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| COURT FILE NUMBER | 1703-21274 | Clerk's Stamp |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA | |
| JUDICIAL CENTRE | EDMONTON | |
| PLAINTIFF | ROYAL BANK OF CANADA | |
| DEFENDANTS | 1679775 ALBERTA LTD., REID-BUILT HOMES LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., REID CAPITAL CORP., and EMILIE REID<br><br>IN THE MATTER OF THE RECEIVERSHIP OF 1679775 ALBERTA LTD., REID-BUILT HOMES LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., 1852512 ALBERTA LTD., and REID CAPITAL CORP. | |
| APPLICANT | ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of 1679775 ALBERTA LTD., REID-BUILT HOMES LTD., REID WORLDWIDE CORPORATION, BUILDER'S DIRECT SUPPLY LTD., REID BUILT HOMES CALGARY LTD., REID INVESTMENTS LTD., 1852512 ALBERTA LTD., and REID CAPITAL CORP. | |
| DOCUMENT | **Brief**<br>**(Advice and Direction regarding Builders' Liens Registered against Developer Lands)** | |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Norton Rose Fulbright Canada LLP<br>400 3rd Avenue SW, Suite 3700<br>Calgary, Alberta T2P 4H2<br><br>Phone: +1 403.267.8222<br>Fax: +1 403.264.5973<br>Email: howard.gorman@nortonrosefulbright.com / aditya.badami@nortonrosefulbright.com<br><br>Attention: Howard A. Gorman, Q.C. / Aditya M. Badami | |

## I. INTRODUCTION

1 This brief is filed in support of an application filed by Alvarez and Marsal Canada Inc. in its capacity as court-appointed Receiver (the **Receiver**) of the current and future assets, undertakings and properties of Reid-Built Homes Ltd., 1679775 Alberta Ltd., Reid Worldwide Corporation, Builder's Direct Supply Ltd., Reid Built Homes Calgary Ltd., Reid Investments Ltd., 1852512 Alberta Ltd., and Reid Capital Corp. (collectively referred to herein as **Reid**).

2 The Receiver seeks advice, direction, and declaratory relief with respect to the definition of "owner" under the *Builders' Lien Act* (the ***Act***)[1] in relation to certain lands owned by Developers (as defined herein) and the validity of liens registered against those lands.

## II. FACTS

3 Before its receivership, Reid entered into a series of Lot Sale Agreements with various developers, including: Melcor Developments Ltd., Lewis Estates Communities Inc., Villeneuve Communities Inc., Winterburn Developments Inc., Rosenthal Communities Inc., Villeneuve Communities Inc., Jesperdale Communities Inc., Westmere Communities Inc., Georgetown Townhouse GP Ltd., Walton Big Lake Developments Corporation, La Vita Land Inc., Genesis Land Development Corp., and Rapperswill Developments Ltd. (collectively, the **Developers**).

4 Pursuant to the Lot Sale Agreements between the subject Reid entity and the subject Developer, Reid had the ability to build or caused to be built improvements and residential houses on lands owned in fee simple by the Developers (the **Lands**). The precise terms of the Lot Sale Agreements were specific to each Developer.

5 On November 2, 2017, Alvarez & Marsal Canada Inc. was appointed as the Receiver of Reid pursuant to a Consent Receivership Order granted by the Honourable Justice Hillier (**Receivership Order**).

6 Liens have been registered under the *Act* against the Lands (**Liens**). A summary of all Liens registered against the Lands can be found at Appendix "A" of this Brief.

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[1] ***Builders' Lien Act***, RSA 2000, c B-7 [the ***Act***] [**TAB 1**].

7 Over the course of the receivership, the Receiver was granted numerous sale approval and vesting orders (**SAVOs**) vesting title to lots registered in the name of a Developer to third-party purchasers. In respect of Liens registered against such Developer-owned lots, the applicable SAVO directed the Receiver to holdback 110 percent of the Lien claims.[2] Copies of all relevant SAVOs can be found at Appendix "B" of this Brief. Those hold-back funds remain held pending determination of the validity of the Liens.

8 On July 30, 2018, the Receiver's legal counsel sent letters to affected Lien claimants and Developers which, among other things, provided them with template affidavits relevant to the "owner" issue developed by the Receiver's legal counsel for Lien claimants and Developers.[3]

9 On August 7, 2018, the Receiver filed the within notice of application.

10 On August 23, 2018, the Receiver filed the Receiver's Tenth Report in which the Receiver invited any affected Developer, Lien claimant, or other interested party to put evidence before the Court in the form of the template affidavits developed by the Receiver, or in such other format as it prefers.[4] The Receiver's Report and template affidavits were filed on the Receiver's website and distributed to the service list.

11 Representatives of various Developers swore affidavit evidence at the Receiver's invitation:

(a) Justin Mauro, on behalf of La Vita Land Inc. (**La Vita**);

(b) Susan Monson on behalf of Melcor Developments Ltd. (**Melcor**) and all Melcor Entities[5];

(c) Arnie Stefaniuk on behalf of Genesis Land Development Corporation (**Genesis**);

12 Additionally, Petrus Johannes Paauw previously swore an affidavit on behalf of Georgetown Townhouse GP Ltd. (**Georgetown**) in support of its separate application for, *inter alia*, a determination that it was not an "owner" as defined in the *Act.* This

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[2] SAVOs related to Reid-owned properties did not similarly require a Lien holdback as such Liens were subordinate to prior registered mortgages. In the case of La Vita Land Inc., the Receiver did not holdback 110 percent of the lien claim because La Vita Land Inc., as purchaser, agreed to assume responsibility for the liens. As no lands owned by Georgetown in fee simple have been sold through the Receivership, the Receiver does not hold back any funds in connection with any such lands.
[3] Tenth Receiver's Report filed August 23, 2018 at para 4.1, Appendix D [**TAB 2**].
[4] *Ibid* at para 4.3.
[5] Melcor Entities include Jesperdale Communities Inc., Lewis Estates Communities Inc. Rosenthal Communities Inc., Villeneuve Communities Inc., Westermere Communities Inc., and Winterburn Developments Inc.

Application was heard on August 15, 2018 and, in a decision dated August 20, 2018, Master Prowse Q.C. concluded that Georgetown "did not become sufficiently involved in 167's construction process so as to render Georgetown an "owner" for the purposes of section 1(j) of the BLA."[6]

13 Representatives of various Lien claimants also swore affidavit evidence at the Receiver's invitation:

(a) Mike Foster on behalf of Rob's Drywall Services Ltd.;

(b) Shawn Tailer on behalf of Davidson Enman Lumber Limited;

(c) Robin Bruno on behalf of R. and R. Bruno;

(d) Jarrett Pratt on behalf of Prattco Excavating Ltd.; and

(e) Michelle Adolph on behalf of BACA Construction 2013.

14 These Affidavits were posted on the Receiver's website and circulated to the service list.

15 There have been no requests to cross-examine on any of the affidavits.

## II ISSUES

16 There is one issue before this Honourable Court: whether the Developers, or any of them, are "owners" of the respective Lands as defined the *Act.* If the Developers are not "owners", then the Lien claimants' Liens are invalid as the Liens are registered against the Developers' fee simple interest in the Lands.

## III LAW AND ANALYSIS

17 Section 6(1) of the *Act* creates the right to lien:[7]

> Creation of lien
>
> 6(1) Subject to subsection (2), a person who
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> (a) does or causes to be done any work on or in respect of an improvement, or

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[6] ***Georgetown Townhouse GP Ltd v. Crystal Waters Plumbing Company Inc.,*** 2018 ABQB 617 at para 41 [***Georgetown***] [**TAB 3**].
[7] ***Act****, supra* at s. 6 [**TAB 1**].

> (b) furnishes any material to be used in or in respect of an improvement,
>
> for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.
>
> [Emphasis added]

18 The *Act* creates a statutory remedy that does not exist at common law. For this reason, the *Act* must be interpreted and applied strictly. As Your Lordship explained in *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*:[8]

> Builders' lien claims are an extraordinary remedy allowing claimants in circumstances to advance claims and collect payment from parties they had no contractual relationship with. Because of the extraordinary nature of the lien remedy, the courts have consistently held that lien claims and the rights of lien claimants are to be construed narrowly.

19 The consequence of this strict interpretation is that the courts will strike liens that identify the wrong interest in the land in the Statement of Lien. As the Alberta Court of Queen's Bench stated, "[w]hen a statute requires that a lien claimant identify whose interest is being charged and what interest is being charged that is a matter of 'real importance'."[9]

20 Accordingly, if Your Lordship decides that the Developers, or any of them, are not "owners" within the meaning of the *Act,* then the Liens are invalid as they were registered against the Developers' fee simple title.

Definition of Owner

21 "Owner" is defined by the *Act* as follows:[10]

> "owner" means a person having an estate or interest in land at whose request, express or implied, and
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> (i) on whose credit,
>
> (ii) on whose behalf,

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[8] ***Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.***, 2017 ABQB 254 at para 65 [***Westpoint***] [**TAB 4**].
[9] ***Arres Capital Inc. v. Graywood Mews Development Corp***., 2011 ABQB 411 at para 12 [**TAB 5**], quoting *Canadian Helicopters Ltd. v. Udo Stephen Building Materials Ltd.*, 2003 CarswellAlta 500 (Alta Master).
[10] ***Act****, supra* at s. 1(j) [**TAB 1**].

(iii) with whose privity and consent, or

(iv) for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

22 Accordingly, to qualify as an "owner" under the *Act*:

(a) the person must have an estate or interest in the land;

(b) the person must have requested the work done on or materials furnished for the improvement, expressly or impliedly; and

(c) the work must have been done or the materials furnished, on the person's credit, on his/her behalf, with his/her privity and consent or for his/her direct benefit.

23 The first criteria is not in issue here: the Developers hold or held freehold title to the Lands.

24 'Privity and consent' and 'credit and on whose behalf' are similarly not in issue. It is not in dispute that the Lien claimants had no contractual relationship with the Developers or that the Developers did not finance any construction activities.[11]

25 Accordingly, this brief will focus on the remaining factors: express or implied request and direct benefit.

Express or Implied Consent

26 Whether there has been a 'request for work' for the purposes of section 1(j) of the *Act* is a question of fact and may be inferred from the totality of the circumstances, viewed in

[11] Affidavit of Shawn Tailer sworn August 29, 2018 at paras 6-8 [**Tailer Affidavit**]; Affidavit of Robin Bruno sworn September 7, 2018 at paras 7-8, 10-11, 13-14 [**Bruno Affidavit**]; Affidavit of Jarrett Pratt sworn August 29, 2018 at paras 3-5 [**Pratt Affidavit**]; Affidavit of Susan Monson sworn August 31, 2018 at paras 24-26 [**Monson Affidavit**]; Affidavit of Mike Foster Sworn August 29, 2018 at paras 3-5 [**Foster Affidavit**]; Affidavit of Arnie Stefaniuk sworn August 30, 2018 at paras 4(e) and 6 [**Stefaniuk Affidavit**]; Affidavit of Justin Mauro sworn August 31, 2018 at para 4(f) [**Mauro Affidavit**]; Affidavit of Petrus Johannes Paauw, sworn November 17, 2018, at paras 17, 24 [**Paauw Affidavit**].

light of the substance of the relationship between the parties and the participation of the liened party in the work being done.[12]

27 A request "does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent."[13] It requires "active participation".[14]

28 There are two Court of Appeal of Alberta decisions that shed light on what amounts to an express or implied request under the *Act*: *Royal Trust Corp of Canada v. Bengert Construction Ltd.* (***Bengert***) and *Acera Developments Inc. v. Sterling Homes Ltd.* (***Acera***).

29 In *Bengert,* the purchasers signed a contract with a construction company for the purchase of a lot and construction of a home on the lot. The construction company acquired title to the land, obtained a mortgage and began work on the construction. Before the house was completed, the construction company went bankrupt. The Court of Appeal concluded that the purchasers had not impliedly requested the work to be done, as:[15]

(a) the purchasers' participation in the construction activities was little more than choosing a house plan;

(b) the purchasers had a minimal part in the design such that their contract did not specify any extras to be added to it;

(c) the purchasers did not have a contractual right to inspect construction as it progressed and did not have any involvement with the subtrades;

(d) the purchasers did not control the cash flow into the project to ensure no builders' liens would be outstanding; and

(e) the contract described the purchasers as interim purchasers such that only upon completion of construction would full price be paid and title transferred.

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[12] ***Acera Developments Inc. v. Sterling Homes Ltd.***, 2010 ABCA 198 at paras 28, 31 [***Acera***] [**TAB 6**].
[13] ***Royal Trust Corp of Canada v. Bengert Construction Ltd.***, 1988 ABCA 58 at para 24 [***Bengert***] [**TAB 7**].
quoting *MacDonald v. MacDonald Rowe* (1964) 49 MPR 91 (PEI SC) [TAB 4]; ***Georgetown****, supra* at para 4 [**TAB 3**].
[14] ***Bengert****, supra* at para 25 [**TAB 7**].
[15] *Ibid* at paras 27-28.

30 In *Acera,* by contrast, Acera Developments Inc. (**Acera**) owned a parcel of land and entered into a Lot Purchase Agreement with Sterling Homes Ltd. (**Sterling**) relating to 136 four-plex townhouse lots. Under the terms of the agreement, sale and purchase of the lands could not occur until certain conditions precedent were met, including Acera registering a plan for subdivision with Land Titles. The plan of subdivision was never registered and none of the lots were ultimately transferred to Sterling. By the time the plan of subdivision was rejected, Sterling had already commenced work on the lots and brought the homes to various stages of completion. Sterling filed a builders' lien against Acera's lands which Acera sought to invalidate on the basis that it did not satisfy the criteria for being an "owner".

31 In concluding that Acera 'requested' the work, the Court of Appeal highlighted that:

(a) Sterling entered into an agreement with Acera to build the townhouses.[16]

(b) The homes to be constructed by Sterling had to be approved by Acera or its consultant.[17]

(c) Sterling was contractually bound to construct improvements to a specific standard and scope: Acera issued architectural and construction guidelines which set out "detailed requirements for the design of the residential units and which gave Acera control over that design."[18] Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing and landscaping.[19]

(d) Acera facilitated Sterling obtaining home building permits.[20]

(e) It was always contemplated by Acera that construction would commence prior to subdivision and there was sufficient interaction between Sterling and Acera to

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[16] ***Acera**, supra* at para 35 [**TAB 6**].
[17] *Ibid* at para 25.
[18] *Ibid* at para 25.
[19] *Ibid* at para 36.
[20] *Ibid* at para 26.

support the conclusion that construction proceeded prior to subdivision at Acera's request.[21]

(f) Acera was actively involved in the supervision and inspection of construction and was fully aware that the construction was proceeding prior to subdivision approval.[22]

32 Master Prowse Q.C. interpreted *Acera* as follows:[23]

> …it seems one of the factors leading to upholding the lien filed by the builder in Acera was the unfairness of the developer encouraging and participating in construction by the builder prior to subdivision taking place, and then the developer through its own default (failing to meet a municipal requirement for subdivision) not accomplishing subdivision. That is not a factor in the present case.

33 In addition to *Bengert* and *Acera,* other decisions of Alberta courts are useful in delineating between "active participation" and "mere knowledge and consent".

34 In *Stealth Enterprises Ltd. v. Hoffman Dorchik* (***Stealth Enterprises***),[24] 632766 Alberta Ltd. (**632**) entered into an agreement to purchase an apartment building from S&U Homes Ltd. (**S&U**). 632 intended to condominiumize the apartment building. As part of the agreement, S&U allowed 632 to carry out whatever renovations it wished in order to condominiumize the building. According to the principal of 632, S&U was fully aware of the nature and scope of the extensive renovations that would be done, although no plans or specifications were given to S&U for approval.[25] Additionally, the principals of S&U visited the building during the course of renovations at least three or four times to view the renovations.[26] Justice Hawco concluded that there had been no implied request for work, reasoning as follows:[27]

> … <u>There is no doubt that S&U was aware, through both Mr. Schroeder and Mr. Unger, and particularly through Mr. Olsen, that work was being done on its building. It knew before the work was started that renovations would be carried out</u>. Both Mr. Schroeder

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[21] *Ibid* at para 32, 36.
[22] *Ibid* at para 36.
[23] ***Georgetown****, supra* at para 42 [**TAB 3**].
[24] ***Stealth Enterprises Ltd. v. Hoffman Dorchik***, 2000 ABQB 311 [***Stealth Enterprises***] [**TAB 8**].
[25] *Ibid* at para 18.
[26] *Ibid* at para 22.
[27] *Ibid* at para 38.

> and Mr. Unger have stated that they did not know what was going to be done to their building and that they did not care, so long as they did not have to pay for it. It does not make any sense that two fairly astute businessman would allow some person, who they professed not to know anything about, begin tearing their lobby apart and ripping carpets and cabinets out of apartments without having some idea of what she was going to do. Nor does their professed ignorance and lack of care accord with the expressed provision in the offer to purchase that should Ms. Grey fail to complete, all work done and all registrations and plans to condominiumize the building would become theirs without any compensation to her. I am therefore satisfied that both Mr. Schroeder and Mr. Unger knew generally what was planned, what was happening on a fairly regular basis and what would be going on. Unfortunately for the plaintiff, this is not enough. …
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> …
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> 40 In this case, there was no active participation by either Mr. Schroeder or Mr. Unger. … But none of the renovations were carried out at their request. They could have cared less about condominiumizing this building. They had no say in what was done, they gave no directions with respect to how anything should be done. …
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> [Emphasis added]

35 Similarly, in *K & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd.* (***K & Fung***),[28] the registered owner of a restaurant entered into a lease with the operators of the restaurant. The lease stipulated that the tenant would upgrade the premises.

36 The tenant hired the lien claimants to do work on the property but failed to pay for work done. The lien claimants then registered lien claims against the owner's fee simple title.

37 The Court of Appeal of Alberta determined that although the lease gave the landlord considerable control over the tenant's improvements, the landlord never exercised that control[29] and was not actively involved in the renovation project, apart from approving concept plans and approving the selection of paint for the exterior of the building. The registered owner did not select the general contractor, did not prepare nor approve a set of construction plans, did not control funding for the construction, and did not provide

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[28] ***K & Fung Canada Ltd. v. N.v. Reykdal & Associates Ltd.***, 1998 ABCA 178 [***K & Fung***] [**TAB 9**].

[29] See also ***Georgetown***, supra at paras 23-24 [**TAB 3**]: "[23] The lienholders argue that it is the expected arrangement at the outset that should count. In other words, the fact that Georgetown signed a contract giving them the authority to become extensively involved in the building process is what matters, not what in fact happened. [24] I disagree. While Georgetown's contractual authority is a relevant factor to consider, to me it is not as significant as what in fact happened."

any on-site supervision or inspection.[30] Further, the lease agreement did not require the tenant to construct improvements to any standard or any specified scope.[31] As such, the landlord was not an "owner" and the liens were declared invalid.

38 In *Permasteel Building Systems Ltd. v. Semon* (***Permasteel***),[32] 676386 Alberta Ltd. (**676**) entered into a purchase agreement with the defendant Semon for the purchase of land of which Semon was the registered owner. The agreement required construction of a building on the land by Semon with 676 to approve specifications for the building. Representatives of 676 were on site from time to time during construction, although 676 had no right to inspect the building as it was being constructed. 676 also did not have the right to give directions in respect of the work being done. It did order a few changes, but it did not have the right to instruct the general contractor to make those changes – change orders were negotiated with Semon who alone had the right to instruct the contractor.[33] As well, 676 had no part in the financing of construction.[34] Based on these factors, the Court was satisfied that 676 was not an owner.

39 Finally, in *Westpoint,* the lien claimants advanced an argument that the mortgagee of the property was an owner within the meaning of the *Act.* In concluding that the mortgagee was not an owner, Your Lordship explained there was no evidence of any direct dealings between Westpoint and any of the contractors and Westpoint did not pay any of the contractors or subcontractors.[35]

40 From these authorities, the following factors are relevant considerations to the definition of "owner" under the *Act*:

(a) **Direct Dealings**

Direct dealings between the alleged owner and the contractor is one factor to consider in examining the relationship between the parties. Privity of contract is not, however, a condition precedent to the imposition of liability.[36] In *Acera,* where the subject developer was found to be an "owner", there was a direct contractual relationship between it and the lien claimant.

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[30] ***K & Fung**, supra* at para 8 [**TAB 9**].
[31] *Ibid* at para 14.
[32] ***Permasteel Building Systems Ltd. v. Semon***, 2000 ABQB 275 [***Permasteel***] [**TAB 10**].
[33] *Ibid* at paras 7 and 22.
[34] *Ibid* at para 24.
[35] ***Westpoint**, supra* at paras 100-101 [**TAB 4**].
[36] ***Acera**, supra* at paras 28-31 [**TAB 6**].

Per *K & Fung, Semon* and *Bengert,* a contract requiring construction to take place, without more, will not render a developer an "owner".

(b) **Approval of Building Plans versus Architectural Controls**

Having input into the building plans is insufficient to amount to an implied request of the work; there must be a contractual requirement, *which was exercised*, to construct improvements to a specific standard and scope.

For example, in *Acera,* in holding the developer liable as owner, the Court emphasized that Sterling was contractually bound to construct improvements to a specific standard and scope, which involved detailed requirements for the design of the units (including with respect to construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing and landscaping) over which Acera had control.

By comparison, in *Bengert,* the Court held that choosing a house plan and having a minimal part in design weighed against the purchaser being held liable as an "owner". In *K & Fung,* approving concept plans and selecting paint colour did not amount to an implied request of the work, and in *Permasteel,* the right to approve specifications was deemed insufficient to amount to an implied request. In *Stealth Enterprises,* the Court held that the fee simple title holder did not request the work as it "gave no directions with respect to how anything should be done."[37]

(c) **Onsite Inspection and Supervision**

A contractual right to inspect and supervise the status of construction is a relevant factor.

In *Acera,* the Court found that Acera was "actively involved in the supervision of the construction."[38]

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[37] ***Stealth Enterprises***, *supra* at para 40 [**TAB 8**].
[38] ***Acera***, *supra* at para 36 [**TAB 6**].

By comparison, in both *Stealth Enterprises* and *Permasteel Building,* the Court declined to hold the fee simple title holder liable as owner, despite the registered owner having visited the site and inspected construction from time to time.

(d) **Knowledge that Construction was Ongoing**

Knowledge of the scope of the improvement and what was happening on a regular basis is insufficient to amount to an implied request for the work per *Permasteel, Bengert* and *Stealth Enterprises.*

(e) **Control of Funds**

In *Bengert,* the Court of Appeal emphasized that the purchasers did not control the cash flow into the project to ensure no builders' liens were outstanding. This was similarly emphasized as a factor in *K & Fung*.

In *Westpoint,* Your Lordship determined that it was irrelevant that the mortgagee financed the project as it did not pay the subcontractors directly.[39]

This is consistent with a statutory interpretation of the *Act.* As explained by the Supreme Court of Canada, "the ultimate goal [of statutory interpretation] is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme."[40] Other sections of the *Act* clearly contemplate payment from the owner to the general contractor.[41] Accordingly, to preserve the harmony of the *Act,* the "owner" should be the one responsible for paying for the work.

41 Applying those factors to the Developers in this case:

(a) **Melcor Entities:**

The Melcor Entities developed, and sometimes protected by way of restrictive covenant, architectural guidelines.[42] These restrictive covenants ran with the

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[39] ***Westpoint****, supra* at para 101 [**TAB 4**].
[40] ***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)***, 2006 SCC 4 at para 49 [**TAB 11**].
[41] See, for example, ss. 1(h)(i)(B), 1(g)(ii)(B), 1(i)(ii), 18(1), 18(2), 18(5), 19(1), 21(1), 22(1)(b), 25, 26, 27(1), 33(1) [**TAB 1**].
[42] Monson Affidavit at paras 6-7; Affidavit of Michelle Adolph sworn September 14, 2018 at paras 11-13 [**Adolph Affidavit**].

land and continued to be binding post-sale.[43] Reid was contractually required to build houses in accordance with these architectural guidelines.[44]

The applicable Lot Sale Agreement required Reid to complete construction of a dwelling within two years, although this provision was never invoked.[45]

The Melcor Entities had no involvement on the standard and scope of improvements.[46]

The Melcor Entities had no contractual agreements with any of the contractors working on the Lands,[47] were unaware of the identity of any contractors retained by Reid,[48] had no involvement with any contractors or suppliers or their retention by Reid,[49] and never gave instruction or direction to any trades.[50]

The Melcor Entities did not inspect construction "and [were] not necessarily aware of the progress of construction."[51]

The Melcor Entities retained title until payment (or as a result of a SAVO),[52] which could have occurred, and in many cases did occur, prior to construction.[53]

(b) **Genesis:**

Pursuant to the Lot Sale Agreements with Genesis, Reid was required to commence construction within 24 months of the date of the Agreement and to complete construction within 12 months thereafter.[54]

Genesis retained rights with respect to architectural guidelines and controls to approve exterior design of the buildings to be construction, including without limitation exterior materials, finishes and colour approval.[55] This right was exercised and Reid submitted building plans and specifications to Genesis for

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[43] Monson Affidavit at para 23.
[44] Adolph Affidavit at paras 12-14.
[45] Monson Affidavit at para 11; Adolph Affidavit at para 10 [**Adolph Affidavit**].
[46] *Ibid* at para 14.
[47] *Ibid* at paras 12, 24; Bruno Affidavit at paras 13-14; Foster Affidavit at paras 3-5.
[48] Monson Affidavit at para 13.
[49] *Ibid* at para 25.
[50] *Ibid* at para 26.
[51] *Ibid* at para 14.
[52] *Ibid* at para 15.
[53] *Ibid* at para 17.
[54] Stefaniuk Affidavit at para 4(a); Tailer Affidavit at para 3(d).
[55] Stefaniuk Affidavit at para 4(b); Tailer Affidavit at para 3(b) and (c).

approval.[56] However, Genesis did not require construction to a specific standard and scope[57] and, except for ensuring Reid's compliance with the above-noted architectural guidelines, Genesis did not have the right of oversight.[58]

Genesis did not hire, communicate with, or pay any contractors retained by Reid and had no input, contract or rights to such contractors.[59] Genesis never had direct contract with the contractors, including after Reid's insolvency.[60]

Payment was required prior to transfer of title.

(c) **La Vita:**

Pursuant to the Lot Sale Agreements with La Vita, Reid was contractually required to construct residential houses.[61]

La Vita's approval was required with respect to conformity with architectural guidelines which were registered against title. This was enforced by La Vita.[62] However, Reid was not required to construct improvements to a specific standard or scope.[63]

It was understood that construction would commence before transfer of the Lands from La Vita to Reid,[64] however, La Vita was not entitled to, and did not, inspect construction, nor was it aware of the progress of construction.[65] La Vita did not have the right of oversight or input into the hiring of contractors,[66] it did not pay any of the contractors directly,[67] it did not have any direct contact with the contractors, including after Reid's insolvency.[68]

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[56] Stefaniuk Affidavit at para 4(b) and (d); Tailer Affidavit at para 3(e) and (f).
[57] Stefaniuk Affidavit at para 4(d).
[58] *Ibid* at para 4(f).
[59] Stefaniuk Affidavit at para 4(e), 6; Foster Affidavit at paras 3-5; Tailer Affidavit at paras 7-8; Bruno Affidavit at paras 7-8; Pratt Affidavit at paras 3-5.
[60] *Ibid*.
[61] Mauro Affidavit at para 4(a).
[62] *Ibid* at para 4(b).
[63] *Ibid* at para 4(d).
[64] *Ibid* at para 4(c)
[65] *Ibid* at para 4(e).
[66] *Ibid* at para 4(g)
[67] *Ibid* at para 4(f).
[68] *Ibid* at para 6; Pratt Affidavit at paras 3-5; Tailer Affidavit at para 6-8; Bruno Affidavit at paras 10-11.

La Vita was not required to pay for any of the development and did not control the cash flow into the project.[69]

(d) **Georgetown:**

Pursuant to the Lot Sale Agreement, Reid was to provide Georgetown with guidelines with respect to home styles and colours as well as the plans and all information required by Georgetown, for approval, however, that never occurred.[70] Georgetown did not ask for any changes to the design or pricing of the houses.[71]

Under the Lot Sale Agreement, Georgetown retained the right to enter the lands to carry out certain work, however, this right was not exercised until after the receivership.[72] Georgetown did inquire into the start date for construction on the show homes.[73]

Georgetown did not have a contractual relationship with any of the contractors working on the project.[74] While the Lot Sale Agreement contemplated Georgetown's supervision of contractors providing utility servicing work, there is no evidence that this occurred.[75]

The Lot Sale Agreement was conditional upon Georgetown registering a subdivision plan and all required easements, roadway plans and utility rights of way relating to the Lands,[76] which was obtained prior to the commencement of construction.[77]

Master Prowse concluded on the basis of these facts that Georgetown does not satisfy the definition of "owner" under the *Act.*

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[69] Mauro Affidavit at para 4(f).
[70] Questioning of Petrus Johannes Paauw held March 8, 2018 at pp. 21:5-22:16; 27:12-28:10. See also: ***Georgetown**, supra* at paras 14-23 [**TAB 3**].
[71] Questioning of Petrus Johannes Paauw held March 8, 2018 at pp. 12:20 – 13: 5; 14:12-27. See also: ***Georgetown**, supra* at paras 14-23 [**TAB 3**].
[72] Questioning of Petrus Johannes Paauw held March 8, 2018 at pp. 28:4-29:21.
[73] Questioning of Petrus Johannes Paauw held March 8, 2018 at pp. 18:17-25.
[74] Paauw Affidavit at paras 17, 24; Foster Affidavit at paras 3-5
[75] ***Georgetown***, *supra* at para 19 [**TAB 3**].
[76] Paauw Affidavit at para 7.
[77] *Ibid* at para 12.

42 In light of the applicable case law and the affidavits filed by the Developers and Lien Claimants, the Receiver is of the opinion that there is no evidence to support a conclusion that the Developers requested the work, as required to satisfy the definition of "owner".

43 Further, reviewing the *Act* as a whole demonstrates that holding a non-controlling Developer who is the registered owner of a property liable as an "owner" would be inconsistent with other provisions of the *Act* related to "owner", including the following:

(a) Maintaining the major lien fund (s. 18(1));

(b) Receiving a certificate of substantial performance (s. 19(1));

(c) Retaining money related to lien funds (s. 21(1));

(d) Liability related to major lien funds and minor lien funds (s. 25)

(e) Mortgagee holdbacks by owners primarily liable on a contract (s. 26);

(f) Payment from lien funds (s. 27(1)); and

(g) Production of contracts (s. 33(1)).

Direct Benefit

44 In *Acera,* the Court of Appeal found a direct benefit to Acera given that the improvements to the land were attached to the land and owned by Acera until subdivision approval and transfer of title. Sterling was both the purchaser under the lot purchase agreement and the lien claimant. As Acera failed to transfer the lots to Sterling as contemplated, yet directed construction to commence prior to subdivision, the Court of Appeal held that Acera had benefited:[78]

> 38 Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.

[78] ***Acera**, supra* at paras 38-39 [**TAB 6**].

> 39 In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.
>
> [Emphasis added]

45 As such, Sterling, the lien claimant, was able to satisfy the Court that it was also an "owner" under its lot purchase agreement to protect its contract of construction.

46 By comparison, in *Stealth Enterprises,* the agreement of purchase and sale included a clause which stipulated as follows:[79]

> In the event the purchaser fails to complete on July 31, 1995 … all work done by the purchaser shall become the property of the vendor without compensation and the vendor shall be entitled to all benefits and registrations and plans to stratify the building without compensation to the purchaser.

47 Notwithstanding that the registered owner stood to retain the benefit of the improvements in the event the sale did not close, the Court nonetheless concluded that the work was not to its benefit:[80]

> The only way in which they stood to benefit was should the transaction not proceed, they would receive, without paying for them, certain upgrades. However, they were more interested in selling the building than reaping the so called benefits.

48 Similarly, in *Westpoint,* Your Lordship concluded that the argument that a mortgagee directly benefited from an improvement as a result of an increase in security arising from the improvement is "at best doubtful".[81] Your Lordship explained that "plainly [the improvement] was not for [the mortgagee's] direct benefit, it was for [the fee simple title holder's] direct benefit: all that the appellants could get would be an indirect benefit in

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[79] ***Stealth Enterprises****, supra* at para 2 [**TAB 8**].
[80] *Ibid* at para 40.
[81] ***Westpoint****, supra* at para 103 [**TAB 4**].

the additional security they would have if the value of the lands were increased by the buildings more in amount than the sums they paid to Irving."[82]

49 Accordingly, per the reasoning in *Westpoint* and *Stealth Enterprises*, standing to gain *some* benefit from the improvement, such as an increase in security or benefits in the event the transaction does not proceed, is insufficient. There must be a direct benefit that the claimed owner was actually seeking, such as in *Acera* where Acera directed that construction commence prior to transfer of title knowing that transfer was conditional on subdivision approval which was in its own control.

50 While the Developers did stand to receive certain improvements to the Lands without paying for them in the event the transaction did not proceed, the evidence suggests they were more interested in selling the lands than "reaping the so called benefits". The Developers were not actively involved in construction (some did not even keep apprised of the status of construction), sales could have proceeded prior to construction, and the sale price for the Developer was unconnected to the ultimate purchase price for the finished house.

51 Significantly, in the within matters involving Developer holdbacks, the circumstances confirm that each Developer did not directly benefit from the improvements as each Developer SAVO limited payment to the Developer to the amount agreed to in the Lot Sale Agreement with any additional value or benefit accruing to the Receivership estate.

Conclusion

52 In considering the foregoing, the Receiver has concluded that the Developers do not satisfy the criteria of being an "owner" under the *Act* and believe the holdback should be released to the benefit of the Receivership estate, subject to this Court's agreement in that regard.

## V RELIEF REQUESTED

53 The Receiver respectfully requests the following declaratory relief:

(a) determinations of which, if any, of the Developers satisfy the definition of "owner" as defined under the *Act;*

[82] *Ibid.*

(b) that the Receiver is not required to continue to holdback 110 percent of the value of Liens registered against Developer-owned lands where the Developer does not constitute an "owner" under the *Act*; and

(c) that the Receiver is authorized to distribute those funds no longer required to be held back in respect of Developer lands to be distributed in accordance with the administration of the receivership estate.

54 In accordance with this Court's usual practice, the Receiver does not believe any party is entitled to its costs of this Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2018**

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