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

Written Submissions

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I. OVERVIEW

1. Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (the **"Petitioners"**) apply for access to approximately $250,214.32 in accrued interest (the **"Accrued Interest"**) that has been generated from pre-sale deposits (the **"Deposits")** made pursuant to certain pre-sale purchase agreements. The Accrued Interest is presently held by Dentons Canada LLP (**"Dentons"**).

2. This application was initially scheduled to be heard on February 14, 2022. On that date, counsel for the Petitioners advised that there had been difficulty in serving pre-sale purchasers (the **"Purchasers"**), and he was aware of some potential opposition to the relief sought. Accordingly, in oral reasons now indexed at 2022 BCSC 370, this Court adjourned the present application.

3. The Petitioners now submit this written argument in order to set out their position that:

   (a) The Accrued Interest is presently held by Dentons for the benefit of the Petitioners, not the Purchasers;

   (b) There is no statutory or common law trust attaching to the Accrued which prevents the distribution of the Accrued Interest to the Petitioners and accordingly any right of the Purchasers to the Accrued Interest would be as unsecured creditors; and

   (c) Accordingly, this Court should exercise its discretion under s. 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (the **"*CCAA*"**) to grant the order sought by the Petitioners.

II. BACKGROUND

4. An extensive overview of these proceedings can be found in the Eighth and Ninth Reports of the Monitor dated, respectively, December 14, 2021 and February 22, 2022 (the **"Eight Report"** and the **"Ninth Report"**). The Petitioners do not propose to repeat the contents of those reports here.

A. *The Purchase Agreements*

5. There are presently 21 purchase agreements in place for units at Terrace House. 19 of the purchase agreements are for residential units, the other two are for commercial units. Each of the purchasers under these agreements have made at least one Deposit.

6. This application concerns only 20 of the purchase agreements (the **"Purchase Agreements"**). As discussed further below, these purchase agreements provide that interest is to accumulate to the benefit of the Petitioner Evergreen House Development Limited Partnership (**"Evergreen"**).

7. The other purchase agreement provides that interest accumulated on the deposit is to accrue to the benefit of the purchaser. The deposit and interest for this purchase agreement is held in a separate account, and the Petitioner does not seek any order with respect to it.

B. *Deposits Under the Purchase Agreements and REDMA*

8. The 20 Purchase Agreements each require the purchaser to make deposits at prescribed times, beginning on the date of the agreement.

9. Each of the Purchase Agreements provides that, within 21 days of the receipt of a deposit, Evergreen must forward those funds to a trust account.[1] This is consistent with the *Real Estate Development Marketing Act*[2], where section 18(1) imposes a requirement that funds be promptly deposited into a trust account.

10. Under the terms of the Purchase Agreements, if the purchase is completed, then the deposit is applied to the overall purchase price.[3] Likewise, under the Purchase Agreement, deposits are forfeited, at the election of the Evergreen, where a purchaser fails to pay a subsequent deposit or the balance of the purchase price when due.[4] If Evergreen fails to complete the sale of the strata lot, the deposit is returned to the purchaser.[5]

[1] See p. 5 of Appendix D of the Ninth Report (Redacted Standard Form PSA), Addendum "A", Clause 3(b).
[2] *Real Estate Development Marketing Act,* SBC 2004, c 41
[3] See p. 5 of Appendix D of the Ninth Report (Redacted Standard Form PSA), Addendum "A", clause 3(c).
[4] See p. 5 and 7 of Appendix D of the Ninth Report (Redacted Standard Form PSA), Addendum "A", clauses 3(d) and 8(a).
[5] See p. 5 of Appendix D of the Ninth Report (Redacted Standard Form PSA), Addendum "A", clause 3(e).

11. The Purchase Agreements' treatment of the Deposits corresponds to *REDMA*, which strictly controls the circumstances where the trustee can release the Deposit. For example, section 18(3) of REDMA a certification that Evergreen must deliver to Dentons to demonstrate the completion of the unit – only on providing this certification will Dentons then release the deposit. Section 18(4) prescribes a different certification Evergreen must provide to Dentons where the purchaser has failed to pay a subsequent deposit or the balance of the purchase price.

12. However, s. 19 of *REDMA* does provide a mechanism for Evergreen to access the Deposits during the course of the project. To do so, Evergreen is required to purchase a "deposit protection contract" as defined by the *Insurance Act*, section 142(1) (the **"Insurance Act"**)[6]. The deposit insurance contract insures the purchaser against the loss of the deposit should Evergreen be unable to return the deposit where it has an obligation to do so under *REDMA* or a Purchase Agreement.

13. Section 143 of the *Insurance Act* recognizes that there is no statutory entitlement by the purchaser to the interest in deposit, by noting that a deposit protection contract is only required to indemnify the insured against the loss of interest, where the developer has agreed to pay the insured interest on the deposit.

14. Reflecting the scheme set out in *REDMA*, Evergreen's right to access the Deposits is expressly provided for in the Purchase Agreements:

> The Purchaser understands that under Section 19 of the *Real Estate Development Marketing Act* (British Columbia), developers may enter into a deposit protection contract with an approved insurer pursuant to which the deposits paid by purchasers of land which Is proposed to be subdivided or strata titled may be released to the developer. As a result, the Vendor, at its sole option, may enter Into a deposit protection contract as required by such legislation with respect to the Deposit (or any portion thereof) and the Strata Lot. The Deposit (or such portion thereof) shall be released to the Vendor in accordance with such Insurance contract or security agreement and the provisions of paragraphs 3 and 9 shall be deemed to have been amended accordingly.[7]

15. Evergreen has purchased a deposit protection agreement with Aviva Insurance Company of Canada (**"Aviva"**). Accordingly, Evergreen has through the course of the

[6] *Insurance Act*, RSBC 2012.
[7] See p. 6 of Appendix D of the Ninth Report (Redacted Standard Form PSA), Addendum "A", clause 3.

development drawn on the Deposit account held by Dentons. Where Evergreen has withdrawn funds pursuant to the deposit protection agreement, those funds are no longer held in the Dentons' account and interest is no longer accumulated on them.

C. ***Accumulated Interest Under the Purchase Agreements and REDMA***

16. The Purchase Agreements expressly provide that Deposits are to be placed in an interest- bearing account, and that, subject to any "express" exceptions in the Purchase Agreement, the interest generated will be for the benefit of Evergreen:

> 3. Deposit and Limitation of Vendor's liability. The Deposit shall be dealt with by the Vendor's Solicitors as follows:
>
> […]
>
> (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 with Interest to accrue to the benefit of the Vendor except as otherwise expressly provided herein;

17. The Purchase Agreements only contemplate two circumstances where the Accrued Interest is no longer for the benefit of Evergreen. Neither of these circumstances have arisen to date.

18. First, the Purchase Agreements provide that where the Outside Date is missed, **and** Evergreen elects to terminate the Purchase Agreement, both the deposit and any accumulated interest are returned to the Purchaser:

> If the Completion Date has not occurred by December 31, 2020 (the **"Outside Date"**), then at the Vendor's option this Contract will be terminated, the Deposit and any accrued interest will be returned to the Purchaser and the parties will be released from all of their obligations hereunder...[8]

19. Second, some, though not all of the Purchase Agreements contain clause 7, which provides the right of Purchasers to cancel the agreement and receive back their deposit and accumulated interest where an amendment is made following the issuance of the development's

[8] See p. 4 of Appendix D of the Ninth Report (Redacted Standard Form PSA), Addendum "A", clause 1.

building permit that significantly alters the lot in question or common spaces. No such amendment has been made, nor is one contemplated.

20. In addition, the Purchasers have statutory rights of rescission pursuant to s. 21 of *REDMA* in certain circumstances. However, while *REDMA* requires that, upon the exercise of such a right, the Deposit must be returned to the Purchaser, it does not require the return of interest. In any event, none of the Purchasers have rescinded their Purchase Agreements.

21. In contrast to its heavy regulation of deposits in pre-sale contracts, *REDMA* does not regulate the treatment of interest at all.

III. STATEMENT OF ARGUMENT

22. As described above, under the Purchase Agreements, Evergreen, not the Purchaser, is the beneficiary of the interest that accumulates from the Deposits. In limited circumstances – none of which have occurred – the Purchasers receive a return of their Deposit and accumulated interest.

23. The Purchasers' only entitlement to the Accumulated Interest is the contingent interest under the Purchase Agreement which constitutes a pre-filing obligation subject to compromise pursuant to section 19 of the *CCAA*. There is no statutory entitlement or common law entitlement that would rise to the level of a trust obligation.

D. ***The Accrued Interest is Not the Subject of a Trust in Favour of the Purchasers***

24. A trust over the Accrued Interest in favour of the Purchasers would have to arise in one of two circumstances: either (1), there is a statutory trust imposed by *REDMA*, or (2) there is an express trust arising through the common law. These possibilities are addressed in turn below.

1. **The Accrued Interest is Not the Subject of a Statutory Trust**

25. A plain reading of *REDMA* demonstrates that the Accrued Interest cannot be subject to a statutory trust. The only statutory trust created by *REDMA* is the section 18(1) trust applicable to deposits, which provides as follows:

> **Handling deposits**
>
> 18 (1) 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.

26. Clearly, this section does not create a statutory trust over the Accrued Interest. The Accrued Interest is not "placed" by the developer, but by the savings institution where the funds are held.

27. Moreover, section 18(1) applies only to deposits, and *REDMA*'s definition of deposits does not encompass interest:

> "deposit" means <u>money paid by a purchaser to a developer</u> in relation to a development unit before the purchaser acquires title or any other interest in the development unit;[9]

28. Incorporating interest into the meaning of "deposit" and the statutory trust scheme would necessarily ignore the plain words of the statute. The BC Court of Appeal has explicitly cautioned against doing so with regards to section 18(1) and the scope of the statutory trust.[10]

29. Accordingly, there is no statutory trust over the Accrued Interest.

2. <u>The Accrued Interest is Not the Subject of an Express Trust</u>

30. A "fundamental" feature of Canadian trust law is that for an express trust to come into existence, there must be certainty of intention, certainty of object, and certainty of subject matter.[11] Here, the conduct of Evergreen and the Purchasers provides no indication of an intention to create a trust over the Accrued Interest. Moreover – and likely because there was no intended trust- the manner in which Evergreen and the Purchasers treated Accrued Interest creates insurmountable issues with respect to determining the subject of any express trust.

[9] *REDMA*, s. 1, "deposits".
[10] *Drake v. North Ellis Developments Ltd.*, 2012 BCCA 256 at paras 39-40; *Markin v. Fasken Martineau DuMoulin LLP,* 2019 BCCA 275.
[11] Waters, *Waters' Law of Trusts in Canada* at 5.1.

(a) No Certainty of Intention

31. *Waters' Law of Trusts* explains that "Clear Language" is required in order to establish an express trust.[12] Presumably, if such a trust were intended, it would be found in the language of the Purchase Agreements. However, nothing in the Purchase Agreements indicates any intention of Evergreen or the Purchasers to have the interest held in trust for the benefit of Purchasers. The Purchase Agreements are silent on the treatment of the Accrued Interest other than to indicate that it is, accrued for the benefit of Evergreen, subject to the limited exceptions described above.

32. It would have been straightforward for the parties to indicate that the Accrued Interest was to be held in trust by Dentons for the benefit of the Purchasers. Indeed, the Purchase Agreements contemplate precisely such a trust pertaining to builders' lien holdbacks, whereupon a portion of the purchase price is held in trust for the Purchasers until the expiry of the time for filing a builders' lien:

> 6. **Builders' Lien Holdback**. That portion, if any, of the balance of the Purchase Price required by law to be held back by the Purchaser in respect of builders' lien claims {the **"Lien Holdback"**) will be paid to the Vendor's Solicitors on the Completion Date. The Lien Holdback <u>will be held in trust for the Purchaser</u> pursuant to the *Strata Property Act* (British Columbia) and *Builders Lien Act* (British Columbia) (or successor statutes) solely in respect of lien claims registered in the applicable Land Title Office in connection with work done at the behest of the Vendor. <u>The Vendor's Solicitors are authorized to invest the Lien Holdback in an interest-bearing trust account and to pay to the Vendor (or as directed by the Vendor)</u>, on the earlier of (i) the date on which the time for filing a claim of lien under the *Builders Lien Act* expires; and (ii) the date which is 56 days after the date that the balance of the Purchase Price becomes due as aforesaid, the Lien Holdback plus interest, if any, accrued thereon, less the amount of any builders' lien claim filed against the Strata Lot of which the Purchaser or the Purchaser's Solicitors notify the Vendor's Solicitors in writing by 1:00 p.m. on that day.

33. Had the parties intended to impose a similar structure for the Accrued Interest, such that it was held in trust until it there was no possibility of its return to the Purchaser, they could have easily said so. That they did not is exceptionally strong evidence that no such trust was intended. Further, to the extent that any trust was intended, it would appear that such trust

[12] Waters, *Waters' Law of Trusts in Canada* at 5.1.

would be for the benefit of Evergreen who is entitled to the Accrued Interest in the first instance.

(b) No Certainty of Object

34. To the extent that any trust was intended, it would appear that such trust would be for the benefit of Evergreen who is entitled to the Accrued Interest in the first instance. However, given that the Purchase Agreements provide that in certain circumstances that the Accrued Interest would become for their benefit, there is insufficient certainty of object.

35. The Supreme Court of Canada has held that there is no certainty of object where there is uncertainty as to who the ultimate beneficiary will be.[13]

(c) No Certainty of Subject Matter

36. Moreover, the structure of the Purchase Agreements precludes the possibility of an effective trust in favour of any of the Purchasers. This is so because, as expressly contemplated by the Purchase Agreements and as permitted by *REDMA*, Evergreen was permitted to draw on the Deposits from time to time, and the Deposits were not segregated, but instead held in a single account.

37. This creates insurmountable difficulties with respect to certainty of subject. Where funds were withdrawn from the Dentons' account, there was no indication of which Purchaser's deposit, or portion thereof, was being withdrawn. Yet once the deposit was withdrawn, it no longer generated interest.

38. Consequently, of the Accrued Interest presently held by Dentons, it is not possible to identify the quantum to which any given Purchaser is entitled. The result is a fatal absence of certainty of subject matter.[14]

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[13] *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, para. 84-98.
[14] Waters, *Waters' Law of Trusts in Canada* at 5.3.

E. ***It is Just and Convenience to Provide the Petitioners with Access to the Accrued Interest***

39. As the Eighth and Ninth Reports make clear, the Terrace House project has a significant need for liquidity. Permitting access to the Accrued Interest will improve the likelihood that the project can successfully exit these proceedings with as limited an impact on stakeholders as possible, and accordingly is consistent with the remedial objectives of the *CCAA*.[15]

40. No unfairness results from permitting access to the Accrued Interest. Under the Purchase Agreements, the Accrued Interest is intended for the benefit of either one of the Petitioners (Evergreen), or, in limited circumstances, for the benefit of the Purchasers. Evergreen will obviously benefit from immediate access given the need for liquidity and the Purchasers will benefit from the furtherance of the development of Terrace House. Further, because the Purchasers have nothing other than a contingent unsecured entitlement to the Accrued Interest, they are unlikely to recover the Accrued Interest in any event.

41. Even in the limited circumstances in which the Purchasers may have a contractual entitlement to the Accrued Interest, their claim is subject to compromise should the Petitioners seek to restructure the Purchase Agreements through a Plan of Arrangement.

42. The Purchase Agreements are executory contracts. This is acknowledged at paragraph 12 of the Amended and Restated Initial Order which addresses the Petitioners ability to disclaim them.

43. Any claim of the Purchasers to the Accrued Interest is pursuant to the Purchase Agreements which pre-date the CCAA Proceedings, as such they constitute a pre-filing obligation that can be compromised pursuant to section 19 of the CCAA.

44. Section 19(1) states:

> 19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of the day on which proceedings commenced under this Act, and

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[15] Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at para 59.

> if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

45. Courts have held, that obligations under a pre-filing agreement constitute a pre-filing obligation even if the liabilities arises post filing.[16]

46. Accordingly, any claims of the Purchasers in relation to the Accrued Interest are subject to compromise in a plan of arrangement. To find otherwise would be to elevate any claim of the purchasers, disrupting the priority regime.

47. Accordingly, and for the reasons stated above, the Petitioners request that this Court grant the Order set out at paragraph 1(b) of the Petitioners' Notice of Application.

IV. COSTS

48. The Petitioners do not seek costs in this Application and ask that no costs be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 17, 2022

David Gruber/Keely Cameron
Lawyer for the Petitioners

[16] *SemCanada Crude Company (Celtic Exploration Ltd. #2),* 2021 ABQB 489, at para. 24; *Repsol Canada Energy Partnership v. Delphi Energy Corp.,* 2020 ABCA 364 at para 20, *Arrangement relatif à Métaux Kitco inc.,* 2017 QCCA 268 at para 77-78