

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as amended

B E T W E E N :

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD
(2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED

Respondents

**FACTUM OF DIRCAM ELECTRIC LIMITED
(Application Returnable On December 19, 2018)**

Beard Winter LLP
Barristers and Solicitors
130 Adelaide St. West, Suite 701
Toronto, ON M5H 2K4

Robert C. Harason LSUC#: 19535S
Tel: (416) 306-1707
Fax: (416) 593-7760

Lawyers for the Lien Claimant
Dircam Electric Limited

TO: THE ATTACHED SERVICE LIST

AMENDED SERVICE LIST
(as at October 11, 2018)

TO:	<p>THORNTON GROUT FINNIGAN LLP TD West Tower, Toronto-Dominion Centre 100 Wellington Street West, Suite 3200 Toronto, Ontario M5K 1K7 Fax: (416) 304-1313</p> <p>D.J. Miller Tel: (416) 304-0559 Email: djmiller@tgf.ca</p> <p>Leanne M. Williams Tel: (416) 304-0060 Email: lwilliams@tgf.ca</p> <p>Lawyers for the Applicant, Firm Capital Mortgage Fund Inc.</p>
AND TO:	<p>OWENS, WRIGHT LLP 20 Holly Street, Suite 300 Toronto, Ontario M4S 3B1 Fax: (416) 486-3309</p> <p>Randy H. Lebow Tel: (416) 848-4707 Email: rlebow@owenswright.com</p> <p>Real Estate counsel for the Applicant</p>
AND TO:	<p>RSM CANADA LIMITED Collins Barrow Place 11 King Street West, Suite 700 Toronto, Ontario M5H 4C7 Fax: (416) 480-2646</p> <p>Bryan A. Tannenbaum Tel: (416) 238-5055 Email: bryan.tannenbaum@rsmcanada.com</p> <p>Arif Dhanani Tel: (647) 725-0183 Email: arif.dhanani@rsmcanada.com</p> <p>Privately-appointed Receiver of the Respondents</p>

AND TO:	<p>MEYER, WASSENAAR & BANACH, LLP 5001 Yonge Street, Suite 301 North York, Ontario M2N 6P6 Fax: (416) 223-9405</p> <p>Joseph Fried Tel: (416) 223-9191 (ext. 230) Email: jfried@mwb.ca</p> <p>Lawyers for RSM Canada Limited, in its capacity as Receiver</p>
AND TO:	<p>BORDEN LADNER GERVAIS LLP Bay Adelaide Centre, East Tower 22 Adelaide St. West Toronto, Ontario M5H 4E3 Fax: (416) 367-6749</p> <p>Roger Jaipargas Tel: (416) 367-6266 Email: rjaipargas@blg.com</p> <p>Xue Yan Tel: (416) 367-6322 Email: xyan@blg.com</p> <p>Lawyers for the Purchaser, Empire (Water Wave) Inc.</p>
AND TO:	<p>ROBINS APPLEBY LLP 2600-120 Adelaide Street W. Toronto, Ontario M5H 1T1 Fax: (416) 868-0306</p> <p>David A. Taub Tel: (416) 360-3354 Email: dtaub@robapp.com</p> <p>John Fox Tel: (416) 360-3349 Email: jfox@robapp.com</p> <p>Lawyers for the Respondents, Fortress Brookdale Inc. and Fortress Avenue Road (2015) Inc.</p>

AND TO:	<p>MILLER THOMSON LLP 100 New Park Place, Suite 700 Vaughan, Ontario L4K 0H9</p> <p>Enzo Di Iorio Tel: (905) 532-6613 Email: ediiorio@millerthomson.com</p> <p>Riccardo Del Vecchio Tel: (905) 532-6617 Email: rdelvecchio@millerthomson.com</p> <p>GOLDMAN, SPRINGS, KICHLER & SANDERS LLP 40 Sheppard Avenue West, Suite 700 Toronto, Ontario M2N 6K9 Fax: (416) 225-4805</p> <p>Sheldon Spring Tel: (416) 225-9400 ext. 303 Email: sspring@goldmanspring.com</p> <p>Ari Reichman Tel: (416) 225-9400 ext. 342 Email: ari@goldmanspring.com</p> <p>Lawyers for the Respondent, Fernbrook Homes (Brookdale) Limited</p>
AND TO:	<p>CORSIANOS LEE 3800 Steeles Avenue West, Suite 203W Vaughan, Ontario L4L 4G9</p> <p>George Corsianos Tel: (905) 370-1092 Fax: (905) 370-1095 Email: gcorsianos@cl-law.ca</p> <p>Lawyers for Quincy Investments Limited, 969692 Ontario Limited, 969593 Ontario Limited, 2307271 Ontario Inc., Sasso Auto Consulting Inc., Angelo Grossi, David Mark Doubilet, Gus Stamatiou, Robert Di Matteo and Tonino Amendola</p>

AND TO:	<p>AGUECI & CALABRETTA 5700 Yonge Street, Suite 1110 Toronto, Ontario M2M 4K2</p> <p>James M. Butson Tel: (416) 250-5700 x 215 Fax: (416) 250-5797 Email: james.butson@aclaw.ca</p> <p>Lawyers for Jaekel Capital Inc.</p>
AND TO:	<p>OSLER, HOSKIN & HARCOURT LLP 100 King Street West 1 First Canadian Place Suite 6200, P.O. Box 50 Toronto, Ontario M5X 1B8 Fax: (416) 862-6666</p> <p>Michael De Lellis Tel: (416) 862-5997 Email: mdelellis@osler.com</p> <p>Jeremy Dacks Tel: (416) 862-4923 Email: jdacks@osler.com</p> <p>Patrick Riesterer Tel: (416) 862-5947 Email: priesterer@osler.com</p> <p>Lawyers for FAAN Mortgage Administrators Inc., as Administrators for BDMC</p>

AND TO:	<p>DLA PIPER (CANADA) LLP 1 First Canadian Place 100 King Street West, Suite 6000 PO Box 367 Toronto, Ontario M5X 1E2</p> <p>Derek J. Bell Tel: (416) 369-7960 Email: derek.bell@dlapiper.com</p> <p>Danny M. Nunes Tel: (416) 365-3421 Email: danny.nunes@dlapiper.com</p> <p>Lawyers for Computershare Trust Company of Canada, in its capacity as trustee pursuant to a trust indenture</p>
AND TO:	<p>COMPUTERSHARE TRUST COMPANY OF CANADA 100 University Avenue Toronto, Ontario M5J 2Y1</p> <p>Robert Armstrong Tel: (416) 263-9303 Email: robert.armstrong@computershare.com</p>
AND TO:	<p>FOGLER RUBINOFF LLP 77 King Street West Suite 3000, P.O. Box 95 TD Centre North Tower Toronto, Ontario M5K 1G8</p> <p>Vern W. DaRe Tel: (416) 941-8842 Email: vdare@foglery.com</p> <p>Lawyers for Computershare Trust Company of Canada, in its capacity as Mortgagee</p>

AND TO:	AVIVA INSURANCE COMPANY OF CANADA c/o Aviva Trial Lawyers Ken Chan (Practice Assistant) 800 – 100 King Street West Toronto, Ontario M5X 2A2 Tel: (647) 788-7098 Email: ken.chan@aviva.com
AND TO:	TORYS LLP 79 WELLINGTON STREET WEST, SUITE 3000 TORONTO, ONTARIO M5K 1 N2 FAX: (416) 865-7380 ADAM SLAVENS TEL: (416) 865-7333 EMAIL: aslavens@torys.com LAWYERS FOR TARION WARRANTY CORPORATION
AND TO:	TARION WARRANTY CORPORATION 5160 Yonge St., 12 th Floor Toronto, Ontario M2N 6L9 Danielle M. Peck (Senior Counsel) Tel: (416) 229-3864 Fax: (416) 229-3845 Email: danielle.peck@tarion.com Timothy P. Schumacher (Vice-President & General Counsel) Tel: (416) 229-3874 Fax: (416) 229-3278 Email: tim.schumacher@tarion.com
AND TO:	OLYMPIA TRUST COMPANY 2200, 125-9 th Avenue SE Calgary, Alberta T2G 0P6 Jonathan Bahnuik (General Counsel) Tel: (403) 668-8365 Fax: (403) 265-1455 Email: bahnuikj@olympiatrust.com

AND TO:	<p>FASKEN MARTINEAU DUMOULIN LLP Bay Adelaide Centre 333 Bay Street, Suite 2400 P.O. Box 20 Toronto, Ontario M5H 2T6 Fax: (416) 364-7813</p> <p>Jonathan F. Lancaster Tel: (416) 865-4479 Email: jlancaster@fasken.com</p> <p>Lawyers for Fiera Capital Corporation</p>
AND TO:	<p>CITY OF TORONTO Legal Services 26th Floor, Metro Hall Stn. 1260, 55 John Street Toronto, Ontario M5V 3C6 Fax: (416) 397-5624</p> <p>Amanda S. Hill Tel: (416) 338-5790 Email: ahill@toronto.ca</p> <p><u>Christopher J. Henderson</u> Tel: (416) 397-5624 Email: Christopher.Henderson@toronto.ca</p>

AND TO:	<p>AIRD & BERLIS LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, Ontario M5J 2T9 Fax: (416) 863-1515</p> <p>Courtney V. Raphael Tel: (416) 865-3088 Email: craphael@airdberlis.com</p> <p>Sam Babe Tel: (416) 865-7718 Email: sbabe@airdberlis.com</p> <p>Danielle Muise Tel: (416) 865-3963 Email: dmuise@airdberlis.com</p> <p>Lawyers for the Lien Claimant, Summit Concrete & Drain Ltd.</p>
AND TO:	<p>AIRD & BERLIS LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, Ontario M5J 2T9 Fax: (416) 863-1515</p> <p>Courtney V. Raphael Tel: (416) 865-3088 Email: craphael@airdberlis.com</p> <p>Sam Babe Tel: (416) 865-7718 Email: sbabe@airdberlis.com</p> <p>Danielle Muise Tel: (416) 865-3963 Email: dmuise@airdberlis.com</p> <p>Lawyers for the Lien Claimant, Summit Forming Ltd.</p>

AND TO:	<p>BIANCHI PRESTA LLP 9100 Jane Street 3rd Floor, Building A Vaughan, Ontario L4K 0A4 Fax: (905) 738-0528</p> <p>Domenic C.S. Presta Tel: (905) 738-1078 ext. 2223 Email: dpresta@bianchipresta.com</p> <p>Lawyers for the Lien Claimant, D. Zentil Mechanical Inc.</p>
AND TO:	<p>BARRY S. GREENBERG 7626A Yonge Street Thornhill, Ontario L4J 1V9</p> <p>Tel: (905) 886-9535 Fax: (905) 886-9540 Email: bsgreenberg@rogers.com</p> <p>Lawyer for the Lien Claimant, Atlas Dewatering Corporation</p>
AND TO:	<p>GLAHOLT LLP 800-141 Adelaide Street West Toronto, Ontario M5H 3L5 Fax: (416) 368-3467</p> <p>John Margie Tel: (416) 368-8280 ext: 211 Fax: (416) 368-3467 Email: jmargie@glaholt.com</p> <p>Keith Bannon Tel: (416) 368-8280 Email: kbannon@glaholt.com</p> <p>Lawyers for the Lien Claimants, INNOCON, A PARTNERSHIP OF LAFARGE CANADA INC., LEHIGH HANSON MATERIALS LIMITED AND INNOCON INC.</p>

AND TO:	<p>BEARD WINTER LLP 130 Adelaide Street West, 7th Floor Toronto, Ontario M5H 2K4</p> <p>Robert C. Harason Tel: (416) 306-1707 Email: rharason@beardwinter.com</p> <p><u>Lawyers for the Lien Claimant, Dircam Electric Limited</u></p>
AND TO:	<p>SHIBLEY RIGHTON LLP 250 University Avenue Suite 700 Toronto, Ontario M5H 3E5 Fax: (416) 214-5400</p> <p>Andrea Lee White Tel: (416) 214-5200 Email: andrea.white@shibleyrighton.com</p> <p>Thomas McRae Tel: (416) 214-5206 Email: thomas.mcrae@shibleyrighton.com</p> <p><u>Lawyers for the Lien Claimant, Gilbert Steel Limited</u></p>
AND TO:	<p>RICHTER LAW 15 Bold St. Hamilton, Ontario L8P 1T3 Fax: (905) 523-6285</p> <p>Nicholas A. Richter Tel: (905) 523-7994 Email: nrichter@richterlaw.ca</p> <p><u>Lawyers for the Lien Claimant, Gilbert Steel Limited</u></p>

AND TO:	<p>HAMMOND FLESIAS 3800 Steeles Avenue West Suite 300 Vaughan, Ontario L4L 4G9 Fax: (905) 850-9998</p> <p>Richard Hammond Tel: (905) 850-8550 ext. 400 Email: rhammond@hammond flesias.com</p> <p><u>Lawyers for the Lien Claimant, Concrane Equipment Inc.</u></p>
AND TO:	<p>JOSEPH P. MAGGISANO 201 Lonsmount Drive, Suite 100 Toronto, Ontario M5P 2Y6</p> <p>Tel: (416) 653-5353 Fax: (416) 653-2610 Email: jmaggisano@jpmlaw.ca</p> <p><u>Lawyers for the Lien Claimant, Global Precast Inc.</u></p>
AND TO:	<p>MICHAEL A. HANDLER PROFESSIONAL CORPORATION 10 Director Court, Suite 101 Woodbridge, Ontario L4L 7E8 Fax: (905) 265-2235</p> <p>Michael A. Handler Tel: (905) 265-2252 Email: mhandler@mhandlerlaw.com</p> <p><u>Lawyers for the Lien Claimant, The Fence People Limited</u></p>

AND TO:	<p>GOLDMAN SLOAN NASH & HABER LLP 480 University Avenue, Suite 1600 Toronto, ON M5G 1V2 Fax: (416) 597-3370</p> <p>Catherine E. Willson Tel: (416) 597-6488 Email: willson@gsnh.com</p> <p>Christine Kellowan Tel: (416) 597-7877 Email: kellowan@gsnh.com</p> <p>Tyronne Hodgins (Law Clerk) Tel: (416) 597-9922 ext. 142 Email: hodgins@gsnh.com</p> <p>Lawyers for the Lien Claimant, Aluma Systems Inc.</p>
AND TO:	<p>FREDERIKSE LAW Barristers & Solicitors 4391 Harvester Road, Unit 5A Burlington, Ontario L7L 4X1 Fax: (289) 816-0353</p> <p>Barbara Frederikse Tel: (289) 813-2668 Email: barbara@frederlaw.ca</p> <p>Lawyers for the Lien Claimant, Stephenson's Rental Services Inc.</p>
AND TO:	<p>MINISTRY OF FINANCE (ONTARIO) Legal Services Branch 33 King Street West, 6th Floor Oshawa, Ontario L1H 8H5 Fax: (905) 436-4510</p> <p>Kevin O'Hara Tel: (905) 433-6934 Email: kevin.ohara@ontario.ca</p>

AND TO:	DEPARTMENT OF JUSTICE Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, Ontario M5H 1T1 Diane Winters Tel: (416) 973-3172 Email: diane.winters@justice.gc.ca
AND TO:	THE PURCHASERS OF RESIDENTIAL CONDOMINIUM UNITS

**E-Service List
(as at October 11, 2018)**

djmiller@tgf.ca; lwilliams@tgf.ca; bryan.tannenbaum@rsmcanada.com;
arif.dhanani@rsmcanada.com; jfried@mwb.ca; rjaipargas@blg.com; xyan@blg.com;
dtaub@robapp.com; jfox@robapp.com; ediiorio@millerthomson.com;
rdelvecchio@millerthomson.com; sspring@goldmanspring.com; ari@goldmanspring.com;
gcorsianos@cl-law.ca; james.butson@aclaw.ca; mdelellis@osler.com; priesterer@osler.com;
jdacks@osler.com; derek.bell@dlapiper.com; danny.nunes@dlapiper.com;
robert.armstrong@computershare.com; ken.chan@aviva.com; aslavens@torys.com;
danielle.peck@tarion.com; tim.schumacher@tarion.com; bahnuikj@olympiatrtrust.com;
jlancaster@fasken.com; ahill@toronto.ca; Christopher.Henderson@toronto.ca;
craphael@airdberlis.com; sbabe@airdberlis.com; dmuise@airdberlis.com;
dpresta@bianchipresta.com; bsgreenberg@rogers.com; jmargie@glaholt.com;
kbannon@glaholt.com; rharason@beardwinter.com; andrea.white@shibleyrighton.com;
thomas.mcrae@shibleyrighton.com; nrichter@richterlaw.ca;
rhammond@hammondflerias.com; jmaggisano@jpmlaw.ca; mhandler@mhandlerlaw.com;
willson@gsnh.com; kevin.ohara@ontario.ca; diane.winters@justice.gc.ca;
barbara@frederlaw.ca; vdare@foglars.com; kellowan@gsnh.com; hodgins@gsnh.com

COURIER SERVICE LIST
(as at October 9, 2018)

TO:	FORTRESS REAL DEVELOPMENTS INC. 25 Brodie Drive, Unit 1 Richmond Hill, ON L4B 3K7 Attention: Vince Petrozza
AND TO:	CITYZEN DEVELOPMENT (2005) CORPORATION 56 The Esplanade, Suite 301 Toronto, ON M5E 1A7 Attention: Sam Crignano
AND TO:	CITYZEN DEVELOPMENT (2005) CORPORATION 56 The Esplanade, Suite 308 Toronto, ON M5E 1A7 Attention: Sam Crignano
AND TO:	AVIVA C/O WESTMOUNT GUARANTEE SERVICES INC. 600 Cochrane Dr. Suite 205 Markham, Ontario L3R 5K3
AND TO:	VINCENZO PETROZZA a.k.a. Vince Petrozza 471 Sunset Beach Road Richmond Hill, ON L4E 3J3
AND TO:	JAWAD RATHORE 2 Scandia Court Unionville, ON L6C 1G6

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c.
C.43, as amended**

B E T W E E N :

FIRM CAPITAL MORTGAGE FUND INC.

Applicant

- and -

FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD
(2015) INC. and FERNBROOK HOMES (BROOKDALE) LIMITED

Respondents

**FACTUM OF DIRCAM ELECTRIC LIMITED
(Application returnable on December 19, 2018)**

PART I - THE APPLICATION

1. Firm Capital Mortgage Fund Inc. ("Firm Capital") brought an application for an order, further to the exercise of the power of sale in its mortgage, vesting title in the Brookdale on Avenue Road project in the purchaser and dismissing the construction lien actions against it on the basis (i) that the net proceeds of sale were sufficient to satisfy all legal and statutory requirements in respect of outstanding liens and would be paid into court and (ii) s. 44 of the Construction Act R.S.O. 1990, c. C.30, as amended, which entitles a person to bring a motion to vacate the registration of a lien upon payment into court of the full amount claimed plus the lesser of \$50,000.00 and 25% of the amount claimed as security for costs.
2. No motion was brought in the usual way in advance of the closing to vacate the registration of the liens upon the posting of security pursuant to s. 44 of the Construction Act, R.S.O. 1990, c. C.30, as amended.

3. Instead, Firm Capital sought first to close the transaction and then use the net sales proceeds as security for the liens and security for costs pursuant to s. 44(1) of the Construction Act.
4. No motion was brought pursuant to s. 47(1) of the Construction Act to dismiss the lien actions on the merits.
5. In its factum, Firm Capital asserts that the effect of a vacating order made under s. 44 of the Construction Act is to convert the liens into a charge upon the security posted (which is correct) and to put Firm Capital in the same position as if the liens had not been preserved such that, with the lien claims no longer preserved, the lien actions should be dismissed (which is incorrect).
6. In so asserting, Firm Capital misstates the effect of s. 44(6) of the Construction Act which actually states that it is only in respect of the operation of s. 21 (the lien is a charge upon the holdbacks and additional amounts owing), s. 23 (the owner is personally liable for holdbacks) and s. 24 (restrictions on payment once a written notice of lien is received) that on posting the security an owner or payer is in the same position as if the liens had not been preserved.
7. Firm Capital's assertion ignores the reality that before the lien claimants are entitled to payment of their lien claims out of the security, they must prove their entitlement as against Fortress Brookdale Inc. ("Fortress") and/or Firm Capital and/or the other mortgagees, whether by way of the priority over mortgages afforded by s. 78 of the Construction Act, by way of a charge under s. 21 of the Construction Act on the \$491,000.00 owing to the lien claimants as holdback and additional amounts owed and/or by way of a declaration that one or more of Firm Capital and the other mortgagees are an "owner" under the Construction Act and thus liable for the full amount of the liens.
8. While an order should be made that the liens be vacated by the posting of security by the Receiver for the Respondents pursuant to s. 44(1) of the Construction Act in the sum of \$10,183,523.00 for the amounts claimed in the liens, plus \$581,450.50 for

security for costs, for a total of \$10,764,973.50, allocated to the lien claimants as set out in paragraph 26 of this factum, the lien actions should not be dismissed against Firm Capital. Those actions should proceed to trial, a judgment of reference should be granted and a construction lien master appointed to manage and try the lien actions in the usual way using the specialized procedure enacted by the Legislature and set out in the Construction Act.

PART II - THE FACTS

9. On February 15, 2018, Dircam Electric Limited (“Dircam”), a contractor to Fortress (the registered owner of the project), registered construction liens totaling \$1,140,001.60 for the price of its work done. By Statement of Claim issued on April 10, 2018 and served on the Defendants, Dircam claims priority over the mortgages registered against title under s. 78 of the Construction Act and that the mortgagees are “owners” under the Act and thus liable for the full amount of its liens.

Statement of Claim, Exhibit A to the Affidavit of Karen Louzado, Dircam Responding Application Record (“RAR”), Tab 1A

10. On September 21, 2018, Firm Capital brought an application for an order, further to the exercise of the power of sale in its mortgage, vesting title in the Brookdale on Avenue Road project in the purchaser and dismissing the construction lien actions against it on the basis (i) that the net proceeds of sale were sufficient to satisfy all legal and statutory requirements in respect of outstanding liens and would be paid into court and (ii) s. 44 of the Construction Act R.S.O. 1990, c. C.30, as amended, which entitles a person to bring a motion to vacate the registration of a lien upon payment into court of the full amount claimed plus the lesser of \$50,000.00 and 25% of the amount claimed as security for costs.

Notice of Application, Firm Capital Application Record (“AR”) Tab 1, p. 8, 9

11. Firm Capital did not bring a motion, prior to closing, to vacate the liens upon the posting of security pursuant to s. 44 of the Construction Act, so as to clear title in advance of the closing.

12. Neither was a motion brought to dismiss the lien actions on their merits pursuant to s. 47 of the Construction Act. A motion to dismiss a lien action pursuant to s. 47 of the Construction Act is treated as a motion for summary judgment.

13. Firm Capital provided a draft vesting order in its Application Record.

14. Dircam's counsel made changes to the draft vesting order, obtained the consent of the lien claimants Gilbert Steel Limited, Aluma Systems Inc., The Fence People Limited, Atlas Dewatering Corporation, Summit Concrete & Drain Ltd., Summit Forming Ltd., Global Precast Inc. and Innocon to the changes made, and sent the revised draft vesting order to counsel for Firm Capital on October 3, 2018, for her approval or revision and return with a view to reaching agreement on the form of the vesting order.

Affidavit of Karen Louzado, p. 1, paras. 2, 3, Exhibit A – Email from Robert Harason to DJ Miller and others dated October 3, 2018 at 2:34 p.m. with attached vesting order without track changes (pages 1 to 7, Schedule C, page 1, Schedule G) and with track changes (pages 1 to 7), Dircam Supplementary Application Record (“SAR”) Tab 1A

15. Paragraphs 5 and 6 of the draft vesting order provided to Firm Capital's lawyers provided as follows:

5. THIS COURT ORDERS AND DECLARES that the sum of \$10,764,973.50, out of the purchase price, to stand as security for the claims for lien and costs of the lien claimants, as set out in Schedule G hereto, is hereby paid into court, pursuant to the provisions of s. 44(1) of the Act, in order to vacate the registration of the construction liens and certificates of action listed in Schedule C hereto.

6. THIS COURT ORDERS that, upon completion of the Closing in accordance with the terms of the Sale Agreement and payment by the Receiver on behalf of the Respondents of the sum of \$10,764,973.50 into court, to stand as security for the claims for lien and costs of the lien claimants pursuant to the provisions of s. 44(1) of the Act, and payment by the Receiver of its fees and disbursements and of any amounts having legal priority over the Applicant's Mortgage, the Receiver shall pay the balance of the sale proceeds (the “Net Proceeds”) into court for the benefit of all those claiming an interest in such Net Proceeds pending further order of the Court. Upon payment into court, the Receiver shall deliver a certificate to all parties on the service list herein, (the “Certificate of Completion”) confirming that the payments into court have been made in accordance with the terms of this Order.

16. By email dated October 3, 2018 at 5:09 p.m. from D.J. Miller to Robert Harason, Ms. Miller wrote,

“Could we please schedule a call to discuss the concepts underlying your markup? Once we have an understanding on a conceptual level, we will be in a position to respond on the substance of your markup.”

Affidavit of Karen Louzado, p. 2, para. 4, Exhibit B – email from D.J. Miller to Robert Harason dated October 3, 2018 at 5:09 p.m., Dircam SAR, Tab 1B

17. By email dated October 4, 2018 at 10:20 a.m. from Robert Harason to D.J. Miller, Mr. Harason responded,

“The concept flows from the intention expressed in your order of securing the liens by the posting of security for the claims and 25% for costs and the need to expressly provide for that so that the liens are secured. The amount posted for the liens has then been carved out of the Net Proceeds. The lien actions are not dismissed against any defendants, except for the receiver (if a defendant), because of the priority claims made in the lien statements of claim.”

Affidavit of Karen Louzado, p. 2, para. 5, Exhibit C – email from Robert Harason to D.J. Miller dated October 4, 2018 at 10:20 a.m., Dircam SAR, Tab 1C

18. By email dated October 4, 2018 at 10:50 a.m. from D.J. Miller to Robert Harason, D.J. Miller responded and stated,

“We are not providing any markup of the Vesting Order until such time as we have had a telephone discussion with you, as it appears clear from your markup and your email below that we view the situation differently.”

Affidavit of Karen Louzado, p. 3, para. 6, Exhibit D – email from D.J. Miller to Robert Harason dated October 4, 2018 at 10:50 a.m., Dircam SAR, Tab 1D

19. Counsel for Firm Capital and Dircam did speak on October 4, 2018 and by email dated October 4, 2018 at 8:18 p.m. from D.J. Miller to Mr. Harason and counsel for the lien claimants, Ms. Miller wrote,

“Based on the email below and my brief discussion with Robert Harason today, I think that it would be beneficial to schedule a call with counsel for all lien claimants to discuss the terms of the APA for which the Vesting Order is being sought, the mechanics for closing, and the implications for all concerned.”

Affidavit of Karen Louzado, p. 3, para. 7, Exhibit E – email from D.J. Miller to Robert Harason dated October 4, 2018 at 8:18 p.m., Dircam SAR, Tab 1E

20. Although the call with counsel proposed by Ms. Miller proceeded on Tuesday, October 9, 2018 at 3:00 p.m., counsel for Firm Capital never responded to the draft vesting order provided by counsel for Dircam on October 3, 2018 including paragraphs 5 and 6 thereof.

Affidavit of Karen Louzado, p. 3, para. 8, Dircam SAR Tab 1

21. The Application proceeded, in part, on October 18, 2018, at which time the vesting order was made so as to close the transaction and pay the net proceeds into court. The remaining issues were reserved for argument on December 19, 2018.

22. On December 6, 2018, the lawyers for Firm Capital delivered the Receiver's Statement of Receipts and Disbursements for the period from June 11, 2018 to December 5, 2018, together with the Completion Certificate pursuant to the order of Justice McEwen dated October 18, 2018. In the Receiver's Statement, the payment of the sum of \$491,000.00 by Fortress to the Receiver is noted, among other line items.

23. There is an issue that the sum of \$491,000.00 is part of the holdbacks and additional amounts owed in relation to the improvement by the registered owner of the project, Fortress, upon which the lien claimants have a prior charge pursuant to the provisions of s. 21 of the Construction Act.

Affidavit of Karen Louzado, p. 4, paras. 9, 10, Exhibit F – Receiver's Statement of Receipts and Disbursements for the period from June 11, 2018 to December 5, 2018, Dircam SAR Tab 1F

24. The Receiver's Statement of Receipts and Disbursements discloses an excess of receipts over disbursements in the sum of \$47,253,521.00. After deducting the claims for lien and security for costs totaling \$10,764,973.50 there remains available for distribution to Firm Capital and the other mortgagees the sum of \$36,488,547.50.

PART III - ISSUES AND THE LAW

Issue No. 1 - The application of s. 44(1) of the Construction Act with respect to the segregation of net proceeds paid into court

25. In order to vacate the registration of a construction lien, security equal to the full amount claimed plus the lesser of \$50,000.00 and 25% of the amount claimed in the lien for security for costs must be posted with the court.

s. 44(1) of the Construction Act, c. C.30, as amended

26. The amount of the security to be posted is \$10,183,523.00 for the amounts claimed in the liens, plus \$581,450.50 for security for costs, for a total of \$10,764,973.50, allocated to the lien claimants as follows:

Name of lien claimant	Lien Amount	Security for costs	Total
Summit Concrete & Drain Ltd.	\$28,024.00	\$7,006.00	\$35,030.00
Summit forming Ltd.	\$3,980,765.00	\$50,000.00	\$4,030,765.00
D. Zentil Mechanical Inc.	\$360,540.00	\$50,000.00	\$410,540.00
Atlas Dewatering Corporation	\$144,048.00	\$36,012.00	\$180,060.00
Innocon, Lafarge Canada Inc., Lehigh Hanson Materials Limited, Innocon Inc.	\$1,168,857.00	\$50,000.00	\$1,218,857.00
Dircam Electric Limited	\$321,158.00	\$50,000.00	\$371,158.00
Dircam Electric Limited	\$818,843.00	\$50,000.00	\$868,843.00
Gilbert Steel Limited	\$859,955.00	\$50,000.00	\$909,955.00
The Fence People Limited	\$108,117.00	\$27,029.25	\$135,146.25
Global Precast Inc.	\$818,839.00	\$50,000.00	\$868,839.00
Summit forming Ltd.	\$589,520.00	\$50,000.00	\$639,520.00
Concrane Equipment Inc.	\$141,250.00	\$35,312.50	\$176,562.50
Aluma Systems Inc.	\$739,244.00	\$50,000.00	\$789,244.00
Stephensons Rental Services	\$19,613.00	\$4,903.25	\$24,516.25
Concrane Equipment Inc.	<u>\$84,750.00</u>	<u>\$21,187.50</u>	<u>\$105,937.50</u>
Total	\$10,183,523.00	\$581,450.50	\$10,764,973.50

27. In its Notice of Application (grounds 31 and 32) and Factum (paragraphs 25 to 30) Firm Capital admits the liens are to be vacated by the posting of security pursuant to s. 44(1) of the Construction Act.

28. Dircam adopts the submissions contained in the facta delivered by the lien claimant Innocon.

29. Accordingly, an order should be made that the liens be vacated by the posting of security by the Receiver for the Respondents pursuant to s. 44(1) of the Construction Act in the sum of \$10,183,523.00 for the amounts claimed in the liens, plus \$581,450.50 for security for costs, for a total of \$10,764,973.50, allocated to the lien claimants as set out in paragraph 26 of this factum.

Issue No. 2 – Whether Firm Capital should remain a party to the construction lien actions.

30. Firm Capital seeks, in its Notice of Application, to dismiss the lien actions brought against it on their merits.

31. Section 47(1) of the Construction Act states that on motion, a court may discharge a lien and dismiss an action on any proper ground.

s. 47(1) of the Construction Act, R.S.O. 1990, c. C.30, as amended

32. An order dismissing a lien action on its merits should only be made on a motion brought pursuant to s. 47(1) of the Construction Act in the lien action itself and not by way of an Application.

33. The Construction Act serves a specialized purpose in a narrow field. Its procedure alone should be used in the determination of disputes relating to construction liens. An Application is not an appropriate procedure for the determination of such disputes, especially when it is likely that there will be material facts in dispute.

34. Unless a motion is brought in the lien actions (and not by way of an application) pursuant to s. 47(1) of the Construction Act to dismiss the lien actions and the motion is successful, the lien claimants must proceed with their actions to trial against Fortress,

Firm Capital and the remaining Defendants, in order to determine their entitlement to payment out of the security posted to vacate the liens.

s. 51, 64, 65, 68 and 84 of the Construction Act, R.S.O. 1990, c. C.30, as amended

35. A motion to dismiss a lien action under s. 47(1) of the Construction Act is in reality a motion to discharge a lien. It is akin to a motion for summary judgment under the old regime, before Rule 20 of the Rules of Civil Procedure was amended to provide expanded powers and pre-Hryniak v. Mauldin, 2014 S.C.C. 7.

36. If there are genuine issues for trial then the motion fails and the case must proceed to trial.

Northridge Homes Ltd. v. The Travellers Motel (Owen Sound) Limited et al., 2015 ONSC 3743 (Ont. S.C.J.) at p. 6, para. [13], [14]

Limen Group Ltd. v. Allform Group Ltd., 2016 ONSC 4344 (Ont. S.C.J.) at p. 6, para. [21], [22]

37. There is no inherent jurisdiction to dismiss a lien action.

38. Even if there is inherent jurisdiction to dismiss a lien action, it cannot be exercised in a manner contrary to a statute, such as the Construction Act, so as to alter or ignore the statutory priorities or a Rule. Inherent jurisdiction is a special and extraordinary power and should be exercised only sparingly and in a clear case.

39. All issues should be determined in the lien actions and not on an application to vest title in a purchaser under the power of sale contained in a mortgage.

Baxter Student Housing v. College Housing Co-operative Limited, [1976] 2 S.C.R. 475 (S.C.C.) at p. 480, 483

40. As Firm Capital has brought no motion to dismiss the lien actions pursuant to s. 47(1), its application for a dismissal order must be dismissed.

41. Even if Firm Capital had bought a motion to dismiss the lien actions, its motion, based on the grounds (31 and 32) set out in its Notice of Application, should still be dismissed.

42. Pursuant to s. 14 and 21 of the Construction Act, the lien claimants are entitled to a lien upon the interest of the owner in the project for the price of their services and materials supplied and a charge upon the holdbacks required to be retained and all additional amounts owed in relation to the improvement by the owner.

s. 14, 21 of the Construction Act, R.S.O. 1990, c. C.30, as amended

43. This means that the lien claimants are entitled to a lien against the project and a charge against the \$491,000.00 in the hands of Fortress which was paid to the Receiver.

44. When an order is made vacating the liens upon the posting of security for claim and costs under s. 44(1) of the Construction Act, the lien ceases to attach to the premises and to the holdbacks and other amounts subject to a charge under s. 21, and becomes instead a charge upon the amount paid into court, and the owner shall, in respect of the operation of s. 21 (the lien is a charge upon the holdbacks and additional amounts owing), s. 23 (the owner is personally liable for holdbacks) and s. 24 (restrictions on payment once a written notice of lien is received) be in the same position as if the lien had not been preserved.

s. 44(6) of the Construction Act, c. C.30, as amended

45. This does not mean that the lien actions should be dismissed against the person who posted the security. It is only in respect of the operation of s. 21, 23 and 24 that the owner who posts security for claim and costs under s. 44(1) of the Construction Act is in the same position as if the liens had not been preserved.

46. Notwithstanding the vacating of the liens, the liens and the claims which they represent remain very much alive as before the lien claimants are entitled to payment of their lien claims out of the security, they must prove their entitlement as against Fortress and/or Firm Capital and/or the other mortgagees, whether by way of the priority over

mortgages afforded by s. 78 of the Construction Act, by way of a charge under s. 21 of the Construction Act on the \$491,000.00 owing to the lien claimants as holdback and additional amounts owed and/or by way of a declaration that one or more of Firm Capital and the other mortgagees are an “owner” under the Construction Act and thus liable for the full amount of the liens.

47. Except as provided in s. 78(2) to (6) of the Construction Act, the liens arising from an improvement have priority over all mortgages affecting the owner’s interest in the premises, which in this case applies to each of the mortgages registered against title to the project, including the mortgage to Firm Capital.

s. 78(1) of the Construction Act, R.S.O. 1990, c. C.30, as amended

48. If Firm Capital, as a mortgagee selling under the power of sale in its mortgage, wishes to claim priority over the lien claimants because of its assertion that the posting of security under s. 44 of the Construction Act entitles it to a dismissal order, or any other assertion made with supporting evidence, Firm Capital must bring a motion in the lien actions pursuant to s. 47(1) of the Construction Act to dismiss the lien actions on their merits.

49. As Firm Capital has not brought a motion for dismissal pursuant to s. 47(1) of the Construction Act, its application for an order to dismiss the lien actions should be dismissed.

50. Even if Firm Capital had raised s. 47(1) of the Construction Act as a ground to dismiss the lien actions in its Notice of Application and even if an Application was the appropriate procedure for the review of a lien claim on its merits, Firm Capital has not met the heavy onus on it to prove that there is no genuine issue for trial and thus its application for dismissal of the lien actions must be dismissed.

51. The Receiver’s Statement of Receipts and Disbursements discloses an excess of receipts over disbursements in the sum of \$47,253,521.00. After deducting the claims for lien and security for costs totaling \$10,764,973.50, there remains available for distribution to Firm Capital and the other mortgagees the sum of \$36,488,548.00. As

Firm Capital asserts its mortgage is first in priority over the other mortgages, and the other mortgagees agree, Firm Capital may, if it chooses, admit that the liens are in priority to it and as first mortgagee recoup the entirety of its claimed indebtedness of \$20,131,330.00 from the remaining balance of \$36,488,548.00, thereby avoiding further litigation with the lien claimants while collecting the entirety of its claimed indebtedness.

Issue No. 3 – Whether Firm Capital is entitled to a \$750,000.00 holdback as security for its costs incurred in the lien actions

52. Once the order is made that the liens be vacated by the posting of security by the Receiver for the Respondents pursuant to s. 44(1) of the Construction Act in the sum of \$10,764,973.50, the lien claimants will have no proprietary interest in the \$750,000.00 holdback which constitutes security for Firm Capital's costs of the lien actions retained by it.

53. Apart however from the fact that the Notice of Application did not seek security for costs and that Firm Capital has brought no motion for security for costs with supporting material in each of the lien actions, there is an interests of justice and public policy argument to be made that Firm Capital should be ordered to pay the \$750,000.00 holdback, plus interest, into court in augmentation of the net proceeds available to the other mortgagees.

54. It is contrary to the interests of justice and public policy for a mortgagee selling under power of sale to be paid security for its costs out of the net proceeds of sale which are claimed by other claimants, which it can then use to fund its defense, because with that money it can litigate with impunity, without regard to the cost (to a maximum of the holdback) and has no incentive to take reasonable steps in order to resolve the issues expeditiously on a cost effective basis, because it is not paying its legal costs with its own money.

Issue No. 4 – The appointment of a construction lien master

55. Due to the order staying proceedings against Building and Development Mortgages Canada Inc. (“BDMC”), there is no requirement for BDMC to deliver a Statement of Defence in the lien actions and to date BDMC has not done so. Neither are the lien claimants able to obtain a judgment of reference, refer the lien actions to the Master at Toronto for trial, or proceed with trial management and trial before a Construction Lien Master.

56. In the usual case, once all defenses have been delivered or the time for delivery has expired, a lien claimant may bring a motion for a judgment of reference in order to refer the lien actions to the Master at Toronto for trial.

s. 58(1) of the Construction Act, R.S.O. 1990, c. C.30, as amended

57. Given that it is in the interests of justice for the lien actions to proceed, it is in the interests of justice for the court to lift the stay of proceedings against BDMC in order to permit the lien actions to proceed.

PART IV – ORDER REQUESTED

58. Dircam respectfully requests an order:

- a) ordering and declaring that the sum of \$10,764,970.50 out of the Net Proceeds, shall stand as security for the claims for lien and costs of the lien claimants, allocated among them as set out in paragraph 26 hereof, and be deemed to be paid into court by the Receiver on behalf of the Respondents, pursuant to the provisions of s. 44(1) of the Construction Act, R.S.O. 1990, c. C.30, as amended, in order to vacate the registration of the construction liens and certificates of action listed in Schedule C of the Vesting Order dated October 18, 2018;
- b) dismissing Firm Capital’s application to dismiss the construction lien actions brought against it;

- c) that the amount paid to Firm Capital in order to satisfy its mortgage out of the proceeds of sale be without prejudice to the rights of the lien claimants in the lien actions;
- d) that the stay of proceedings against Building and Development Mortgages Canada Inc. (“BDMC”) on this project be lifted to require BDMC to deliver a Statement of Defense in the lien actions or be noted in default if it does not and to permit the granting of a judgment of reference referring the lien actions to the Master at Toronto for trial;
- e) that there be a judgment of reference referring the lien actions to the Master at Toronto for trial;
- f) that the vesting order dated October 18, 2018 be without prejudice to the claims made in the lien actions and the findings of the construction lien Master on the reference;
- g) for its costs of this Application on a substantial indemnity basis, or in the alternative, on a partial indemnity basis, fixed by the court and payable forthwith by Firm Capital, and if on a partial indemnity basis, the difference between its costs of this Application as salvage costs, fixed by the court, and the amount paid by Firm Capital, payable forthwith out of the security for the claims for lien and costs of the lien claimants posted with the court in order to vacate the liens, or in the further alternative, its costs of this Application as salvage costs, fixed by the court and payable forthwith out of the security for the claims for lien and costs of the lien claimants posted with the court in order to vacate the liens, or in the further alternative, an order reserving its claim for costs of this Application as salvage costs payable out of the security for the claims for lien and costs of the lien claimants posted with the court in order to vacate the liens, to the Construction Lien Master or trial judge;
- h) such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED



By Robert C. Harason, counsel for the Lien
Claimant Dircam Electric Limited

SCHEDULE A

1. Baxter Student Housing v. College Housing Co-operative Limited, [1976] 2 S.C.R. 475 (S.C.C.)
2. Northridge Homes Ltd. v. The Travellers Motel (Owen Sound) Limited et al., 2015 ONSC 3743 (Ont. S.C.J.)
3. Limen Group Ltd. v. Allform Group Ltd., 2016 ONSC 4344 (Ont. S.C.J.)

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF DIRCAM ELECTRIC LIMITED
(Application Returnable December 19, 2018)**

Beard Winter LLP
Lawyers
130 Adelaide St. West, Suite 701
Toronto, ON M5H 2K4

Robert C. Harason LS#: 19535S
Tel: 416.306.1707
Fax: 416.593.7760

Lawyers for the Lien Claimant Dircam Electric
Limited

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

FACTUM OF DIRCAM ELECTRIC LIMITED

Beard Winter LLP
Barristers and Solicitors
130 Adelaide St. West, Suite 701
Toronto, ON M5H 2K4

Robert C. Harason LSUC#: 19535S
Tel: 416.306.1707
Fax: 416.593.7760

Lawyers for the Lien Claimant Dircam Electric
Limited