable foreseeability of harm plus a close and direct relationship of proximity sufficient to justify the imposition of a *prima facie* duty of care. In other words, a court must determine whether a sufficiently close relationship — otherwise called proximity — exists between the defendant and the plaintiff that has suffered the damage such that the defendant could reasonably foresee that carelessness on its part might cause damage to the plaintiff. If foreseeability and proximity are established, a *prima facie* duty of care arises. The second stage asks whether there are any policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach may give rise.

50 I have concluded that the chambers judge was correct in determining that a construction lender does not owe a duty of care to the purchasers of units in a condominium project which it is financing or to the condominium corporation. Difficulties arise at both stages of the *Anns* analysis, making the recognition of a duty of care in these circumstances legally unmanageable and commercially unreasonable.

51 To begin, liability in negligence is premised on the assumption that a party can reasonably foresee who would be damaged by its actions. While a plaintiff need not be foreseeable as an identified individual, the plaintiff must belong to a class of persons within the foreseeable range of risk: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.) at para 28. This presupposes an ability on the part of the allegedly negligent party to determine who would fall within that range, that is within the affected class, as well as the degree to which that class might be adversely affected.

52 However, in the context of the lender-purchaser relationship, problems arise in defining the composition of the class to whom a lender would owe a duty of care. Knowing this would be very important to an interim financier. What if the financier were willing to waive a default or grant extensions of time to the developer or consent to other changes, major or minor, to existing loan agreements? This it would typically be entitled to do under its contractual arrangements with the developer. But in order to mitigate its risk of being sued in negligence for breach of a duty of care, the lender would no doubt seek to consult those to whom it owed a duty of care or, at a minimum, put them on notice of proposed changes before implementing them.

Tab 7

2015 ABQB 115
Alberta Court of Queen's Bench

Jin v. Ren

2015 CarswellAlta 251, 2015 ABQB 115, [2015] 12 W.W.R. 175, [2015] A.W.L.D. 1667, [2015] A.W.L.D. 1668, [2015] A.W.L.D. 1692, [2015] A.W.L.D. 1740, 22 Alta. L.R. (6th) 236, 251 A.C.W.S. (3d) 166, 613 A.R. 96

Shan Jin, Plaintiff and Zigang Ren and Hart Fibre Trade Company Ltd., Defendant

Peter B. Michalyshyn J.

Heard: June 9-19, 2014
Judgment: February 13, 2015
Docket: Edmonton 0703-07538

Counsel: Genevieve Chan, for Plaintiff
Zigang Ren, for himself and Defendant, Hart Fibre Trade Company Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Evidence; Restitution; Torts

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.i General principles

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.h Liabilities
III.1.h.viii Miscellaneous

Estates and trusts
II Trusts
II.1 General principles
II.1.c Miscellaneous

Restitution and unjust enrichment
I General principles
I.2 Requirements for unjust enrichment
I.2.c No juristic reason for enrichment

Headnote

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment
Plaintiff agreed to invest about $300,000 in defendant H Ltd., which defendant R had promoted — Plaintiff believed he would receive controlling interest in H Ltd. — Plaintiff provided funds in several types of currency — H Ltd. never

iii. What is the appropriate currency?

Analysis:

1. Did the agreement between the parties create an express trust?

21 Jin's counsel submits that in making the arrangement with Ren to invest in Hart Fibre and by Jin forwarding his funds in exchange for shares and an interest in land, there was an intention that Ren hold those funds on trust until consideration was exchanged; the result being that Jin can recover his investment monies in full.

22 In order for an express trust to come into existence, there must be three certainties: 1) the intention to create the trust; 2) the *subject-matter* or *trust property*; and, 3) the *object(s)*, or beneficiaries, of the trust: *Luscar Ltd. v. Pembina Resources Ltd.*, 1994 ABCA 356 (Alta. C.A.) at para 96, (1994), 162 A.R. 35 (Alta. C.A.), citing *Knight v. Knight* (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch. Div.).

23 This means that the alleged settlor of the trust must use language clearly showing his intention that the recipient hold the property on trust. It must also be shown that the settlor has clearly described the trust property such that it can be definitely ascertained. Third, there must be no uncertainty as to whether a person is actually a beneficiary. If any of these three certainties does not exist, the trust fails to come into existence or, in other words, is void: DWM Waters, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Carswell, 2005) at 132.

24 The intention to create a trust can be inferred with certainty from context and surrounding circumstances: see *Royal Bank v. Eastern Trust Co.* (1951), 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) at para 13. The words which nearly always reveal intention are "in trust," or "as trustee for," but these words are not necessary: Waters at 135, citing *Canada Trust Co. v. Price Waterhouse Ltd.*, 2001 ABQB 555 (Alta. Q.B.) at para 26, (2001), 288 A.R. 387 (Alta. Q.B.).

25 In this case there are no express words or phrases in any record establishing that the funds advanced were intended to be held by Ren or Hart Fibre in trust for Jin. Even when looking at the conduct and nature of the actual exchange and advancement of funds, nothing in the parties' arrangement constitutes an express trust based on several passages from *Luscar* at paras 100-102 and 105, where the Court determined whether a written agreement created an express or implied trust:

> ...the parties were informed and capable of fully setting out their intended rights and duties in an agreement. The AMI Clause contained none of the usual indicia of trust. While the words "in trust" or "on trust" are not an iron-clad requirement to finding the existence of a trust, one would have expected them here, and their absence is telling...There are many authorities which refer to the onerous duties that trustees bear, and a party should not be saddled with trust obligations where that intention is not clearly expressed. As sophisticated parties, they would have been aware of a trustee's onerous duties, and if they intended to impose those obligations, they would have so stated.
>
> . . .
>
> The statutory regime, as well as the common law, creates duties and concerns for trustees to the extent that no sophisticated party would blindly accept them. Before willingly entering into an agreement that created a trust arrangement, any potential trustee, with the legal resources of the appellant, would therefore be expected to seek to include terms limiting the trustee's liability...
>
> . . .
>
> On the whole of the evidence, it is apparent these parties intended merely to enter into a contract. The commercial context and jurisprudence make it doubtful the parties to such an agreement would even think about an AMI Clause carrying fiduciary duties. I stress the importance of not straining equity beyond its due and proper limits...

26 Applying these principles here, neither Jin nor Ren are as sophisticated as the corporate parties in *Luscar*. However,

they were both still businessmen. Had a trust been the expectation of both parties, one would reasonably expect a written agreement to be drafted in some way confirming Ren's obligation to hold the investment monies to the benefit of or on trust for Jin.

27 It appears the arrangement here was simply intended to be a commercial, contractual exchange: Jin gave Ren *money*, or more precisely, *investment capital*; he did so in *exchange for shares* in the corporation. This is to some extent evidenced by the May 2, 2006 record referred to as an "agreement", and by the nature of the actual exchange. While one may transfer property on trust in exchange for consideration, there appears to have been no contemplation here of creating a trust in those monies until consideration was exchanged. Based on the arrangement and surrounding circumstances, it does not appear that Jin intended the monies to be held by Ren in trust until all the investors and share ratios were confirmed. Rather the evidence shows that Jin expected the investment monies to be used immediately towards Hart Fibre's expenses and start-up costs, with the expectation that Jin would receive a share interest in Hart Fibre in exchange.

28 Furthermore, Jin demanded the return of his funds in August 2006 after Ren failed to confirm Jin's share interest in Hart Fibre by way of shares or by way of an interest in the land purchased by Hart Fibre. This request is further evidence that the parties' arrangement was intended to be purely contractual. Once an express trust is settled — that is, once the property is in the trustee's hands — it cannot generally be revoked or varied unless the terms of the trust or agreement expressly provide for it: *Trustee Act*, RSA 2000, c T-8, s 42(2).

29 Jin's counsel relies on *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, [1993] S.C.J. No. 118 (S.C.C.), a case in which the court found "a stranger" to the trust relationship to be a constructive trustee, so as to be in breach of the express trust agreement. *Air Canada* is of little relevance to the case before me. First, Ren cannot be characterized as a stranger to the trust arrangement, even if there was one. If there were a trust relationship, he would be the express trustee. Second, there was an express trust clearly set out in the *Air Canada* agreement. The agreement expressly authorized a travel agency to receive blank airline ticket stock from Air Canada and to issue tickets directly to the public; funds collected from the sale of Air Canada tickets were to be held *in trust* by the travel agency and paid twice a month to Air Canada. The agreement contained the following clause, cited at 803-804:

> All monies, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the Airline, and *shall be held in trust* by the Agent until satisfactorily accounted for to the airline. All such monies, less applicable commissions to which the Agent is entitled hereunder, shall be remitted to the Airline by the Agent in accordance with the Airline's accounting procedures.
>
> (Emphasis added).

30 There is nothing in any agreement or arrangement in the case before me that contains similar wording so as to constitute an express trust.

31 The only words or actions supporting Jin's proposition that he intended to create a trust was his testimony that he advanced the monies because he "trusted" Ren. However, similar to what was expressed in *Udovitch Estate v. Helm Estate*, 2002 ABQB 94 (Alta. Master) at para 24, (2002), 111 A.C.W.S. (3d) 444 (Alta. Master), albeit in reference to a loan, it would pervert the meaning of the word "trust" in trusts law to say that the exchange here created a trust relationship simply because an investor trusted a corporation's director.

32 I conclude therefore that the parties' intentions were purely contractual. (I pause to emphasize their *intentions* as I have not found a valid contract ever existed between the parties.) Jin intended to invest $300,000 for an interest in Hart Fibre in the form of shares and land purchased by Hart Fibre. There was no evidence supporting an intention, express or implied, that Ren was to hold Jin' monies in trust until consideration was exchanged.

2. Did Ren owe Jin a fiduciary duty, and if so, was it breached?

33 Jin's counsel argues that Ren acted in a fiduciary capacity in the business relationship, in that he was expected to

Tab 8

2019 ABQB 733
Alberta Court of Queen's Bench

Crossroads-DMD Mortgage Investment Corporation v. Sun Country Mortgage Investment Corporation

2019 CarswellAlta 2045, 2019 ABQB 733, [2019] A.W.L.D. 3880, [2019] A.W.L.D. 3894, [2019] A.W.L.D. 3896, [2019] A.W.L.D. 3973, [2019] A.W.L.D. 3974, [2019] A.W.L.D. 3975, [2019] A.W.L.D. 3978, 2 Alta. L.R. (7th) 377, 310 A.C.W.S. (3d) 863, 6 R.P.R. (6th) 198

Crossroads-DMD Mortgage Investment Corporation (Applicant) and MNP Ltd., in its capacity as Trustee of Sun Country Mortgage Investment Corp. (Respondent)

Axcess Capital Advisors Inc. (Applicant) and DMD Mortgage Investment Corporation, DMD II Mortgage Investment Corporation and DMD III Mortgage Investment Corporation (Respondent)

B.E. Romaine J.

Judgment: September 20, 2019
Docket: Calgary B201-218907, 1701-04209

Counsel: Kyle Kashuba, Gino Bruni, Brandon Schur, for MNP Ltd.
Ksena J. Court, Francis N.J. Taman, for Crossroads-DMD Mortgage Investment Corporation

***B.E. Romaine J.*:**

I. Introduction

1 The applicant Crossroads-DMD Mortgage Investment Corporation (Crossroads) by its manager Caplink Financial Corporation (Caplink) seeks an order specifying the distribution of net proceeds of sale of certain real property currently held in trust. The Respondent MNP Ltd as Trustee in bankruptcy of Sun Country Mortgage Investment Corp. (Sun Country) and Receiver of DMD II Mortgage Investment Corporation (DMD II) opposes the distribution order sought by Crossroads and proposes an alternative distribution.

2 Crossroads submits that there are errors in certain mortgages that are registered against title to the properties, that some of the mortgages have been paid off despite the fact that they were not discharged but transferred to the payors, and that Crossroads has priority to the funds by reason of mortgages registered later in time.

3 MNP submits that Crossroads' proposed distribution of proceeds would undermine Alberta's system of land titles and result in inequity, not only to Sun Country and DMD II, but to their third-party creditors. MNP also submits that this Court should not use equitable remedies to save Crossroads from its own poor business practices.

II. Relevant Facts

4 There is little dispute among the parties about the relevant facts.

5 Crossroads is currently managed by Caplink but was managed by CMS Financial Services Ltd (CMS) until December, 2016. During the period of time that CMS managed Crossroads, it also managed Sun Country, DMD II and CMS Real Estate Ltd (CMS Real Estate). The principals of CMS are and were directors and/or shareholders of all of the corporations involved in this litigation. Sun Country is currently in bankruptcy proceedings and DMD II is in receivership. MNP Ltd is the trustee and receiver, respectively, of these corporations. The history relevant to the application occurred while CMS was the manger of Crossroads, Sun Country, DMD II and CMS Real Estate.

38 "Person" is not defined in the Act. However, the *Interpretation Act*, RSA 2000, c. I-8, which applies to the interpretation of every enactment except to the extent that a contrary interpretation appears in the Act, defines "person" as including a corporation. There is no reason to interpret "person" in section 73 (2) as excluding a mortgagor without a clear indication that this was the legislative intent.

39 The Alberta Court of Appeal has addressed the issue of whether a mortgagor can have a mortgage transferred to itself, albeit in dicta, in *First National Mortgage Co. v. L.J.V. Holdings Ltd.*, 1989 ABCA 88 (Alta. C.A.) at para 32. The Court commented with respect to section 64(1) of the previous version of the *Law of Property Act*, now Section 73(1), that:

> Before the discharge of the mortgages, the mortgagor on repayment of the mortgage could have had the mortgage transferred as it wished and could, for example, have had the mortgage transferred to itself. As mortgagee it could then have foreclosed and obtained title to the property. (emphasis added)

40 The issue in that case was whether a unilateral discharge of a mortgage by the mortgagee prevented the mortgagee from suing on the covenant to pay. The Court decided that it did, because the discharge resulted in the mortgagor losing its rights to have the mortgage transferred under what is now Section 73. It was in this context that the comment that a mortgagor could have had the mortgage transferred to itself was made.

41 In *David M. Gottlieb Professional Corp. v. Champion Homes Inc.*, 2012 ABQB 64 (Alta. Q.B.) at para 82, which dealt with substantially the same issue as *First National*, Kenny, J in discussing the decision in the *First National* noted that the s. 73 right that is lost by a unilateral discharge of mortgage is the right to have the mortgage transferred to the mortgagor or its designate when the mortgagor's right to pay the mortgage in full arises.

42 Thus, she noted that the reason that a mortgagee who unilaterally discharges a mortgage is precluded from suing on the covenant to pay in that mortgage is because, by discharging the mortgage, it has unlawfully dealt with the mortgagor's equity of redemption: para 83.

43 These decisions indicate that the purpose of section 73 is to protect a mortgagor's equity of redemption. It follows that a mortgagor can have a mortgage transferred to its designate, which includes itself: *Gottlieb* at para 102.

44 Thus, the fact that Section 73 does not specifically state that a mortgagor is able to have the mortgage transferred to itself does not preclude that outcome. Nor does the section specifically prohibit this.

45 I note that this was in fact the argument that counsel to Crossroads used when persuading Caplink to provide a transfer of the mortgage with respect to the Arbor Crest property.

46 Crossroads relies heavily on the presumption against tautology. However, the presumption can be rebutted by suggesting reasons for a redundancy. Given the legislative purpose of section 73, the absence of words that would restrict a mortgagor from using section 73(2) to compel a transfer, which is in fact what happened in this case, and the case law interpreting section 73, the presumption of tautology, does not apply. I also note section 10 of the *Law of Property Act*, which provides that a contract is valid and enforceable notwithstanding that one of the parties enters into an agreement with itself and some other person. This provision supports an interpretation that allows a mortgagor to compel a transfer to itself. The kind of transfer of mortgage that occurred in this case.

47 The next issue is whether, if the same party becomes both a mortgagor and mortgagee, the result is a merger of the interests.

48 At common law , when a mortgage on land and the ownership of land subject to the mortgage became united in the same person, the result was merger: *Standard Trust Co. v. Panstar Developments Inc.*, 1993 CarswellBC 738 (B.C. S.C.) at para 25. However, section 62 of the *Law of Property Act* provides that "[t]here is no merger by operation of law only of any estate the beneficial interest in which would not be merged or extinguished in equity".

49 Equity requires the court to look at the intention of the parties. It presumes that there is no merger where it is in the owner's interest that the two states should not merge: *Yarley (China) Developments Co. v. Amber Equities Inc.*, [1996] 10 W.W.R. 479 (Alta. Q.B.) at paras 107-108.

50 The presence or possibility of subsequent encumbrances, which became a reality with respect to all three properties at issue, implies that it was more favourable for Sun Country and DMD II to maintain the registration of the transferred first mortgages. As noted by MNP, the fact that the first mortgages were transferred into the names of the respective mortgagors in the case of all three properties suggests a deliberate intent to maintain the first mortgage on title, not mere and repeated clerical errors.

51 Crossroads submits that there is evidence that indicates a contrary intention. However, the ambiguous statement by the CMS employee in the Arbor Crest situation that "[b]ecause title is in the property, we can't register a mortgage to ourselves" was made in the context of his earlier remark that "[w]e don't show any of our financing on title", and was in response to a question of whether there were "seconds from the MICs" that would have to be postponed. This is not sufficient to indicate an intention that there not be a merger of interests.

52 This statement was at any event later contradicted by counsel for DMD II, who, it is conceded, acted for both Crossroads and DMD II from time to time with respect to the same property. The lack of reference to the mortgage in years-later unaudited financial statements of Sun Country and DMD II is not a credible indication of intention at the time the mortgages were transferred.

53 Crossroads also refers to statement from one of its managers as to intention. These statements were made when she was attempting to recover funds from Sun Country and DMD II. Such after-the-fact statements are not persuasive in the face of a course of conduct with respect to mortgages that was consistent across all three properties.

54 Crossroads submits that CMS would have been acting in the interests of Sun Country or DMD II despite its fiduciary duties to Crossroads in permitting the first mortgages to remain on title to the properties, and that, in the absence of a clear intention to benefit Sun Country and DMD II, no such intention should be inferred, as this would require a finding of a breach of CMS' fiduciary duties to Crossroads.

55 This ignores the fact that CMS had the same fiduciary duties to Sun Country and DMD II, and that these duties may have been breached had the first mortgages not been transferred in the manner in which they were. While CMS as manager may have had a conflict of interest with respect to these transactions, that is no reason to put Crossroads in a better position than it is now in.

56 MNP notes that Crossroads paid out the first mortgages, in whole or in part, on two of the properties in exchange for second mortgages at significantly higher interest rates, which would seem only to benefit Crossroads, instead of merely accepting transfers of the first mortgages. I agree that an examination of the totality of the transactions in question, including the relationship between the first mortgages and the second mortgages, does not support an intention of merger.

57 The case cited by Crossroads to support its submissions, *Hopps v. Borowski*, 1928 CarswellSask 22 (Sask. C.A.) is distinguishable. In that case, the Court found as a fact that there was no intention to maintain the mortgage nor any benefit in doing so.

58 Crossroads submits that acceptance of the validity of the first mortgages makes the second mortgages of no value. Second mortgages typically carry an element of risk, and it is not this Court's function to protect Crossroads from what has proven to be an ill-advised business decision.

59 Finally, disregarding the first mortgages would be to disregard validly registered transfers and instruments on the certificate of title to the respective properties. There are strong policy reasons to reject the submission that it was the mortgagors' intention that the transfers would result in mergers, absent any persuasive evidence of that intent.

60 I find therefore that there was no merger at equity, and thus none by operation of law.