No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

– AND –

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, C. 57, AS AMENDED

– AND –

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Names of applicants: Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

To: The Service List

TAKE NOTICE that an application will be made by the applicants to Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street Vancouver BC V6Z 2E1 on February 14, 2022 at 9:00 a.m., by MS Teams, for the order set out in Part 1 below.

a) **ORDERS SOUGHT**

1. An Order substantially in the form attached as **Schedule A** hereto, providing for the following relief:

(a) Abridging the time for service of this notice of application, to the extent necessary;

(b) Authorizing and directing Dentons Canada LLP to release the accrued interest generated on the Pre-Sale Deposits to the Petitioners;

(c) Increasing the amount that the Petitioners may borrow from $25,900,000 to $27,700,000; and

(d) Authorizing the Petitioners to enter into the February 7, 2022 commitment letter with Domain Mortgage Corp. ("**Domain**").

2. Such further and other relief as this Honourable Court may deem just.

b) **FACTUAL BASIS**

1. This application supplements the application filed by the Petitioners on December 10, 2021, which addressed the relief sought with respect to increasing the amount that the Petitioners may borrow.

2. The Petitioners, Evergreen House Development Limited Partnership and its general partner, Port Capital Development (EV) Inc., own the **"Terrace House Project"**. The Terrace House Project consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighbourhood, located at 1250 W Hastings St., Vancouver.

3. Between 2017 and 2019, The Petitioners entered into a number of pre-sale purchase agreements, which resulted in the payment of deposit amounts totaling $8,005,201 to Dentons Canada LLP ("**Dentons**"), in trust, pursuant to pre-sale purchase agreements.

4. The standard form pre-sale purchase agreement used by the Petitioners provides that interest on the deposit is to accrue for the benefit of the Vendor except as is otherwise provided in the pre-sale purchase agreement. Under the pre-sale purchase agreement, the only circumstance in which the Vendor would not be entitled to the deposit is if completion has not occurred by the Outside Date, which may be extended for up to one year.

5. There is one pre-sale agreement wherein the Petitioners agreed to amend the standard form pre-sale purchase agreement to provide that the accrued interest would be for the benefit of the purchaser. Excluding that pre-sale purchase agreement, there is approximately $250,214.32 in accrued interest currently held by Dentons pursuant to pre-sale agreements for the benefit of the Petitioners as Vendor.

6. The Petitioners obtained a Deposit Protection Insurance Facility from Aviva Insurance Company of Canada in October 2017 to enable the release of residential deposits from trust so that they may be used as a source of project financing. In May 2020, it was estimated that there is a

contingent liability of approximately $14.7 million to Aviva Insurance Company of Canada ("**Aviva**") under the Deposit Protection Insurance Facility.

7. On May 29, 2020, the Petitioners obtained an order in these proceedings (the "**Initial Order**") granting them various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). On June 8, 2020, the Petitioners obtained an amended and restated initial order (the "**ARIO**") in these proceedings that, among other things extended the Stay of Proceedings and approved an interim financing facility.

8. As set out in the Eighth Report of the Monitor, Ernst & Young Inc. dated December 14, 2021, the Petitioners require additional funding to enable the Petitioners to continue their restructuring efforts.

9. Not only is the accrued interest intended to be for the benefit of the Petitioners contractually, but providing access to the funds at this time, will help address the Petitioners need for additional funding.

10. To further address the Petitioners need for additional funding, the Petitioners are also seeking an increase in borrowing and approval of the February 7, 2022 commitment letter with Domain ("**February Commitment Letter**").

11. The Petitioners seek to increase the borrowing limit to $27.7 million. In the December 10, 2021 Application, the Petitioners were only requesting an increase to $27.2 million, however, a further increase by $500,000 is being sought to enable the Petitioners to make a payment owed to Aviva pursuant to the October refinancing that occurred. This payment is also necessary to obtain Aviva's consent to the February Commitment Letter, which is a condition precedent to Domain providing additional financing.

12. The February Commitment Letter provides for additional financing of $1.8 million for a 4 month term at an interest rate of 24% per annum. Approximately $777,625 of the funds would be available to the Petitioners for use related to the Terrace House Project.

c) **LEGAL BASIS**

1. The Petitioners rely on the *Real Estate Development Marketing Act*, SBC 2004, c 41 ("**REDMA**"), CCAA*,* the *Supreme Court Civil Rules* and the inherent jurisdiction of this Honourable Court in support of their application for the release of the accrued interest.

2. Section 18 of REDMA sets out the requirements for treating and releasing a deposit obtained from a purchaser. Subsection 18(1) of REDMA provides:

> A developer who receives a deposit from a purchaser in relation to a development unit must promptly place the deposit with a brokerage, lawyer, notary public or prescribed person who must hold the deposit as trustee in a trust account in a savings institution in British Columbia.

3. REDMA defines "deposit" to mean, "**<u>money paid by a purchaser</u>** to a developer in relation to a development unit before the purchaser acquires title or any other interest in the development unit" [emphasis added]. The definition of "deposit" does not include the interest accrued on the deposit. Accordingly, it is not captured by the statutory trust obligations to the purchaser.

4. The entitlement to the accrued interest is addressed contractually through the pre-sale purchase agreements. All but one of the pre-sale purchase agreements provides under section 3(b) that:

> (b) The Deposit, or any portion thereof, received under the terms of this Agreement will be, within 21 business days of receipt of the Deposit by the Vendor's Solicitors, deposited in an interest-bearing trust account with a Canadian chartered bank, trust company or credit union **<u>with interest to accrue to the benefit of the Vendor except as otherwise expressly provided herein;</u>** **[Emphasis added]**

5. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47, the Supreme Court of Canada held, that contracts should be interpreted "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract". In this instance, it is clear that the intention of the parties

was that the accrued interest would not form part of the deposit and would be for the benefit of the Petitioners.

6. In *Markin v. Fasken Martineau DuMoulin LLP,* 2019 BCCA 275, the Court declined the request to interpret the definition of "deposit" broadly, finding that REDMA should not be used in an attempt to disavow terms of contracts freely entered into.

7. While the pre-sale purchase agreements provide the purchasers with a contingent claim to payment of accrued interest in the event that construction completion does not occur by the Outside Date as may be extended by the Vendor, that contractual obligation does not itself amount to a trust claim over the accrued interest. Further, the release of the accrued interest will further the Vendor's ability to advance construction in furtherance of construction completion, to the benefit of the purchasers.

8. The Petitioners also rely on the Court's inherent jurisdiction and section 11 of the CCAA which allows the Court to exercise its discretion to grant orders as appropriate towards achieving the broad statutory and policy objectives of the CCAA. The release of the accrued interest in this case will further the objectives of the CCAA through assisting in reducing the amount of funds that need to be borrowed.

9. With respect to the remainder of the relief sought by the Petitioners, they rely on the December 10, 2021 application.

MATERIAL TO BE RELIED ON

10. At the hearing of this Application, the Petitioners will rely on:

(a) The Ninth Report of the Monitor to be filed;

(b) The Eighth Report of the Monitor, filed;

(c) Affidavit of Macario Reyes Dated May 21, 2021; and

(d) Such further material as counsel may advise and the Court may permit.

The applicants estimate that the application will take 20 minutes.

☒ This matter is not within the jurisdiction of a master. Madam Justice Fitzpatrick is seized of this proceeding.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: February 10, 2022

Signature of David E. Gruber
Lawyer for the Applicants

THIS NOTICE OF APPLICATION is prepared and delivered by David E. Gruber of the firm Bennett Jones LLP, Barristers & Solicitors, counsel for the applicants, File No. 090034.00001, whose place of business and address for delivery is 2500 – 666 Burrard Street, Vancouver, British Columbia, V6C 2X8. Telephone: (604) 891-7500. Facsimile: (604) 891-5100. [gruberd@bennettjones.com]

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs ____________ of Part 1 of this notice of application

☐ with the following variations and additional terms:

Dated: ______________________________ ____________________________________

Signature of ☐ Judge ☐ Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ experts