

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

and

CONACHER KINGSTON HOLDINGS INC. and 5004591 Ontario Inc.

Respondents

AIDE MEMORANDUM OF AJGL GROUP INC. AND 1001079582
ONTARIO INC.

[Submissions on Including, if an AVO is granted, Paragraph 6 of the July 24, 2024 Vesting

Order of the Honourable Justice Cavanagh]

December 10, 2024

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**AIDE MEMORANDUM OF AJGL GROUP INC. AND 1001079582
ONTARIO INC.**

**[Submissions regarding the Inclusion, if an AVO is granted, Paragraph 6 of the July 24,
2024 Vesting Order of the Honourable Justice Cavanagh]**

1. This memorandum is filed on behalf of AJGL Group Inc. and 1001079582 Ontario Inc (“**100 Inc**”), collectively referred to as AJGL.
2. The within request that paragraph 6 of Justice Cavanagh’s Order of July 24, 2024 be included in an AVO if one is granted, is supported by, and also requested by, all other parties claiming any ownership interest, beneficial or legal, in the Islington Property, namely, in addition to AJGL, Elena Terpselas, in her Capacity as Estate Trustee of the Estate of Nicholas Kyriacopoulos. Also, the party claiming an equitable mortgage over the Property also supports, and requests, the inclusion of the term, namely Issam A. Saad and 2588087 Ontario Inc.

Part 1 – The Identical Relief Already Adjudicated and Granted in an Identical Motion in this Receivership

3. The term AJGL requests is identical to a term in a recent Order, in this matter, involving the exact same relief of seeking a vesting Order, when the Collateral Security (Toronto) is sold before the Primary Security (Kingston) and the parties requesting the term (AJGL and Nicholas Kyriacopoulos’s estate) are requesting the Order to protect their rights of subrogation as guarantors.

4. AJGL submits that the form of Vesting Order should include the same term (the “Term) as set out in the July 24, 2024 Vesting Order, for the same reason it was included in the vesting order approved by Justice Cavanagh.

5. The July 24 2024 Moton, with respect to the issue of the including of the Term in the vesting Order, was in all material respects identical to the motion before the Court on December 10, 2024 – the sale of the Toronto Property.

6. Justice Cavanagh’s endorsement states the following regarding the inclusion of the term:

“[7] In addition to the Toronto Property, the Lender has mortgage security over the Kingston Property.

[8] As a result of this circumstance, the requested form of approval and vesting order includes, at paragraph 6, additional language requested by some interested parties, and agreed to by the Receiver.

[9] Counsel for 2478659 Ontario Inc., a mortgagee with security over the Kingston Property, expressed concern that the inclusion of this language may signal that additional rights are being conferred by the order.

[10] The additional language in the approval and vesting order (which also provides for distribution of proceeds) does not confer additional rights, but confirms for clarity that the order is without prejudice to rights that exist.”

7. Paragraph 6 of Justice Cavanagh’s Order states:

6. THIS COURT ORDERS THAT the distribution to Cameron Stephens Mortgage Capital Ltd. (as contemplated as part of the Interim Distribution) is without prejudice to any arguments, positions, claims, rights or entitlements that any person may now have, or could have or has made to date or may hereafter decide to make in relation to either Property, and without limiting the generality of the foregoing, does not prejudice any claims or rights that any person has or may have under the foregoing general wording as well as (i) to claim to subrogate to any of the security or loan debt held by Cameron Stephens, or in relation to duties and obligations relating thereto or claims under Section 2 of the *Mercantile Law Amendment Act* or otherwise, (ii) to claims relating to rights arising from Section 2 of the *Mortgages Act*, (iii) to claim contribution and indemnity from any person (other than, for certainty, against the Receiver); and (iv) to assert any marshalling arguments provided that, for certainty, no party may make any claim against any recipient on account of proceeds received from the Interim Distribution.

8. The Term AJGL seeks is identical to paragraph 6 above, except that the term “Interim Distribution” is changed to the Receiver’s term used on this motion: the “Toronto Distribution

Part 2 – The Term is consistent with fact that Priority Issues will be determined Later

9. The deferral of the issues referenced in the Term for adjudication later makes sense because, the extent of subrogation will depend on the ultimate proceeds from the sale of Kingston (including the fact that there may not be any surplus proceeds).

10. The Term is consistent with the decision of the Honourable Justice Black, regarding a parties claim for marshalling, at the October 9, 2024 hearing – that claims between stakeholders is an issue for later, as follows:

“[24] The order sought by the Receiver contemplates, after the distributions described above, the postponement of any further distributions to creditors pending the sale of the Islington Property. So, any excess proceeds from the sale of the Kingston Property will be held in trust by the Receiver until the Islington Property is sold and stakeholders have an opportunity to make submissions about the appropriate distribution of both any surplus funds from the Kingston Property and the net proceeds of sale of the Islington Property.”

11. The Term is consistent with the fact that the issues regarding the priority between different stakeholders is a matter to be dealt with later in the within proceeding.

Part 3 – The Reasons AJGL seeks to ensure that the AVO does not prejudice its claims/priority

12. It is respectfully submitted that there is no reason for the Court to read any further, regarding AJGL’s reasons **why** it believes it will (later) be successful in exercising rights of subrogation, since, as set out above, it is an issue to be determined later. This section is, however,

included here in the event, which is not submitted, an overview of the merits of AJGL's claims to subrogation should be reviewed on the within motion.

Subrogation

13. Pursuant to the common law, and to statutory provisions, a guarantor is entitled to the benefit of, and to an assignment of, both the security held by the creditor, and the underlying loan obligation owed to the creditor.

14. Without the requested Term, the distribution of funds to Cameron Stephens from a sale of the Islington Property may adversely affect the practicalities as well as the legal ability to effectively exercise rights of subrogation.

15. This particular Cameron Stephens loan facility has more than one debtor, and has multiple security on different lands in different cities, and also has other security on non-real estate property under the Personal Property Security Act ("PPSA"). It is a combined basket of security for the single loan. When the sales proceeds from the Islington Property are paid to Cameron Stephens, the loan commitment requires Cameron Stephens to discharge the entirety of the mortgage security on the Islington lands. The entitlement of our client to the benefit of the full Cameron Stephens security package and underlying Loan Obligation (by way of subrogation) should be safeguarded.

16. The repayment of funds to Cameron Stephens (arising from the sale by the Receiver of the Islington Property) is effectively repayment by or on behalf of the owner of those lands. It is imperative that the full security package continue to have full legal validity and priority, and, as noted above, that the "state of accounts" as between Cameron Stephens and Kingston Conacher would need to show that the full loan obligation continues to be outstanding and owed by Kingston

Conacher, notwithstanding the receipt of any funds from the Islington Properties. For example, neither Kingston Conacher nor anyone claiming through Kingston Conacher could redeem the security for the Loan Obligation by paying an amount less than the full unreduced Loan Obligation (being approximately \$13 million), and all interest on that full amount (which payment would then be apportioned between Cameron Stephens and our client).

17. AJGL is entitled to utilize the same priority position that Cameron Stephens has, and AJGL wants to ensure that the AVO does not adversely impact AJGL in relation to the matters described above. The simplistic statement in the proposed Approval & Vesting Order that funds will be paid to Cameron Stephens does not serve to make clear that these other legal entitlements are still safeguarded.

Theoretical Subrogation example:

18. Assume a lender lends \$10 million to a borrower secured by a first mortgage on the property of the borrower. In addition, the lender obtains a guarantee from a guarantor that guarantees the entire \$10 million loan amount. When a default occurs, the lender enforces first against the guarantor and obtains a \$6 million payment from the guarantor. The guarantor gives notice that it requires to be subrogated to the position of the lender. How much does the lender tell the primary borrower is outstanding in respect of the obligations of the primary borrower? The lender has to tell the borrower that the borrower still in effect owes \$10 million. If the lender told the borrower that the borrower owes only \$4 million, the borrower could pay \$4 million and get a discharge of all of the security. However, this would destroy the subrogation rights of the

guarantor, because the validity of the security will have been terminated, or severely called into question. Instead, the lender must say the \$10 million continues to be owing by the borrower. Perhaps the lender can say that \$10 million continues to be owing, of which \$4 million is owing to the lender and \$6 million is owing to the guarantor by virtue of subrogation by the guarantor. Either way, it does not change the fact that \$10 million is still owing by the borrower, and the fact that the security against the property of the borrower still secures a \$10 million outstanding obligation by the borrower.

19. And so far as Kingston Conacher is concerned, Kingston Conacher would still be faced with a \$13,000,000 loan-debt obligation. However within the Cameron Stephens/AJGL/500 co-creditor group, Cameron Stephens would be entitled to the first portion of that loan-debt amount (being \$13,000,000 less what was paid by or on behalf of AJGL/500 from the Islington Property) and the nominee of AJGL and 500 would be entitled to the remainder of the \$13,000,000 of that loan-debt amount (up to the amount that was paid by or on their behalf from their asset, the Islington Property).

Impact of Section 2 of the Mortgages Act

20. Section 2(1) of the Mortgages Act states:

“2 (1) Despite any stipulation to the contrary, where a mortgagor is entitled to redeem the mortgagor may require the mortgagee, instead of giving a certificate of payment or reconveying and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs, and the mortgagee is bound to assign and convey accordingly.”

21. The definition of “mortgagor” in Section 1 of the Act says that “mortgagor includes any person deriving title under the original mortgage or entitled to redeem a mortgage, according to the person’s estate, interest, or right in the mortgaged property”. It is not limited to only the registered owner of the land. A beneficial owner of land is a person “entitled to redeem a mortgage” and therefore falls within the definition of “mortgagor”.

22. The concept of Section 2 of the Mortgages Act is that when the mortgagor/debtor pays the debt secured by the mortgage to the creditor, the debtor has a statutory entitlement to require that its nominee become an owner of the debt and of the security for the debt (instead of the debt and security simply ceasing to exist). The nominee of the mortgagor thus becomes a creditor, with the rights of a creditor. This particular Cameron Stephens loan facility has more than one debtor, and has multiple security on different lands in different cities, and also has other security on non-real estate property under the Personal Property Security Act (“PPSA”). It is a combined basket of security for the single loan. When the sales proceeds from the Islington Property are paid to Cameron Stephens, the loan commitment requires Cameron Stephens to discharge the entirety of the mortgage security on the Islington lands. However, Section 2 of the Mortgages Act provides a separate statutory entitlement that AJGL or 500 (or anyone falling within the definition of “mortgagor”) can avail itself of. Section 2 allows AJGL or 500 (or anyone falling within the definition of “mortgagor”) to require its nominee to become an owner of the debt and the security and become a creditor. However, because the loan is a single umbrella loan with a basket of various security securing it, and given that the sales proceeds paid to Cameron Stephens by or on behalf of the owners of the Islington Property (being 500 and AJGL) would not (presumably) pay the entirety of the single loan-debt, but only a part of it (although it does discharge the entirety of the particular mortgage on the Islington Property), the proper interpretation of Section 2 in this context

is that either or both of AJGL or 500 is entitled to require its nominee to become a partial owner of the overall debt and overall security, and become a creditor within that context. Therefore, the nominee of either or both of AJGL or 500 becomes in the nature of a subordinate participant or partner or co-owner with Cameron Stephens of the overall debt and the remaining security for that debt. The nominee of AJGL and/or 500 is a “subordinate“ participant because clearly Cameron Stephens would have the first entitlement to funds arising from the remaining security for the overall \$13,000,000 loan-debt.

23. There is no legal doubt that if either or both of AJGL or 500 paid to Cameron Stephens the entire \$13,000,000 outstanding debt, that either or both of AJGL or 500 would be entitled to require an assignment to its nominee from Cameron Stephens of the entire security package and the entire underlying debt. Therefore, if either or both of AJGL or 500 pays to Cameron Stephens a portion of the \$13,000,000 outstanding debt (derived from their asset, the Islington Property), then either or both of AJGL or 500 should be entitled to an assignment to its nominee of a proportionate share of the entire security package and the entire underlying debt.

24. This result is not inequitable in any way; in fact, it is the opposite, it is totally equitable. It is similar to the rights of subrogation that the common law (and statute law) already gives to a guarantor. A guarantor is entitled to subrogate to the position of the creditor. This means that the guarantor takes over the security of the creditor, and also the debt or other obligation owed to the creditor. Section 2 of the Mortgages Act is giving similar rights by statute to the actual mortgagor, rather than to the person who has the status of being a guarantor.

25. The repayment of funds to Cameron Stephens (arising from the sale by the Receiver of the Islington Property) is effectively repayment by or on behalf of the owner of those lands, being

AJGL and 500. The Receiver does not have control of 500 as a corporation; the Receiver only has rights in respect of the real estate. 500 retains all of its other rights, and can make the decision to utilize Section 2 of the Mortgages Act. The Receiver has no control over AJGL; AJGL retains all of its rights, and can make the decision to utilize Section 2 of the Mortgages Act.

26. **ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9th day of December, 2024

A handwritten signature in black ink, appearing to be "J. Cole", is written above a solid horizontal line.

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Respondents

Court File No. CV-23-00701672-00CL

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PROCEEDING COMMENCED AT
TORONTO

AIDE MEMORANDUM OF INTERESTED PARTY
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