

Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF AN APPLICATION UNDER Section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

B E T W E E N:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

MOTION RECORD

(Returnable March 10, 2014 before a Single Judge of the Court of Appeal)

February 27, 2014

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BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

MOTION RECORD
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Tab	Page No.
1 Notice of Motion returnable March 10, 2014	1
2 Affidavit of Naheel Suleman sworn February 27, 2014, with exhibits:	11
A. Exhibit "A" – Order of the Honourable Justice Thorburn dated November 15, 2013	26
B. Exhibit "B" – Order of the Honourable Justice D. Brown dated December 11, 2013	44
C. Exhibit "C" – Walter Traub’s letter to counsel for the Receiver dated February 10, 2014	48
D. Exhibit "D" – Second Supplemental Report of the Receiver dated February 13, 2014	51
E. Exhibit "E" – Email from Frank Mondelli with attached February 14, 2014 letter from Toronto Capital	78

F. Exhibit “F” – Approval and Vesting Order of Justice D. Brown dated February 14, 2014	81
G. Exhibit “G” – Reasons for Decision of the Honourable Justice D. Brown dated February 18, 2014	93
H. Exhibit “H” – 2122775 Ontario Inc.’s Notice of Appeal and Appellant’s Certificate.....	97
I. Exhibit “I” – Letter from Toronto Capital dated February 27, 2014	113
J. Exhibit “J” – New Commitment from Toronto Capital in the amount of \$5,000,000 dated February 27, 2014	115
K. Exhibit “K” – Commitment from Toronto Capital in the amount of \$3,000,000.....	121
L. Exhibit “L” – Letter from Lisa Corne dated February 25, 2014	126
M. Exhibit “M” – Email from Adam Wygodny, counsel for Urbancorp, dated February 25, 2014	172

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BETWEEN:

HOME TRUST COMPANY

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- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

NOTICE OF MOTION

(Returnable March 10, 2014 before a Single Judge of the Court of Appeal)

The Appellant, 2122775 Ontario Inc. (“**212 Ontario**”) will make a Motion to a Judge of the Court of Appeal on Monday, March 10, 2014 at 10:00 a.m., or as soon after that time as the Motion can be heard at the Court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The Motion is to be heard orally.

THE MOTION IS FOR:

1. An Order, if necessary, abridging the time for service and filing of this Notice of Motion, Motion Record and any related motion materials, and dispensing with further service thereof such that the motion is properly returnable on March 10, 2014;

2. Directions on the issue of whether the Order of the Honourable Justice D. Brown dated February 14, 2014 (the “**Approval and Vesting Order**”) is automatically stayed pending disposition of the Appeal;
3. If the Court finds that the Approval and Vesting Order is not automatically stayed, an Order staying it pending the disposition of the Appeal and preventing the sale transaction (the “**Transaction**”) from taking place as set out in the Approval and Vesting Order;
4. An Order for an expedited Appeal; and
5. Such further and other relief as counsel may advise and this Honourable Court permit.

THE GROUNDS FOR THE MOTION ARE:

1. Pursuant to the Approval and Vesting Order, the Honourable Justice D. Brown authorized and approved the Transaction contemplated by an Agreement of Purchase and Sale (“**APS**”) between Collins Barrow Toronto Limited, in its capacity as Receiver of 212 Ontario (“**Receiver**”) and the purchaser, Urbancorp (Downtown) Developments Inc. (“**Urbancorp**”) for lands known municipally as 2426 and 2427 Bayview Avenue, Toronto, Ontario (the “**Property**”) and granted a Vesting Order to Urbancorp on closing;
2. The Appellant is seeking approval to redeem the mortgage (“**Home Trust Mortgage**”) of the Respondent, Home Trust Company (“**Home Trust**”) and, upon payment into Court of the amount owing under the Home Trust Mortgage together with the fees and disbursements of the Receiver, to have the Home Trust Mortgage discharged, or in the alternative, assigned as it directs;

3. The Appeal automatically stays the Vesting and Approval Order in accordance with section 195 of the *Bankruptcy and Insolvency Act*;
4. The Receiver and Urbancorp have indicated that they dispute the automatic stay and intend to proceed with the Transaction. This is therefore an urgent matter which must be dealt with as it imperils the Appellant's rights to the Property and that of the subsequent mortgages;
5. The Appellant has a binding commitment from its lender for \$8,000,000 of financing which has been reallocated in a manner which remedies any previous alleged deficiencies. The funding pursuant to the commitments shall occur on or before 14 days after a court order staying the Approval and Vesting Order;
6. It is just and proper in the circumstances to stay the Approval and Vesting Order;
7. There is a serious issue to be dealt with on the Appeal;
8. The Appellant and Subsequent Mortgagees will lose their \$20 million investment if the Transaction proceeds. The balance of convenience favours granting the relief sought by the Appellant;
9. The irreparable harm to be suffered by the Appellant and the Subsequent Mortgagees is greater than any potential harm to be suffered by the Receiver or Urbancorp if the stay is not confirmed or imposed;
10. There are issues of timing which render the Appeal urgent and it is reasonable and just to expedite the Appeal in the circumstances;

11. Sections 193 and 195 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B. 3;
12. Sections 97 and 134 (2) of the *Courts of Justice Act* R.S.O. 1900, c. 43;
13. Rules 1.04, 1.05, 41.05 and 63.02 of the *Rules of Civil Procedure*; and
14. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) Affidavit of Naheel Suleman sworn February 27, 2014 and the exhibits attached thereto;
- (b) The Motion Record of the Receiver dated February 7, 2014 filed for the motion returnable February 14, 2014;
- (c) The Motion Record of 212 Ontario filed for the motion returnable February 14, 2014;
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

February 27, 2014

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HOME TRUST COMPANY
Applicant

v.

2122775 ONTARIO INC.
Appellant
(Respondent)

Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

NOTICE OF MOTION

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BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

AFFIDAVIT OF NAHEEL SULEMAN

I, Naheel Suleman, of the City of Toronto, in the Province of Ontario, MAKE

OATH AND SAY:

1. I am the President and owner of 100% of the shares in the Appellant corporation, 2122775 Ontario Inc. ("**212 Ontario**") and as such have knowledge of the matters to which I hereinafter depose. Where my information is based upon a review of documents, or has been received from others, I have identified the sources of my information and do verily believe my information to be true.

212 ONTARIO'S MOTION

2. I swear this Affidavit in support of 212 Ontario's motion to the Court of Appeal returnable March 10, 2014 for:

- 1) Directions on the issue of whether the Order of the Honourable Justice D. Brown dated February 14, 2014 (the “**Approval and Vesting Order**”) is automatically stayed pending disposition of the Appeal;
- 2) if the Court finds that the Approval and Vesting Order is not automatically stayed, for an Order staying it pending the disposition of the Appeal and preventing the sale transaction (the “**Transaction**”) from taking place as set out in the Approval and Vesting Order; and
- 3) an Order for an expedited Appeal; and

THE PROPERTY

3. In 2010, 212 Ontario bought 1.3 acres of land known municipally as 2425 and 2427 Bayview Avenue in Toronto, Ontario (“the “**Property**”) in 2010 for the purpose of building a 20 luxury unit townhouse development (the “**Development**”).
4. 212 Ontario paid \$10.1 million for the Property.
5. Construction on the Development commenced in early 2012.
6. To date, 80% of the underground construction and all servicing has been completed at the Property. The technical and working drawings for the 20 luxury units have been completed. All city fees and utility connection fees have been paid. The exterior of the model home has been completed. Approximately \$3,500,000 was incurred to complete this work.

7. Construction on the Development was temporarily halted in the summer of 2013 as a result of financing issues.

THE PARTIES

8. 212 Ontario is an Ontario corporation and the registered owner and developer of the Property.
9. HUSH Homes Inc. ("**HUSH**") is an Ontario corporation which acts as the project manager for the Development. I am the president and director of HUSH.
10. Home Trust Company ("**Home Trust**") is a mortgage lender which advanced a first mortgage loan to 212 Ontario in the amount of \$6,500,000 (the "**Home Trust Mortgage**").
11. Collins Barrow Toronto Limited ("**Collins Barrow**" or the "**Receiver**") is the Court appointed Receiver of 212 Ontario and the Property.
12. VS Capital Corporation ("**VS Capital**") is a mortgage lender which advanced third and fourth mortgage loans to 212 Ontario as follows:
 - Second mortgage of \$8,750,000;
 - Fourth mortgage of \$3,500,000;
13. Zaherali Visram ("**Visram**") is an individual resident in Toronto, Ontario and a mortgage lender who advanced a third mortgage loan to 212 Ontario in the amount of \$5,100,000.
14. VS Capital and Visram are hereinafter collectively referred to as the "**Subsequent Mortgagees**").

15. Urbancorp (Downtown) Developments Inc. (“Urbancorp”) is the purchaser of the Property pursuant to the Agreement of Purchase and Sale entered into between Urbancorp and the Receiver as set out in the Vesting and Approval Order.

SECURED CREDITORS

16. The various charges registered against the Property are:

CREDITOR	AMOUNT OF CHARGE	NATURE
Home Trust	\$6,500,000	Mortgage
VS Capital	\$8,750,000	Mortgage
Visram	\$5,100,000	Mortgage
VS Capital	\$3,500,000	Mortgage
Cameo Fine Cabinetry (Mississauga) Inc.	\$30,000	Mortgage
King Masonry Yard Ltd.	\$8,782	Construction Lien
UCIT Online Security Inc.	\$29,595	Construction Lien
Silverado Custom Home Corporation	\$37,500	Construction Lien

OVERVIEW OF EVENTS

Initial Financing Efforts

17. From March 2013 through late 2013, I worked diligently on behalf of 212 Ontario to obtain complete financing for the Property. I was able to obtain a complete financing commitment however I was ultimately unable to execute on it. Accordingly, in late 2013 I began to pursue traditional financing with the intention of separately applying for construction financing once 65% of the Development was sold.

Recent Financing Efforts

18. When efforts to execute complete financing were ultimately unsuccessful in late 2013, I commenced negotiations for financing with the construction lender Toronto Capital Inc. ("**Toronto Capital**"). I have worked with Toronto Capital in the past for the financing of other projects.
19. Toronto Capital provided 212 Ontario with a Term Sheet setting out its financing commitment in the amount of \$5,000,000 dated January 2014 from Milev Limited ("**Milev**"). This was attached as Exhibit "B" to my affidavit sworn February 13, 2014. Toronto Capital provided 212 Ontario with a Term Sheet setting out a financing commitment in the amount of \$3,000,000 dated January 21, 2014 from USHJO Enterprises Inc. ("**USHJO**").
20. On January 23, 2014, Toronto Capital wrote a letter indicating that the lenders were ready, willing and able to close pursuant to the Term Sheets. This letter was attached as Exhibit "D" to my affidavit sworn February 13, 2014. I was advised by Frank Mondelli ("**Mondelli**") and Michael Sanella ("**Sanella**") of Toronto Capital that the financing was firm and that it would take approximately 14 days to complete.
21. I sought Consent from the Subsequent Mortgagees because the Toronto Capital financing required new first and second mortgages and the Subsequent Mortgagees would need to postpone to the new first and second mortgages.

22. I received the Consent from the Subsequent Mortgagees on February 10, 2014. The Consent from the Subsequent Mortgagees was attached as Exhibit "E" to my affidavit sworn February 13, 2014.
23. The \$8,000,000 financing commitment from Toronto Capital would fully pay out the Home Trust Mortgage, the Receiver's costs and disbursements, all lien claimants, and provide working capital to continue construction of the model home and marketing costs, thus assisting us with achieving the targeted 65% of sales to obtain full construction financing.

PROCEEDINGS

Home Trust's Motion to Appoint a Receiver

24. On October 30, 2013 Home Trust brought an application for the appointment of a receiver pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*. This application was initially returnable on November 8, 2013 but subsequently adjourned to November 15, 2013.
25. Pursuant to the Order of the Honourable Justice Thorburn dated November 15, 2013 (the "**Receivership Order**"), Collins Barrow was appointed as Receiver. The Receivership Order indicated that the Honourable Justice Thorburn would remain seized of the matter for the purpose of approval of the Receiver's fees (paragraph 32). Attached hereto and marked as **Exhibit "A"** is a copy of the Receivership Order.

Receiver's Motion for Marketing and Sales Process Approval

26. On December 11, 2013, the Receiver brought a motion for, *inter alia*, an Order approving the marketing and sales process and an Order authorizing the Receiver to enter into an agreement of purchase and sale conditional upon Court approval. The Order of the Honourable Justice D. Brown dated December 11, 2013 granted the Receiver the relief sought (the "**Marketing Order**"). Attached hereto and marked as **Exhibit "B"** is a copy of the Marketing Order dated December 11, 2013.

Receiver's Motion for Sale Approval and a Vesting Order – February 14, 2014

27. The Receiver brought a motion for, *inter alia*, an Order approving a proposed sale to Urbancorp and an Order vesting in Urbancorp all right, title and interest of 212 Ontario's assets ("**Sale and Vesting Approval Motion**"). The Sale and Vesting Approval Motion was returnable February 14, 2014.
28. The Receiver delivered its motion materials on Friday, February 7, 2014.
29. At the time the Receiver delivered its motion materials I had not yet received the Consent from the Subsequent Mortgagees. It was delivered on February 10, 2014 as aforesaid.
30. As a result of the financing obtained from Toronto Capital, 212 Ontario's intention was to bring its own motion to stay the sale proceedings pending the funding commitments from Toronto Capital as described herein. I was advised by 212 Ontario's then counsel Brian Jenkins ("**Jenkins**") and do verily believe that he communicated this to Walter Traub ("**Traub**"), counsel for the Subsequent Mortgagees, and that Traub confirmed same to counsel for the Receiver, Lisa Corne ("**Corne**") on February 10, 2014. Attached hereto and

marked as **Exhibit "C"** is a copy of Traub's letter to counsel for the Receiver dated February 10, 2014.

31. Unfortunately, there were issues at 212 Ontario's counsel's office which precluded 212 Ontario from delivering its motion materials until February 13, 2014.
32. I was advised by Jenkins and do verily believe that his firm's building was closed on Friday, February 7 through Tuesday, February 11, 2014 due to a water main break.
33. On February 13, 2014, 212 Ontario served its motion materials to stay approval of the sale which motion materials included my affidavit sworn February 13, 2014.
34. I am advised by Jenkins and do verily believe that he did not receive the Second Supplemental Report of the Receiver dated February 13, 2014 until the evening at which time he forwarded it on to me. I received the Supplemental Report of the Receiver at approximately 10 p.m. The Second Supplemental Report of the Receiver is attached hereto and marked as **Exhibit "D"**.
35. The Second Supplemental Report of the Receiver was critical of the financing commitments provided by Toronto Capital and USHJO and alleged that the financing provided therein was insufficient to pay out the Home Trust Mortgage and costs and the unpaid receivership costs to date. The Receiver alleged that there was a funding deficiency of \$548,917. My understanding from the Receivership Order was that the Honourable Justice Thorburn was seized of any issues regarding the Receiver's fees.

36. The \$8,000,000 of financing provided by Toronto Capital was not insufficient to pay out the Home Trust Mortgage. The only issue was the manner in which the funds had been allocated as set out therein.
37. Although 212 Ontario's motion materials had been served, the Second Supplemental Report of the Receiver appears to have been written before receipt of those materials as it indicated that it had not received any motion materials to confirm that 212 Ontario would be seeking an Order to enable it to fully redeem the Home Trust Mortgage and terminate the receivership proceedings.
38. I spoke with Jenkins at approximately 10 p.m. on February 13, 2014 and he outlined the Receiver's allegations about the shortfall in financing. Jenkins and I agreed, given that the motion was returnable the next morning, that a representative from Toronto Capital should attend the motion with a revised financing letter confirming the binding commitment and that the representative could give *viva voce* evidence to the Judge about the binding financing commitment.
39. Arrangements were made for Sanella of Toronto Capital to attend on February 14, 2014 and I advised Sanella that we needed confirmation of reallocation from Toronto Capital to satisfy the Court and the Receiver.
40. On February 14, 2014, Sanella and I attended the motion before the Honourable Justice D. Brown. While we were at Court, I am advised by Mondelli and do verily believe that he was drafting a revised letter which was emailed to me and to Sanella while we were in Court. I received it while Jenkins was making submissions to the Honourable Justice D. Brown. As such, there was no opportunity for Jenkins to show the Judge the letter.

Attached hereto and marked as **Exhibit "E"** is a copy of the email from Mondelli with attached February 14, 2014 letter from Toronto Capital.

41. Further to 212 Ontario's motion, Jenkins requested a stay of the sale, indicated that he had a revised financing letter available from Toronto Capital and requested that a representative from Toronto Capital be allowed to give *viva voce* evidence with respect to the revisions and the unconditional nature of the commitment. The Honourable Justice D. Brown refused the request. Jenkins then asked for a one week adjournment so that 212 Ontario could file additional Affidavit material and that request was also refused.
42. Counsel for the Subsequent Mortgagees confirmed to the Honourable Justice D. Brown at the Sale and Vesting Approval Motion that the Subsequent Mortgagees supported the Toronto Capital financing and 212 Ontario's motion to stay the Transaction as well as to adjourn.
43. If Sanella had been allowed to give *viva voce* evidence, I am advised by Sanella and do verily believe that he would have confirmed at the Sale and Vesting Approval Motion that the funds could be reallocated and that there was a binding commitment to finance within 14 days.
44. Pursuant to the Approval and Vesting Order, the Honourable Justice D. Brown authorized and approved the Transaction contemplated by an Agreement of Purchase and Sale ("APS") between the Receiver and Urbancorp for the Property and granted a Vesting Order to Urbancorp on closing. Attached hereto and marked as **Exhibit "F"** is a copy of the Approval and Vesting Order.

45. In the Reasons for Decision of the Honourable Justice D. Brown, he determined that 212 Ontario's proposal was inferior and that it was not firm as the consideration was inadequate to pay the first mortgage and the Receiver's charge. Attached hereto and marked as **Exhibit "G"** is a copy of the Reasons for Decision of the Honourable Justice D. Brown.

212 ONTARIO APPEALS

46. 212 Ontario has appealed the decision of the Honourable Justice D. Brown dated February 14, 2014 to the Court of Appeal. Attached hereto and marked as **Exhibit "H"** is a copy of 212 Ontario's Notice of Appeal and Appellant's Certificate.
47. 212 Ontario is seeking approval to redeem the Home Trust Mortgage and, upon payment into Court of the amount owing under the Home Trust Mortgage together with the fees and disbursements of the Receiver, to have the Home Trust Mortgage discharged, or in the alternative, assigned as it directs, as well as payment to all lien claimants.

FINANCING AVAILABLE

48. Toronto Capital has provided 212 Ontario with a letter confirming, in accordance with the term sheets provided on January 21, 2014, full and binding commitments subject to standard closing conditions only. This letter also confirms that Toronto Capital adjusted the use of funds to satisfy the full payout of the Home Trust Mortgage, the Receiver's fees and disbursements and all lien claimants. Attached hereto and marked as **Exhibit "I"** is a letter from Toronto Capital dated February 27, 2014.
49. I am advised by Sanella and do verily believe that the same information set out in the February 27, 2014 letter would have been provided at the Sale and Vesting Approval

Motion by way of *viva voce* evidence. Sanella was unable to do so as aforesaid because the Honourable Justice D. Brown refused the request by Jenkins to allow Sanella to give *viva voce* evidence.

50. Attached hereto and marked as **Exhibit “J”** is a Commitment from Toronto Capital in the amount of \$5,000,000 dated February 27, 2014. This Commitment states that funding shall occur on or before 14 days after a court order staying the Approval and Vesting Order.
51. Attached hereto and marked as **Exhibit “K”** is a Commitment from Toronto Capital in the amount of \$3,000,000. This Commitment states that completion of the loan shall occur on or before 14 days after a court order staying the Approval and Vesting Order. This Commitment also indicates that the proceeds shall be used for the complete payout of the Home Trust Mortgage, payout of the Receiver’s fees and disbursements, liens, legal fees and working capital – remainder.
52. It is clear that the financing available to 212 Ontario is, and was, adequate to eliminate any alleged deficiency as set out in the Reasons for Decision of the Honourable Justice D. Brown and the Second Supplemental Report of the Receiver.

Automatic Stay of the Vesting and Approval Order

53. I am advised by Harvin Pitch (“Pitch”), 212 Ontario’s counsel on the Appeal, and do verily believe that the Appeal automatically stays the Approval and Vesting Order in accordance with section 195 of the *Bankruptcy and Insolvency Act*.
54. When the Notice of Appeal and Appellant’s Certificate were served, Pitch advised all parties on the service list that 212 Ontario took the position that the Vesting and Approval

Order was automatically stayed pursuant and asked any counsel who intended to oppose the automatic stay to advise by close of business on February 25, 2014.

Receiver and Urbancorp Dispute the Automatic Stay

55. The Receiver and Urbancorp have indicated that they dispute the automatic stay and intend to proceed with the Transaction. Corne responded that she did not agree that there is an automatic stay and that the Receiver intends to proceed with completion of the sale transaction. Attached hereto and marked as **Exhibit "L"** is a letter from Corne dated February 25, 2014. Attached hereto and marked as **Exhibit "M"** is an email from Adam Wygodny, counsel for Urbancorp, dated February 25, 2014. To the date of this affidavit, I am advised by counsel for 212 Ontario, Jennifer Lake ("**Lake**") that no other responses were received.

56. It is my view that the Receiver should seek to protect the interests of the existing secured creditors. In this matter, the interests of 212 Ontario, as well as the interests of the majority creditors, the Subsequent Mortgagees, are at risk of being extinguished. The Transaction, if it proceeds, is against the best interests of the 212 Ontario and the Subsequent Mortgagees. I am also personally affected by personal and corporate guarantees (for HUSH) which I provided to the Subsequent Mortgagees.

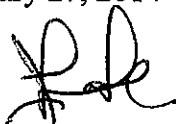
URGENT NATURE OF THE MOTION

57. Given the Receiver and Urbancorp's position on the stay and intention to proceed with the Transaction, this is an urgent matter. If the Transaction takes place before the hearing of

the Appeal, the Appeal is moot. 212 Ontario and the Subsequent Mortgagees' rights are at risk and 212 Ontario has a solution to remedy this.

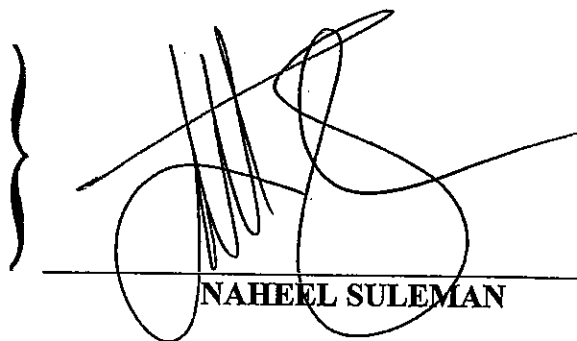
58. 212 Ontario and the Subsequent Mortgagees have made a significant investment in the Development and stand to lose that investment. 212 Ontario and the Subsequent Mortgagees will lose their investments totalling \$17.35 million if the sale to Urbancorp is allowed to proceed.
59. I swear this affidavit in support of 212 Ontario's motion and for no other or improper purpose.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario on
February 27, 2014



Commissioner for Taking Affidavits
(or as may be)

JENNIFER J. LAKE



NAHEEL SULEMAN

HOME TRUST COMPANY
Applicant

v.

2122775 ONTARIO INC.
Appellant
(Respondent)
Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**AFFIDAVIT OF NAHEEL SULEMAN
(SWORN FEBRUARY 27, 2014)**

TEPLITSKY, COLSON LLP

Barristers
70 Bond Street, Suite 200
Toronto Ontario
M5B 1X3

Harvin D. Pitch (LSUC #12101P)
Jennifer J. Lake (LSUC #535651)
Tel: (416) 365-9320
Fax: (416) 365-7702

Lawyers for the Appellant

This is Exhibit "A" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

Court File No.: CV-13-10313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE

JUSTICE *THOMAS*

)

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FRIDAY, THE 15TH DAY

OF NOVEMBER, 2013

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

APPLICATION UNDER s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3,
s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C-43 and
Rules 14.05(2) and (3) (d), (g) and (h) of the Rules of Civil Procedure

ORDER

THIS APPLICATION made by Home Trust Company ("Home Trust") for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 as amended (the "CJA") appointing Collins Barrow Toronto Limited ("Collins Barrow") as receiver and receiver and manager (jointly, the "Receiver") without security, of all of the assets,

undertakings and properties of 2122775 Ontario Inc. (the "Debtor") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of John Harry, sworn October 29, 2013 and the Exhibits thereto and on hearing the submissions of counsel for Home Trust, and on reading the consent of Collins Barrow to act as the Receiver:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, Collins Barrow is hereby appointed Receiver, without security, of all of the lands and premises legally described in Schedule "B" hereto (the "Lands") and of all the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including those acquired for, or used in relation to, the development of the Lands and construction of improvements thereon, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate and carry on all or any part of the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons, from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;
- (g) to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$500,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act* and subsection 31(1) of the Ontario *Mortgages Act* shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;
- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

- (t) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that: (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.
5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. **THIS COURT ORDERS** that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. **THIS COURT ORDERS AND DECLARES** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such

other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. **THIS COURT ORDERS** that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.
14. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of current employees only to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate

and attempt to complete one or more sales of the Property (each, a "Sale") and for the sole purpose of assisting or facilitating the prospective purchaser's or bidder's negotiations or discussions with said employees in respect of future employment with the prospective purchaser or bidder. Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
18. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel in this proceeding are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.
19. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its legal counsel, and such amounts shall

constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

20. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.
21. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.
22. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.
23. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

24. **THIS COURT ORDERS** that notwithstanding paragraphs 20 to 23 inclusive above, and as an alternate thereto, the Receiver is hereby authorized to borrow money to fund the exercise of its duties hereunder by way of advances from the Applicant, which advances shall be secured by the Applicant's security on the Property (including, without limitation, the Mortgage as defined in and as attached as an exhibit to the Affidavit of John Harry sworn October 29, 2013) with the same priority that may attach to such security.

GENERAL

25. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
26. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.
27. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
28. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order. Accordingly, this Court further orders that the Receiver is hereby expressly appointed as a foreign representative of the Debtor for purposes of seeking the recognition and enforcement of this Order in a foreign proceeding, and taking any actions necessary to discharge its duties under the Order and applicable law.

29. **THIS COURT ORDERS** that the applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.
30. **THIS COURT ORDERS** that the Applicant and the Receiver and any party who has served a Notice of Appearance, may serve any materials in this proceeding by e-mailing a pdf or other electronic copy of such material to counsels' email address as recorded on the Service List from time to time, in accordance with the e-filing protocol of the Commercial List to the extent practicable, and the Receiver may post a copy of any or all such material on its website at www.collinsbarrow.com (the "Website").
31. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order, provided that nothing in this section operates to extend any applicable appeal period.
32. *I will remain seized of this matter for the purpose of approval of the receiver's fees on the consent of all parties. Counsel for the receiver submitted that this is a straightforward matter involving the sale of property.*

LESTER LEVINSKY & ASSOCIATES - TORONTO
 COURT REPORTERS
 LEVINSKY LEVINSKY & ASSOCIATES

NOV 15 2013
 NB

Schedule "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. ●

AMOUNT \$ ●

1. THIS IS TO CERTIFY that Collins Barrow Toronto Limited, the receiver and the receiver and manager (the "Receiver") of the assets, undertakings and properties of 2122775 Ontario Inc. (the "Debtor") appointed by Order of the Ontario Superior Court of Justice (the "Court") dated the ● day of November, 2013 (the "Order") made in an action having Court file number ●, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ ●, being part of the total principal sum of \$ ● which the Receiver is authorized to borrow under and pursuant to the Order.
2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.
3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.
4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.
5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

(a)

DATED the ____ day of _____, 2013.

Collins Barrow Toronto Limited

solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____

Name:

Title:

SCHEDULE "B"**LEGAL DESCRIPTION**

PIN

10126 - 1010 LT

Part of Lot 8 Concession 2 EYS (N York),
designated as Parts 1 & 2 on Plan 66R24078;
City of Toronto

ADDRESS

2425 and 2427 Bayview Avenue
Toronto

HOME TRUST COMPANY
Applicant

v.

Court File No. CV-13-10313-00CL
2122775 ONTARIO INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

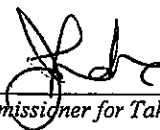
ORDER

GOWLING LAFLUEUR HENDERSON LLP
Barristers and Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Calvin J. Ho (LSUC No. 40875B)
Tel: (416) 862-5788
Fax: (416) 862-7661

Solicitors for the Applicant
Home Trust Company

This is Exhibit "B" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

Court File No. CV-13-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE)	WEDNESDAY, THE 11 TH
)	
MR. JUSTICE D.M. BROWN)	DAY OF DECEMBER, 2013

B E T W E E N:

HOME TRUST COMPANY

Applicant

-and-

2122775 ONTARIO INC.

Respondent

APPLICATION UNDER s. 243(1) of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985 c. B-3, s. 101 of the *Courts of Justice Act*,
R.S.O. 1990, c. C-43, as amended

ORDER

THIS MOTION, made by Collins Barrow Toronto Limited, in its capacity as Court appointed receiver and receiver and manager (the "Receiver") of 2122775 Ontario Inc. (the "Debtor"), without security, of all the lands and premises municipally known as 2425 and 2427 Bayview Avenue, Toronto, Ontario, and all of the Debtor's current and future assets, undertakings and properties, for an Order approving the marketing and sales process proposed in the First Report to Court of the Receiver (the "First Report"), as well as the activities of the Receiver as set out in the First Report, was heard this day at 330 University Avenue, Toronto, Ontario.

- 2 -

ON READING the First Report and on hearing the submissions of counsel for the Receiver, no other person appearing though served,

1. **THIS COURT ORDERS** that the First Report and the activities of the Receiver as described in the First Report for the period November 15, 2013 to December 3, 2013, are hereby approved.
2. **THIS COURT FURTHER ORDERS** that the Receiver's marketing and sales plan for the Lands as described in the First Report (the "Marketing Process") is hereby approved, and the Receiver is hereby authorized and directed to proceed with carrying out the Marketing Process.
3. **THIS COURT FURTHER ORDERS** that Appendix "J" to the First Report, being the Confidential Information Memorandum, shall be sealed, kept confidential, and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope and shall only be opened upon further order of the Court.
4. **THIS COURT FURTHER ORDERS** that the Receiver shall retain independent legal counsel at such time and capacity as may be deemed necessary by the Receiver.
5. **THIS COURT FURTHER ORDERS** that if considered by the Receiver to be necessary or appropriate, to disclose to and review with any secured creditors of the Debtor or any of their advisors, any and all offers received by the Receiver to purchase the Lands.
6. **THIS COURT FURTHER ORDERS** that the Receiver shall have its costs of this Motion from the estate herein in accordance with the initial Appointment Order.

DEC 11 2013


A. Anissimova
Registrar

Court File No. CV-13-10313-00CL

HOME TRUST COMPANY
Applicant v. 2122775 ONTARIO INC.
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ORDER

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
Suite 1600 – 1 First Canadian Place
100 King Street West
Toronto, Ontario
M5X 1G5
Attn: Calvin J. Ho (LSUC #40875B)
TEL: (416) 862 5788
FAX: (416) 862-7661

Lawyers for the Applicant

This is Exhibit "C" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE



dedicated to your success

WALTER M. TRAUB
Tel: 416-597-9922
E-mail: traub@gsnh.com

Clerk: Nicole Yap
Tel: (416) 597-6479
Email: yap@gsnh.com

Our File No.: 120404

February 10, 2014

Dickinson Wright LLP
Barristers & Solicitors
199 Bay Street, Suite 2200
Toronto, Ontario M5L 1G4

Attention: Lisa Come

Dear Sirs:

Re: Home Trust Company v. 2122775 Ontario Inc.

This is further to my telephone discussion with you of today wherein I indicated that I received communication from Mr. Brian Jenkins of Messrs. Keyer Mason Ball LLP acting for 2122775 Ontario Inc. indicating that he intends to proceed before the court for an Order requesting redemption of the Home Trust Company mortgage by the borrower and staying the receivership and sale proceedings pending funding pursuant to financing commitments received from Toronto Capital Inc. as per enclosed. Due to a flood occurrence at the offices of Messrs. Keyser Mason Ball, LLP Mr. Jenkins is not in the office and has asked me to communicate this advice to you.

I am also authorized to deliver to you the enclosed two financing commitments which have been received by 2122775 Ontario Inc. together with a letter from Toronto Capital Inc. confirming that subject to fulfillment of standard financing conditions the financing commitments are firm.

Please be further advised that we have received instructions from our clients, VS Capital Corporation and Mr. Zaherali Visram, the second, third and fourth mortgagees of the subject property, to consent to the Toronto Capital Inc. financing and to the redemption by 2122775 Ontario Inc. of the first mortgage in favour of Home Trust Company.

Pursuant to such instructions we are authorized to appear before the court and support 2122775 Ontario Inc.'s application for redemption of the Home Trust Company mortgage and for temporary stay of the receivership and sale process, to allow for completion of such financing and full redemption of the Home Trust Company mortgage and termination of the receivership.

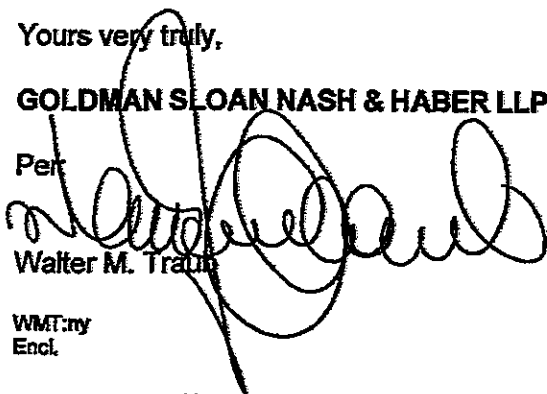
I am copying Mr. Jenkins with this correspondence, as per his request.

If I may be of any further assistance please feel free to call me at any time.

Yours very truly,

GOLDMAN SLOAN NASH & HABER LLP

Per

A large, stylized handwritten signature in black ink, appearing to read 'Walter M. Train', is written over the text 'Per' and 'Walter M. Train'.

Walter M. Train

WMT:ny
Encl.

c. *Mr. Brian Jenkins*
VS Capital Corporation, Attn: Mr. Manji and Zahera Visram

This is Exhibit "D" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

Court File No. CV-13-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondents

SECOND SUPPLEMENTAL REPORT OF THE RECEIVER

February 13, 2014

Table of Contents

I.	INTRODUCTION.....	1
II.	NOTICE OF INTENT TO REDEEM HOME TRUST MORTGAGE.....	1
III.	REVIEW OF TERM SHEETS.....	3
IV.	RECEIVER'S COMMENTS ON TERM SHEETS.....	6
V.	THE RECEIVER'S SALES PROCESS.....	8
VI.	CONCLUSION	9

Appendices

GSNH Letter.....	A
TCI letter, TCI Term Sheet and Ushjo Term Sheet.....	B

I. INTRODUCTION

1. This Second Supplemental Report ("**Second Supplemental**") is to be read in conjunction with the Second Report of Collins Barrow Toronto Limited, Court-appointed receiver and receiver and manager of 2122775 Ontario Inc. (the "**Receiver**") dated February 5, 2014 ("**Second Report**") and the Supplemental Report of the Receiver dated February 5, 2014 ("**First Supplemental**"). The First Supplemental, which the Receiver has requested be sealed until the closing of the sale of the Lands, provides the Court with details of the offers received by the Receiver and the Receiver's activities following receipt of those offers.
2. The purpose of the Second Supplemental is to
 - (a) inform the Court of a pending proceeding by 2122275 Ontario Inc. ("**2122775**" or the "**Debtor**") in which 2122275 will request that the Court issue an Order allowing for the redemption of the Home Trust Company ("**Home Trust**") mortgage by the Debtor and staying the receivership and sale proceedings; and
 - (b) provide information to the Court on the two term sheets that were provided to the Receiver which the Receiver understands will form the basis of the Debtor's requests described above.
3. All defined terms in the Second Supplemental have the meanings ascribed to them in the Second Report.

II. NOTICE OF INTENT TO REDEEM HOME TRUST MORTGAGE

4. On February 10, 2014, Dickinson Wright LLP ("**Dickinson**"), counsel for the Receiver, received correspondence from Goldman Sloan Nash & Haber LLP

("GSNH"), counsel for VS Capital and Visram, the second through fourth mortgagees:

- (a) indicating that GSNH had received communication from Keyser Mason Ball LLP ("**Keyser**"), counsel for the Debtor, that Keyser intended to apply for an Order requesting redemption of the Home Trust mortgage by the Debtor and staying the receivership and sale proceedings pending funding pursuant to financing "*commitments*" received from Toronto Capital Inc. ("**TCI**");
 - (b) enclosing the two financing term sheets which had been received by 2122775 together with a letter from TCI stating that subject to fulfillment of standard legal requirements, its lenders were "*ready, willing and able to close their respective commitments*"; and
 - (c) advising that GSNH had received instructions from VS Capital and Visram to consent to the TCI financing and to the redemption by 2122775 of the Home Trust mortgage, and that GSNH was authorized to appear before the Court and support 2122775's application for redemption of the Home Trust mortgage and for a temporary stay of the receivership and sale process, to allow for completion of such financing and full redemption of the Home Trust mortgage and termination of the receivership.
5. A copy of the GSNH letter is attached hereto as Appendix "A".
 6. Included in the correspondence from GSNH were copies of a term sheet from Toronto Capital Inc. In Trust (the "**TCI Term Sheet**"), a term sheet from Ushjo Enterprises Inc. (In Trust) (the "**Ushjo Term Sheet**") and a letter dated

January 23, 2014 from TCI stating, *inter alia*, that "*Subject to standard legal requirements (i.e. Registration of security and confirmation of property taxes) our Lenders are ready, willing and able to close their respective commitments.*"

Copies of the letter from TCI, the TCI Term Sheet and the Ushjo Term Sheet are attached hereto as Appendix "B".

7. Notwithstanding that the letter from TCI was dated January 23, 2014, a copy was not provided to the Receiver until the evening of February 10, 2014.
8. The Receiver forwarded a copy of the GSNH letter, the TCI letter, the TCI Term Sheet and the Ushjo Term Sheet to Home Trust, which had not received prior notice of the Debtor's intent to redeem the Home Trust mortgage.

III. REVIEW OF TERM SHEETS

9. The Receiver has reviewed the TCI Term Sheet and the Ushjo Term Sheet.
10. Set out below are the salient terms of those term sheets as they relate to the Debtor receiving the contemplated financing:

(i) *TCI Term Sheet*

- a. The purpose of the loan is to pay out the existing first mortgage in favour of Home Trust in the amount of \$6,820,000;
- b. The borrowers are the Debtor and HUSH Homes Inc. ("HUSH");
- c. The lender is Milev Limited;
- d. The principal amount of the loan is \$5,000,000;
- e. The mortgage security is to include a first mortgage against the lands and improvements over 2425 Bayview Avenue, Toronto, Ontario;

-
- f. The term of the loan is 15 months during which interest on the loan is calculated at 7% per annum for the first 12 months and at 12% per annum for the last 3 months of the term;
- g. Financing is conditional on, among other things:
- i. Title proving acceptable to the Lender and his solicitors;
 - ii. Property taxes to be in good standing;
 - iii. Satisfactory site inspection by the Lender or his agents;
 - iv. Receipt of confirmation that the building permit is in good standing;
and
 - v. Standstill agreements from the subsequent encumbrances;
- h. A brokerage fee of 1% (\$50,000) is payable to TCI from the advance amount;
- i. A holdback in the amount of \$175,000, representing the first 6 months interest payment, will be held back from the advance;
- j. Payment of a Lender's fee of \$50,000 and a stand-by fee of \$5,000 upon issuance of the commitment letter; and
- k. The letter was open for acceptance by 2122775 until January 20, 2014.

The letter was accepted by 2122775; however, the date of the acceptance is not included on the letter.

(ii) *Ushjo Term Sheet*

- a. The lender is Ushjo Enterprises Inc. (in Trust) ("**Ushjo**");
- b. The borrowers are the Debtor and HUSH;
- c. The amount of the loan is \$3,000,000;

d. The loan proceeds are to be paid out as follows:

Payout of Home Trust mortgage	\$2,045,000
Declining interest reserve	210,000
Liens	120,000
Complete model home	300,000
Fees	140,000
Legals	40,000
Working Capital	<u>Remainder</u>
	<u>\$3,000,000</u>

- e. The mortgage security is to include a second collateral mortgage of \$3,000,000 over 2425 Bayview Avenue, Toronto, Ontario, subject to a 1st mortgage of no greater than \$5,000,000 with an interest rate of 7%;
- f. The term of the loan is 15 months during which interest on the loan is calculated at 14% per annum;
- g. Financing is conditional on, among other things:
- i. No material adverse change having occurred in the Company's business or assets;
 - ii. The Lender and the Lender's solicitor being satisfied with the results of their due diligence;
 - iii. Property taxes to be in good standing;
 - iv. Satisfactory site inspection by the Lender;
 - v. The borrowers have 6 months from the date of closing to obtain a commitment for construction financing, which commitment will include the repayment of this financing in full. This condition is on a best efforts basis;
 - vi. A lender fee of \$80,000 is to be deducted from the advance amount;

-
- vii. A non-refundable allowance towards legal costs of \$3,000 is to be paid upon acceptance of the term sheet;
 - viii. A brokerage fee of \$40,000 is payable to TCI from the advance amount;
 - ix. A referral fee of \$20,000 is payable to "Fred" from the advance amount; and
 - x. A fee of \$80,000 shall be paid to the Lender and TCI at the time of refinance.

The term sheet appears to have been accepted and agreed on January 21, 2014.

IV. RECEIVER'S COMMENTS ON TERM SHEETS

- 11. The Receiver has reviewed the term sheets with a view to determining whether (i) the proposed financing will be sufficient in quantity to redeem Home Trust's mortgage and costs plus unpaid costs of the receivership, and (ii) the term sheets provide any certainty as to when a payout of the Home Trust mortgage would occur. The Receiver's comments are set out below.
- 12. The purpose of the financing is to provide for the full redemption of the Home Trust mortgage and the termination of the receivership. However, the financing to be provided by Milev Limited and Ushjo is not sufficient to pay out Home Trust's mortgage and costs plus unpaid receivership costs incurred to date. The total of Home Trust's mortgage and costs, the cost of funding the receivership and receivership disbursements is approximately \$7,368,917 as at February 10, 2014 compared to the funds that would be available upon the closing of the

financing of \$6,820,000. The resultant deficiency is \$548,917, calculated by the Receiver as follows:

Funds allocated for payout of Home Trust mortgage	
TCI Term Sheet	\$ 4,775,000
Ushjo Term Sheet	2,045,000
Total available for payout of Home Trust mortgage	<u>\$ 6,820,000</u>
Balance owed to Home Trust as at February 10, 2014	\$ 6,730,006
Receiver's Borrowing Charge to February 10, 2014	301,609
Actual and accrued receivership costs to February 10, 2014	337,302
Total mortgage and receivership costs to date	<u>\$ 7,368,917</u>
Deficiency in funding	<u>\$ (548,917)</u>

13. The term sheets are undated and do not specify any firm dates as to when the Lenders' due diligence is to be completed or when the funds will be advanced. As noted earlier in this report, the funding appears conditional upon certain conditions being satisfied.
14. The Ushjo Term Sheet states that the second collateral mortgage is to be subject to a first mortgage of no greater than \$5,000,000 with an interest rate of 7%; however, the proposed first mortgage specifies an interest rate of 12.00% for the last 3 months of the term. The terms of the TCI Term Sheet therefore do not appear to satisfy the conditions of the Ushjo Term Sheet.
15. The Ushjo Term Sheet provides for \$120,000 to be allocated to payment of liens registered against the property. As of the date of receivership, the Debtor's books and records indicated that the lien claimants were owed \$134,353.
16. With regard to this information, the Receiver notes these are term sheets and not commitments. There is no commitment from the lenders. The Receiver also

notes that to the best of its knowledge, the lenders have not contacted the Receiver to make arrangements to visit the site.

V. THE RECEIVER'S SALES PROCESS

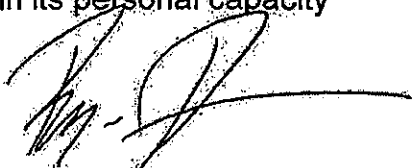
17. As described more fully in the Second Report and First Supplemental, the Receiver has carried out a marketing and sales process in accordance with the Marketing Order and is seeking an order authorizing and directing the Receiver to enter into and carry out the terms of the agreement of purchase and sale between the Receiver and Urbancorp (Downtown) Developments Inc. ("**Purchase Agreement**").
18. The terms of the Purchase Agreement allow for full payout of Home Trust's mortgage and costs; payment in full of the costs of the receivership administration, and a closing 31 days after the date of the Approval and Vesting Order.
19. The Receiver is of the view that upon completion of the Purchase Agreement, it will also have surplus funds with which to make payments to the mortgagee(s) and/or other creditors ranking behind Home Trust. Despite the Receiver's requests to VS Capital and Visram, the Receiver has not yet received any documentation to support the amounts that may be claimed to be secured by the mortgages of VS Capital and Visram. As a result, it is difficult at this time for the Receiver to comment on which creditors of the Debtor would be entitled to receive the surplus funds arising from the completion of the Purchase Agreement.

VI. CONCLUSION

20. As of the date of this report, the Receiver has not yet received any motion materials from the Debtor, VS Capital or Visram to confirm that the Debtor will seek an Order to enable it to fully redeem the Home Trust mortgage and to terminate these receivership proceedings. Notwithstanding, the Receiver has prepared this report for the Court for the benefit of the Court in the event such materials are served.

All of which is respectfully submitted to this Court as of this 13th day of February, 2014.

COLLINS BARROW TORONTO LIMITED
In its capacity as Court Appointed Receiver
and Manager of 2122775 Ontario Inc. and
not in its personal capacity



Per: Bryan A. Tannenbaum, FCPA, FCA, FCIRP
President

APPENDIX A



dedicated to your success

WALTER M. TRAUB
Tel: 416-597-9922
E-mail: traub@gsnh.com

Clerk: Nicole Yap
Tel: (416) 597-6479
Email: yap@gsnh.com

Our File No.: 120404

February 10, 2014

Dickinson Wright LLP
Barristers & Solicitors
199 Bay Street, Suite 2200
Toronto, Ontario M5L 1G4

Attention: Lisa Corne

Dear Sirs:

Re: Home Trust Company v. 2122775 Ontario Inc.

This is further to my telephone discussion with you of today wherein I indicated that I received communication from Mr. Brian Jenkins of Messrs. Keyer Mason Ball LLP acting for 2122775 Ontario Inc. indicating that he intends to proceed before the court for an Order requesting redemption of the Home Trust Company mortgage by the borrower and staying the receivership and sale proceedings pending funding pursuant to financing commitments received from Toronto Capital Inc. as per enclosed. Due to a flood occurrence at the offices of Messrs. Keyer Mason Ball, LLP Mr. Jenkins is not in the office and has asked me to communicate this advice to you.

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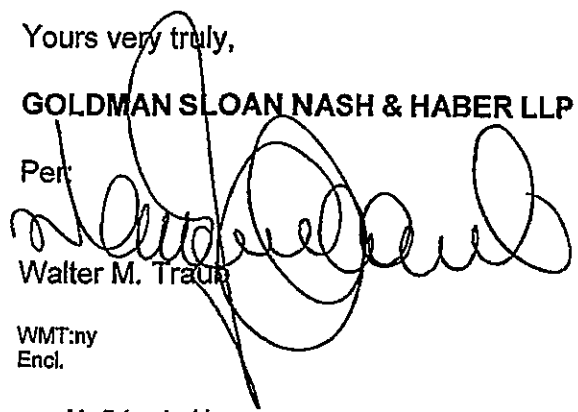
I am copying Mr. Jenkins with this correspondence, as per his request.

If I may be of any further assistance please feel free to call me at any time.

Yours very truly,

GOLDMAN SLOAN NASH & HABER LLP

Per:

A large, stylized handwritten signature in black ink, appearing to read 'Walter M. Traub', is written over the printed name and extends upwards into the 'Yours very truly,' line.

Walter M. Traub

WMT:ny
Encl.

c. *Mr. Brian Jenkins*
VS Capital Corporation, Attn: Mr. Manji and Zaherali Visram

APPENDIX B

Toronto

Capital

P: 416.225.0555 F: 647.438.2066 W: www.torontocapital.com

A: 480 Lawrence Ave West, 4th Flr, Toronto, Ontario M5M 1C4

January 23, 2014

RE: Borrowers – 2122775 Ontario Inc. & Hush Homes Inc.
Property – 2425 Bayview Ave, Toronto, Ontario
1st mortgage financing of \$5Million
2nd mortgage financing of \$3Million

To whom it may concern;

Subject to standard legal requirements (ie. Registration of security and confirmation of property taxes) our Lenders are ready, willing and able to close their respective commitments.

Building permits appear to be in good standing.
Subsequent encumbrances and their legal counsel have indicated their willingness to enter into agreeable standstill agreements.

Legal counsel for the 1st mortgagee:
Leor Margulies
Robbins, Appleby, Taub

Legal counsel for the 2nd mortgagee:
Barry Rotenberg
Harris Schaeffer

Sincerely,

Frank Mondelli

Frank Mondelli
Toronto Capital Inc.
(signed electronically)

TORONTO CAPITAL INC. IN TRUST

TERM SHEET

PRIVATE & CONFIDENTIAL

Subject to the terms and conditions set forth in this letter, the Lender will proceed to issue a letter of commitment.

1. PURPOSE

To provide a first mortgage to assist with the payout of the existing 1st mortgage in favour of Home Trust in the amount of \$6,820,000.00.

2. BORROWER(S)

2122775 Ontario Inc.
Hush Homes Inc.
(hereinafter collectively called "Borrower").

The Borrower covenants and agrees to satisfy all the terms, conditions and requirements herein contained before any advance is made. The obligation of the Borrower and Covenantors to make payment under the mortgage and other security and perform all other obligations hereunder shall be deemed to be joint and several.

The property and facts are to be as represented by you to the Lender. Material discrepancy or inaccuracy in any information, statements or representations made or furnished to us by or on behalf of you shall be cause for cancellation of this commitment.

3. COVENANTOR(S)

Naheel Suleman (Unlimited) (hereinafter referred to as the "Guarantors")

The Borrower and Guarantors covenant to satisfy all the terms, conditions and requirements herein contained before any advances are made. The liability of the Borrower and Guarantors to make payment under the mortgage and perform all other obligations hereunder and the liability of the Guarantors shall be continuing and joint and several.

4. LENDER

Milev Limited.

5. DESCRIPTION OF SECURITY

A development site approved with building permit issued for 20 luxury townhomes.

-2-

6. MORTGAGE SECURITY

Mortgage security shall include but not be limited to:

- a) A valid First Mortgage charge in the amount of \$5,000,000.00 against all lands and improvements over 2425 Bayview Avenue, Toronto, Ontario, known as Hush-Alexandria Project;
- b) The Unlimited Guarantee of Naheel Suleman;
- c) An assignment of all approvals, permits and authorizations;
- d) An assignment of all Purchase and Sale Agreements;
- e) A General Security Agreement over all fixtures, equipment and chattels, etc;
- f) An Assignment of all insurance policies including adequate Builder's All Risk (If applicable);
- g) Title insurance;
- h) Such other security as may be deemed necessary by the Lender's solicitors;
- i) All security documentation shall include Lender's standard forms, including default provisions.

7. MUNICIPAL ADDRESS

2425 Bayview Avenue, Toronto, Ontario.

8. LEGAL DESCRIPTION

To be provided.

9. TYPE OF LOAN

Conventional First Mortgage.

10. PRINCIPAL AMOUNT

\$5,000,000.00

11. TERM

15 Months

12. INTEREST RATE

7.00%, per annum, calculated and payable monthly for the 1st 12 months and 12.00% for last 3 months of the term.

13. LENDER'S FEE

\$50,000.00 (1.00% of loan amount), the Lender's fee shall be due and deemed earned upon acceptance of the commitment letter to be issued following the receipt of this signed letter and the associated stand-by fee.

14. MONTHLY PAYMENTS

During the term of the loan, interest only payments shall be calculated and compounded monthly. Payments shall be payable monthly on the first business day of each and every month that an outstanding balance remains unpaid.

The initial payment shall be due and payable on the first day of the first month following the depletion of the interest reserve and-

15. FUNDING

When conditions precedent have been satisfied.

16. INTEREST ADJUSTMENT DATE

The Interest Adjustment Date shall be no later than the first day of the calendar month immediately following the month in which the funding of this loan is made.

17. AMORTIZATION

The loan is to be interest only.

18. PREPAYMENT

The loan shall be closed for 9 months and open upon 60 days written notice thereafter.

19. CONDITIONS PRECEDENT

In addition to the matters described elsewhere in this term sheet, the conditions to be satisfied in advance of the disbursement of funds under the mortgage contemplated herein shall include but not be limited to;

- a) The funds secured by the mortgage will be advanced upon title proving acceptable to the Lender and his solicitors, upon registration of the security documents as required and upon receipt from the Lender's solicitors of a satisfactory report on registration of the security documents and confirmation of no adverse filings concerning the Borrower in any ministry, department or agency of government which, in the Lender's solicitor's opinion, could affect the priority of the mortgage; and upon fulfillment of all other terms and conditions of this commitment.
- b) Property taxes to be in good standing
- c) Satisfactory site inspection by the Lender or his agents.
- d) Receipt of confirmation that the building permit is in good standing.
- e) Standstill agreements from the subsequent encumbrances.

20. TAXES

All outstanding taxes, assessments and other sums, charged or levied against the lands shall be current and in good standing, failure to do so will constitute a default under the mortgage.

.../4

-4-

21. INSURANCE

The Borrower shall have proper and adequate Insurance coverage in effect at all times with the lender named as first loss payee.

22. LEGAL FEES

The Borrower shall be responsible for all legal fees incurred by the Lender in connection with the loan contemplated by this commitment. The Lender will appoint Leor Margulies of Robbins, Appleby, Taub upon receipt of this executed commitment letter and associated stand-by fees.

23. STAND-BY FEE

The borrower shall submit along with this executed letter a stand-by fee in the amount of \$5,000.00 to be applied against the lender's legal fees and any outstanding legal fees in the event the loan is not proceeded with as a result of the borrower's inability to comply with any of the terms contemplated herein. This fee shall be deemed earned and non-refundable upon issuance of the commitment letter contemplated herein.

24. BROKERAGE FEE

A brokerage fee of 1.00% shall be deducted from the advance of funds payable to Toronto Capital Inc.

25. INTEREST RESERVE

There will be a holdback from the advance in the amount of \$175,000.00 representing the first 6 (six) months interest payment.

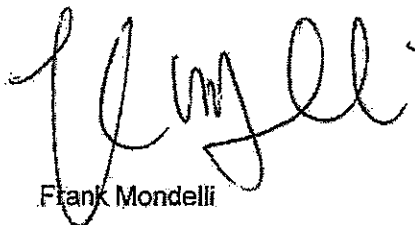
26. ACKNOWLEDGEMENT

The lender acknowledges the existence of subsequent encumbrances.

This letter will be open for acceptance by the Borrower until January 20, 2014, failing which, this letter will become null and void.

Yours very truly,

TORONTO CAPITAL INC.



Frank Mondelli


FM/sk



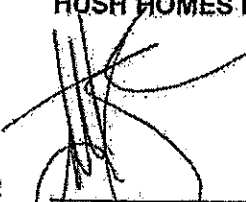
The foregoing term sheet and all terms and conditions thereof are hereby accepted by the undersigned this day of January, 2014.

BORROWER:

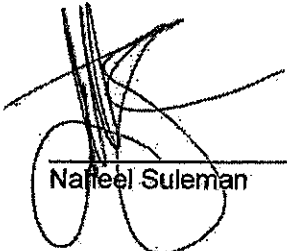
2122775 ONTARIO INC.


Per: _____
Name:
Title:

HUSH HOMES INC.


Per: _____
Name:
Title:

GUARANTOR(s)


Nafeel Suleman _____

USHJO ENTERPRISES INC. (IN TRUST)

TERM SHEET

PRIVATE & CONFIDENTIAL

Up to \$3,000,000 CDN 2nd Mortgage Financing

- Lender:** USHJO ENTERPRISES INC. (in Trust)
(the "Lender") will provide financing of up to CDN \$3,000,000.
- Borrower(s):** 2122775 Ontario Inc.
Hush Homes Inc.
- Use of Proceeds:** The proceeds will be used as follows:
- Complete Payout of Home Trust 1st mortgage \$2,045,000
 - Declining Interest Reserve - \$210,000
 - Liens - \$120,000
 - Complete model home - \$300,000
 - Fees - \$140,000
 - Legals - \$40,000
 - Working capital - Remainder
- Note: Monies for the model home and working capital are to be deposited directly into a bank account at Korea Exchange Bank.
- Closing:** The completion of the Loan ("Closing") shall occur on or before January 24th, 2014 or such other date as agreed by the Borrowers and the Lender (the "Closing Date").
- Maturity:** All accrued interest and principal shall become due 15 months from the Closing Date. (the "Maturity Date")
- Interest Rate:** The Loan shall bear interest at 14.0% per annum, interest payable there under shall accrue from day to day and shall be payable monthly calculated on the basis of the actual number of days elapsed from the Closing Date.
- Monthly interest payments on both the first and second mortgage during the first 6 months from closing will be drawn from the Interest Reserve. If there is a shortfall and/or the Interest Reserve is fully drawn, the Borrower(s) are responsible.

- 2 -

Security Interest:

The Loan shall be secured by:

- 2nd collateral mortgage of \$3,000,000 over 2425 Bayview Avenue, Toronto, Ontario (Hush – Alexandria project) subject to a 1st mortgage of no greater than \$5,000,000 with an interest rate of 7%.
- Unlimited guarantees of:
 - Naheel Suleman
- 2nd position Assignment of all approvals and authorizations
- 2nd position Assignment of all Purchase and Sale Agreements
- 2nd position Assignment of Insurance
- Opinion by Borrower's counsel as to due authorization, valid execution and enforceability of all security.
- Such other documentation, instruments, agreements, security and/or assurances as may be reasonably requested by the Lender and/or its solicitors.

Guarantors:

Naheel Suleman – Unlimited

Repayment:

The loan is closed for 6 months and open thereafter.

Conditions:

In addition to the matters described elsewhere in this Term Sheet, the completion of the transaction will be subject to the following conditions:

- (a) no material adverse change having occurred in the Company's business or assets;
- (b) the Lender and the Lender's solicitor being satisfied with the results of its due diligence; and
- (c) the Company having done all things necessary to allow the security to be registered as contemplated herein, and in a manner satisfactory to the Lender and its solicitors
- (d) property taxes to be in good standing. Property tax statements to be provided semi-annually evidencing no arrears.
- (e) satisfactory site inspection by the Lender
- (f) Funds to be used for payment of completion of the model home and working capital to be advanced into an account designated by the Lender. Release of the funds will be authorized by the Lender or a representative of the Lender against approved invoices.

- 3 -

- (g) The Borrower(s) have 6 months from the date of closing to obtain a commitment for construction financing. This commitment will include the repayment of this financing in full. This condition is on a best efforts basis.

- Legal Documentation:** The Loan will be made pursuant to Security Agreements. Such agreements shall contain, among other things, customary representations and warranties of the Borrower(s) and the Borrower(s) shall also execute such documents and agreements as may be required by Lender's solicitors.
- Lender Fee:** A Lender Fee of \$80,000 shall be deducted from the advance amount.
- Legal Fees:** All Legal Fees are to the account of the Borrower. A non-refundable allowance towards legal costs of \$3,000 shall be paid upon acceptance of this term sheet.
- Brokerage Fee** A Brokerage fee of \$40,000 shall be deducted from the advance amount.
Brokerage Fee payable to: Toronto Capital Inc.
- Referral Fee** A Referral fee of \$20,000 shall be deducted from the advance amount.
Referral fee payable to: Fred
- Other Fee** A Fee of \$80,000 payable to the Lender and Toronto Capital Inc. shall be paid at the time of refinance.
- Acceleration:** All principal and interest shall become due immediately should an Event of Default occur.
- Event of Default:** The following are events of default ("Events of Default")
- The Borrower(s) failing to make an interest payment.
 - The Borrower(s) default on one or more of the Conditions of this Term Sheet.
 - The Borrower(s) becoming insolvent or it commits an act of bankruptcy.

- 4 -

Delinquency Fees: Any legal fees, monitoring fees, receiver's fees or other fees associated with the collection of the Loan shall be paid by the Borrower, shall bear interest at a rate of 24.0% per annum and shall be due when incurred (the "Delinquency Fees").

Default Interest If the Loan is in default it will bear interest at 24.0% per annum, payable on a monthly basis.

Additional Provisions:

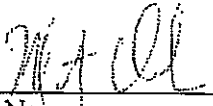
- Interest will be drawn from the Interest Reserve for the first 6 monthly payments.
- A series of 9 postdated cheques or automatic bank transfer to be provided on or before closing for the remaining 9 months.
- N.S.F. fee of \$500.00 for each dishonoured cheque
- 3 month interest penalty will be charged if the mortgage is not paid out in full on the maturity date
- In the event of default, the mortgagee is entitled to charge \$1,500.00 for each action or proceeding instituted and a fee of \$100.00 per day for administering the maintenance and security of any property in its possession.

If this Term Sheet is acceptable to you, please sign it in the space provided below and return an original copy to us on or before 11:59 p.m. on January 21, 2014 Toronto Time.

Accepted and agreed this 21 day of January, 2014.

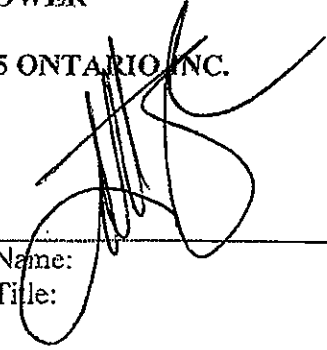
LENDER

USHJO ENTERPRISES INC. (in Trust)

Per: 
Name:
Title: President

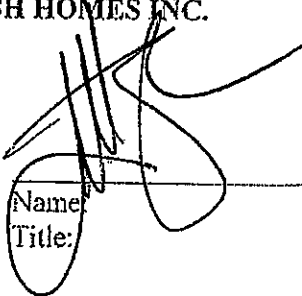
BORROWER

2122775 ONTARIO INC.

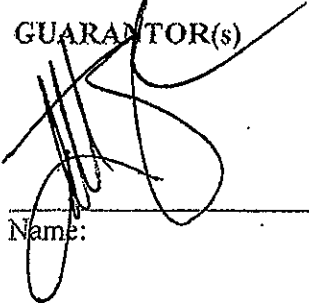
Per: 
Name:
Title:

BORROWER(s)

HUSH HOMES INC.

Per: 
Name:
Title:

GUARANTOR(s)


Name:

GUARANTOR(s)

Name:

This is Exhibit "E" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

From: Frank - Toronto Capital <frank@torontocapital.com>
Date: February 14, 2014 at 10:49:18 AM EST
To: Michael Sannella <michael@torontocapital.com>, Naheel HUSH <naheel@hush.ca>
Subject: Letter 2

Frank Mondelli
Toronto Capital Inc.
480 Lawrence Ave West, 4th Flr
Toronto, Ontario
T - 416-225-0555 ext 301
C - 647-938-7595
F - 647-438-2066
Lic 11032

February 14, 2014

RE: Borrowers – 2122775 Ontario Inc. & Hush Homes Inc.
Property – 2425 Bayview Ave, Toronto, Ontario

2nd mortgage financing of \$3Million – Ushjo Enterprises Inc. (In Trust)

To whom it may concern;

We commit to the following changes of the 2nd mortgage financing:

1. **Delete:** Existing Use of Proceeds

Add: Use of Proceeds

- Complete payout of Home Trust - \$2,700,000
- Liens - \$120,000
- Fees - \$140,000
- Legals - \$40,000

2. Security:

- 2nd mortgage of \$3,000,000 over 2425 Bayview Avenue, Toronto, Ontario, (Hush – Alexandria project) subject to a 1st mortgage of no greater than \$5,000,000 with an interest rate of 7% during the first 12 months and 12% thereafter.

- Net proceeds from the 1st mortgage (after interest reserve, fees and legals) is approximately \$4,700,000.
- Net proceeds from the 2nd mortgage (after fees and legals) is approximately \$2,820,000.
- Total proceeds of approximately \$7,520,000 is sufficient to payout the indebtedness of approximately \$7,504,000.

Sincerely,

Frank Mondelli

Frank Mondelli
Toronto Capital Inc.
(signed electronically)

This is Exhibit "F" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

Court File No. CV-10313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.)
 JUSTICE ^DBROWN)

FRIDAY, THE 14th DAY
 OF FEBRUARY, 2014

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

APPLICATION UNDER section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended
 and section 101 of the *Court of Justice Act*, R.S.O. 1990, c. C-43, as amended

APPROVAL AND VESTING ORDER

THIS MOTION, made by Collins Barrow Toronto Limited in its capacity as the Court-appointed receiver and manager (the "Receiver") of the undertaking, property and assets of 2122775 Ontario Inc. (the "Debtor") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and Urbancorp (Downtown) Developments Inc. (the "Purchaser") made as of January 22, 2014 and appended to the Supplemental Report of the Receiver dated February 5, 2014 (the "Supplement"), and vesting in the Purchaser the Debtor's right, title and interest in and

to the assets described in the Sale Agreement (the "Purchased Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Supplement and the Second Report of the Receiver (the "Report")

both dated February 5, 2014 and on hearing the submissions of counsel for the Receiver, the Purchaser, Home Trust Company, The Delta, VS Capital Corporation, and the heretofore named *Prakash Visram*, ~~[NAMES OF OTHER PARTIES APPEARING]~~, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Luisa Salerno sworn February 6, 2014 filed:

1. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and that the Sale Agreement is commercially reasonable and in the best interests of the Debtor and its stakeholders. The execution of the Sale Agreement by the Receiver is hereby authorized and approved, and the Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

2. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "Receiver's Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement and listed on Schedule B hereto shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Thorburn dated November 15, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) and, for greater

certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

3. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Land Titles Division of Toronto of an Application for Vesting Order in the form prescribed by the *Land Titles Act*, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "Real Property") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule C hereto.

4. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

6. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

7. THIS COURT ORDERS that, notwithstanding:

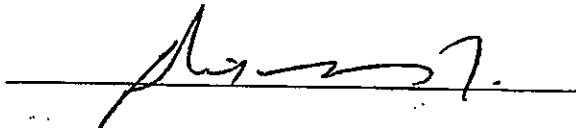
(a) the pendency of these proceedings;

- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

9. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB 14 2014

MS

Schedule A – Form of Receiver’s Certificate

Court File No. CV-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

APPLICATION UNDER section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Court of Justice Act*, R.S.O. 1990, c. C-43, as amended

RECEIVER’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Thorburn of the Ontario Superior Court of Justice (the "Court") dated November 15, 2013, Collins Barrow Toronto Limited was appointed as the receiver and manager (the "Receiver") of the undertaking, property and assets of 2122775 Ontario Inc. (the "Debtor").

B. Pursuant to an Order of the Court dated February 14, 2014, the Court approved the agreement of purchase and sale made as of January 22, 2014 (the "Sale Agreement") between the Receiver and Urbancorp (Downtown) Developments Inc. (the "Purchaser") and provided for the vesting in the Purchaser of the Debtor’s right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the

- 2 -

Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in section 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;
2. The conditions to Closing as set out in section 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Receiver.
4. This Certificate was delivered by the Receiver at _____ [TIME] on _____ 2014.

**COLLINS BARROW TORONTO LIMITED,
in its capacity as Receiver of the undertaking,
property and assets of 2122775 Ontario Inc.,
and not in its personal capacity**

Per: _____

Name:

Title:

Schedule B – Purchased Assets

The right, title and interest of the Debtor, if any, in the real property described as PIN No. 10126-1010 (LT) Part of Lot 8 Concession 2 EYS (N York), designated as Parts 1 & 2 on Plan 66R24078; City of Toronto, including the existing underground parking garage, and one townhome situated thereon, and all plans in the possession or control of the Receiver relevant to the development thereof, and the construction of any buildings thereon.

The right, title and interest of the Debtor, if any, in all prepaid Development Charges, payment in lieu of Park, Hydro connection fees, security for Hydro usage and similar payments previously made with respect to the Lands and the benefit of any Letters of Credit posted with respect to compliance with any Site Plan Agreement or similar Agreements with the City of Toronto or any utility provider.

Schedule C – Claims to be deleted and expunged from title to Real Property

Reg. Num.	Date	Instrument Type	Amount	Parties From	Parties To
AT2708324	2011/06/01	Charge	\$6,500,000.00	2122775 Ontario Inc.	Home Trust Company
AT2708325	2011/06/01	No Assgn Rent Gen		2122775 Ontario Inc.	Home Trust Company
AT2918710	2012/01/13	Charge	5,100,000.00	2122775 Ontario Inc.	Visram, Zaherali
AT2918711	2012/01/13	No Assgn Rent Gen		2122775 Ontario Inc.	Visram, Zaherali
AT3114322	2012/08/29	Charge	8,750,000.00	2122775 Ontario Inc.	VS Capital Corporation
AT3153542	2012/10/17	Charge	4,000,000.00	2122775 Ontario Inc.	VS Capital Corporation
AT3224700	2013/01/25	Postponement		Visram, Zaherali	VS Capital Corporation
AT3269812	2013/04/04	Construction Lien	8,782.00	King Masonry Yard Ltd.	
AT3270855	2013/04/05	Construction Lien	29,595.00	UCIT Online Security Inc.	
AT3298579	2013/05/13	Certificate		UCIT Online Security Inc.	
AT3302736	2013/05/16	Certificate		King Masonry Yard Ltd.	2122775 Ontario Inc. Hush Homes Inc. c.o.b. as Hush Fine Home
AT3312698	2013/05/31	Charge	30,000.00	2122775 Ontario Inc.	Cameo Fine Cabinetry (Mississauga) Inc.

AT3224858	2013/06/14	Construction Lien	37,500.00	Silverado Custom Home Corporation	
AT3361475	2013/07/26	Certificate		Silverado Custom Home Corporation	
AT3470427	2013/12/04	Court Order appointing receiver		Collins Barrow Toronto Limited	

**Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property**

(unaffected by the Vesting Order)

“Assumed Encumbrances” means the following:

1. The exceptions and qualifications contained in Section 44(1) of the *Land Titles Act*, R.S.O. 1990, and any amendments thereto or any successor legislation, except paragraph 11;
2. The reservations, limitations, provisos and conditions expressed in the original grant from the Crown;
3. Any registered or unregistered easements or rights of way in favour of any governmental authority or public utility provided that none of the foregoing interfere in any material adverse respect with the current use of the Property;
4. Inchoate liens for taxes, assessments, public utility charges, governmental charges or levies not at the time due;
5. All agreements and easements, registered or otherwise, for utilities and services for hydro, water, heat, power, sewer, drainage, cable and telephone serving the Property, adjacent or neighbouring properties, provided none of the foregoing interfere in any material adverse respect with the current use of the Property;
6. Any encroachments, minor defects or irregularities indicated on any survey of the Property or which may be disclosed on an up-to-date survey of the Property provided that in either case same do not materially adversely impair the use, operation, or marketability of the Property;
7. Zoning (including, without limitation, airport zoning regulations), use and building by-laws and ordinances, federal, provincial or municipal by-laws and regulations, work orders, deficiency notices and any other noncompliance;
8. Any breaches of any Applicable Laws, including outstanding building permits, work orders and deficiency notices;
9. Any subdivision agreements, site plan agreements, developments and any other agreements with the Municipality, Region, publicly regulated utilities or other governmental authorities having jurisdiction;
10. Minor title defects, if any, that do not in the aggregate materially affect the use of the Property for the purposes for which it is used on the date of acceptance of this Agreement.

HOME TRUST COMPANY
Applicant

-and- 2122775 ONTARIO INC.
Respondent

Court File No. CV-13-10313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

APPROVAL AND VESTING ORDER

DICKINSON WRIGHT LLP

Commerce Court West
Suite 2200, P.O. Box 447
199 Bay Street
Toronto Ontario, M5L 1G4
Fax: (416) 865-1398

LISA S. CORNE

LSUC Registration No. 27974M
Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608

Lawyers for Collins Barrow Toronto Limited in its capacity
as receiver of 2122775 Ontario Inc.

This is Exhibit "G" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

CITATION: Home Trust Company v. 2122775 Ontario Inc., 2014 ONSC 1039
COURT FILE NO.: CV-13-10313-00CL
DATE: 20140218

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Home Trust Company, Applicant

AND:

2122775 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Corne, for the Receiver, Collins Barrow Toronto Limited

C. Ho, for the applicant, Home Trust Company

B. Jenkins, for the Defendant, 2122775 Ontario Inc.

S. Crocco, for the proposed purchaser, Urbancorp (Downtown) Developments Inc.

L. Finegold, for the subsequent mortgagees, US Capital Corp. and Ali Visram

HEARD: February 14, 2014

REASONS FOR DECISION

I. Receiver's sale approval motion and debtor's effort to stay the motion

[1] Collins Barrow Toronto Limited, the receiver of 2122775 Ontario Inc. (the "Debtor") pursuant to the November 15, 2013 appointment order of Thorburn J., moved for the approval of an agreement of purchase and sale between it and Urbancorp (Downtown) Developments Inc. ("Urbancorp") of certain assets of the Debtor. The Debtor moved for a temporary stay of the receivership and its sale process for 30 days in order to enable it to complete a re-financing. At the hearing I dismissed the Debtor's motion and granted the approval and vesting order sought by the Receiver. These are my reasons for so doing.

[2] The Debtor owned property on the east side of Bayview Avenue, north of Post Road (the "Property"). The Debtor was undertaking to develop a townhouse complex on the Property. Following its appointment the Receiver moved for an order approving a sales and marketing process for the Property. I granted that order on December 11, 2013.

[3] The Receiver then conducted a standard marketing process, including the distribution of a marketing flyer, placing advertisements in local papers, distributing a confidential information

memorandum to 111 parties who signed a confidentiality agreement, making an electronic data room available to such parties and conducting 28 site tours. The Receiver set a bid deadline of January 23, 2014.

[4] Ten offers were made to the Receiver, and the Receiver contacted the top four offerors to clarify their bids. The Receiver then set a revised deadline of January 30 for the top four offerors to improve their bids. Following a call from one of the other offerors, the Receiver contacted the remaining six bidders and afforded them the opportunity to submit improved bids. By the time of the revised deadline, 11 offers had been sent to the Receiver. After discussing the offers with Home Trust, the Receiver accepted the offer from Urbancorp, subject to Court approval.

[5] The Receiver filed, on a confidential basis, a summary of all offers received at the initial and revised deadlines. The Urbancorp offer was superior in regards to price, as well as its unconditional nature.

[6] Shortly before the return date of the Receiver's approval motion, the Debtor advised that it had negotiated term sheets with two lenders – Toronto Capital Inc. and USHJO Enterprises Inc. – which, if completed, would take out the first mortgage of Home Trust and allow the development of the project so that on completion the Debtor could pay the amounts due to the second, third and fourth mortgagees. The Debtor advised the Receiver that it would apply to the Court to request the redemption of the Home Trust mortgage and to stay the sale process. The subsequent mortgagees supported the Debtor's motion to stay the sale approval process to permit the negotiation of the refinancing.

[7] In its Second Supplemental Report the Receiver observed that neither term sheet was "firm" and the combined amounts in the term sheets would be insufficient to pay out the Home Trust mortgage and the Receiver's actual and accrued receivership costs. At the hearing counsel for the Debtor advised that his client was working on obtaining revised term sheets which would eliminate any such deficiency.

[8] Urbancorp filed an affidavit from its Chief Financial Officer, Susanna Han, which stated that it had spent time and money participating in the Receiver's bidding process and it had participated in good faith believing that the superior offer would be approved by the Court. Urbancorp also stated that a delay in the closing of the purchase could push back the start of resuming the development of the townhouses, thereby increasing costs and delaying the timing of the development. Han deposed: "[I]t would be manifestly unfair and prejudicial to Urbancorp if the approval of the sale is not granted in these circumstances".

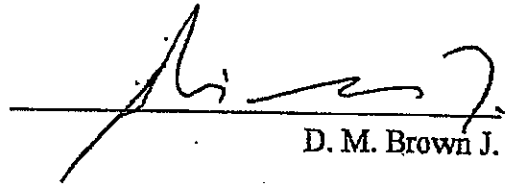
[9] Although the Debtor portrayed its request as one seeking a stay of the sale in order to enable it to redeem the first mortgage, in essence the Debtor sought an extension of the bid deadline in order to make a late bid. If granted, the stay requested by the Debtor would seriously impugn the integrity of the court-sanctioned sales and marketing process. The bid process employed by the Receiver was done pursuant to the Sales and Marketing Order and was transparent. It was open to the Debtor to participate in the bid process. While the Debtor did not do so until well after the bid deadline had passed, 11 other bidders complied with the rules of the sales process set by the Receiver, and Urbancorp submitted the superior bid. To permit the Debtor to stay the sales process in such circumstances would risk seriously eroding the

confidence of the market in the integrity of receivership sales processes sanctioned by the Ontario Superior Court of Justice.

[10] Moreover, this is not a case where the Debtor had presented a vastly superior offer to that accepted by the Receiver. On the contrary, the Debtor's proposal was inferior in all respects: it was not firm and the consideration would be inadequate to pay the first mortgage and the Receiver's charge.

[11] I concluded that the sales process conducted by the Receiver and the agreement it submitted for court approval satisfied the principles set out in *Royal Bank of Canada v. Soundair*¹ – the Receiver sought prior court approval for a sales and marketing process; it followed that process; it used a transparent sales process; it afforded all offerors an opportunity to submit improved bids; and, the Receiver accepted the superior bid.

[12] For those reasons, I dismissed the Debtor's motion to stay the sale process, and I granted the approval and vesting order sought by the Receiver. Given the commercially sensitive information contained in the Receiver's Supplemental Report dated February 5, 2014, I order that it be sealed until the closing of the Urbancorp agreement of purchase and sale or the further order of this Court.

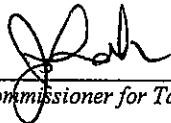


D. M. Brown J.

Date: February 18, 2014

¹ (1991), 4 O.R. (3d) 1 (C.A.)

This is Exhibit "H" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

Court of Appeal No.
Court File No. CV-13-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

HOME TRUST COMPANY

(Applicant)

- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

IN THE MATTER OF AN APPLICATION UNDER Section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

NOTICE OF APPEAL

THE APPELLANT, 2122775 ONTARIO INC. ("**212 Ontario**") hereby appeals to the Court of Appeal from the decision of the Honourable Justice D. Brown dated February 14, 2014 made at Toronto, Ontario.

THE APPELLANT ASKS that the Approval and Vesting Order of the Honourable Justice D. Brown dated February 14, 2014 which, *inter alia*, authorized and approved a sale transaction (the "**Transaction**") contemplated by an Agreement of Purchase and Sale ("**APS**") between Collins Barrow Toronto Limited, in its capacity as Receiver of 212 Ontario ("**Receiver**") and the purchaser, Urbancorp (Downtown) Developments Inc. ("**Urbancorp**") for lands known municipally as 2426 and 2427 Bayview Avenue, Toronto, Ontario (the "**Property**") and which granted a Vesting Order to Urbancorp on closing, be set aside in its entirety.

The APPELLANT ASKS that it be allowed to redeem the mortgage (“**Home Trust Mortgage**”) of the Respondent, Home Trust Company (“**Home Trust**”) and, upon payment into Court of the amount owing under the Home Trust Mortgage together with the fees and disbursements of the Receiver, that the Home Trust Mortgage be discharged, or in the alternative assigned as directed by the Appellant.

THE GROUNDS OF APPEAL are as follows:

1. The Receiver brought a motion returnable February 14, 2014 to approve the Transaction and to obtain, *inter alia*, a Vesting Order with respect to the Receiver’s sale of the Property to Urbancorp pursuant to an APS made as of January 22, 2014 between the Receiver and Urbancorp and to provide a vesting of the Property in Urbancorp’s name following the closing of the Transaction which was to take place within the earlier of 31 days of the date of the Vesting Order or May 1, 2014;
2. In response, the Appellant brought a cross-motion returnable on February 14, 2014 seeking to stay the sale approval process for 30 days in order to allow it to: i) redeem the Home Trust Mortgage and pay the Receiver’s fees and disbursements; and ii) obtain an assignment or discharge of the Home Trust Mortgage and a discharge of the Receiver in due course. The financing to be acquired by the Appellant provided opportunities for the 2nd, 3rd and 4th mortgages on the Property to be repaid, which the Transaction pursuant to the Approval and Vesting Order does not;
3. The Honourable Justice D. Brown refused to grant any extension of the hearing (“**Extension**”) to allow the Appellant to confirm that its financing commitment to pay the Home Trust Company Mortgage and Receiver’s fees could be effected within 14 to 21 days, or

alternatively to allow the Appellant's lender to testify *viva voce* on February 14, 2014 and confirm that the financing commitment to pay for the discharge of the Home Trust Mortgage and Receiver's fees was a firm commitment that would be financed within 14-21 days from February 14, 2014;

4. The Honourable Justice D. Brown erred in law in refusing to grant the Extension or allow the *viva voce* evidence in that he:
 - a) acted without granting the Appellant due process, contrary to legal principles;
 - b) failed and/or refused to consider exercising discretion in favour of the Appellant on equitable principles.
 - c) failed to allow the opportunity for redemption;
 - d) caused serious and substantial prejudice to the subsequent mortgagees who, as a result of the Vesting Order, stand to lose virtually all of their investments;
 - e) exercised judicial discretion on incorrect principles; and
 - f) failed to consider whether to apply, or alternatively refused to apply, the equitable right to relief from forfeiture and the statutory right to relief from forfeiture under Section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the right of redemption under Section 22(1) of the *Mortgages Act*, R.S.O. 1990, C. M.40 entitling the Appellant to redeem the first mortgage.
5. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The Order of the Honourable Mr. Justice Brown is a final Order in that the specific issues raised before him were finally, substantively and conclusively determined;
2. Sections 193(a), (b) and (c) and 195 of the *Bankruptcy and Insolvency Act*, R.S.O. 1985, c. D-3, as amended;
3. Sections 6.1(b) and 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
4. Sections 2 and 22(1) of the *Mortgages Act*, R.S.O. 1990, C. M.40; and
5. Leave to appeal is not required.

February 24, 2014

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2122775 ONTARIO INC.
Appellant
(Respondent)

v.

HOME TRUST COMPANY
(Applicant)
Court of Appeal No.
Court File No. CV-13-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

NOTICE OF APPEAL

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Court of Appeal No.
Court File No. CV-13-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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HOME TRUST COMPANY

(Applicant)

- and -

2122775 ONTARIO INC.

Appellant
(Respondent)

IN THE MATTER OF AN APPLICATION UNDER Section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

APPELLANT'S CERTIFICATE

THE APPELLANT, 2122775 ONTARIO INC. ("**212 Ontario**") certifies that the following evidence is required for the appeal in the Appellant's opinion:

1. Order of Justice D. Brown dated December 11, 2013
2. Motion Record of the Receiver dated February 7, 2014
3. Second Supplemental Report of the Receiver dated February 13, 2014
4. Motion Record of 2122775 Ontario Inc. returnable February 14, 2014
5. Reasons for Decisions of Justice D. Brown dated February 18, 2014
6. Approval and Vesting Order of Justice D. Brown dated February 14, 2014

February 24, 2014

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2122775 ONTARIO INC.
Appellant
(Respondent)

v.

HOME TRUST COMPANY
(Applicant)
Court of Appeal No.
Court File No. CV-13-10313-00CL

**ONTARIO
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Proceeding commenced at Toronto

APPELLANT'S CERTIFICATE

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Lawyers for the Appellant, 2122775 Ontario Inc.

This is Exhibit "I" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

Toronto Capital

P: 416.225.0655 F: 647.438.2066 W: www.torontocapital.com
A: 480 Lawrence Ave West, 4th Flr, Toronto, Ontario M5M 1C4

February 27, 2014

RE: Borrowers – 2122775 Ontario Inc. & Hush Homes Inc.
Property – 2425 Bayview Ave, Toronto, Ontario
1st mortgage financing of \$5Million
2nd mortgage financing of \$3Million

To whom it may concern;

In accordance with the term sheets provided on January 21, 2014 we are pleased to provide full and binding commitments subject to standard closing conditions only.

In addition, we have adjusted the use of funds to satisfy full payout of Home Trust, the Receiver fees and disbursements and all Lien claimants.

Sincerely,



Frank Mondelli
Toronto Capital Inc.

This is Exhibit "J" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE



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TORONTO CAPITAL INC. IN TRUST

COMMITMENT

PRIVATE & CONFIDENTIAL

1. PURPOSE

To provide a first mortgage to assist with the payout of the existing 1st mortgage in favour of Home Trust

2. BORROWER(S)

2122775 Ontario Inc.
 Hush Homes Inc.
 (hereinafter collectively called "Borrower").

The Borrower covenants and agrees to satisfy all the terms, conditions and requirements herein contained before any advance is made. The obligation of the Borrower and Covenantors to make payment under the mortgage and other security and perform all other obligations hereunder shall be deemed to be joint and several.

The property and facts are to be as represented by you to the Lender. Material discrepancy or inaccuracy in any information, statements or representations made or furnished to us by or on behalf of you shall be cause for cancellation of this commitment.

3. GUARANTOR(S)

Naheel Suleman (Unlimited) (hereinafter referred to as the "Guarantors")

The Borrower and Guarantors covenant to satisfy all the terms, conditions and requirements herein contained before any advances are made. The liability of the Borrower and Guarantors to make payment under the mortgage and perform all other obligations hereunder and the liability of the Guarantors shall be continuing and joint and several.

4. LENDER

Toronto Capital Inc. (In Trust)

5. DESCRIPTION OF SECURITY

A development site approved with building permit issued for 20 luxury townhomes.

A handwritten signature in black ink, appearing to be a stylized 'S' or similar character, located in the bottom right corner of the page.

6. MORTGAGE SECURITY

Mortgage security shall include but not be limited to:

- a) A valid First Mortgage charge in the amount of \$5,000,000.00 against all lands and improvements over 2425 Bayview Avenue, Toronto, Ontario, known as Hush-Alexandria Project;
- b) The Unlimited Guarantee of Naheel Suleman;
- c) An assignment of all approvals, permits and authorizations;
- d) An assignment of all Purchase and Sale Agreements;
- e) A General Security Agreement over all fixtures, equipment and chattels, etc;
- f) An Assignment of all insurance policies including adequate Builder's All Risk (if applicable);
- g) Title insurance;
- h) All security documentation shall include Lender's standard forms, including default provisions.

7. MUNICIPAL ADDRESS

2425 Bayview Avenue, Toronto, Ontario.

8. LEGAL DESCRIPTION

To be provided.

9. TYPE OF LOAN

Conventional First Mortgage.

10. PRINCIPAL AMOUNT

\$5,000,000.00

11. TERM

15 Months

12. INTEREST RATE

7.00%, per annum, calculated and payable monthly for the 1st 12 months and 12.00% for last 3 months of the term.

13. **LENDER'S FEE**

\$50,000.00 (1.00% of loan amount), the Lender's fee shall be due and deemed earned upon acceptance of this commitment letter and receipt of the court order staying the vesting order.

14. **MONTHLY PAYMENTS**

During the term of the loan, interest only payments shall be calculated and compounded monthly. Payments shall be payable monthly on the first business day of each and every month that an outstanding balance remains unpaid.

The initial payment shall be due and payable on the first day of the first month following the interest adjustment date provided for by this mortgage.

15. **FUNDING**

Funding to occur on or before 14 days after a court order staying the vesting order.

16. **INTEREST ADJUSTMENT DATE**

The Interest Adjustment Date shall be no later than the first day of the calendar month immediately following the month in which the funding of this loan is made.

17. **AMORTIZATION**

The loan is to be interest only.

18. **PREPAYMENT**

The loan shall be closed for 9 months and open upon 60 days written notice thereafter.

19. **CONDITIONS PRECEDENT**

In addition to the matters described elsewhere in this term sheet, the conditions to be satisfied in advance of the disbursement of funds under the mortgage contemplated herein shall include but not be limited to:

- a) The funds secured by the mortgage will be advanced upon title proving acceptable to the Lender and his solicitors, upon registration of the security documents as required and upon receipt from the Lender's solicitors of a satisfactory report on registration of the security documents and confirmation of no adverse filings concerning the Borrower in any ministry, department or agency of government which, in the Lender's solicitor's opinion, could affect the priority of the mortgage, and upon fulfillment of all other terms and conditions of this commitment.
- b) Property taxes to be in good standing
- c) Receipt of confirmation that the building permit is in good standing.
- d) Standstill agreements from the subsequent encumbrances.

20. **TAXES**

All outstanding taxes, assessments and other sums, charged or levied against the lands shall be current and in good standing, failure to do so will constitute a default under the mortgage.

21. **INSURANCE**

The Borrower shall have proper and adequate insurance coverage in effect at all times with the lender named as first loss payee.

22. **LEGAL FEES**

The Borrower shall be responsible for all legal fees incurred by the Lender in connection with the loan contemplated by this commitment.

23. **STAND-BY FEE**

The borrower shall submit along with this executed letter a stand-by fee in the amount of \$15,000.00 to be applied against the lender's legal fees and any outstanding legal fees in the event the loan is not proceeded with as a result of the borrower's inability to comply with any of the terms contemplated herein. This fee shall be deemed earned and non-refundable upon issuance of the commitment letter contemplated herein.

24. **BROKERAGE FEE**

A brokerage fee of 1.00% shall be deducted from the advance of funds payable to Toronto Capital Inc.

25. **INTEREST RESERVE**

There will be a holdback from the advance in the amount of \$87,500.00 representing the first 3 (three) months interest payment.

26. **ACKNOWLEDGEMENT**

The lender acknowledges the existence of subsequent encumbrances.

This letter will be open for acceptance by the Borrower until February 28, 2014, failing which, this letter will become null and void.

Yours very truly,

TORONTO CAPITAL INC.

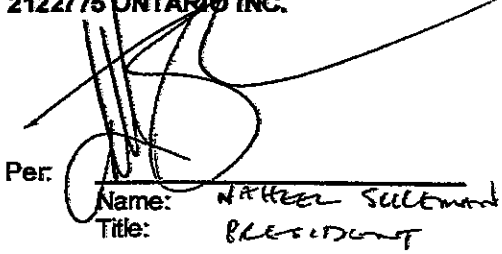


Frank Mondelli

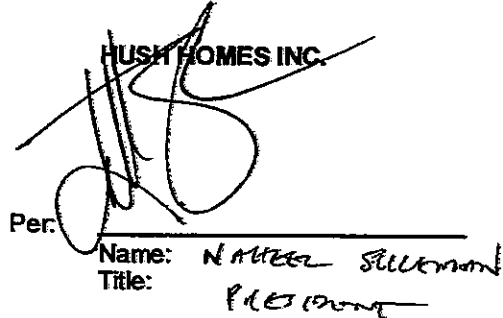
The foregoing term sheet and all terms and conditions thereof are hereby accepted by the undersigned this day of February, 2014.

BORROWER;

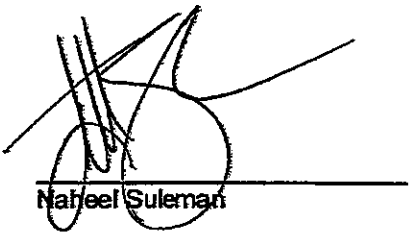
2122775 ONTARIO INC.


Per. _____
Name: NAFEEL SULEMAN
Title: PRESIDENT

HUSH HOMES INC.


Per. _____
Name: NAFEEL SULEMAN
Title: PRESIDENT

GUARANTOR(s)


Nafeez Suleman

This is Exhibit "K" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE



P: 416.225.0555 F: 647.438.2066 W: www.torontocapital.com
 A: 480 Lawrence Ave West, 4th Flr, Toronto, Ontario M5M 1C4

TORONTO CAPITAL INC. (IN TRUST)

COMMITMENT

PRIVATE & CONFIDENTIAL

Up to \$3,000,000 CDN 2nd Mortgage Financing

- Lender:** TORONTO CAPITAL INC. (in Trust)
 (the "Lender") will provide financing of up to CDN \$3,000,000.
- Borrower(s):** 2122775 Ontario Inc.
 Hush Homes Inc.
- Use of Proceeds:** The proceeds will be used as follows;
- Complete Payout of Home Trust 1st mortgage
 - Payout Receiver fees and disbursements
 - Liens
 - Legal Fees
 - Working capital - Remainder
- Closing:** The completion of the Loan ("Closing") shall occur on or before 14 days after a court order staying the vesting order (the "Closing Date").
- Maturity:** All accrued interest and principal shall become due 15 months from the Closing Date. (the "Maturity Date")
- Interest Rate:** The Loan shall bear interest at 14.0% per annum, interest payable there under shall accrue from day to day and shall be payable monthly calculated on the basis of the actual number of days elapsed from the Closing Date.
- Security Interest:** The Loan shall be secured by:
- 2nd mortgage of \$3,000,000 over 2425 Bayview Avenue, Toronto, Ontario (Hush - Alexandria project) subject to a 1st mortgage of no greater than \$5,000,000 with a 15 month term and an interest rate of 7% for the first 12 months and 12% for the last 3 months.
 - Unlimited guarantees of: Naheel Suleman

- 2nd position Assignment of all approvals and authorizations
- 2nd position Assignment of all Purchase and Sale Agreements
- 2nd position Assignment of Insurance
- Standstill Agreements from the subsequent encumbrances.
- Opinion by Borrower's counsel as to due authorization, valid execution and enforceability of all security.
- Such other documentation, instruments, agreements, security and/or assurances as may be reasonably requested by the Lender and/or its solicitors.

Guarantors:

Naheel Suleman - Unlimited

Repayment:

The loan is closed for 6 months and open thereafter.

Conditions:

In addition to the matters described elsewhere in this Term Sheet, the completion of the transaction will be subject to the following conditions:

- (a) the Company having done all things necessary to allow the security to be registered as contemplated herein, and in a manner satisfactory to the Lender and its solicitors;
- (b) property taxes to be in good standing. Property tax statements to be provided semi-annually evidencing no arrears.

Legal Documentation:

The Loan will be made pursuant to Security Agreements. Such agreements shall contain, among other things, customary representations and warranties of the Borrower(s) and the Borrower(s) shall also execute such documents and agreements as may be required by Lender's solicitors.

Lender Fee:

A Lender Fee of \$80,000 shall be deducted from the advance amount.

Legal Fees:

All Legal Fees are to the account of the Borrower. A non-refundable allowance towards legal costs of \$15,000 shall be paid upon acceptance of this term sheet and receipt of a court order staying the vesting order.

Brokerage Fee

A Brokerage fee of \$60,000 shall be deducted from the advance amount.

Brokerage Fee payable to: Toronto Capital Inc.

Other Fee

A Fee of \$80,000 payable to the Lender and Toronto Capital Inc. shall be paid at the time of discharge.

Acceleration: All principal and interest shall become due immediately should an Event of Default occur.

Event of Default: The following are events of default ("Events of Default")

- The Borrower(s) failing to make an interest payment.
- The Borrower(s) default on one or more of the Conditions of this Term Sheet.
- The Borrower(s) becoming insolvent or it commits an act of bankruptcy.

Delinquency Fees: Any legal fees, monitoring fees, receiver's fees or other fees associated with the collection of the Loan shall be paid by the Borrower, shall bear interest at a rate of 24.0% per annum and shall be due when incurred (the "Delinquency Fees").

Default Interest If the Loan is in default it will bear interest at 24.0% per annum, payable on a monthly basis.

Additional Provisions:

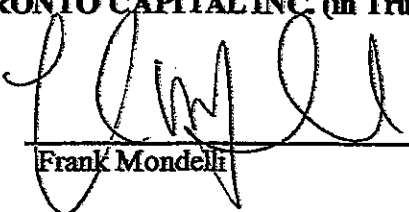
- A series of 9 postdated cheques or automatic bank transfer to be provided on or before closing for the remaining 9 months.
- N.S.F. fee of \$500.00 for each dishonoured cheque
- 3 month interest penalty will be charged if the mortgage is not paid out in full on the maturity date
- In the event of default, the mortgagee is entitled to charge \$1,500.00 for each action or proceeding instituted and a fee of \$100.00 per day for administering the maintenance and security of any property in its possession.

If this Term Sheet is acceptable to you, please sign it in the space provided below and return an original copy to us on or before 11:59 p.m. on February 28, 2014 Toronto Time.

Accepted and agreed this 27th day of February, 2014.

LENDER

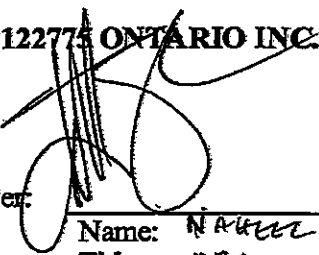
TORONTO CAPITAL INC. (in Trust)

Per: 

Frank Mondelli

BORROWER


2122775 ONTARIO INC.

Per: 

Name: NAZEEM SULEMAN
Title: PRESIDENT

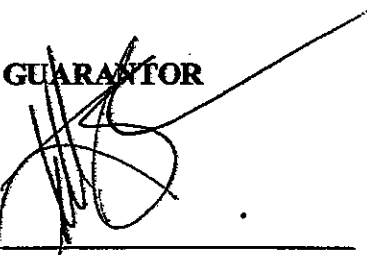
BORROWER

HUSH HOMES INC.

Per: 

Name: NAZEEM SULEMAN
Title: PRESIDENT

GUARANTOR



Name: NAZEEM SULEMAN

GUARANTOR

Name:

This is Exhibit "L" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

LISA S. CORNE
LCorne@dickinsonwright.com
(416) 646-4608

February 25, 2014

Sent by email

Harvin D. Pitch
Teplitsky, Colson LLP
70 Bond St., Suite 200
Toronto, ON M5B 1X3

Re: Receivership of 2122775 Ontario Inc.

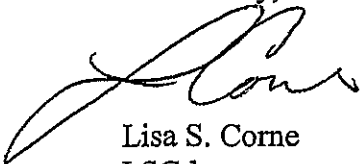
Dear Mr. Pitch:

As you know, we represent Collins Barrow Toronto Limited in its capacity as court-appointed receiver (the "Receiver") of the undertaking, property, and assets of 2122775 Ontario Inc. ("212"). In response to your letter of February 24, 2014 and the Notice of Appeal by 212 from the Approval and Vesting Order of Justice Brown dated February 14, 2014 (the "Order"), we do not agree that there is any automatic stay of the Order at this time, and the Receiver intends to proceed with completion of the sale transaction approved by the Order.

As the Order was granted in a proceeding under the *Bankruptcy and Insolvency Act* ("BIA"), section 193(e) of the BIA requires that leave to appeal be obtained unless the Order falls within subsections 193(a) through (d). In our view, the Order does not fall within subsections 193(a) through (d) of the BIA, as those sections have been narrowly construed by the Courts. I am enclosing for your reference the decision of Justice Blair in *BDC v. Pine Tree Resorts Inc.* which sets out the applicable law regarding appeals pursuant to section 193 of the BIA.

To the extent that the appeal is governed by section s. 6 (1) (b) of the *Courts of Justice Act*, there is no automatic stay of the Order pending appeal. Pursuant to Rule 63 of the *Rules of Civil Procedure*, you must apply for an order to obtain a stay. Until an order granting a stay is obtained, the Order remains in effect and can be relied upon by the Receiver to close the transaction. I refer you to the decision in *Regal Constellation Hotel*, a copy of which is enclosed.

Yours truly,



Lisa S. Corne
LSC:las
Encl.

cc. Client, Service List

DETROIT | NASHVILLE | WASHINGTON, D.C. | TORONTO | PHOENIX | LAS VEGAS | COLUMBUS
TROY | ANN ARBOR | LANSING | GRAND RAPIDS | SAGINAW

SERVICE LIST

TO: 2122775 Ontario Inc.
c/o Keyser Mason Ball LLP
4 Robert Speck Parkway
Suite 1600
Mississauga, ON L4Z 1S1

Charles Stobie / Brian Jenkins
Tel: 905.276.0409
Fax: 905-276-2298
E-mail: cstobie@kmblaw.com
jenkins@kmblaw.com

AND TO: Naheel Suleman
c/o Keyser Mason Ball LLP
4 Robert Speck Parkway
Suite 1600
Mississauga, ON L4Z 1S1

Charles Stobie / Brian Jenkins
Tel: 905.276.0409
Fax: 905-276-2298
E-mail: cstobie@kmblaw.com
jenkins@kmblaw.com

AND TO: Musa Suleman
c/o Keyser Mason Ball LLP
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Suite 1600
Mississauga, ON L4Z 1S1

Charles Stobie / Brian Jenkins
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Fax: 905-276-2298
E-mail: cstobie@kmblaw.com
jenkins@kmblaw.com

AND TO: Zaherali Visram
c/o Goldman Sloan Nash & Haber LLP
480 University Ave, Suite 1600
Toronto, ON M5G 1V2

Robert J. Drake
Tel: 416-697-5014
Fax: 416-597-3370
E-mail: drake@gsnh.com

AND TO: VS Capital Corporation
c/o Goldman Sloan Nash & Haber LLP
480 University Ave, Suite 1600
Toronto, ON M5G 1V2

Robert J. Drake
Tel: 416-697-5014
Fax: 416-597-3370
E-mail: drake@gsnh.com

AND TO: Cameo Fine Cabinetry (Mississauga) Inc.
c/o Loopstra Nixon LLP
135 Queens Plate Drive, Suite 600
Etobicoke, ON M9W 6V7

Rejean David Theriault
Tel: 416-748-4751
Fax: 416-746-8319
E-mail: rtheriault@loonix.com

AND TO: Martino Contractors Ltd.
c/o Aird & Berlis LLP
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Courtney V. Raphael
Tel: 416-863-1500
Fax: 416-863-1515
E-mail: craphael@airdberlis.com

AND TO: King Masonry Yard Ltd.
c/o RDQ Banisters and Solicitors LLP
BDC Building
3901 Highway 7, Suite 400
Vaughan, ON L4L 8L5

Enzo Di Iorio
Tel: 905-264-7800 Ext: 223
Fax: 905-264-7808
E-mail: ediiorio@rdqlaw.com

AND TO: UCIT Online Security Inc.
c/o Fogler, Rubinoff LLP
77 King Street West
Suite 3000, TD Centre
Toronto, ON M5K 1G8

Marty R. Kaplan
Tel: 416-941-8822
Fax: 416-941-8852
E-mail: mkaplan@foglers.com

AND TO: Silverado Custom Home Corporation
c/o Bruce R. Jaeger
Fluxgold Izsak Jaeger LLP
50 West Pearce Street, Suite 10
Richmond Hill, ON L4B 105

Bruce R. Jaeger
Tel: 905-763-3770 ex. 212
Fax: 905-763-3772
E-mail: bjjaeger@fijlaw.com

AND TO: Ministry of Finance (Ontario)
Legal Services Branch
33 King Street West, 6th Floor
Oshawa, ON L1H 8H5

Kevin O'Hara
Tel: 905- 433-6934
Fax: 905- 436-4510
Email: Kevin.ohara@ontario.ca

AND TO: Department of Justice
The Exchange Tower
130 King Street West Suite 3400,
P.O. Box 36 Toronto
ON M5X 1K6

Diane Winters
Tel: 416- 973-3172
Fax: 416- 973-0810
Email: diane.winters@justice.gc.ca

AND TO: Aviva Insurance Company of Canada
c/o Goldman Sloan Nash & Haber LLP 480 University Ave,
Suite 1600 Toronto, Ontario M5G 1V2

Robert J. Drake
Tel: 416-697-5014
Fax: 416-597-3370
Email: drake@gsnh.com

AND TO: Home Trust Company
c/o Gowling Lafleur Henderson LLP
1 First Canadian Place
Suite 1600
100 King St. W.
Toronto, ON M5X 1G5

Calvin Ho
Tel: 416-862-5788
Fax: 416-862-7661
Email: calvin.ho@gowlings.com

AND TO: Urbancorp (Downtown) Developments Inc.
c/o Harris, Sheaffer LLP
Suite 610
4100 Yonge St.
Toronto, ON M2P 2B5

Barry Rotenberg
Phone: 416 250-3699
Fax: 416 250-5300
Email: brotenberg@harris-sheaffer.com

AND TO: Aird & Berlis LLP
Brookfield Place, Suite 1800
Box 754, 181 Bay St.
Toronto, ON M5J 2T9

Sanj Sood
Tel: 416 865-3083
Fax: 416 863-1515
Email: ssood@airdberlis.com

AND TO: Urbancorp (Downtown) Developments Inc.
c/o Berkow, Cohen LLP
Suite 400
141 Adelaide St. W.
Toronto, ON M5H 3L5

Jack B. Berkow/ Scott A. Crocco
Tel: 416 364-4082/416 364-4900
Fax: 416 364-3865

Email: jberkow@berkowcohen.com
scrocco@berkowcohen.com

Court File No. CV-10313-00CL



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.
JUSTICE ^{D.}BROWN

)
)
)

FRIDAY, THE 14th DAY
OF FEBRUARY, 2014

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

APPLICATION UNDER section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Court of Justice Act*, R.S.O. 1990, c. C-43, as amended

APPROVAL AND VESTING ORDER

THIS MOTION, made by Collins Barrow Toronto Limited in its capacity as the Court-appointed receiver and manager (the "Receiver") of the undertaking, property and assets of 2122775 Ontario Inc. (the "Debtor") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and Urbancorp (Downtown) Developments Inc. (the "Purchaser") made as of January 22, 2014 and appended to the Supplemental Report of the Receiver dated February 5, 2014 (the "Supplement"), and vesting in the Purchaser the Debtor's right, title and interest in and

to the assets described in the Sale Agreement (the "Purchased Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Supplement and the Second Report of the Receiver (the "Report")

both dated February 5, 2014 and on hearing the submissions of counsel for the Receiver, the Purchaser, Home Trust Company, the Debtor, VS Capital Corporation, and the Receiver, the [NAMES OF OTHER PARTIES APPEARING]; no one appearing for any other person on the

B.

service list, although properly served as appears from the affidavit of Luisa Salerno sworn February 6, 2014 filed:

1. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and that the Sale Agreement is commercially reasonable and in the best interests of the Debtor and its stakeholders. The execution of the Sale Agreement by the Receiver is hereby authorized and approved, and the Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.
2. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "Receiver's Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement and listed on Schedule B hereto shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Thorburn dated November 15, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) and, for greater

certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

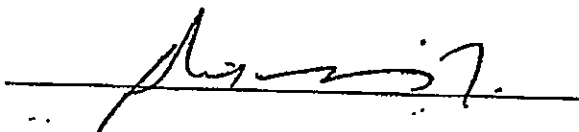
3. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Land Titles Division of Toronto of an Application for Vesting Order in the form prescribed by the *Land Titles Act*, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "Real Property") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule C hereto.
4. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.
5. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.
6. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.
7. THIS COURT ORDERS that, notwithstanding:
 - (a) the pendency of these proceedings;

- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

9. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB 14 2014



Schedule A – Form of Receiver’s Certificate

Court File No. CV-10313-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

APPLICATION UNDER section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Court of Justice Act*, R.S.O. 1990, c. C-43, as amended

RECEIVER’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Thorburn of the Ontario Superior Court of Justice (the "Court") dated November 15, 2013, Collins Barrow Toronto Limited was appointed as the receiver and manager (the "Receiver") of the undertaking, property and assets of 2122775 Ontario Inc. (the "Debtor").

B. Pursuant to an Order of the Court dated February 14, 2014, the Court approved the agreement of purchase and sale made as of January 22, 2014 (the "Sale Agreement") between the Receiver and Urbancorp (Downtown) Developments Inc. (the "Purchaser") and provided for the vesting in the Purchaser of the Debtor’s right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the

Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in section 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;
2. The conditions to Closing as set out in section 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Receiver.
4. This Certificate was delivered by the Receiver at _____ [TIME] on _____ 2014.

**COLLINS BARROW TORONTO LIMITED,
in its capacity as Receiver of the undertaking,
property and assets of 2122775 Ontario Inc.,
and not in its personal capacity**

Per: _____

Name:

Title:

Schedule B – Purchased Assets

The right, title and interest of the Debtor, if any, in the real property described as PIN No. 10126-1010 (LT) Part of Lot 8 Concession 2 EYS (N York), designated as Parts 1 & 2 on Plan 66R24078; City of Toronto, including the existing underground parking garage, and one townhome situated thereon, and all plans in the possession or control of the Receiver relevant to the development thereof, and the construction of any buildings thereon.

The right, title and interest of the Debtor, if any, in all prepaid Development Charges, payment in lieu of Park, Hydro connection fees, security for Hydro usage and similar payments previously made with respect to the Lands and the benefit of any Letters of Credit posted with respect to compliance with any Site Plan Agreement or similar Agreements with the City of Toronto or any utility provider.

Schedule C – Claims to be deleted and expunged from title to Real Property

Reg. Num.	Date	Instrument Type	Amount	Parties From	Parties To
AT2708324	2011/06/01	Charge	\$6,500,000.00	2122775 Ontario Inc.	Home Trust Company
AT2708325	2011/06/01	No Assgn Rent Gen		2122775 Ontario Inc.	Home Trust Company
AT2918710	2012/01/13	Charge	5,100,000.00	2122775 Ontario Inc.	Visram, Zaherali
AT2918711	2012/01/13	No Assgn Rent Gen		2122775 Ontario Inc.	Visram, Zaherali
AT3114322	2012/08/29	Charge	8,750,000.00	2122775 Ontario Inc.	VS Capital Corporation
AT3153542	2012/10/17	Charge	4,000,000.00	2122775 Ontario Inc.	VS Capital Corporation
AT3224700	2013/01/25	Postponement		Visram, Zaherali	VS Capital Corporation
AT3269812	2013/04/04	Construction Lien	8,782.00	King Masonry Yard Ltd.	
AT3270855	2013/04/05	Construction Lien	29,595.00	UCIT Online Security Inc.	
AT3298579	2013/05/13	Certificate		UCIT Online Security Inc.	
AT3302736	2013/05/16	Certificate		King Masonry Yard Ltd.	2122775 Ontario Inc. Hush Homes Inc. c.o.b. as Hush Fine Home
AT3312698	2013/05/31	Charge	30,000.00	2122775 Ontario Inc.	Cameo Fine Cabinetry (Mississauga) Inc.

AT3224858	2013/06/14	Construction Lien	37,500.00	Silverado Custom Home Corporation	
AT3361475	2013/07/26	Certificate		Silverado Custom Home Corporation	
AT3470427	2013/12/04	Court Order appointing receiver		Collins Barrow Toronto Limited	

**Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property**

(unaffected by the Vesting Order)

“Assumed Encumbrances” means the following:

1. The exceptions and qualifications contained in Section 44(1) of the *Land Titles Act*, R.S.O. 1990, and any amendments thereto or any successor legislation, except paragraph 11;
2. The reservations, limitations, provisos and conditions expressed in the original grant from the Crown;
3. Any registered or unregistered easements or rights of way in favour of any governmental authority or public utility provided that none of the foregoing interfere in any material adverse respect with the current use of the Property;
4. Inchoate liens for taxes, assessments, public utility charges, governmental charges or levies not at the time due;
5. All agreements and easements, registered or otherwise, for utilities and services for hydro, water, heat, power, sewer, drainage, cable and telephone serving the Property, adjacent or neighbouring properties, provided none of the foregoing interfere in any material adverse respect with the current use of the Property;
6. Any encroachments, minor defects or irregularities indicated on any survey of the Property or which may be disclosed on an up-to-date survey of the Property provided that in either case same do not materially adversely impair the use, operation, or marketability of the Property;
7. Zoning (including, without limitation, airport zoning regulations), use and building by-laws and ordinances, federal, provincial or municipal by-laws and regulations, work orders, deficiency notices and any other noncompliance;
8. Any breaches of any Applicable Laws, including outstanding building permits, work orders and deficiency notices;
9. Any subdivision agreements, site plan agreements, developments and any other agreements with the Municipality, Region, publicly regulated utilities or other governmental authorities having jurisdiction;
10. Minor title defects, if any, that do not in the aggregate materially affect the use of the Property for the purposes for which it is used on the date of acceptance of this Agreement.

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

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2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

Business Development Bank of Canada v. Pine Tree Resorts Inc.

Business Development Bank of Canada Applicant (Respondent) and Pine Tree Resorts Inc. and 1212360 Ontario Limited Respondents (Appellants)

Ontario Court of Appeal [In Chambers]

R.A. Blair J.A., In Chambers

Heard: April 22, 2013

Judgment: April 29, 2013

Docket: CA M42401, M42383, M42395 (C56856)

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Proceedings: refused leave to appeal *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 2013 CarswellOnt 12749 ((Ont. S.C.J. [Commercial List]))

Counsel: Milton A. Davis for Appellants, Pine Tree Resorts Inc., 1212360 Ontario Limited

David Preger for Appellant, Romspen Investment Corporation

Harvey Chaiton for Respondent, Business Development Bank of Canada

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; Property

Bankruptcy and insolvency --- Practice and procedure in courts --- Appeals --- To Court of Appeal --- Availability --- Leave by judge

Respondent P Inc. owned and operated hotel --- Business development bank (applicant) was owed approx. \$2.6 million by P Inc., and held first security for that indebtedness by way of mortgage on hotel lands and general security

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

agreements over land and chattels — Second mortgage was also in default, and second mortgagee was owed approx. \$4.2 million — Applicant brought successful application for appointment of receiver over assets of respondents — P Inc. and second mortgagee brought motion for leave, if required, to appeal — Motion dismissed — There was no automatic right to appeal from order appointing receiver, and leave was required — Neither s. 193(a) nor (c) of Bankruptcy and Insolvency Act applied in circumstances — This was not appropriate case in which to grant leave — P Inc. and second mortgagee raised number of grounds relating to exercise of application judge's discretion which were entitled to deference and were purely factual and case specific and not of general significance — There were serious reservations about likelihood of success on appeal with respect to legal issue raised — Success on appeal would require creative interpretation of s. 22 of Mortgages Act, one that would potentially create element of uncertainty in field of mortgage enforcement — Serious reservations about merits, together with need for timely sale process, led to conclusion that leave ought not be granted — As such, receivership order was not to be stayed.

Cases considered by R.A. Blair J.A., In Chambers:

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of) (1997), 48 C.B.R. (3d) 171, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re*) 206 A.R. 295, 1997 CarswellAlta 737, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re*) 156 W.A.C. 295 (Alta. C.A. [In Chambers]) — referred to

Baker, Re (1995), 1995 CarswellOnt 58, 31 C.B.R. (3d) 184, (sub nom. *Baker (Bankrupt), Re*) 83 O.A.C. 351, 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]) — considered

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 1999 CarswellAlta 809, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — referred to

Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — referred to

Ditchburn Boats & Aircraft (1936) Ltd., Re (1938), [1938] O.W.N. 241, 1938 CarswellOnt 74, 19 C.B.R. 240, [1938] 3 D.L.R. 751 (Ont. C.A.) — referred to

Dominion Foundry Co., Re (1965), 1965 CarswellMan 7, 8 C.B.R. (N.S.) 74, 51 W.W.R. 679, 52 D.L.R. (2d) 79 (Man. C.A.) — considered

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201, 198 O.A.C. 27 (Ont. C.A. [In Chambers]) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2003), 2003 CarswellOnt 6652 (Ont. C.A. [In Chambers]) — considered

Leard, Re (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135, (sub nom. *Leard (Bankrupt), Re*) 71 O.A.C. 56, 1994 CarswellOnt 274 (Ont. C.A.) — referred to

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — followed

R.J. Nicol Homes Ltd. (Trustee of) v. Nicol (1995), 30 C.B.R. (3d) 90, 77 O.A.C. 395, 1995 CarswellOnt 42 (Ont. C.A.) — followed

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — referred to

Theodore Daniels Ltd. v. Income Trust Co. (1982), 135 D.L.R. (3d) 76, 25 R.P.R. 97, 1982 CarswellOnt 659, 37 O.R. (2d) 316 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(c) — considered

s. 193(e) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Mortgages Act, R.S.O. 1990, c. M.40

s. 22 — considered

s. 22(1) — considered

Words and phrases considered:

future rights

The portions of s. 193 of the BIA [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] relied upon by [the second

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

mortgagee and one of the respondents] are the following:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

...

(e) in any other case by leave of a judge of the Court of Appeal.

.....

"Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

MOTION for leave to appeal from granting of receivership order.

R.A. Blair J.A., In Chambers:

Overview

1 On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

2 Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 ("BIA"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

3 For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

4 BDC is owed approximately \$2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately \$4.3 million.

5 The Inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements.

6 Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the Notice of Power of Sale for redemption.

7 Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the Inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

8 Pine Tree supports Romspen's plan because it involves re-opening the Inn for the upcoming summer season and attempting to sell the property on a going concern basis. BDC rejects this option as unrealistic because it views the Inn's operations as being an irretrievably losing proposition.

9 Romspen argued before the application judge — and argues here as well — that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40, to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses, and outstanding realty taxes. However, it does not propose to repay approximately \$250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

10 In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centre piece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

11 On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the mortgage and — where there are unperformed covenants — performing those covenants as well.

Is Leave to Appeal Necessary?

12 In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (11 March 2005), Court File No. M32275 (Ont. C.A., in Chambers), Catzman J.A.; *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)* (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]).

13 The portions of s. 193 of the BIA relied upon by Romspen and Pine Tree are the following:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

...

(e) in any other case by leave of a judge of the Court of Appeal.

14 Neither (a) nor (c) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

15 "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

16 Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

17 Nor do I accept the argument that the property in the appeal exceeds in value \$10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co., Re*, at para. 7, to allow an appeal as of right in

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

18 In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The Test

19 In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(e). As he noted at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

20 One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.). It asks the following questions:

(i) Is the point appealed of significance to the practice as a whole?

(ii) Is the point raised of significance in the action itself?

(iii) Is the appeal prima facie meritorious?

(iv) Will the appeal unduly hinder the progress of the action?

21 These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 ("CCAA"), although their application has not been confined to those types of cases.

22 A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (Ont. C.A.), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or (c) involves an obvious error, causing prejudice for which there is no remedy.

23 Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(e) of the BIA: see, in addition to *R.J. Nicol Homes Ltd. (Trustee of)*, for example, *Leard; Re* (1994), 114 D.L.R. (4th) 135 (Ont. C.A.); and *Century Services Inc.*

24 This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol Homes Ltd. (Trustee of)* approach by considering such factors as whether there is an arguable case for

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this Court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]); and *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]). These factors echo the criteria set out in *Power Consolidated (China) Pulp Inc.*

25 In *Baker, Re*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded at p. 381 that the *R.J. Nicol Homes Ltd. (Trustee of)* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics Inc.*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol Homes Ltd. (Trustee of)* and the *Power Consolidated (China) Pulp Inc.* criteria — without apparently distinguishing between them — as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

26 Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this Court.

27 I take from this brief review of the jurisprudence that, while judges of this Court have tended to favour the *R.J. Nicol Homes Ltd. (Trustee of)* test in the past, there has been a movement towards a more expansive and flexible approach more recently — one that incorporates the *Power Consolidated (China) Pulp Inc.* notions of overall importance to the practice area in question or the administration of justice as well as some consideration of the merits.

28 That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

29 Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;

b) is *prima facie* meritorious, and

c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

30 It is apparent these considerations bear close resemblance to the *Power Consolidated (China) Pulp Inc.* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this Court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

31 I have not referred specifically to the three *R.J. Nicol Homes Ltd. (Trustee of)* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power, or (c) involves an obvious error causing prejudice for which there is no remedy, will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated (China) Pulp Inc.* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker, Re* and by Armstrong J.A. in *Fiber Connections Inc.* In my view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol Homes Ltd. (Trustee of)* factors into the test.

32 As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

33 The *Power Consolidated (China) Pulp Inc.* criteria are the criteria applied by this Court in determining whether leave to appeal should be granted in restructuring cases under the CCAA: see *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), Feldman J.A., at para 15; and *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both CCAA and BIA insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the Test in the Circumstances

34 I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

35 First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the Inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

36 I would not grant leave to appeal on those grounds.

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

37 The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission is the argument that the outstanding HST arrears — although a default in the observance of a covenant under the BDC mortgage — could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

38 I have serious reservations about the likelihood of success of this submission on appeal.

39 Romspen relies upon the jurisprudence of this Court establishing that a mortgagor — and therefore, a subsequent mortgagee — is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316 (Ont. C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a \$250,000 covenant — payment of the outstanding HST arrears.

40 For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*[FN1], and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case.

41 I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

42 Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

43 There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the Inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

44 For the foregoing reasons, I decline to grant leave to appeal.

Disposition

45 There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the BIA. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances.

2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 227 A.C.W.S. (3d) 611, 115 O.R. (3d) 617, 307 O.A.C. 1

The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

46 No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Motion dismissed.

FN1 Section 22(1) provides: Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable, (a) at any time before sale under the mortgage: or (b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.
[Emphasis added]

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

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2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355



2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Regal Constellation Hotel Ltd., Re

In the Matter of the Receivership of **Regal Constellation Hotel Limited**, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Ontario Court of Appeal

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004

Judgment: June 28, 2004

Docket: CA C41258, C41257

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Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.

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Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.

James P. Dube for Aareal Bank A.G.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Subject: Contracts; Property; Corporate and Commercial; Insolvency

Sale of land --- Judicial sale --- Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Cases considered by Blair J.A.:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

Durrani v. Augier (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — referred to

National Life Assurance Co. of Canada v. Brucefield Manor Ltd. (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

Regal Constellation Hotel Ltd., Re (July 4, 2003), Cumming J. (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 100 — considered

Land Titles Act, R.S.A. 2000, c. L-4

s. 191 — referred to

Land Titles Act, R.S.O. 1990, c. L.5

Generally — referred to

Pt. IX — referred to

Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

s. 78(4) — considered

ss. 155-157 — referred to

Regulations considered:

Land Titles Act, R.S.O. 1990, c. L.5

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

General, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

Blair J.A.:

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.[FN1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of \$23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed \$33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was \$45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for \$25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a \$1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for \$31 million. While the HIG bid was accompanied by a \$1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its \$31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same \$25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the \$2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a \$2.5 million deposit plus \$500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for \$24 million. It was again unconditional and this time was buttressed by a \$20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for \$2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of \$24 million, HSBC would be suffering a shortfall on its secured debt of approximately \$9 million; in addition there are unsecured creditors of the hotel with claims exceeding \$2 million. As the receiver had not been able to generate any other new offers at a price comparable to the \$24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the \$3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of \$27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver \$24 million and registered the vesting order on title. Aareal Bank's \$20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by \$20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.

.....

It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the parties;

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its \$20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions[FN2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,

(a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or

(b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.

78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.[FN3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset [italics

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

[40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

[41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, *Registration of Title to Land*, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

[42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,

"Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,[FN4] in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master.

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The Appeals on the Merits

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed \$45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its \$31 million bid on September 2, 2003 - just the day before the First 203 Offer for \$25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that \$20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the \$45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the \$45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of \$45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

57 I turn, then, to the \$31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower \$25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional \$25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the \$24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of \$9 million. In addition, there are outstanding unsecured creditors with over \$2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted \$45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought \$57,123.25 on a partial indemnity basis if successful. The receiver asks for \$61,919.00 and Aareal Bank requests \$12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of \$137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

- a) To the receiver, in that amount of \$40,000;
- b) To 203, in the amount of \$40,000; and,
- c) To Aareal Bank, in the amount of \$12,225.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

69 These amounts are inclusive of fees, disbursements and GST.

Laskin J.A.:

I agree.

Feldman J.A.:

I agree.

Appeal dismissed.

FN1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

FN2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

FN3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

FN4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may re-vest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

END OF DOCUMENT

This is Exhibit "M" referred to in the Affidavit of Naheel Suleman
sworn February 27, 2014



Commissioner for Taking Affidavits (or as may be)

JENNIFER J. LAKE

From: Adam Wygodny [<mailto:awygodny@berkowcohen.com>]

Sent: February-25-14 4:11 PM

To: Harvin Pitch; lcome@dickinsonwright.com; calvin.ho@gowlings.com; Robert Drake; jenkins@kmbllaw.com; rtheriault@loonix.com; craphael@airdberlis.com; ediliorio@rdglaw.com; mkaplan@foglers.com; bjaeager@cfijlaw.com; kevin.ohara@ontario.ca; diane.winters@justice.gc.ca; ssood@airdberlis.com

Cc: Jack B Berkow; Gail Shakirof; brotenberg@harris-sheaffer.com

Subject: Home Trust Company v. 2122775 Ontario Inc., Superior Court of Justice File No. CV-13-10313-00CL

We are litigation counsel to the respondent in the above-captioned proceeding, Urbancorp (Downtown Developments Inc.), and are writing in response to the letter from Mr. Pitch dated February 24, 2014, under cover of which he transmitted his Notice of Appeal in the above-captioned proceeding.

In Mr. Pitch's letter he requested that any party disputing a stay of the Approval and Vesting Order of Justice D. Brown dated February 14, 2014, advise Mr. Pitch, prior to the close of business on February 25, 2014, of their intention to dispute the aforementioned stay. We are hereby writing to advise you that we intend to dispute the stay of the Approval and Vesting Order of Justice D. Brown dated February 14, 2014.

Adam J. Wygodny

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COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

MOTION RECORD
(Returnable March 10, 2014 before a Single Judge of the
Court of Appeal)

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