

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF Section 101 of the  
*Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

BETWEEN:

**TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE  
TRUST COMPANY OF CANADA**

Applicants

- and -

**WYNFORD PROFESSIONAL CENTRE LTD. and GLOBAL MILLS INC.**

Respondents

**FACTUM OF THE APPLICANTS, TREZ CAPITAL LIMITED PARTNERSHIP and  
COMPUTERSHARE TRUST COMPANY OF CANADA**

April 24, 2015

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Applicants

- and -

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Respondents

**FACTUM OF TREZ CAPITAL LIMITED PARTNERSHIP and  
COMPUTERSHARE TRUST COMPANY OF CANADA**

**(Responding Parties To Priority Motion Brought By Metro Toronto Condominium  
Corporation No. 1037 Returnable April 28, 2015)**

**PART I - INTRODUCTION**

1. This motion is brought by the Metro Toronto Condominium Corporation No. 1037 ("MTCC 1037") to claim an equitable lien of \$1,284,508.23 (the "Arrears") for common element fee arrears owing by Wynford Professional Ltd. ("Wynford") in priority to the first mortgage held by Trez Capital Limited Partnership ("Trez") and Computershare Trust Company of Canada ("Computershare") (collectively the "Lender").

2. The sale of the Wynford Units is scheduled to be completed by the Collins Barrow Toronto Limited (the "Receiver") on April 27, 2015. Pursuant to the Order of Justice McEwen

dated March 27, 2015 ( the "**McEwen Order**"), the Receiver is to hold back an amount equal to the Arrears from the proceeds of sale (the "**Disputed Funds**") pending the determination of the priority to these funds on this motion or further Order of the Court.<sup>1</sup>

3. MTCC 1037 claims an equitable lien as a remedy for alleged unjust enrichment as a result of the alleged fraud, negligence and bad faith of Norma Walton ("**Norma**"), Ronauld Walton ("**Ronauld**") and their corporation, the Rose and Thistle Group Inc. ("**Rose and Thistle**"), a related company to Wynford. MTCC 1037 claims that the Lender failed to exercise proper due diligence when completing the Loan (defined below) and ought to have known of the alleged equitable lien at the time it registered its mortgage and as a result, the alleged equitable lien should have priority over the Lender's mortgage.

4. It is not alleged that the Lender was a participant in the alleged fraud, negligence and bad faith of Norma, Ronauld and Rose and Thistle.

5. The Lender denies that MTCC 1037 is entitled to an equitable lien for the Disputed Funds in priority to its mortgage.

6. For the purposes of this motion, the Lender and MTCC 1037 have agreed to proceed on the presumption that MTCC 1037 would be able to prove its unjust enrichment allegations against Norma, Ronauld and Rose and Thistle (the "**Presumption**"), which is being advanced in the action bearing Court File No. CV-14-513481 (the "**Fraud Action**"). The Presumption has been agreed to for the purposes of determining whether MTCC 1037's alleged equitable lien could have priority to the Disputed Funds, if proven. The Presumption is without prejudice to the

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<sup>1</sup> Tab 2 of the Lender's Second Further Supplementary Motion Record.

Lender's right to oppose MTCC 1037's claims in the Fraud Action should it be determined that the alleged equitable lien could have priority over the Lender's mortgage if the unjust enrichment allegations are proven.

## **PART II - SUMMARY OF FACTS**

### **The Parties**

7. Trez is a limited partnership that operates as a commercial mortgage lender. Computershare is a Canadian company with its head office located in Toronto, Ontario. Computershare holds the mortgage security as the custodian for Trez on Trez loans.

8. Wynford is an Ontario Corporation. Wynford was the registered owner of 83 condominium units and 297 parking spaces (the "**Wynford Units**") in a commercial condominium building located at the address municipally known as 18 Wynford Drive, Toronto, Ontario (the "**Wynford Property**").<sup>2</sup> Wynford is a single purpose company that previously formed part of the Rose and Thistle real estate portfolio. The sale of the Wynford Units is scheduled to close on April 27, 2015.

9. MTCC 1037 is the condominium corporation for the Wynford Property.<sup>3</sup>

10. The principals of Wynford and Rose and Thistle are Norma and Ronauld. Norma and Ronauld were both lawyers in good standing with the Law Society of Upper Canada (the "**LSUC**") at the time the Lender completed the Loan (defined below) but have since been

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<sup>2</sup> Affidavit of Gaetano Coscia sworn February 9, 2015 at para 6 [Coscia Affidavit].

<sup>3</sup> Coscia Affidavit at para 7.

suspended and administratively suspended by the LSUC.<sup>4</sup>

### **Background – The Loan**

11. Wynford purchased the Wynford Units on February 7, 2011. Upon purchasing the Wynford Units, Wynford became the owner of the majority of the units in the Wynford Property and:

- (a) assumed control of the MTCC 1037 condominium board (the "**Board**"); and
- (b) appointed Rose and Thistle as property manager of the Wynford Property (the "**Management**").

12. In addition to Norma and Ronauld, the Board also included three independent directors, being Stanley Bernstein, George Habib and Jonathan Griffiths (collectively the "**Independent Directors**").

13. MTCC 1037 alleges that upon assuming control of the Board and the Management, Norma and Ronauld, caused Rose and Thistle not to collect any condominium common element fees from Wynford and also failed to register a lien on title to the Wynford Units for the outstanding fees pursuant to section 85 of the *Condominium Act*. It is alleged that this caused MTCC 1037 to accrue the Arrears. This allegation is unproven and forms the basis of the Presumption.

14. In or around February 2013, Wynford approached the Lender about providing a mortgage loan to Wynford with respect to the Wynford Property (the "**Loan**"). Prior to February 2013, the Lender had a pre-existing business relationship with Norma, Ronauld and Rose and Thistle. The Lender was aware that Norma and Rose and Thistle had established themselves as active real

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<sup>4</sup> Exhibits A & B to the Coscia Affidavit.

estate investors with a good reputation in the Toronto real estate community. These negotiations proceeded well and ultimately the Lender decided to provide the Wynford Loan pursuant to the commitment letter dated February 19, 2013, wherein the Lender agreed to loan to the Borrower \$9,850,000.00 on the terms and conditions set out therein (the "**Wynford Commitment**").<sup>5</sup>

15. The purpose of the Loan was to provide first mortgage financing to assist Wynford with refinancing the Wynford Property.<sup>6</sup> Prior to the Loan being made, the Lender conducted extensive due diligence (the "**Lender's Initial Due Diligence**"). The Lender's Initial Due Diligence focused on the strength of Wynford, the state of the Wynford Property as well as the Wynford's business plan. This Lender's Initial Due Diligence, *inter alia*, included:<sup>7</sup>

- (a) a review of Wynford's financial statements;
- (b) a review of environmental reports;
- (c) review of appraisals of the Wynford Property;
- (d) review of a Building Condition assessment;
- (e) confirmation that property taxes were up to date;
- (f) confirmation of proper insurance;
- (g) review of the net worth statements of Ronauld and Norma; and
- (h) conducting a site visit.

16. As part of the Lender's practice, it does not look specifically into any condominium

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<sup>5</sup> Exhibit E to the Coscia Affidavit.

<sup>6</sup> Exhibit E to the Coscia Affidavit.

<sup>7</sup> Coscia Affidavit at para 15.



related issues as part of the Lender's Initial Due Diligence.<sup>8</sup> These issues are left to the Lender's lawyers to review and be satisfied with prior to a loan being completed. That being said, at no point in the Lender's dealings with Wynford, Rose and Thistle or Norma was the Lender given any indication that there were any deficiencies in the status of MTCC 1037 or that Wynford was in default of its common element fee payments.<sup>9</sup> Had the Lender been advised of such common element fee arrears, or other allegations of fraud that have now been made by MTCC 1037, the Lender would not have issued the Wynford Commitment and would not have completed the mortgage transaction resulting in the Wynford Mortgage.<sup>10</sup>

17. The fact that Norma and Ron were members of the Board did not raise any suspicions with the Lender. This did not seem out of the ordinary to the Lender, given that Norma and Ronauld were shareholders, officers and directors of Wynford and that Wynford owned approximately 70% of the condominium units in the Wynford Property. Further, at the time that the Loan was entered into, the Lender understood Norma and Ronauld to be lawyers and there was no reason to believe that they were acting dishonestly.<sup>11</sup>

18. Once the Lender issued the Wynford Commitment, the Lender retained Blaney McMurtry LLP ("**Blaneys**") as its real estate lawyers to complete the mortgage transaction.<sup>12</sup> In this capacity, Blarneys, on behalf of the Lender, made the usual inquiries with respect to the status of MTCC 1037.

19. Blaneys was previously familiar with Norma, Ronauld and Rose and Thistle, having

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<sup>8</sup> Coscia Affidavit at para 16.

<sup>9</sup> Coscia Affidavit at para 16.

<sup>10</sup> Coscia Affidavit at para 16.

<sup>11</sup> Coscia Affidavit at para 17.

<sup>12</sup> Affidavit of Robert Cohen sworn February 10, 2015 at para 3 [Cohen Affidavit].

acted for the Lender on an earlier mortgage transaction between the Lender and Wynford related company.<sup>13</sup>

20. Wynford was independently represented in respect of the Loan by J. Todd Holmes ("Mr. Holmes"), formerly of Devry Smith Frank LLP. Blaneys had no direct communication with the principals of Wynford and all of the executed security instruments were provided to Blaneys by Mr. Holmes' office.<sup>14</sup>

21. Prior to closing the Loan and advancing the funds, Blaneys obtained two separate status certificates from MTCC 1037 dated March 6, 2013, one in respect of the condominium units<sup>15</sup> (the "**Condominium Status Certificate**") and one in respect of the parking units<sup>16</sup> (the "**Parking Status Certificate**") (collectively the "**Status Certificates**"). The Status Certificates, *inter alia*:

- (a) stated that Wynford was not in default of payment of common element fees for the Wynford Units (paragraph 5 of the Condominium Status Certificate and paragraph 1 of the Parking Status Certificate);
- (b) appended a list of all the Wynford Units which clearly stated that under the column "Common Expenses Payment" that the Wynford Units were "Not in default" (schedule attached to the Condominium Status Certificate and the Parking Status Certificate); and
- (c) stated that the MTCC 1037 reserve fund was in good order (paragraphs 13-16 of the Condominium Status Certificate).

22. In addition to the Status Certificates, Blaneys, on behalf of the Lender, obtained a Statutory Declaration sworn by Norma on behalf of Wynford dated March 6, 2013 (the

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<sup>13</sup> Cohen Affidavit at para 7.

<sup>14</sup> Cohen Affidavit at para 8.

<sup>15</sup> Exhibit F to the Coscia Affidavit

<sup>16</sup> Exhibit G to the Coscia Affidavit.

"Statutory Declaration").<sup>17</sup> The Statutory Declaration stated, *inter alia*, that:

- (a) Norma was unaware of any corporation who would have any claim or interest in the Property that is adverse or inconsistent with the Borrower's title (paragraph 3);
- (b) there were no special assessments contemplated by MTCC 1037 and that there were no legal actions pending or in conflict by or against MTCC 1037 (paragraph 12);
- (c) the Borrower had complied with all terms, conditions, rules and regulations contained in the respective Condominium Declaration, By-Laws and Regulations since the Borrower purchased the Wynford Property (paragraph 14); and
- (d) the representations made to the Lender in the Wynford Commitment and the other related security arising therefrom was true and accurate (paragraph 31).

23. In reliance, *inter alia*, on the representations made in the Status Certificates and the Statutory Declaration, the Lender fully advanced the Loan in the sum of \$9,850,000.00 to the Borrower on March 7, 2013.<sup>18</sup>

24. As security for the Loan, the Borrower provided the Lender, *inter alia*, a charge/mortgage between Wynford Professional Centre Ltd., as Chargor and Computershare Trust Company of Canada, as Chargee registered on title in Land Titles as Instrument No. AT3251575 (the "**Wynford Mortgage**").<sup>19</sup> The Wynford Mortgage was at all material times registered in first position on all of the Wynford Units.

25. The Lender had no knowledge of the Arrears or MTCC 1037's alleged equitable lien at any time prior to the registration of the Wynford Mortgage and advanced funds under the Loan.<sup>20</sup>

26. Further, Blaneys completed title searches of the Wynford Units prior to completing the

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<sup>17</sup> Exhibit H to the Coscia Affidavit.

<sup>18</sup> Exhibit I to the Coscia Affidavit.

<sup>19</sup> Exhibit J to the Coscia Affidavit.

<sup>20</sup> Coscia Affidavit at para 23.

Loan, which showed that no statutory liens for common element fee arrears were registered on title to the Wynford Units pursuant to section 85 of the *Condominium Act*.<sup>21</sup>

27. According to MTCC 1037, Wynford owed MTCC 1037 \$811,841.34 as at March 7, 2013 for unpaid common element fees. The balance of the Arrears accrued after the registration and advance of funds of the Wynford Mortgage.<sup>22</sup>

### **The Appointment of the Manager and the Discovery of the Arrears**

28. In or around November 8, 2013, the Lender became aware that Norma and Ronauld were in a dispute with their business partner Dr. Stanley Bernstein. As a result of this dispute, pursuant to the Order of Justice Newbould dated January 5, 2013 (the "**Manager Order**") Schonfeld Inc. Receivers + Trustees (the "**Manager**") was appointed Manager of Wynford and 31 other companies related to Rose and Thistle.<sup>23</sup>

29. Following the appointment of the Manager, the Lender and their lawyers engaged in discussions with the Manager and the Manager's counsel to inquire into the state of Wynford and the Wynford Property. It was during these discussions that the Lender first became aware that MTCC 1037 was claiming that Wynford was owed over \$1,200,000.00 of common element fee arrears.<sup>24</sup>

### **The Appointment of the Receiver**

30. Pursuant to the Order of Justice Wilton-Siegel dated April 2, 2014, the Wynford Units

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<sup>21</sup> Coscia Affidavit at para 24.

<sup>22</sup> Exhibit 1 to the Affidavit of Kystra Ryan sworn April 22, 2015.

<sup>23</sup> Exhibit N to the Coscia Affidavit.

<sup>24</sup> Coscia Affidavit at para 26.

were removed from control of the Manager and the Receiver was appointed as receiver of Wynford (the "**Receiver Order**").<sup>25</sup>

31. In May 2014, the Receiver made payment of the common element fee arrears that were owing by Wynford to MTCC 1037 for the months of February, March and April 2014.<sup>26</sup> At this time, MTCC 1037 had still not registered a lien on title pursuant to section 85 of the *Condominium Act*. The Receiver has continued to keep the common element fees current since it made payment in May 2014.<sup>27</sup>

#### **The Lender and Blaneys Exercised the Proper Due Diligence**

32. The Lender and Blaneys dispute MTCC 1037's claim that they failed to exercise proper due diligence when completing the Loan. In response to this allegation, Robert Cohen Q.C. ("**Cohen**") of Blaneys states that:

- (a) the fact that Norma and Ronauld were members of the board of directors of MTCC 1037 and the fact that Norma signed the Status Certificates did not raise any suspicions. This did not (and does not) seem unusual to Cohen, given that:
  - (i) Norma and Ronauld were shareholders, officers and directors of Wynford;
  - (ii) Wynford owned approximately 70% of the condominium units in the Wynford Property; and
  - (iii) it is common for principals of companies owning a large number of condominium units to be voted in as members of the board of directors of the condominium corporation established to govern the condominium in

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<sup>25</sup> Exhibit Q to the Coscia Affidavit.

<sup>26</sup> Affidavit of Dalechand Naraine sworn January 14, 2015 at para 38.

<sup>27</sup> Coscia Affidavit at paras 29 & 30.

which the company owns such units;<sup>28</sup>

- (b) Wynford was represented by its own independent lawyer, and the principals of the Wynford were practicing lawyers. In the circumstances, there was no reason to believe that Wynford was acting dishonestly or that the information provided by Mr. Holmes, as Wynford's lawyer, which included the Status Certificates, was incorrect or fraudulent.<sup>29</sup>
  
- (c) he disagrees with the assertion that the Lender failed to exercise proper due diligence by relying on "old financial statements" and not requesting updated financial statements upon receipt of the Status Certificates.<sup>30</sup> Cohen states that the accepted practice among commercial real estate lawyers in Ontario when acting for lenders on mortgage financing transactions is that they rely on statements made in status certificates provided by the condominium corporations and in the statutory declarations provided by borrowers. Further, Cohen states that they do not insist on the delivery of up-to-date financial statements and in fact, this reliance is codified in sections 76(4) and 76(6) of the *Condominium Act*.<sup>31</sup>
  
- (d) when Blaneys obtained the Status Certificates and the Statutory Declaration in this case, there was nothing unusual and there were no "red flags" raised concerning any of the parties or the transaction, notwithstanding that the financial statements were not up-to-date. Therefore, there was no reason, nor obligation in

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<sup>28</sup> Cohen Affidavit at para 13.

<sup>29</sup> Cohen Affidavit at para 14.

<sup>30</sup> Cohen Affidavit at para 15.

<sup>31</sup> Cohen Affidavit at para 16.

law, to look behind either the Status Certificates or the Statutory Declaration or to make additional inquiries about the statements therein.<sup>32</sup>

### **The Lender's Expert Witness Evidence – The Loeb Affidavit**

33. The Lender retained Audrey Loeb ("Loeb") of Miller Thomson LLP to provide her opinion on the reasonableness and legal effect of the steps taken by the Lender and Blaneys in completing the Loan and more specifically, reviewing the Status Certificates. Loeb is a leading lawyer in the area of condominium law in Ontario and author of two textbooks on condominium law: *Condominium Law and Administration* (binder service, Thomson Carswell) and the *Condominium Act: A User's Manual* (softcover, Thomson Carswell).

34. In Loeb's affidavit sworn February 20, 2015 (the "**Loeb Affidavit**"), Loeb provides an overview of the purposes of status certificates within the context of the legislative framework of the *Condominium Act*. At paragraphs 13 -21 of the Loeb Affidavit, Loeb explains that:

- (a) the consumer protection nature of the *Condominium Act*, its explicit provisions, and the case law on status certificates all provide that a mortgagee is entitled to rely on the information contained in (or omitted from) the status certificate, and that a condominium corporation is bound by the same as against the mortgagee;
- (b) the documents appended to the prescribed status certificate form are provided for information purposes only and do not trump the explicit statements made in the status certificate;
- (c) the only time a status certificate recipient may be required to "look behind" the status certificate would be if the status certificate, on its face, contained information which a reasonable recipient would further investigate. Unless the representations made on a status certificate clearly point to an issue for which a reasonable recipient would make further inquiries, that recipient is entitled to rely on that information and is protected from proceedings commenced by the condominium with regard to same;

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<sup>32</sup> Cohen Affidavit at para 17.

- (d) these provisions of the *Condominium Act* correspond with sections 72(1) and 78(5) of the *Land Titles Act*.<sup>33</sup>

35. In Loeb's analysis of the facts of this case, she determined that the statements contained in the Status Certificates would offer no suggestion whatsoever to Blaneys that the Wynford Units had common element fee arrears. At paragraph 23 of the Loeb Affidavit, Loeb addresses MTCC 1037's allegation that the Lender failed to exercise proper due diligence in reviewing the Status Certificates for the Wynford Units and states that:

- (a) it was not irregular and should not have raised any concerns that Norma signed the Status Certificates given her role on Board and as principal of Wynford;
- (b) there was no evidence of circumstances to raise suspicions of the alleged wrongdoing of Norma and Ronauld, and in the absence of such suspicions, it would go well beyond the normal practice of a condominium lawyer to make inquiries with all members of the Board as to the affairs of MTCC 1037;
- (c) there was no onus on the Lender to make further enquiries to confirm whether later financial statements existed in order to confirm clear representations of the Wynford Units and no arrears as set out in the Status Certificates.<sup>34</sup>

36. Accordingly, Loeb concludes at paragraph 24 of the Loeb Affidavit that it was reasonable for the Lender to rely on the Status Certificates and that the Status Certificates did not contain representations which would raise suspicions on the part of Blaneys or otherwise shift the onus

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<sup>33</sup> Affidavit of Audrey Loeb sworn February 20, 2015 at paras 13- 21 [Loeb Affidavit].

<sup>34</sup> Loeb Affidavit at para 22.



of the Lender or Blaneys to "look behind" the Status Certificates.<sup>35</sup>

### **MTCC 1037's Expert Witness Evidence – The Lash Affidavit**

37. MTCC 1037 retained Denise Lash ("Lash") of Aird & Berlis LLP to provide her opinion on the reasonableness and legal effect of the steps taken by the Lender and Blaneys in completing the Loan and more specifically, reviewing the Status Certificates.

38. In Lash's affidavit sworn March 2, 2015 (the "**Lash Affidavit**"), Lash disagrees with Loeb and states that her opinion is that it was unreasonable that the Lender and Blaneys did not make further inquiries in respect of the Status Certificates. Specifically, Lash states that the Lender failed to exercise proper due diligence by:

- (a) relying on outdated financial statements from 2010; and
- (b) proceeding with the Wynford Mortgage in the absence of up to date information about the reserve fund.<sup>36</sup>

(the "**Alleged Red Flags**")

39. In her conclusion of the Lash Affidavit, Lash states she believes that the above mentioned defects constituted "red flags" which, combined with the nature of the relationship between Norma, Rose and Thistle and Wynford, ought reasonably to have necessitated further inquiry by the Lender but did not conclude that the Lender was wilfully blind.<sup>37</sup>

### **The Lender's Expert Witness Evidence – The Loeb Reply Affidavit**

40. Loeb commented on the Lash Affidavit and the Alleged Red Flags raised by Lash in her

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<sup>35</sup> Loeb Affidavit at para 24.

<sup>36</sup> Affidavit of Denise Lash sworn March 2, 2015 at para 50 [Lash Affidavit].

<sup>37</sup> Lash Affidavit at para 50.

reply affidavit sworn March 18, 2015 (the "**Loeb Reply Affidavit**"), *inter alia*, as follows:

- (a) to force mortgagees to, in essence, "satisfy themselves" that the statements made in Status Certificates were correct by examining the content of the enclosures provided would run directly counter to consumer protection and would diminish severely the exercise of a status certificate, that is, to have a condominium corporation make statements about its affairs;<sup>38</sup>
- (b) in her opinion, the Alleged Red Flags, in the context of the Lender lending to Wynford, were of far less importance to a lender than the representations that there were no common expense arrears for the units in question which would have taken priority over the loan advances; and<sup>39</sup>
- (c) neither the reserve fund nor the audited financial statements would have provided any unit specific information to the Lender, which would have contradicted the clear statements made in the Status Certificates in regard to common element arrears.<sup>40</sup>

#### **MTCC 1037's Expert Witness Evidence – The Lash Reply Affidavit**

41. Lash delivered her reply to the Loeb Reply Affidavit by way of her reply affidavit sworn March 25, 2015 (the "**Lash Reply Affidavit**"). The Lash Reply Affidavit commented on the Loeb Reply Affidavit and reiterated the reasons for her opinion that the Lender failed to exercise proper due diligence when dealing with the Status Certificates.

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<sup>38</sup> Affidavit of Audrey Loeb sworn March 18, 201 at para 6 [Loeb Reply Affidavit].

<sup>39</sup> Loeb Reply Affidavit at para 9.

<sup>40</sup> Loeb Reply Affidavit at para 10.

**The Lender's Potential Shortfall**

42. The proceeds of sale of the Wynford Units are insufficient to pay both the Wynford Mortgage and the Arrears. If MTCC 1037 is granted priority to the Disputed Funds, the Lender will suffer a shortfall and will not fully recover the indebtedness owing on the Loan.

**PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

43. The issue on this motion is whether the alleged equitable lien for the Arrears being asserted by MTCC 1037 has priority over the Wynford Mortgage.

44. The Lender states that the alleged equitable lien for the Arrears asserted by MTCC 1037 does not have priority over the Wynford Mortgage because:

- (a) MTCC 1037 is not entitled to an equitable lien;
- (b) in the alternative, even if MTCC is entitled to an equitable lien, it does not have priority because section 93 of the *Land Titles Act* (the "*LTA*") provides the Wynford Mortgage with priority over all unregistered interests despite actual notice;
- (c) even if the doctrine of actual notice applies, the Lender did not have actual notice nor was the Lender wilfully blind to the alleged equitable lien;
- (d) the equities of the case favour the Lender;
- (e) MTCC 1037 is not able to revive the statutory lien for the Arrears; and
- (f) there is no law to support MTCC 1037's position for the imposition of an equitable lien in priority to a registered mortgage.

**A. The Priority to the Disputed Funds is Governed by the *Land Titles Act***

45. The dispute as to the priority to the Disputed Funds is between a registered charge of the

Wynford Units (the Wynford Mortgage) and a claim to a unregistered equitable interest in the Wynford Units (MTCC's Claim for an equitable lien based on the Arrears). This dispute is governed by the *LTA*.<sup>41</sup>

**B. MTCC 1037 is not Entitled to an Equitable Lien**

46. Section 85 *Condominium Act, 1998*, allows a condominium corporation to register a lien against an owner's unit for up to three (3) months of common element fee arrears. If a certificate of lien is not registered on title during this time period, the lien expires. Once a certificate of lien is registered pursuant to section 85(3), all future unpaid common element fee arrears are captured under the registered lien.<sup>42</sup>

47. Section 86 of the *Condominium Act*, provides that a certificate of lien registered pursuant to section 85 has priority over all mortgages registered against the unit in question provided that the condominium corporation complies the notice provisions set out in section 86(3). Section 86(3) requires that the condominium corporation shall, on or before the day a certificate of lien is registered, give written notice of the lien to every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien.<sup>43</sup>

48. MTCC 1037 has no statutory lien on the Wynford Unit for the Arrears as its lien for common element arrears was restricted to 3 months of common element fee arrears pursuant to section 85 of the *Condominium Act*.<sup>44</sup> As set out in paragraph 31, the Receiver made payment of three (3) months of common element fees that were owing by Wynford to MTCC 1037 in May

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<sup>41</sup> *Land Titles Act*, RSO 1990, c L5 [*LTA*].

<sup>42</sup> *Condominium Act*, RSO 1998 c 19, s 85 [*Condominium Act*].

<sup>43</sup> *Ibid*, s 86.

<sup>44</sup> *Ibid*, s 85.

2014. The Receiver has continued to keep the common element fees current since it made payment in May 2014. As a result, MTCC 1037 was paid the full amount that was capable of being asserted as a statutory lien and did not ever register a lien or give the Lender notice as required under sections 85 and 86 of the *Condominium Act*.

49. The Court of Appeal delineated the limitations of a condominium corporation's statutory lien rights for common element fee arrears in *Toronto Standard Condominium Corporation No. 1908 v. Stefcu Plumbing & Mechanical Contracting Inc.* In this case, the condominium corporation attempted to revive its lien rights for past common element fee arrears following the expiry of its lien and to claim priority over a mortgagee on an application brought pursuant to section 134 of the *Condominium Act*. On this issue Court of Appeal stated:

.....s. 86 grants the condominium corporation a powerful tool by creating a priority for the collection of common expenses. However, the use of that tool is conditional on the condominium corporation fulfilling its obligation to register its lien and provide notice to encumbrancers.

In my view, this part of the Act is designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of the various stakeholders. Lane J. was correct in *York Condominium Corp. No. 482 v. Christiansen*,(2003), 2003 CanLII 11152 (ON SC), 64 O.R. (3d) 65 (Ont. S.C.J.) when he observed, at para 5: "[A] principal object of the Act is to achieve fairness among the parties -- owners, their tenants, their mortgagees, the corporation itself -- in raising the money to keep the common enterprise solvent."

In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common expenses against the right of a mortgagee to have notice of a default in the payment of common expenses. This right of notice is of significant benefit to a mortgagee. It allows a mortgagee to determine if it should take steps to protect its interests under s. 88, by paying the common expenses, treating the failure to pay as a default under the mortgage, and commencing enforcement proceedings. The proposed revival strategy ignores the fair balance the legislature has struck between the rights of mortgagees and condominium corporations.

.....  
In summary, I am of the view that the revival scheme proposed by Toronto Standard is inconsistent with the purpose of the Act and the intention of the legislature. This interpretation of the Act upsets the balancing of the rights of stakeholders, by granting an unfettered right to a priority to condominium corporations, to the detriment of mortgagees.

Toronto Standard's position is also inconsistent with the scheme of the Act. If its interpretation were accepted, and a priority could be revived utilizing the s. 134 procedure for an expired lien

right, s. 85(2) would be rendered meaningless. A condominium corporation could ignore its obligation to register a lien under that sub-section, safe in the knowledge that it could always assert its lien rights later and still claim priority. Thus, Toronto Standard's interpretation would result in a statute that is internally inconsistent.<sup>45</sup>

50. When a statute has occupied the field of when a statutory lien will be created, in circumstances where a statutory lien was created in accordance with the statute, it is not proper for the court to create an equitable lien in its place.<sup>46</sup>

51. The circumstances of this case are analogous to case law under the *Construction Lien Act* (the "CLA"), where a lien claimant's failure to comply with the statutory provisions of the CLA to perfect a construction lien results in the expiry of lien rights. In these circumstances a claimant whose lien expired has no right to assert a claim to an interest in land in some other manner.<sup>47</sup>

52. Having failed to comply with sections 85 and 96 of the *Condominium Act*, MTCC 1037's lien rights expired and it cannot now assert an equitable lien in place of the expired statutory lien. Accordingly, MTCC 1037 has no basis to claim an equitable claim against the Wynford Units and is now left to its other remedies, including a claim for damages against Wynford, Rose and Thistle, Norma, Ronauld and the Independent Directors.

**C. If MTCC 1037 is Entitled to an Equitable Lien, it does not have Priority to the Wynford Mortgage**

53. In the alternative, if MTCC 1037 is entitled to an equitable lien for the Arrears, the Wynford Mortgage takes priority over all unregistered interests pursuant to section 93(3) of the *LTA* and the equitable lien cannot have priority over the Wynford Mortgage because the doctrine

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<sup>45</sup> *Toronto Standard Condominium Corporation No. 1908 v. StefcO Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696 at paras 40-46 ["*Stefco*"].

<sup>46</sup> *Talbot v Pawelzik*, [2005] OJ No 748 at para 20 ["*Talbot*"].

<sup>47</sup> *Rafat General Contractor Inc. v. 1015734 Ontario Ltd.*, [2005] OJ No 5526 at para 3 ["*Rafat*"]

of actual notice does not apply.

54. In the further alternative, even if the doctrine of actual notice does apply, the Lender did not have actual notice of the alleged equitable lien nor was the Lender wilfully blind to the alleged equitable lien. Accordingly, MTCC 1037's alleged equitable lien does not have priority over the Wynford Mortgage.

Section 93(3) of the LTA

55. Section 93(3) of the *LTA* states:

Effect of charge when registered

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land. [Emphasis Added]

56. Under Ontario's land titles system, the rights of a bona fide purchaser for value (including a mortgagee) who has a registered interest in a property trumps any prior unregistered interests in that property.<sup>48</sup>

57. Taken at its highest, MTCC 1037's claim to an equitable lien is an unregistered interest in the Wynford Units. An equitable lien in these circumstances would be a remedial device that would only attach to the Wynford Units at the time it was imposed by the Court.<sup>49</sup> In these circumstances the equitable lien would be an interest that came into existence after the registration of the Wynford Mortgage and could only be an interest in subsequent priority.

58. Section 93(3) of the *LTA* operates to oust the doctrine of actual notice in Ontario in

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<sup>48</sup> 909403 *Ontario Ltd. v. DiMichele*, 2014 ONCA 261 at paras 107 & 108 [“*DiMichele*”].

<sup>49</sup> *Scherer v. Price Waterhouse Ltd.*, [1985] OJ No 881 at para 98 [“*Scherer*”].

respect of a registered charge notwithstanding the chargee's actual notice of any unregistered interest in a property, including an equitable lien.<sup>50</sup> Pursuant to section 93(3) of the *LTA*, even if the Lender had actual notice of the alleged equitable lien, which is denied and not supported anywhere in the evidence, MTCC 1037's equitable lien is subordinate to the Wynford Mortgage.

59. This point was clearly articulated by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, where he stated:

In addition to the equitable considerations addressed above, I would add, if it were necessary to address this issue, that I see no basis for excluding the operation of section 93(3) of the *Land Titles Act* in respect of an equitable lien. There is nothing in the language of section 93(3) that provides that the principles of equity are intended to override the operation of this provision of the *Land Titles Act*. Indeed, an unregistered equitable lien would appear to be the very type of interest to which section 93(3) is directed.<sup>51</sup>

The Lender Did Not Have Actual Notice Nor Was It Wilfully Blind To The Alleged Equitable Lien

60. Even if the doctrine of actual notice does apply, MTCC 1037's claim to an equitable lien cannot have priority in these circumstances as the Lender did not have actual notice nor was the Lender wilfully blind to the alleged equitable lien.

61. The Supreme Court of Canada addressed the doctrine of actual notice in the context of the priority of interests under what is now section 78 (5) the *LTA* in *United Trust Co. v. Dominion Stores Ltd.* The doctrine of actual notice contemplates that where a holder of a registered interest has actual notice of a prior unregistered interest at the time it registers its

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<sup>50</sup> *Holborn Property Investments Inc. v. Romspen Investment Corporation*, [2008] OJ No 5722 at para 42 ["*Holborn*"]; *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648 at paras 121-136 & 185, (reversed on other grounds by 2011 ONCA 817) ["*Woods*"].

<sup>51</sup> *Woods*, *supra* note 49 at para 185.



interest, the registered interest will be subordinate to the unregistered interest.<sup>52</sup>

62. Actual notice was interpreted by Epton J., as she then was, in *Durrani v. Augier*, wherein she stated:

Actual notice is knowledge, not presumed knowledge as in the case of constructive notice. The concept of actual notice has most often been discussed in the context of the Registry Act, the second form of land registration in Ontario. Recently Salhany J. in *Canadian Imperial Bank of Commerce v. Rockway Holdings Ltd.* (1996), 1996 CanLII 8007 (ON SC), 29 O.R. (3d) 350, 3 R.P.R. (3d) 174 (Gen. Div.) reviewed the authorities on the definition of actual notice and concluded that the term "actual notice" [at p. 356]:

means actual notice (as opposed to constructive notice) of the nature of the prior agreement and its legal effect. There is no requirement that there be actual notice of the precise terms of the agreement, such as the amount of the consideration passing between the parties or the term of the agreement. The test, in my view, is whether the registered instrument holder is in receipt of such information as would cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument.

Thus, a person has actual notice if he or she is aware of the existence of a legal right. It is not necessary that the person have knowledge of the precise details of that legal right. In circumstances that involve the transfer of title, a purchaser does not need to have actual knowledge of the particular person who is in fact the true owner or holder of title of the property. It is sufficient for actual notice that the purchaser is aware that the person with whom they are dealing as the vendor does not have a legitimate claim to the title. This follows, since the logical inference to draw from the knowledge that the vendor with whom the purchaser is dealing does not have a legitimate right to the title is that someone else is, in fact, the true owner.<sup>53</sup> [Emphasis Added]

63. The Courts have held that one cannot resort to wilful blindness to avoid obtaining actual knowledge.<sup>54</sup>

64. The test for wilful blindness is a factual one. In the circumstances of this case, in order for the Lender to be found to have been wilfully blind, MTCC 1037 must demonstrate that the Lender's suspicions arose to the point where it saw the need to make further inquiries but

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<sup>52</sup> *United Trust Co. v. Dominion Stores Ltd.*, [1976] SCJ No 99 at para 90 ["*United Trust*"].

Please see note 51 above, wherein Wilton-Siegel J. considered *United Trust* in his reasons and determined that section 93(3) of the *LTA* provided a registered mortgage absolute priority over an equitable lien in circumstances where the mortgagee had actual notice of the equitable lien.

<sup>53</sup> *Durrani v. Augier*, [2000] OJ No 2960 at paras 61 & 62 ["*Durrani*"].

<sup>54</sup> *Vieira v. Breg Trading Ltd.*, 2014 ONSC 4570 at para 36 ["*Vieira*"].

deliberately chose not to make those inquiries.<sup>55</sup>

65. MTCC 1037's allegation is not that the Lender was wilfully blind, rather that the Lender failed to carry out proper due diligence and had it done so, the existence of the Arrears and corresponding equitable lien would have been uncovered. This is an allegation that the Lender had "constructive notice" on the basis that the Lender "ought to have known" of the Arrears.

66. The Loeb Affidavit and the Loeb Reply Affidavit provide a fair, objective and independent opinion that it was reasonable for the Lender and Blaneys to rely on the Status Certificates and that there were no circumstances that would raise suspicions on the part of Blaneys to shift the onus to "look behind" the Status Certificates. This opinion is based on a comprehensive analysis of the facts of this case and relevant law on point.

67. The Lender denies the allegation that it failed to conduct proper due diligence and states that it was entitled to rely on the statements made in the Status Certificates and in the Statutory Declaration. The Lender adopts the opinion set in the Loeb Affidavit and Loeb Reply Affidavit in support of this position.

68. MTCC 1037 cannot obtain priority over the Wynford Mortgage in these circumstances because there is no evidence that the Lender had actual knowledge of the equitable lien or was wilfully blind to avoid obtaining actual knowledge of the equitable lien. To the contrary, the evidence demonstrates that the Lender received explicit statements in the Status Certificates and the Statutory Declaration that there were no common element fees owing to MTCC 1037 at the time of the registration of the Wynford Mortgage, there were no suspicious circumstances and

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<sup>55</sup> *Canada Mortgage and Housing Corporation v. Gray*, 2013 ONSC 1986 at paras 63-69, aff'd by 2014 ONCA 236 at para 42 ["CMHC"].

had there was no need to make further enquiries.

**D. The Equities Favour the Lender**

69. The Lender submits that the Court need not consider the equities when making its determination of priority to the Disputed Funds as a complete answer lies with section 93(3) of the *LTA*, or alternatively, in MTCC 1037's failure to satisfy the test in the doctrine of actual notice. However, even if consideration is given to the equities of this matter, the equities favour the Lender or are at best equal with those of the Lender.

70. The Court of Appeal held in *Toronto Dominion Bank v. Faulkner* that in circumstances where the equities are equal between competing claims in a property, legal title prevails.<sup>56</sup>

71. The Lender is a victim of fraud having relied on the misrepresentations made in the Status Certificates and Statutory Declaration. MTCC 1037 admits that the Lender is a victim of Norma, Ronauld and Rose and Thistle's alleged fraud, negligence and bad faith at paragraph 7 of its factum.

72. MTCC 1037 attempts to distinguish between the circumstances of the parties by stating that the Lender should have uncovered the Arrears through proper due diligence whereas it did not have any way to prevent the allegedly improper action. MTCC 1037's should not succeed in this argument as it has failed to put forward any evidence to demonstrate:

- (a) why the Independent Directors could not have detected the alleged fraud, negligence and bad faith; or
- (b) how Independent Directors complied with requisite standard of care and exercise the care, diligence and skill that a reasonably prudent person would exercise in

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<sup>56</sup> *Toronto Dominion Bank v. Faulkner*, [1990] OJ No 1085 (ONCA) at paras 18, 19 & 24 ["*Faulkner*"].

comparable circumstances as set out in section 37 of the *Condominium Act*.<sup>57</sup>

73. The Lender submits that the equities favour the Lender. MTCC 1037 and the Independent Directors were in the best position to detect the alleged fraud, negligence and bad faith and had the Independent Directors exercised the requisite standard of care to protect MTCC 1037 and not allowed Norma, Ronauld and Rose and Thistle to operate unchecked, the alleged improper conduct would have been detected. In light of this failure, the equities favour the Lender, an arms' length party and MTCC 1037 cannot assert that it did not have any way to prevent the allegedly improper conduct when the misconduct arose within its own organization.

74. If the equities do not favour the Lender, the equities of the circumstances that led to the accrual of the Arrears are at best equal between MTCC 1037 and the Lender. Accordingly, pursuant to *Toronto Dominion Bank v. Faulkner*, the Lender as holder of a registered charge, should have priority to the Disputed Funds.

**E. MTCC 1037 is not Entitled to Revive its Lien Rights**

75. Having failed to comply with sections 85 and 86 of the *Condominium Act*, MTCC 1037 is not entitled to revive its lien rights pursuant to section 134 of the *Condominium Act*.

76. This issue was determined in *Toronto Standard Condominium Corporation No. 1908 v. Stefcó Plumbing & Mechanical Contracting Inc.* where the Court of Appeal decided that such a revival scheme was inconsistent with the purpose of the *Condominium Act* and the intention of the legislature and that such an interpretation would upset the balancing of the rights of stakeholders, by granting an unfettered right to a priority to condominium corporations, to the

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<sup>57</sup> *Condominium Act*, *supra* note 42, s 37.

detriment of mortgagees.<sup>58</sup>

77. The fact that there was no allegation of fraud, negligence or bad faith in *Stefco* is immaterial. MTCC 1037's position is that its lien rights should be revived and would still run afoul of legislature's balancing of the mortgagee's right to proper notice of a default in order to allow it to consider all of its options.<sup>59</sup>

78. There is no evidence that Lender had actual knowledge of the Arrears or the alleged equitable lien. Accordingly, MTCC 1037 should not be permitted to revive its lien rights in order to take priority over the Disputed Funds in conflict with the Lender's rights under the *LTA*. In these circumstances, MTCC 1037's proper remedy is a claim for damages against Norma, Ronauld, Rose and Thistle and the Independent Directors.

**F. The Caselaw Relied upon by MTCC 1037 is Inapplicable**

*CIBC Mortgages Inc. (c.o.b. Firstline Mortgages) v. Computershare Trust Co. of Canada*

79. MTCC 1037 relies on *CIBC Mortgages Inc. (c.o.b. Firstline Mortgages) v. Computershare Trust Co. of Canada*<sup>60</sup> ("*CIBC Mortgages*"), for the proposition that an "innocent" party adversely affected by the fraudulent actions of the mortgagor should have the priority of its debt protected.

80. *CIBC Mortgages* was decided pursuant to section 155 of the *LTA* on the basis that the registration of a void instrument does not cure its defect and a void instrument or registration cannot give good title. Accordingly, it was held that in circumstances where a mortgage was

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<sup>58</sup> *Stefco*, *supra* note 45 at para 45.

<sup>59</sup> *Ibid* at para 42.

<sup>60</sup> *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada*, 2015 ONSC 543.

fraudulently discharged, the registration of that discharge was void and could not give clear title to fraudsters and subsequent mortgagees dealing directly with the fraudsters did not have priority to the mortgage that had been fraudulently discharged.<sup>61</sup>

81. This case was not decided under section 93(3) of the *LTA* and does not stand for the proposition that an "innocent" party adversely affected by the fraudulent actions of the mortgagor should have its unregistered claim protected in priority to a registered mortgage.

*XDG Ltd. v. 1099606 Ontario Ltd.*

82. MTCC 1037 relies on *XDG Ltd. v. 1099606 Ontario Ltd.*<sup>62</sup> ("*XDG*") for the proposition that it would be unconscionable and inequitable to allow a mortgagee to obtain priority based on wilful blindness or negligence.

83. *XDG* is not applicable as it was decided under the *Ontario Business Corporation Act*, a different statutory framework with different considerations. This case is governed by the *LTA* and the *Condominium Act*. As set out by Loeb in the Loeb Reply Affidavit, there is a robust body of case law on status certificates under section 76 of the *Condominium Act* such that reference to general corporate law cases like *XDG* is unnecessary. More specifically, the facts of *XDG* deal with a due diligence situation in which a lender took almost no steps, unlike the steps which were taken by Blaneys in the case at bar. Further, the lender in the *XDG* case was not statutorily entitled to rely on the statements in a status certificate, as the Applicants were entitled to do on the Status Certificates.<sup>63</sup>

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<sup>61</sup> *Ibid* at para 58.

<sup>62</sup> *XDG Ltd. v. 1099606 Ontario Ltd.*, [2004] OJ No 1695.

<sup>63</sup> Loeb Reply Affidavit *supra* note 38 at para 13.

**G. If the Lender is Entitled to Priority Over the Mortgage, this Priority should be Limited to the Portion of the Arrears that Existed at the Time the Wynford Mortgage was Registered**

84. As a further alternative, if MTCC 1037 is entitled to an equitable lien in priority over the Wynford Mortgage, this priority should be limited to \$811,841.34. This is the amount of the Arrears that predate the Wynford Mortgage. A claim for any subsequent amount would clearly be subsequent to the registered charge of the Wynford Mortgage.

**CONCLUSION**

85. The Lender submits that MTCC 1037's motion should fail as its claim is contrary to section 93(3) of the *LTA* and there is no authority to support its alleged equitable lien being given priority over the Wynford Mortgage. The position taken by MTCC 1037 is not supported by the evidence nor is it tenable at law.

86. Although MTCC 1037 may be a victim of fraud, negligence and bad faith on the part of Norma, Ronauld and Rose and Thistle, these unfortunate circumstances do not provide the legal basis to jump the queue and obtain priority over the registered interest in the Wynford Mortgage.


**PART IV - ORDER REQUESTED**

87. The Lender requests an Order:

- (a) dismissing this motion with costs payable to it by MTCC 1037; and
  - (b) releasing the Disputed Funds being held pursuant to the McEwen Order.
-

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: April 24, 2015

  
\_\_\_\_\_  
**IRVING MARKS**

Date: April 24, 2015

  
\_\_\_\_\_  
**DOMINIQUE MICHAUD**



**SCHEDULE 'A'**  
**LIST OF AUTHORITIES**

1. *Toronto Standard Condominium Corporation No. 1908 v. StefcO Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696.
2. *Talbot v Pawelzik*, [2005] OJ No 748.
3. *Rafat General Contractor Inc. v. 1015734 Ontario Ltd.*, [2005] OJ No 5526.
4. *909403 Ontario Ltd. v. DiMichele*, 2014 ONCA 261.
5. *Scherer v. Price Waterhouse Ltd.*, [1985] OJ No 881.
6. *Holborn Property Investments Inc. v. Romspen Investment Corporation* , [2008] OJ No 5722.
7. *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648 rev'd on other grounds by 2011 ONCA 817.
8. *United Trust Co. v. Dominion Stores Ltd.*, [1976] SCJ No 99.
9. *Durrani v. Augier*, [2000] OJ No 2960.
10. *Vieira v. Breg Trading Ltd.*, 2014 ONSC 4570.
11. *Canada Mortgage and Housing Corporation v. Gray*, 2013 ONSC 1986 aff'd by 2014 ONCA 236.
12. *Toronto Dominion Bank v. Faulkner*, [1990] OJ No 1085 (ONCA)
13. *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada*, 2015 ONSC 543.
14. *XDG Ltd. v. 1099606 Ontario Ltd* , [2004] OJ No 1695.

**SCHEDULE 'B'**  
**STATUTES AND REGULATIONS**

1. *Land Titles Act*, RSO 1990, c L5.
2. *Condominium Act*, SO 1998 c 19.

TREZ CAPITAL LIMITED  
PARTNERSHIP ET AL.

*Applicants*

-and- WYNFORD PROFESSIONAL CENTRE  
LTD.

*Respondents*

Court File No. CV-14-10493-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

IN THE MATTER OF Section 101 of the  
*Courts of Justice Act* and Section 243 of the *Bankruptcy  
and Insolvency Act*

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANTS, TREZ CAPITAL  
LIMITED PARTNERSHIP AND  
COMPUTERSHARE TRUST COMPANY  
OF CANADA

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