Court File No.CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

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

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

COSTS SUBMISSIONS OF ARGO LUMBER INC. and NEWMAR WINDOW MANUFACTURING INC.

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TO: THE HONOURABLE MR. JUSTICE WILTON-SIEGEL

1. With respect to His Honour's Endorsement released on September 25, 2015 ("Endorsement") (copy attached at **TAB 1**), the Costs Submissions of Argo Lumber Inc. and Newmar Window Manufacturing Inc. are set out below and in the Bill of Costs attached (**TAB 2**). It is important to note that both Argo Lumber and Newmar Manufacturing sought costs in their Factum.

2. The Applicants brought a motion for an Order declaring they have authority to enter into a Settlement Agreement (as defined in the Endorsement) with Tarion Warranty Corporation ("Tarion") without the approval of the Court; or, in the alternative, an Order approving the Settlement Agreement. This issue arose because Silver Streams Homes Inc. ("Silver") and the numbered company Applicants were registered as vendors with Tarion while Puccini, the vendor of the properties, was not. Silver and the numbered company Applicants provided Letters of Credit to Tarion as beneficiary. Essentially, to then deal with Tarion's inability to draw on the Letters of Credit as a result of Puccini's absence from the registration, the Applicants, Imran Jinnah ("Jinnah"), and Tarion entered into the Settlement Agreement pursuant to which Silver would assume all of the obligations of Puccini with respect to Tarion.

3. Jinnah and the Applicants stood to benefit under the Settlement Agreement. If approval of the Settlement Agreement was granted, four *Provincial Offences Act* charges against Puccini under the *Ontario New Home Warranties Act* would be withdrawn or dismissed and Jinnah's personal guarantees provided to secure the obligations of the Applicants under the Letters of Credit would be reduced by the amount of any draws under the Letters of Credit.

4. As creditors, Argo Lumber Inc. ("Argo Lumber") and Newmar Window Manufacturing Inc. ("Newmar Window"), opposed the Settlement Agreement and, thus, the motion. The Monitor took no position on the motion. Tarion supported the motion of the Applicants.

5. In addition to the Motion Record and Reply Motion Record, cross-examinations and examinations were held; and, Tarion and the Applicants each delivered Factums. The Factum of Tarion was 40 pages in length.

6. Argo Lumber and Newmar Manufacturing attempted to settle the motion. In particular, on June 18, 2015 and again on June 24, 2015, Argo Lumber and Newmar Window, as responding parties offered to settle the motion on the basis of $127,000.00 being paid to Tarion and the balance being released to the Estate with no costs of the motion ("Offer") (see copy attached as Tab A to the Bill of Costs).

7. The basis of the Offer was the fact that to-date only $125,564.73 had been paid in claims. Attached at Tab B to the Bill of Costs is a copy of the "Possession Information" for Silver from Tarion's website reflecting this information.

8. The Offer was not accepted. The Responding Parties were fully successful on the motion as the Applicants' motion was dismissed in its entirety. Argo Lumber and Newmar Manufacturing, therefore, beat their Offer.

9. There is no question that these Responding Parties are entitled to their costs as set out in the Bill of Costs in accordance with the *Rules of the Civil Procedure*, R.R.O. 1990, Reg.194 (the "*Rules*"). Argo Lumber and Newmar Window respectfully seek an

Order awarding costs payable to them as against Jinnah, the Applicants and Tarion; or, in the alternative, out of the Estate, in the amount of **$20,458.89** in accordance with the Bill of Costs.

10. Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 ("*CJA*"), "*the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the Court*". The factors to be taken into account are outlined in Rule 57 of the *Rules*.

11. This is a case, despite being in a CCAA proceeding, where the usual rule should be followed and costs should follow the result. The Applicants would have requested costs if they had been successful. So, it is only reasonable that Argo Lumber and Newmar Window be awarded their costs as a result of their success. The costs sought flow from the reasonable expectations of the parties.

> ***Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 88 C.B.R. (5th) 320 at para.3-7 (Tab 3)**

12. All creditors were at liberty to oppose the motion; however, they did not. Argo Lumber and Newmar Window took on the risk and the cost of opposing the motion. They were completely successful in doing so and are thus entitled to be paid their costs. In our respectful submission, payment of these costs would not represent a preference. The dismissal of the Applicants' motion serves to benefit all creditors of the Estate as it saved the Estate approximately $1 million. It is also important to note that the costs of Jinnah continue to be paid from the Estate despite the fact that the administration of the Estate has been completed for some time and the only remaining issues are the lien claims which have been referred to an arbitrator. If

anyone is receiving a preference, it is Jinnah.

13. Following the release of the Endorsement, Argo Lumber and Newmar Window made repeated attempts to address the issue of costs. The Applicants and Tarion delayed the filing of the Notice of Appeal and refused to agree on the payment of any costs to the successful responding party. As a result, Argo Lumber and Newmar Window had no alternative but to seek a chambers appointment in respect of the issue. Any delay in respect of the issue of costs is solely attributable to the Applicants and Tarion.

DATD: DECEMBER 14, 2015

Emilio Bisceglia

ALL OF WHICH IS RESPECTFULLY SUBMITTED
EMILIO BISCEGLIA, Counsel for Argo Lumber Inc. and Newmar Manufacturing Inc.

Sonja Turajlich

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147650 ONTARIO INC.

Applicant

Court File No. 13-10362-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

COSTS SUBMISSIONS OF ARGO LUMBER INC. AND NEWMAR WINDOW MANUFACTURING INC.

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TAB 1

CITATION: Silver Streams Homes Inc. (Re), 2015 ONSC 5938
COURT FILE NO.: Click and Type
DATE: 20150925

SUPERIOR COURT OF JUSTICE - ONTARIO

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *S. Schwartz and M. Poliak*, for Silver Streams and Numbered Companies

A. Slavens, for Tarion Warranty Corporation

J. Klein, for MediGroup Incorporated and certain other lien claimants

E. Bisceglia, for Argo Lumber Inc. and Newmar Window Manufacturing Inc.

I. Aversa, for the Monitor

HEARD: June 25, 2015

ENDORSEMENT

[1] On this motion, the applicants in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") seek an order declaring that they have the requisite authority to enter into a Settlement Agreement (as defined and described below) without the approval of the court, or, alternatively, an order approving the Settlement Agreement.

Background

The Parties and the Puccini Project

[2] The applicants are affiliated Ontario corporations owned by Imran Jinnah ("Jinnah"). Silver Stream Homes Inc. ("Silver") is a residential homebuilder in the GTA. The numbered corporation applicants are the registered owners of lands that comprise phases I, II and III of a development referred to as the "Puccini Project" in Richmond Hill, Ontario.

[3] Silver Streams Homes (Puccini) Inc. ("Puccini") was incorporated for the purpose of selling the homes in the Puccini Project. Over the course of the Puccini Project, the applicants

entered into agreements of purchase and sale for 95 homes in which Puccini was the vendor (the "Purchase Agreements").

[4] This proceeding arises because Silver and the numbered corporation applicants were registered as vendors with Tarion Warranty Corporation ("Tarion") under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Act"), but Puccini was not.

[5] The applicants initiated these proceedings under the CCAA by the order dated December 17, 2013 of Newbould J. (the "Initial Order"). Subsequently, as a result of the failure to register under the Act, Puccini was charged with four counts of acting as a vendor of a new home without being properly registered, pursuant to a proceeding commenced on September 3, 2014 (the "POA Proceeding").

[6] Jinnah says that he believed that Puccini was registered as a vendor under the Act until he received a summons in the POA Proceeding in September 2014. In an affidavit sworn March 25, 2015 in these proceedings (the "Jinnah Affidavit"), Jinnah states that: (1) the failure to register Puccini as a vendor under the Act was inadvertent; (2) it was always the applicants' intention that all of the corporate entities involved in the Puccini Project would be properly registered under the Act; (3) at all relevant times, he believed Puccini was in fact a registrant under the Act; and (4) it was always the intention of the applicants that Tarion would have recourse and access to the Letters of Credit (as defined below) for the payment by Tarion of any claims against the applicants made by purchasers of the 95 homes covered by the Purchase Agreements.

The Letters of Credit

[7] In connection with the registration of Silver and the numbered corporation applicants under the Act, these parties provided Tarion with letters of credit in the aggregate amount of $920,000 (the "Letters of Credit"), and a deposit in the amount of $320,000 (the "Deposit").

[8] The Letters of Credit comprise letters of credit of the Bank of Montreal ("BMO") in the amounts of $250,000, $400,000 and $270,000, respectively dated April 12, 2012, November 12, 2010 and January 13, 2009.

[9] The Letters of Credit were issued pursuant to banking facilities established initially between Symphony Series Co-Tenancy Co-op ("Symphony") and BMO, pursuant to an offer of financing dated September 2, 2008 (the "Offer to Finance"). The Offer to Finance was amended by a letter between Symphony and BMO dated April 3, 2009. Among other things, this letter substituted as borrowers 2148993 Ontario Inc. ("993") and/or 2148990 Ontario Inc. ("990") and/or 2148991 Ontario Inc. ("991") and/or 2147650 Ontario Inc. ("650"). Pursuant to a further letter agreement between BMO and Symphony dated February 28, 2013, revised financing facilities were agreed to as set out in a term sheet (the "Term Sheet") attached to the letter agreement.

[10] The Term Sheet contemplated as borrowers, 993 and/or 990 and/or 650 and/or 2147681 Ontario Inc. ("681"). It also contemplated Letters of Credit facilities in the amounts of $670,000 and $250,000, which are understood to be represented by the Letters of Credit. The Term Sheet

provided that the Letters of Credit were to be secured by a portion of the net closing proceeds of each sale of homes in phase II of the Puccini Project, in the amount of $75,000 per unit, and from the net closing proceeds of the sales of homes in phase III of the Puccini Project in specified amounts depending upon lot size after repayment of a separate $4.5 million non-revolving demand loan facility provided under the Term Sheet. The cash collateral currently held by BMO to secure the Letters of Credit is herein referred to as the "Security".

[11] With respect to the Deposit, it is my understanding that this security was provided by 991 with respect to sales of homes in phase IV of the Puccini Project and that these lands have been sold in private power of sale proceedings. 991 is not an applicant in these CCAA proceedings. Any issue regarding the current security representing the Deposit after such power of sale proceedings is properly dealt with outside the present proceeding, and accordingly this Endorsement does not address the entitlement to such security.

The Settlement Agreement

[12] The Purchase Agreements pertaining to the 95 homes in the Project sold by Puccini advised the purchasers that a Tarion warranty was available. The Letters of Credit were provided to Tarion to secure the indemnification obligations of the vendor to Tarion in the event the vendor was unable to satisfy its warranty obligations to the purchasers under the Purchase Agreements and the Act.

[13] Each of the Letters of Credit is drawn in favour of Tarion as the beneficiary. In order to draw under each Letter of Credit, Tarion must provide BMO with a certificate stating that the monies being drawn are "in respect of obligations owed or which will be owed by the Registrant to the Beneficiary". In each case, the Registrant identified in the Letter of Credit is Silver rather than Puccini, although, in the case of the first Letter of Credit, the Registrant also includes 650, 990, 993, 681 and 991. Accordingly, Tarion is not able to provide the required certificate under the Letters of Credit entitling it to draw thereunder.

[14] In such circumstances, as the BMO loans contemplated under the Term Sheet have been repaid, if Tarion cannot draw under the Letters of Credit, the Security would be released by BMO and returned to the estate of the applicants to be distributed in accordance with the priorities determined under the CCAA.

[15] To address Tarion's inability to draw under the Letters of Credit as a result of the absence of registration of Puccini under the Act, the applicants, Tarion and Jinnah have entered into an agreement dated February 2015 (the "Settlement Agreement"). The Settlement Agreement provides that, upon the "Effective Settlement Date", Silver and Puccini will enter into an assignment and assumption agreement (the "A/A Agreement"). Pursuant to the A/A Agreement, Puccini will assign and sell to Silver all of Puccini's right, title and interest in the Purchase Agreements. In turn, Silver agrees to pay and perform all of Puccini's obligations in connection therewith, including, for greater certainty, all obligations commensurate with being a registered "vendor" under the Act in connection with the Purchase Agreements. For this purpose, the "Effective Settlement Date" is defined to be the date that an order of this court approving the Settlement Agreement becomes a final order.

[16] The intended effect of the Settlement Agreement is that Silver will assume the obligations of Puccini in respect of Tarion and thereby enable Tarion to provide a certificate referencing the obligations of Silver as a "Registrant". Jinnah will also benefit from the Settlement Agreement in at least two respects. Paragraph 9 of the Settlement Agreement provides that the POA Proceeding will be dismissed or withdrawn on the Effective Settlement Date. In addition, Jinnah's obligations under personal guarantees given to Tarion to secure the applicants' obligations in respect of the Puccini Project will be reduced by the amount of any draws under the Letters of Credit.

[17] I note that the record before the Court on this motion did not disclose any contractual indemnification obligation of Silver to Tarion that would be engaged upon implementation of the Settlement Agreement and would thereby permit Tarion to draw on the Letters of Credit. At the hearing, counsel for Tarion advised that such an obligation would be located in the vendor agreement signed by Silver upon its registration with Tarion. Subsequent to the hearing, in response to a request of the Court for the relevant documentation, the applicants provided copies of a builder agreement and a vendor agreement, each dated March 12, 2004, and referred to the indemnification provisions in section 2.1 of each agreement.

[18] The Court is not required to determine, and therefore makes no determination, regarding whether the Settlement Agreement is effective to engage the indemnification provisions in the builder agreement and the vendor agreement described above in respect of any claims that may be asserted by purchasers under the Purchase Agreements. This motion proceeds on the basis that the applicants and Tarion are of the view that payments out of the guarantee fund administered by Tarion in respect of the homes subject to such Purchase Agreements will give rise to "obligations owed or which will be owed by [a] Registrant to the Beneficiary."

[19] I also note that the Objecting Parties (as defined below) objected to disclosure of the builder agreement and the vendor agreement to the Court, because such documentation had not previously been produced by the applicants in this proceeding. I do not think there is any basis for such an objection given that this documentation is not being used by the Court in any substantive manner in reaching the determination in this Endorsement.

Applicable Law

[20] For the purposes of this motion, the following provisions of the *Ontario New Home Warranties Plan Act* are relevant.

[21] Section 6 of the Act provides that no person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act. It is not disputed that Puccini qualified as a "vendor" under the definition of that term in section 1 of the Act.

[22] Section 13 provides that every vendor of a home provides a warranty to an owner:

> 13. (1) Every vendor of a home warrants to the owner,
>
> (a) that the home,

> (i) is constructed in a workmanlike manner and is free from defects in material,
>
> (ii) is fit for habitation, and
>
> (iii) is constructed in accordance with the Ontario Building Code;
>
> (b) that the home is free of major structural defects as defined by the regulations; and
>
> (c) such other warranties as are prescribed by the regulations.

[23] Sections 14(3) and 14(4) provide remedies to an owner of a home in the case of a breach of the warranty in section 13:

> (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
>
> (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
>
> (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.
>
> (4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed. Accordingly, pursuant to section 14, an owner may have a claim payable out of the guarantee fund administered by Tarion.

[24] It is significant for present purposes that the Act does not, however, provide a statutory right of indemnification in favour of Tarion in respect of any amounts paid to satisfy claims by owners for a breach of a vendor's warranty out of the guarantee fund administered by Tarion that is described in section 14. To fill this gap in the legal chain, Tarion requires that registrants agree contractually to a right of indemnification in its favour. The obligation of indemnification is set out in a form of indemnity signed by each registrant and any other indemnitor of the registrant. As mentioned, in this proceeding, the applicants rely upon the indemnification provisions referred to above in a builder agreement and a vendor agreement executed by Silver in connection with its registration under the Act.

The Objections

[25] Two groups of lien claimants oppose the requested approval of the Settlement Agreement (collectively, the "Objecting Parties").

[26] A group of construction trade creditors led by MediGroup Incorporated (collectively referred to as the "Trades") have filed an objection which is set out in an affidavit of Frank Del Fatti ("Del Fatti"), sworn April 6, 2015 (the "Del Fatti Affidavit"). In this affidavit, Del Fatti submits that Jinnah should not be able to alter the existing contractual arrangements to the detriment of the Trades who have filed lien claims, given that claims for liens in significant amounts have been filed, a deficiency is anticipated, and a breach of trust action has been started. The Trades submit that Tarion should instead rely on its guarantee from Jinnah. Del Fatti notes that the Settlement Agreement would relieve Jinnah of his obligations under his guarantee in favour of Tarion, as well as resolve the POA Proceeding, and thereby allow Jinnah to build homes in the future.

[27] In addition, two other lien claimants, Argo Lumber Inc. and Newmar Window Manufacturing Inc., are separately represented on this motion and support the submission of the Trades.

Preliminary Observations

[28] The conclusions in this Endorsement are informed by the following observations and determinations.

[29] First, I do not think it is accurate to state, as the Objecting Parties submit, that the effect of the Settlement Agreement would be to elevate Tarion from an unsecured party to a secured party, in the sense that the Settlement Agreement would establish security that did not already exist. The effect of the Settlement Agreement is to allow Tarion to access security that was put in place before the CCAA proceedings by the applicants, other than Puccini, to which Tarion is not currently entitled because of the wording of the Letters of Credit and the absence of any registration of Puccini under the Act.

[30] Second, on the other hand, implementation of the Settlement Agreement changes the *status quo* in three respects. Most significantly, at present, Tarion cannot access the Letters of Credit with the result that the Security held by BMO for the Letters of Credit is effectively available for all of the creditors of the applicants in the CCAA proceedings in accordance with the applicable rules of priority. The effect of implementation of the A/A Agreement is to remove such Security from the estate of the applicants in favour of Tarion to the extent of any claims that Tarion may subsequently assert as a result of payments out of the guarantee fund administered by it. In addition, the POA Proceeding will be dismissed or withdrawn on implementation of the Settlement Agreement. Further, as mentioned, Jinnah will benefit by the reduction of his payment obligations under a personal guarantee given to Tarion in the amount of any draws under the Letters of Credit.

[31] Third, the only parties to the Settlement Agreement are the applicants, Jinnah (their principal shareholder and controlling mind and will) and Tarion. Tarion and Jinnah are also the

only parties that benefit from implementation of the Settlement Agreement. Conversely, the other creditors of the applicants are neither parties to, nor beneficiaries under, the Settlement Agreement and would be adversely affected by its implementation to the extent that any Security is applied in respect of any draws by Tarion under the Letters of Credit.

Analysis and Conclusions

[32] The parties agree that there are three issues to be addressed on this motion:

1. do the applicants have the power to enter into the Settlement Agreement, including without limitation the A/A Agreement, without approval of the court?

2. if not, does the Court have the authority to approve the Settlement Agreement, including without limitation the A/A Agreement? and

3. if yes, should the Court approve the Settlement Agreement, including without limitation the A/A Agreement?

I will address each issue in turn.

The Power of the Applicants to Enter into the A/A Agreement

[33] The applicants argue that they have the corporate power and capacity to enter into and perform the Settlement Agreement, including without limitation the A/A Agreement, and therefore do not require court approval. In particular, they assert that nothing in the CCAA, or in the orders issued in these CCAA proceedings, constrains their corporate power and capacity to enter into and perform the A/A Agreement. The applicants say that Silver therefore continues to have the corporate power and capacity to perform all of Puccini's obligations under the Purchase Agreements and to assume all of its liabilities in connection therewith, notwithstanding the CCAA proceedings.

[34] I do not agree for the following reasons.

[35] As mentioned, the A/A Agreement contains: (1) an assignment of Puccini's rights under the Purchase Agreements to Silver; and (2) an agreement of Silver in favour of Puccini to assume and perform all of Puccini's obligations under the Purchase Agreements, including without limitation all of Puccini's obligations as a "vendor" under the Act.

[36] In the present context, the significant aspect of the A/A Agreement is Silver's assumption of Puccini's obligations as a vendor under the Act. As mentioned, the applicants are proceeding on the basis that the legal effect of such assumption is that Silver will thereafter have an obligation to Tarion to indemnify it for any claims for breach of warranty that are asserted by purchasers of the 95 homes covered by the Purchase Agreements which are satisfied out of the guarantee fund maintained by Tarion.

[37] The parties agree that the execution and performance of the A/A Agreement does not contravene any provision of the CCAA. The more difficult issue is the operation of the Initial Order in these CCAA proceedings.

[38] I agree with the applicants that the provisions of paragraph 5 and of paragraph 10 of the Initial Order are not engaged in the present circumstances. These provisions are permissive rather than restrictive in respect of the applicants' ability to carry on business during the currency of the CCAA proceedings.

[39] However, I am of the opinion that the execution and performance of the A/A Agreement does engage the provisions of paragraph 9(c) of the Initial Order. This paragraph provides, among other things, that except as specifically permitted therein, the applicants are directed to refrain from granting credit or incurring liabilities, except in the ordinary course of business or until further order of the court.

[40] The execution and performance of the A/A Agreement has the result that Silver will incur the liabilities of Puccini under the Purchase Agreements. In doing so, it will incur liabilities otherwise than in the ordinary course of its business, insofar as the Purchase Agreements have already been entered into between Puccini and the purchasers thereunder. This is contrary to the plain meaning of the Initial Order.

[41] The applicants appear to accept that the proposed assumption of liabilities contemplated by the A/A Agreement would be outside the ordinary course of business of Silver. They argue instead that paragraph 9(c) should be interpreted on a consolidated basis, because they say the CCAA proceedings have, at all times, effectively been conducted on a consolidated basis for administrative purposes. In support of this view, the applicants note that all receipts and disbursements have been processed through a single bank account maintained for all of the applicants. The applicants say that, on this basis, paragraph 9(c) should be interpreted to refer to the incurring of new liabilities not already incurred by one of the applicants. On this interpretation, the Initial Order would not prohibit one applicant from assuming the obligations of another applicant.

[42] This was not, however, the manner in which the applicants were operated prior to, and as of, the date of the Initial Order. There is also no formal court order for consolidation of the applicants. Further, the Court understands that the construction lien claims are not being addressed on a consolidated basis in these proceedings. Accordingly, the separate legal and financial status of the applicants remains in effect during these CCAA proceedings.

[43] Given such separate legal and financial status, I conclude that there is no basis for the interpretation of the operation of paragraph 9(c) on a consolidated basis in the manner proposed by the applicants. Accordingly, I also conclude that the applicants require an order of the court to implement the Settlement Agreement.

<u>The Authority of the Court to Approve the A/A Agreement</u>

[44] In the alternative, the applicants argue that the Court has the authority to approve the Settlement Agreement, including in particular the A/A Agreement, to the extent such approval is required under the Initial Order or otherwise.

[45] The applicants say such authority is based on the broad discretion granted to the Court in section 11 of the CCAA. That provision reads as follows:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[46] In support of their position, the applicants rely on the decision of Morawetz J. in *Nortel Networks Corp.*, Re, 2010 ONSC 1708, 192 A.C.W.S. (3d) 368, and in particular on the following passages at paragraphs 69-71 of that decision :

> In *Re Stelco Inc.*, (2005), 2005 CanLII 40140 (ON CA), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.
>
> In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (CanLII), 2010 ONSC 1096 (S.C.J.).
>
> I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.*, [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra*, and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (CanLII), 2010 ONSC 1096 (S.C.J.).

[47] I agree with the statement in *Nortel* at paragraph 69 that a court has authority under section 11 of the CCAA to approve a settlement that is not limited to preserving the *status quo*. More generally, I am satisfied that the Court has the authority by virtue of section 11 of the

CCAA to approve the Settlement Agreement in the present circumstances. Such authority, however, requires demonstration by the applicants that the test for approval of an agreement pursuant to the discretion granted in section 11 has been satisfied.

Should the Court Approve the Settlement Agreement?

[48] The test for approval of a settlement agreement has been set out in *Nortel* by Morawetz J. at paragraph 73 as follows:

> A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

[49] Before addressing the application of the test for approval of an agreement in CCAA proceedings, it is important to note that the circumstances in *Nortel* were very different from the present circumstances. *Nortel* involved a multi-faceted agreement among a number of stakeholder groups, as well as the applicant, respecting the termination of discretionary pension and employment benefit payments that were existing obligations of the applicant. The settlement agreement in that case therefore resolved certain issues among such stakeholders, as well as settled claims between the debtor corporation and certain of the stakeholder groups who were parties to the agreement.

[50] In the present circumstances, the only parties to the Settlement Agreement are the applicants, their principal shareholder, and Tarion. These are also the only parties that benefit from implementation of the Settlement Agreement. The other creditors of the applicants who are neither parties to, nor beneficiaries under, the Settlement Agreement would be adversely affected by its implementation. The purpose of the A/A Agreement is rectification by the applicants of arrangements between themselves and Tarion that arose as a result of negligence, which they prefer to call inadvertence, on the part of the applicants. It does not resolve any issues among stakeholders in respect of outstanding obligations of the relevant applicant, being Puccini.

[51] The applicants say that the Settlement Agreement meets the requirements of the test articulated in *Nortel*. I will address each prong of the test in turn.

[52] First, the spirit and principal purpose of the CCAA is to permit insolvent corporations a period of time to restructure their affairs with their stakeholders with a view to proposing a plan of arrangement that will allow it to continue its business for the benefit of its stakeholders and, more generally, for the benefit of the public. In the present case, the CCAA proceedings permitted the applicants to complete and sell ten homes in the Puccini Project. This has now occurred. There is therefore no sense in which the Settlement Agreement will further the principal purpose of the CCAA.

[53] Given the present circumstances of the applicants, I accept that it may be appropriate to consider the spirit and purpose of the CCAA as it has been developed in the context of a "liquidating CCAA". In *Nortel,* Morawetz J. commented at paragraph 74 on the spirit and purpose of the CCAA in such context as follows:

> The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

[54] In the present circumstances, the practical effect of implementation of the Settlement Agreement is to alter the entitlement that currently exists with respect to the Security being held by BMO as security for any draws that Tarion might make under the Letters of Credit. It is inconsistent with the purpose of the CCAA, particularly in a liquidating CCAA proceeding, to alter existing priorities in respect of security, even those that arise as a result of inadvertence or negligence. I think the same principle should operate where the issue is the ability to access security.

[55] Further, implementation of the Settlement Agreement does not materially advance the CCAA proceedings in any way, except to the extent of eliminating the prospect of further litigation by Tarion regarding its entitlement to the Security posted for the Letters of Credit. The reduction of such litigation by virtue of implementation of the A/A Agreement between two applicants that would not otherwise further the purposes of the CCAA cannot, by itself, satisfy this requirement of the test for approval of the Settlement Agreement. Moreover, the Objecting Parties remain free to challenge Tarion's right to draw under the Letters of Credit, as they are not parties to the Settlement Agreement. On this basis, it is not clear that it can be meaningfully asserted that implementation of the Settlement Agreement will eliminate the prospect of further litigation.

[56] Given these two considerations, the Settlement Agreement would not satisfy the first requirement of the test in *Nortel.* I would add that, in the absence of an agreement involving a compromise of any claims of any creditors of the applicants, I think there is serious doubt that the Settlement Agreement is an agreement of the nature contemplated by *Nortel.*

[57] The second prong of the test for approval of the Settlement Agreement is demonstration that it is fair and reasonable in all the circumstances. As mentioned, the applicants say that the Settlement Agreement meets this requirement. They submit that implementation of the Settlement Agreement, in particular implementation of the A/A Agreement, will put the parties to the Agreement in the position that the applicants and Tarion intended them to be in. They also say that implementation will also put the Objecting Parties in the position that they expected to be in at the date of the Initial Order. The applicants argue that maintenance of the arrangements

respecting entitlement to the Security, as they existed on the date of the Initial Order, would result in a windfall to the Objecting Parties and the other unsecured creditors of the applicants.

[58] In this regard, Del Fatti himself states in the Del Fatti Affidavit that he accepted as true the statement of Jinnah, in his affidavit sworn December 11, 2013 in the application for the Initial Order, that Puccini was registered with Tarion. He further states that he believed any security posted with Tarion was for the benefit of Puccini.

[59] I am not satisfied, however, that implementation of the Settlement Agreement would be fair and reasonable in the circumstances, notwithstanding the element of rectification and the expectation of the Trades as acknowledged in the Del Fatti Affidavit. I reach this conclusion for the following reasons.

[60] First, insofar as the fairness and reasonableness test requires demonstration of a balancing of conflicting interests of stakeholders, as is suggested in *Nortel* at paragraph 74, the Settlement Agreement cannot satisfy this requirement. The Settlement Agreement does not balance the interests of stakeholders in any meaningful respect. Its purpose is to place one creditor, Tarion, in the position that Tarion and the applicants intended it to be in, all to the detriment of the Objecting Parties.

[61] Second, apart from Tarion, the only other beneficiary of the Settlement Agreement is the principal shareholder of the applicants, Jinnah, whose guarantee obligations are correspondingly reduced to the extent the Security is available to Tarion. In other words, implementation of the Settlement Agreement will have the effect of granting a benefit to a shareholder, in his capacity as an unsecured creditor, at the expense of the other creditors of the applicants, including the lien claimants. Further, Jinnah would receive this benefit notwithstanding the fact that his negligence resulted in the circumstances giving rise to the present motion.

[62] Third, Tarion argues that the Settlement Agreement furthers the public interest generally by preserving the guarantee fund that it administers under the Act for the benefit of the residential home construction industry in this Province. There are two difficulties with this argument.

[63] First, it entails a concept of public interest that is too remote from the purpose of the CCAA to be a consideration on this motion. As mentioned, insofar as the CCAA is directed toward a public benefit, the statute seeks to maintain the continuing operations of a debtor company, with the associated benefits of employment and tax revenues generated thereby.

[64] Second, and more importantly, the calculus of public benefit in the present circumstances is more complex and essentially impossible to assess on the record. Among other considerations, Tarion is a mandatory insurer. It has, or can have, the ability to reserve against unauthorized vendors who fail to indemnify it for warranty claims paid out of the guarantee fund. In this sense, as the Objecting Parties submit, Tarion is better able to spread the risk of loss across all of the residential units it insures than the Objecting Parties whose risk is higher, being dependent upon the unencumbered value of the properties against which they have claims. Further, in terms of moral hazard, it is not clear that the public interest lies in relieving Jinnah of his

personal liability on his guarantee to Tarion and dismissal of the POA Proceeding by permitting the applicants, which Jinnah controlled, to rectify his negligence.

[65] Given the foregoing, I do not think that a court can meaningfully or responsibly make a determination regarding where the public interest lies in the present circumstances, and, accordingly, I make no such determination.

[66] In the present circumstances, while the Settlement Agreement would put Tarion in the position that the applicants may have intended it to be in, the Settlement Agreement will also benefit Jinnah, the principal shareholder and an unsecured creditor in his capacity as a guarantor, at the expense of the other creditors of the applicants, including the lien claimants. It is possible that a court could find such an agreement to be fair and reasonable if there were a reasonable possibility of a plan of compromise or arrangement that would continue the applicants as operating entities. In that event, it may be possible to demonstrate that a proposed agreement of the nature of the Settlement Agreement would be fair to the other creditors based on a reasonable prospect of a benefit to them resulting from a successful plan of arrangement. However, that is not the present case.

[67] Given that the applicants have commenced a liquidating CCAA proceeding and are therefore effectively in bankruptcy proceedings, I think that, on balance, it would be unfair to rearrange the arrangements respecting entitlement to the Security that would otherwise operate in a bankruptcy in the manner proposed by the applicants. After a bankruptcy has occurred, courts are very reluctant to relieve against mistakes that would benefit a few creditors at the expense of the others, particularly where the benefitting creditors include the shareholder of the bankrupt corporation.

[68] Based on the foregoing, I conclude that the Settlement Agreement does not satisfy the requirements for approval of an agreement under section 11 of the CCAA. Accordingly, I conclude that the Court should refrain from exercising its discretion to approve the Settlement Agreement.

<u>Conclusion</u>

[69] Based on the foregoing, the applicants' motion is denied in its entirety.

Wilton-Siegel J.

Wilton-Siegel J.

Date: September 25, 2015

TAB 2

Court File No.: CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

BILL OF COSTS OF ARGO LUMBER INC. AND NEWMAR WINDOW MANUFACTURING

SUMMARY OF
AMOUNT CLAIMED FOR FEES AND DISBURSEMENTS

ITEM	SUBTOTALS
Fees	$16,299.50
Taxes on total fees	$ 2,118.94
DISBURSEMENTS	$ 2,040.46
TOTAL	$20,458.89

CHART OF FEES & DISBURSEMENTS

ITEM*	Lawyer	Hours	Actual Rate	Totals per Lawyer	Substantial Indemnity Rate (85% of actual)	Total Per Lawyer	Partial Indemnity Rate (70% of actual)	Totals Per Lawyer	AMOUNTS CLAIMED
Receipt and review of Motion Record of the Applicants in respect of the Tarion Motion; To preparing Responding Motion Record; To receive and review Reply Record;	EB	4.4	$450.00	$1,980.00	$382.50	$1,683.00	$315.00	$1,386.00	
	ST	6.4	$350.00	$2,240.00	$297.50	$1,904.00	$245.00	$1,568.00	
Subtotals:				**$4,220.00**		**$3,587.00**		**$2,954.00**	**$2,954.00**
Drafting Subpoenas to Witnesses and Notices of Cross-Examinations; To preparation for and attendance at the Cross-Examinations on the Tarion Motion;	EB	9	$450.00	$4,050.00	$382.50	$3,442.50	$315.00	$2,835.00	
	ST	7.0	$350.00	$2,450.00	$297.50	$2,082.50	$245.00	$1,715.00	
Subtotals:				**$6,500.00**		**$5,525.00**		**$4,550.00**	**$4,550.00**

ITEM*	Lawyer	Hours	Actual Rate	Totals per Lawyer	Substantial Indemnity Rate (85% of actual)	Total Per Lawyer	Partial Indemnity Rate (70% of actual)	Totals Per Lawyer	AMOUNTS CLAIMED
Receipt and Review of all Answers to Undertakings, Refusals and Under Advisements; Draft Factum and receiving and review Factum of Applicants and of parties represented by James Klein	EB	2.0	$450.00	$900.00	$382.50	$765.00	$315.00	$630.00	
	ST	8.3	$350.00	$2,905.00	$297.50	$2,469.25	$245.00	$2,033.50	
Subtotals:				**$3,805.00**		**$3,234.25**		**$2,663.50**	**$2,663.50**
Legal research; Prepare for motion; Attend motion on June 25, 2015	EB	8.0	$450.00	$3,600.00	$382.50	$3,060.00	$315.00	$2,520.00	
	ST	4.4	$350.00	$1,540.00	$297.50	$1,309.00	$245.00	$1,078.00	
Subtotals:				**$5,140.00**		**$4,369.00**		**$3,598.00**	**$3,598.00**
Review of Endorsement issued September 25, 2015 and reporting to client	EB	1.0	$450.00	$450.00	$382.50	$382.50	$315.00	$315.00	
	ST	1.2	$350.00	$420.00	$297.50	$357.00	$245.00	$294.00	
Subtotals:				$870.00		$739.50		$609.00	$609.00

ITEM*	Lawyer	Hours	Actual Rate	Totals per Lawyer	Substantial Indemnity Rate (85% of actual)	Total Per Lawyer	Partial Indemnity Rate (70% of actual)	Totals Per Lawyer	AMOUNTS CLAIMED
Communications with opposing counsel regarding September 25, 2015 Endorsement and issue of costs and settlement of Order; Drafting communications to Commercial Court and Mr. Justice Wilton-Siegel in respect of the 9:30 chamber's appointment;	EB	1.0	$450.00	$450.00	$382.50	$382.50	$315.00	$315.00	
	ST	2.0	$350.00	$700.00	$297.50	$595.00	$245.00	$490.00	
Subtotals:				**$1,150.00**		**$977.50**		**$805.00**	**$805.00**
Preparation of Bill of Costs and attendance at December 2, 2015 9:30 chamber appointment	EB	2.0	$450.00	$900.00	$382.50	$765.00	$315.00	$630.00	
	ST	2.0	$350.00	$700.00	$297.50	$595.00	$245.00	$490.00	
Subtotals:				**$1,600.00**		**$1,360.00**		**$1,120.00**	**$1,120.00**

ITEM*	Lawyer	Hours	Actual Rate	Totals per Lawyer	Substantial Indemnity Rate (85% of actual)	Total Per Lawyer	Partial Indemnity Rate (70% of actual)	Totals Per Lawyer	AMOUNTS CLAIMED
Totals									**$16,299.50**
H.S.T.									**$2,118.94**
TOTAL									**$18,418.44**

*Headings include all related correspondence, emails, meetings, calls, drafting and review of relevant documents.

STATEMENT OF EXPERIENCE

Name of lawyer	Year of Call
Emilio Bisceglia ("EB")	1993
Sonja Turajlich ("ST")	1996

Note: Hourly rates for Lawyers are as follows:

EB: $450.00

ST: $350.00

NON-EXPERT DISBURSEMENTS

DISBURSEMENT	TOTAL
Corporation Searches	$47.00
Omega Process Server Fees	$210.00
Subpoena Monies	$53.00
Network Reporting	$1,128.94
Laura Merrihew (Law Clerk - Transcript Summaries)	$580.00
Minister of Finance	$22.00
TOTALS	**$2,040.94**

NOTE #1: On June 18, 2015 and again on June 24, 2015, the Responding Parties offered to settle the motion on the basis of $127,000.00 being paid to Tarion and the balance being released to the Estate with no costs of the motion (see copy at Tab A attached of offer). The offer was not accepted. The Responding Parties were fully successful on the motion.

NOTE #2. Attached at Tab B is a copy of the "Possession Information" for Silver Streams Homes from the Tarion website showing that only $125,564.73 has been paid in claims to-date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Emilio Bisceglia
Bisceglia & Associates, Professional Corporation
Lawyers for the Plaintiff

TAB A

Subject: RE: Silver Streams Homes Inc. et al. - without prejudice
Date: Wednesday, 24 June, 2015 4:51:41 AM Eastern Daylight Time
From: Emilio Bisceglia <ebisceglia@lawtoronto.com>
To: 'Slavens, Adam' <aslavens@torys.com>, '(Aird & Berlis) Ian Aversa' <iaversa@airdberlis.com>, '(Aird & Berlis) Steven Graff' <sgraff@airdberlis.com>, '(Bisceglia & Assoc) Sonja Turajlich' <sturajlich@lawtoronto.com>, '(Chaitons) Harvey Chaiton' <harvey@chaitons.com>, '(Chaitons) Lynn Lee' <lynn@chaitons.com>, '(Chaitons) Maya Poliak' <maya@chaitons.com>, '(Chaitons) Stephen Schwartz' <stephen@chaitons.com>, '(Drudi Alexiou) Marco Drudi' <mdrudi@dakllp.com>, '(Klein & Assoc.) James Klein' <jkilein@kalaw.ca>, '(Koskie) Jeffrey Long' <jlong@kmlaw.ca>, 'Jack Greenberg' <jackgreenberg@greenberglawyers.ca>, 'Richard Mazar'

I confirm I have formal instructions to settle the motion with $127k paid to Tarion and the balance released to the estate. There would be no costs and we would have to agree on the form of order.

Emilio Bisceglia
Bisceglia & Associates Professional Corporation
Barristers-at-Law
Suite 200 - 7941 Jane Street
Concord, Ontario, L4K 4L6

Tel 905-695-5200
Dir 905-695-3100
Fax 905-695-5201

e-mail: ebisceglia@lawtoronto.com

From: Emilio Bisceglia [mailto:ebisceglia@lawtoronto.com]
Sent: Wednesday, June 24, 2015 9:30 AM
To: 'Slavens, Adam'; '(Aird & Berlis) Ian Aversa'; '(Aird & Berlis) Steven Graff'; '(Bisceglia & Assoc) Sonja Turajlich'; '(Chaitons) Harvey Chaiton'; '(Chaitons) Lynn Lee'; '(Chaitons) Maya Poliak'; '(Chaitons) Stephen Schwartz'; '(Drudi Alexiou) Marco Drudi'; '(Klein & Assoc.) James Klein'; '(Koskie) Jeffrey Long'; 'Jack Greenberg'; 'Richard Mazar'
Subject: RE: Silver Streams Homes Inc. et al. - without prejudice
Importance: High

Adam

I read your facta yesterday. Given the last paragraph why is this matter not settling as per my suggestion below?

Please call me

Emilio Bisceglia
Bisceglia & Associates Professional Corporation
Barristers-at-Law
Suite 200 - 7941 Jane Street
Concord, Ontario, L4K 4L6

Tel 905-695-5200
Dir 905-695-3100
Fax 905-695-5201

e-mail: ebisceglia@lawtoronto.com

From: Emilio Bisceglia [mailto:ebisceglia@lawtoronto.com]
Sent: Thursday, June 18, 2015 9:17 AM
To: 'Slavens, Adam'; '(Aird & Berlis) Ian Aversa'; '(Aird & Berlis) Steven Graff'; '(Bisceglia & Assoc) Sonja Turajlich'; '(Chaitons) Harvey Chaiton'; '(Chaitons) Lynn Lee'; '(Chaitons) Maya Poliak'; '(Chaitons) Stephen Schwartz'; '(Drudi Alexiou) Marco Drudi'; '(Klein & Assoc.) James Klein'; '(Koskie) Jeffrey Long'; 'Jack Greenberg'; 'Richard Mazar'
Subject: RE: Silver Streams Homes Inc. et al. - without prejudice

without prejudice

Adam

I do not have instructions but Jim and I had discussed a settlement whereby Tarion gets the $127k and the balance goes to the Estate. Is there any interest? I think the limitation period has expired on the other homes?

Any interest ?

Emilio Bisceglia
Bisceglia & Associates Professional Corporation
Barristers-at-Law
Suite 200 - 7941 Jane Street
Concord, Ontario, L4K 4L6

Tel 905-695-5200
Dir 905-695-3100
Fax 905-695-5201

e-mail: ebisceglia@lawtoronto.com

From: Pellegrini, Cathy [mailto:cpellegrini@torys.com] **On Behalf Of** Slavens, Adam
Sent: Tuesday, June 16, 2015 2:12 PM
To: (Aird & Berlis) Ian Aversa; (Aird & Berlis) Steven Graff; (Berkow Cohen) Scott Crocco; (Berkow, Cohen) Alexandra Lev-Farrell; (Bisceglia & Assoc) Emilia Bisceglia; (Bisceglia & Assoc) Sonja Turajlich; (Cavalluzzo Shilton) Carrie Clynick; (Cavalluzzo) Tracey Henry; (Chaitons) Harvey Chaiton; (Chaitons) Lynn Lee; (Chaitons) Maya Poliak; (Chaitons) Stephen Schwartz; (CRA) Kay Singh; (CRA) Kevin Dias; (Drudi Alexiou) Marco Drudi; (Fluxgold) Liliana Ferreira; (Goldman Sloan) Leonard Finegold; (Goodman Solomon) David Goodman; (Gowlings) Calvin Ho; (Grant Thornton) Daniel Sobel; (Grant Thornton) Jonathan Krieger; (Klein & Assoc.) James Klein; (Koskie) Jeffrey Long; (Min. Finance) Kevin O'Hara; (Minden Gross) Tim Dunn; (Nanda Assoc) Sabrina Hussain; (Pallet Valo) Anna Esposito; (Pallett Valo) Maria Ruberto; (Walsh Mcluskie) James Walsh, Q.C.; Bomhof, Scott; Harvey Mandel; Jack Greenberg; Jeffrey Spiegelman; Jolanta Krystkowicz; Richard Mazar; SaharZomorodi; Slavens, Adam
Subject: Silver Streams Homes Inc. et al.

In connection with the motion returnable June 25, 2015, please find attached Tarion Warranty Corporation's Responding Factum and Brief of Authorities, which are served upon you pursuant to the *Rules of Civil Procedure.*

Cathy Pellegrini

Legal Assistant to Scott Bomhof and Adam Slavens

P. 416.865.7333 | F. 416.865.7380 | 1.800.505.8679
79 Wellington St. W., 30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada | www.torys.com

TORYS LLP

TAB B

Ontario Builder Directory Search

Silver Streams Homes

Company Information

Registration Number:	Umbrella Group. See Associated Companies for a list of group members.
Umbrella Group:	
What is an Umbrella Group?	
Date of initial registration (yyyy/mm/dd):	2004/05/10
Address:	Box No. 30534, 10660 Yonge St.
	RICHMOND HILL, ON L4C 0C7
Telephone:	905-508-7186
Fax:	905-508-3671
Web Site:	www.silverstreamshomes.com
E-mail Address:	imranjinnah@hotmail.com

Sales & Marketing Contact Person:	Imran Jinnah
Director: *	
Officer: *	
Other Companies in Umbrella Group: *	2147650 Ontario Inc.-Expired 2147651 Ontario Inc.-Expired 2146990 Ontario Inc.-Expired 2146991 Ontario Inc.-Expired 2146993 Ontario Inc.-Expired
	Expand List

* The list of officers and directors and member companies comprising the Umbrella Group is based upon information provided by the builder with its application for registration or renewal. Tarion does not independently verify this information and is not responsible for ensuring the accuracy of this information.

10 Year Warranty History At A Glance

Possessions:	74	What is a possession?
Chargeable Conciliations:	26	What is a chargeable conciliation?
Homes with Claims:	15	What does Home with Claims mean?
Dollars Paid in Claims:	$125,564.73	What does Dollars Paid in Claims mean?

Possession Information

Please note that the statistical information contained in the chart below is updated on a quarterly basis and is current as of September 30, 2015.

Year	Freehold Possessions	Condominium Unit Possessions	Total Possessions	Chargeable Conciliations	Homes with Claims (Excluding Major Structural Defects)	Dollars Paid in Claims (Excluding Major Structural Defects)	Homes with Major Structural Defect Claims	Dollars Paid in Major Structural Defect Claims	Total Dollars paid in Claims
2015	1	0	1	8	4	$25,376.40	0	$0.00	$25,376.40
2014	6	0	6	14	11	$100,188.33	0	$0.00	$100,188.33
2013	20	0	20	2	0	$0.00	0	$0.00	$0.00
2012	20	0	20	0	0	$0.00	0	$0.00	$0.00
2011	5	0	5	0	0	$0.00	0	$0.00	$0.00
2010	19	0	19	0	0	$0.00	0	$0.00	$0.00
2009	0	0	0	2	0	$0.00	0	$0.00	$0.00
2008	3	0	3	0	0	$0.00	0	$0.00	$0.00
2007	0	0	0	0	0	$0.00	0	$0.00	$0.00
2006	0	0	0	0	0	$0.00	0	$0.00	$0.00
2005	0	0	0	0	0	$0.00	0	$0.00	$0.00
TOTAL	74	0	74	26	15	$125,564.73	0	$0.00	$125,564.73

Communities

WHITBY
RICHMOND HILL
MAPLE
VAUGHAN

Return to Search

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147650 ONTARIO INC.

Applicant

Court File No. 13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BILL OF COSTS OF ARGO LUMBER INC. AND NEWMAR WINDOW MANUFACTURING

BISCEGLIA & ASSOCIATES
Professional Corporation
Barristers-at-law
7941 Jane Street, Suite 200
Concord, Ontario
L4K 4L6

Tel: (905) 695-5200
Fax: (905) 695-5201

Emilio Bisceglia
LSUC No. 34568Q
Lawyers for Argo Lumber Inc. and
Newmar Window Manufacturing

2011 ONSC 7465
Ontario Superior Court of Justice [Commercial List]

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.

2011 CarswellOnt 14401, 2011 ONSC 7465, 88 C.B.R. (5th) 320

Return on Innovation Capital Ltd. as agent for Roi Fund Inc, Roi Sceptre Canadian Retirement Fund, Roi Global Retirement Fund and Roi High Yield Private Placement Fund and Any Other Fund Managed by Roi from time to time (Applicants) and Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co and Gandi Special Holdings LLC. (Respondents)

Newbould J.

Judgment: December 16, 2011
Docket: 09-CL-8172

Proceedings: additional reasons to *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Maya Poliak for Monitor, BDO Canada Limited
Mathew Halpin, Evan Cobb for TA Associates Inc.
Christopher J. Cosgriffe for Harry Gandy, James Gandy, Trent Garmoe

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

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Miscellaneous

Costs — GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act (CCAA) — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion was granted — Parties made submissions regarding costs — Certain creditor awarded $30,000, monitor awarded $50,000 for counsel fees and disbursements, and $12,000 for its own fees and disbursements — Making costs orders in proceedings under CCAA was not rare occurence — Monitor was successful and was entitled to costs — Monitor in proceedings had unusual functions such as filing plan — Claimants were sophisticated creditors whose claim of indemnification was intended to dilute unsecured creditors' claim — Monitor acted properly — Taking position contrary to claimants did not disentitle monitor from costs — Participation of certain creditor was not redundant and creditor was entitled to costs — Claimants' assertion that indemnities were under control of monitor added time to proceedings — Rates and time spent by counsel were not excessive.

ADDITIONAL REASONS to judgment reported at *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List]), respecting costs.

***Newbould J.*:**

1 On August 25, 2011 I released my endorsement on a motion brought by BDO Canada Limited in its capacity as a court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

2 The Monitor was successful and seeks costs of the motion on a partial indemnity basis. The position of the Monitor was supported by TA Associates, Inc. ("TA Associates ") which also seeks costs on a partial indemnity basis. The cost orders are opposed by the Claimants.

3 The usual rule is that absent some special circumstance, costs follow the event. In this case, the Claimants assert that costs are rarely made in a CCAA proceeding and should not be made in this case. Reliance is placed on the following statement of the Ontario Court of Appeal in *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165 (Ont. C.A.):

> 4. We make no order as to costs of the underlying motions. We understand that the conventional approach in CCAA proceedings is to rarely make costs orders, with the result that each party bears its own costs. There are sound policy

> reasons that underlie this approach, which include the reality that as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs: see *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487, at para. 31 (Gen. Div.) and *Re Calpine Canada Energy Limited*, [2008] A.J. No. 965, at para. 1. We see no reason to depart from the usual practice.

4 The statement of the Court of Appeal that cost orders are rarely made in CCAA proceedings is somewhat surprising. Recently, for example, in *Grant Forest Products Inc., Re* (2009), 58 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) in a motion in a CCAA proceeding between the former chairman and the secured lenders, I ordered costs to be paid to the former chairman. That decision was affirmed by the Court of Appeal (2010), 101 O.R. (3d) 383 (Ont. C.A.) in which costs were also awarded for the appeal. See also my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, [2011] O.J. No. 4378 (Ont. S.C.J. [Commercial List]) in a case dealing with costs in a receivership matter.

5 I do not read the decision of the Court of Appeal as laying down a principle that costs should rarely be ordered in CCAA proceedings. The statement is "We understand that..." and indicates that the court was essentially passing on what it was told, which I think was an overstatement. The cases cited do not stand for any general principle that costs are rarely ordered. In *Canadian Asbestos Services Ltd. v. Bank of Montreal* [1993 CarswellOnt 226 (Ont. Gen. Div.)], Chadwick J. in declining costs in a CCAA proceeding stated:

> I appreciate SGB 2000 Inc. has incurred a large number of legal costs in disputing these various applications. However, it was apparent very early in these proceedings that there was going to be limited funds available for distribution. As such counsel should have considered the cost to the client, and the likelihood they would not recover costs.

6 In *Calpine Canada Energy Ltd., Re* [2008 CarswellAlta 1163 (Alta. Q.B.)] Romaine J. ordered costs to be paid in a CCAA proceeding. Regarding the issue of whether costs are ordered in CCAA proceedings, she did not state that costs are rarely made, but rather that it was often that cost orders were not made. She stated:

> Often in proceedings under the Companies' Creditors Arrangement Act, costs are not awarded against unsuccessful parties.

7 I agree with Romaine J. that cost orders are often not made in CCAA proceedings. I do not agree that they are rarely made and, as I said, I do not read the decision in *Re Calpine* as dictating otherwise.

8 The Claimants contend that in CCAA proceedings, Monitors are officers of the court with an obligation to act independently and to consider the interests of the debtor and creditors, with a duty to remain neutral as between the various stakeholders in the CCAA proceedings. Thus it is claimed that the Monitor should not be entitled to costs for taking a position that was contrary to the interests of the Claimants.

9 While Monitors are officers of the court and intended normally to provide neutral services and neutral advice, BDO in this case had obligations beyond that of a typical Monitor. By order of Cameron J. dated March 9, 2010, BDO as Monitor was empowered and authorized to do a number of things on behalf of the Gandi companies, including being authorized to file a plan of compromise or arrangement. This order was necessitated because under the CCAA process, all of the business and assets of the Gandi companies had been sold and all of the directors and officers had resigned and there was no functioning board of directors. Proceeds from the sale were sufficient to pay off secured creditors and on the same day, BDO was

authorized by Cameron J. to establish a claims procedure to distribute the available cash from the sale of assets among the unsecured creditors.

10 The claims process was substantially completed by November 2010 and the Monitor prepared a consolidated plan of compromise and arrangement and scheduled a motion for approval to file the plan. On December 20, 2010 the Claimants filed proofs of claim in excess of $76 million. The basis for their claim is set out in my endorsement of August 25, 2011. On February 18, 2011 the Claimants brought a motion for leave to file their claims. At that time the Monitor raised concerns regarding the evidence supporting the claims and the fact that a portion of them appeared to constitute equity claims. Morawetz J. granted the Claimants leave to file their claims late and noted that the Monitor could apply to the court regarding preliminary issues that had been identified.

11 The Claimants alleged that they were *de jure* directors and officers of the corporate entities in the Gandi Group. TA Associates had advanced $75 million to the Gandi Group by way of $25 million of debt and $50 million of equity. In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claimed damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

12 The Claimants asserted an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration. Their right to be indemnified was hotly contested as was the question of whether their claim was an equity claim has to $50 million. The Claimants were thus not normal creditors in a CCAA proceeding, but rather sophisticated individuals seeking to put themselves in a position to substantially dilute the unsecured creditors on an indemnity that had to be determined, one way or the other. The indemnity claims of the Claimants, if permitted, would have delayed distributions to all creditors for a considerable period of time.

13 On March 11, 2011 the Monitor disallowed the indemnity claims of the Claimants and advised them that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings. The Claimants then served a notice of dispute, which led to the motion before me.

14 In the circumstances of this case, I find no fault with the actions of the Monitor in bringing the matter before the Court and taking the position that it did. It really had no other choice. It was the Monitor who was charged with the responsibility of filing a plan of compromise and arrangement, and the form in which the plan would finally be settled depended on the outcome of the motion.

15 In the circumstances, I am of the view that Monitor is entitled to its costs on a partial indemnity basis as it was successful.

16 The claim for costs by TA Associates is opposed by the Claimants. TA Associates is a substantial creditor and would be severely affected if the indemnity claims of the Claimants were accepted by the Monitor. It participated in the motion. It filed an affidavit of Mr. Johnson who was cross-examined by counsel for the Claimants. TA Associates' counsel examined one of the Claimants on his affidavit and participated fully in the motion. The Claimants oppose any order for costs in favour of TA Associates whose participation they contend was redundant. I do not agree. Whether the indemnities are proper claims

in the CCAA proceedings is of importance to TA Associates because the indemnities are said to protect the Claimants in the event that an award is made against them in the arbitration commenced by TA Associates in the U.S. The Claimants had to know that if they succeeded in their position, that would give them some leverage in the arbitration proceedings as TA Associates would be making a claim in the arbitration that if successful would partially end up coming out of its own pocket. The Claimants could not have expected TA Associates to sit back, particularly as it was the Monitor who brought the motion for directions and it was not clear at the outset exactly what the Monitor would do in the motion.

17 In my view TA Associates is entitled to its costs, although some recognition is to be given to the fact of duplication of efforts in considering what a fair and reasonable cost order is to be made against the Claimants.

18 The monitor seeks costs of $45,431.09, inclusive of HST, for fees and disbursements of $10,804.91, inclusive of HST. It also seeks fees and disbursements from BDO of $12,178.99, inclusive of HST. Apart from the usual work done on a motion such as this, because the Claimants alleged they were officers and directors of all members of the Gandi Group, it was necessary to consult U.S. Counsel regarding some of the Gandi companies that were incorporated in Delaware and Texas. In the face of a lack of written indemnities, the Claimants took the position that the indemnities were in the possession, power or control of the Monitor. Because of that position taken by the Claimants, counsel for the Monitor had to attend at the offices of the former solicitors of the Gandi Group to review the corporate governance documents. BDO and its counsel had to review 11 boxes of books and records of the Gandi Group in storage and 29 additional boxes at the Claimants' request. The Monitor was also required to review the books and records of the Gandi Group to disprove the allegations made by the Claimants that the Monitor authorized payment of certain legal fees of the Claimants in the arbitration.

19 The Claimants contend that the work done by counsel for BDO was excessive. While it is not required that the Claimants produce information as to the amount of time spent by its counsel, its failure to do so is something to be taken into account. In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), Wrinkler J. (as he then was) stated:

> The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

20 In *Frazer v. Haukioja*, 2010 ONCA 249 (Ont. C.A.), it was contended that the trial judge erred in awarding costs against the defendant. LaForme, J.A. for the court stated:

> Dr. Haukioja argued before the trial judge that Grant Frazer's counsel docketed almost twice as much time as his own. This, he says is relevant to Dr. Haukioja's reasonable expectations and establishes that he could not reasonably have expected Mr. Frazer's counsel to have invested so much more time than his own.
>
> The answer to this argument is found in the submissions of Grant Frazer that were made to this court.
>
> In making his finding with respect to the application of that part of rule 57.07(1)(0.b) "the amount of costs that an

unsuccessful party could reasonably expect to pay..." the trial judge noted Mr. Haukioja's failure to provide adequate information as to his own legal costs incurred. He also agreed with the observations of Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660at para.16 that, "the failure to volunteer that information may undermine the strength of the unsuccessfully part's criticisms of the successful party's requested costs." In that regard, his decision is entirely consistent with the authorities, and in particular the dicta of the Divisional Court in Andersen, "the inference must be that the [unsuccessful] Defendants devoted as much or more time and money" as did the successful Plaintiffs: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. S.C.J.) at paras. 24 to 27.

21 In reviewing the cost outline filed on behalf of the Monitor, nothing on the face of it would indicate that excessive time was spent. This was not a straightforward matter by any means and involved some novel issues. Nor do I think that the hourly rates used were excessive, being $350 per hour for Mr. Chaiton who was called in 1982 and $170 for Ms. Poliak who was called in 2007.

22 The Claimants contend that work done by BDO should not be permitted. The work done by BDO was entirely in connection with the motion and was necessitated by the need to review books and records and to supervise the Claimants' review of the record boxes. These costs would not have been incurred but for the position taken by the Claimants. In my view the cost of the work done by BDO was for and incidental to the motion and permissible in accordance with section 131 of the *Courts of Justice Act*.

23 TA Associates claims fees of $37,055 and disbursements of $4,522.11. In reviewing the cost outline filed on behalf of TA Associates, nothing on the face of it would indicate that excessive time was spent. As well, the hourly rates appear reasonable, being $350 per hour for Mr. Halpin who was called in 1986 and $165 per hour for Mr. Cobb who was called in 2008.

24 Taking into account the factors enumerated in rule 57.01, including the time spent, the results achieved, the complexity of the matter, the issue of possible duplication by counsel for the Monitor and for TA Associates, and also considering the amount of costs that an unsuccessful party such as TA Associates in the circumstances of this motion could reasonably expect to pay, I order that costs be paid by the Claimants within 30 days as follows:

1. To the Monitor for its counsel's fees and disbursements, $50,000 inclusive of HST.

2. To the Monitor for its fees and disbursements, $12,000 inclusive of HST.

3. To TA Associates for its counsel's fees and disbursements, $30,000 inclusive of HST.

Order accordingly.