Court File No. 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 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.

Applicants

FACTUM OF THE APPLICANTS
(Motion Regarding Tarion Settlement)
(Returnable June 25, 2015)

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON, M2N 7E9

Stephen Schwartz (LSUC #25980A)
Tel: (416) 218-1132
Fax: (416) 218-1832
Email: stephen@chaitons.com

Maya Poliak (LSUC#54100A)
Tel: (416) 218-1161
Fax: (416) 218-1849
Email: maya@chaitons.com

Lawyers for Applicants

TO: SERVICE LIST

I – OVERVIEW

1. The Applicants bring a motion for:

   (a) an order declaring that they have the requisite authority to enter into a Settlement Agreement dated February 17, 2015 (the "**Settlement Agreement**") with Tarion Warranty Corporation ("**Tarion**") without the approval of the Court; or, in the alternative,

      i. an order approving the Settlement Agreement

2. The Applicants were builders/owners of a residential development project in Richmond Hill, Ontario referred to in these proceedings as the "**Puccini Project**". In connection with the Puccini Project and as required under the *Ontario New Home Warranties Plan Act,* R.S.O. 1990, c. O.31 (the "**Warranties Act**"), the Applicants provided security in favour of Tarion in the aggregate amount of $1.24 million by way of cash collateral and letters of credit. The security was provided to Tarion to allow it to pay for deposit claims and warranty claims by purchasers in connection with the Puccini Project homes in the event the Applicants were unable to satisfy their obligations under the Warranties Act.

3. The Applicants are insolvent and are not able to satisfy their obligations to their purchasers under the Warranties Act. On December 17, 2013, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act* ("**CCAA**") pursuant to an order of Mr. Justice Newbould (the "**Initial Order**").

4. For ease of administration and marketing purposes, Silver Streams Homes (Puccini) Inc. ("**Puccini**") acted as a vendor under the agreements of purchase and sale. At all relevant times the Applicants believed and understood that all of the companies involved with the Puccini Project were covered by the Applicants registrations with Tarion under the Warranties Act.

5. In or around the summer of 2014, the Applicants for the first time learned that their registrations under the Warranties Act did not extend to Puccini. The failure to register Puccini under the Warranties Act was inadvertent. To remedy the defect of Puccini not being a properly registered vendor under the Warranties Act and allow Tarion to access the security

posted in respect of the Puccini Project, the Applicants agreed to enter into the Settlement Agreement and, among other things, assign to Silver Streams Homes Inc. ("**Silver Streams**"), which is a Tarion registrant, all of Puccini's rights, title, interest and obligations under the agreements entered into by Puccini in its capacity as vendor.

6. A number of the Applicants' lien claimants object to the Settlement Agreement and take the position that the letters of credit in favour of Tarion should be cancelled and the funds released to the Applicants' estate to be distributed in accordance with priorities to be determined by the Court.

7. It was always the intention of the Applicants that: (i) all of the corporate entities involved with the Puccini Project be registered with Tarion; and (ii) Tarion would have recourse and access to the security posted by the Applicants for the payment by Tarion of claims made by purchasers of homes in the Puccini Project. The Settlement Agreement, once implemented, will restore Tarion, the Applicants, the purchasers of the ninety five Puccini Project homes and the Applicants' creditors to the positions that they would have been in had Puccini been registered under the Warranties Act.

II - FACTS

(a) Background and Tarion Registrations

8. The Applicants are affiliated Ontario corporations owned by Imran Jinnah. At the time of the CCAA filing, the Applicants were in the process of completing the Puccini Project. The Puccini Project is comprised of four phases. Title to the lands in Phases I, II and II are registered in the names of the numbered company Applicants. Title to Phase IV was held by 2148991 Ontario Inc. which is not a debtor in these CCAA proceedings.

> Affidavit of Imran Jinnah sworn March 25, 2015 (the "**Jinnah Affidavit**") at para. 8

9. Tarion is a private, not-for-profit corporation that was established in 1976 to protect the rights of new home purchasers and regulate new home builders and vendors. Tarion administers the Warranties Act, which sets out the warranty protection that new home

purchasers are entitled to in the Province of Ontario as well as the scheme for the administration of same.

Jinnah Affidavit at para. 16

10. Silver Streams was registered as a builder and vendor with Tarion under the Warranties Act in or around May 2004. In or around May 2010, the numbered company Applicants were also registered as vendors under the Warranties Act.

Jinnah Affidavit at para.17

11. In connection with their registrations under the Warranties Act, the Applicants were required to and did provide letters of credit in the aggregate amount of $920,000 (the "**Letters of Credit**") and a cash deposit in the amount of $320,000 in favour of Tarion to secure the Applicants' obligations to Tarion under the Warranties Act (collectively, the "**Security**"). The Security was provided to Tarion to allow it to pay for deposit claims and warranty claims by purchasers in connection with the Puccini Project homes in the event the Applicants were unable to satisfy their obligations under the Warranties Act. The Security was financed as follows:

i. Letters of Credit: by way of credit facilities with Bank of Montreal ("**BMO**"); and

ii. Cash collateral: by way of credit facilities with RBC.

Jinnah Affidavit para. 22

Reply Affidavit at paras. 6-8

Answers to Undertakings of Imran Jinnah

12. The security financed by RBC was posted in respect of Phase IV of the Puccini Project.

Answers to Undertakings of Imran Jinnah

13. The original security in favour of Tarion in connection with the Puccini Project was financed pursuant to a Term Sheet dated August 25, 2008 among Symphony Series Co-Tenancy Corp. ("**Symphony**") as Borrower (the predecessor to Silver Streams) and Bank of Montreal ("**BMO**") as lender.

> Reply Affidavit of Imran Jinnah sworn April 13, 2015 (the "**Jinnah Reply Affidavit**") at para. 6

14. After Puccini was incorporated, the Applicants decided to develop the Puccini Project through Puccini and, accordingly, BMO made the above credit facilities available to the Applicants as opposed to Symphony. The BMO credit facilities were amended over time with the numbered company Applicants replacing Symphony as borrowers under the facilities.

> Jinnah Reply Affidavit at para. 7
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> Exhibit A to the Jinnah Reply Affidavit

15. At all relevant times between 2008, when the Puccini Project was commenced and until on or around the summer of 2014, the Applicants believed and understood that the Puccini Project was properly registered with Tarion under the Warranties Act and that the registrations in respect of the Puccini Project extended to all of the Applicants. This belief and understanding has been continuously communicated to the Court in this proceeding.

> Jinnah Affidavit at paras. 2, 18 and 19

16. The Applicants were building and selling new homes. The agreements of purchase and sale between the Applicants and their purchasers, including all of the agreements where Puccini was the vendor, advised the purchasers that a Tarion warranty was available.

> Jinnah Affidavit at para. 21

17. The Applicants' registrations under the Warranties Act were renewed on an annual basis. In addition, the Applicants paid to Tarion registration fees for every lot constructed by the Applicants at a cost ranging from $800 to $1,400 per lot. As a result, in addition to the Security, the Applicants incurred substantial costs on an annual basis to maintain their Tarion registrations in good standing.

> Imran Answers to Undertakings

18. In excess of ninety five Puccini Project homes have been sold by the Applicants to date with Puccini acting as vendor under the agreements of purchase and sale. In all of these transactions, it was the Applicants' and the purchasers' understanding that the sold homes were subject to the Warranties Act and that Tarion could look to the Letters of Credit to fund expenditures for deposit claims and warranty claims made by purchasers in the event the Applicants default in their obligations under the Warranties Act.

Jinnah Affidavit at paras. 22 and 28

19. In or around the summer of 2014, the Applicants learned for the first time that contrary to their previous understanding, the Applicants' registrations in respect of the Puccini Project did not extend to Puccini.

Jinnah Affidavit at para. 24

Examinations of Jack Greenberg held on May 22, 2015

20. On September 3, 2014, a *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (the "**Offences Act**") summons was issued to Puccini under the Warranties Act, which, summons among other things, charged Puccini with acting as a vendor of a new home without being properly registered under the Warranties Act.

Jinnah Affidavit at para. 25

(b) Settlement Agreement

21. Upon learning that Puccini was not a registered vendor under the Warranties Act, the Applicants entered into discussions with Tarion to remedy the inadvertent defect of Puccini not being a properly registered vendor under the Act, which ultimately resulted in the Settlement Agreement being negotiated and executed. Pursuant to the Settlement Agreement, the Applicants agreed, among other things, that Puccini will assign to Silver Streams all of its rights, title, interest and obligations under the purchased agreements entered into by Puccini in its capacity as vendor.

Jinnah Affidavit at para. 29

(c) Objections to the Settlement Agreement

22. The Settlement Agreement is conditional on, among other things, the Applicants advising the Service List and the Court of the terms of the Settlement Agreement and requesting that any person wishing to oppose or object to the execution, delivery or performance of the Settlement Agreement (the "**Objection**") serve notice of such Objection by no later than fourteen (14) calendar days from the date on which notice to the Service List of the Settlement Agreement is provided.

Settlement Agreement, Exhibit F to the Jinnah Affidavit

23. If an Objection was received by the Applicants within the prescribed time period, the Applicants, under the Settlement Agreement were required to schedule a motion for an order approving the Settlement Agreement.

Settlement Agreement, Exhibit F to the Jinnah Affidavit

24. A number of construction lien claimants filed Objections. The lien claimants' Objections can be summarized as follows:

i. The Security could not have been posted on behalf of Puccini;

ii. Tarion cannot avail itself of the security without an assignment contemplated by the Settlement Agreement and should be prevented by the Court from doing so; and

iii. The impact of the Settlement Agreement being carried out would elevate Tarion from the position of an unsecured party to that of a secured party against the Letters of Credit.

(d) Failure to Register Puccini was Inadvertent

25. It was always the intention of the Applicants that: (i) all of the corporate entities involved with the Puccini Project be properly registered with Tarion; and (ii) Tarion would have

recourse and access to the Security for payment by Tarion of claims made by purchasers against the Applicants.

Jinnah Affidavit at para. 40

26. There is no evidence before the Court to refute the Applicants' statements that Tarion was the intended beneficiary of the Security. Had the Applicants understood that a separate registration in respect of Puccini was required this registration would have been completed forthwith as the cost of registering a company under the Warranties Act is nominal and the penalties for failing to properly register under the Warranties Act are severe and include criminal sanctions.

Jinnah Affidavit at para. 19

(e) The Security Was Posted In Favour of Tarion

27. The lien claimants' argument that the Security could not have been posted on behalf of Puccini because it wasn't registered with Tarion lacks common sense and is contrary to the statutory scheme of the Warranties Act. Under the Warranties Act, any new construction project must be registered with Tarion before construction can begin and security must be posted concurrent with such registration. The Security was posted first by Symphony and subsequently by the numbered companies, to secure the Applicants' obligations to Tarion in connection with the Puccini Project, irrespective of who the vendor would be.

(f) The Lien Claimants are Seeking a Windfall

28. Contrary to the submissions of the lien claimants, it is the lien claimants who are seeking a windfall by trying to access funds available under the Letters of Credit. In these CCAA proceedings it was always known and understood that the letters of credit were provided in favour of Tarion. The lien claimants now seek to take advantage of the Applicants' inadvertent error and claim the proceeds from the Letters of Credit for themselves.

IV - LAW AND ARGUMENT

(a) Court Approval of the Settlement Agreement is not Required

29. There is nothing in the CCAA or Initial Order that requires the Applicants to seek approval of the Settlement Agreement or prevents Tarion from accessing the Letters of Credit. On the contrary, the stay of proceedings under the CCAA expressly excludes beneficiaries of a letter of credit.

> S. 11.04 of the CCAA
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> L.W. Houlden and Geoffrey B. Morawetz, *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, N87 – Letters of Credit, Tab 1 of the Applicants' Brief of Authorities

(b) The Applicants' Are Not Seeking to Elevate Tarion's Status or Grant New Security

30. Contrary to the assertions of the lien claimants, the Settlement Agreement does not grant Tarion new security. There is no change to the quantum of Security posted or the terms on which it can be utilized by Tarion. It is clear on the evidence before the Court that the Settlement Agreement is simply the mechanism by which Tarion may access the existing security posted in its favour before any construction work on the Puccini Project was even commenced. Such action is analogous to a secured creditor taking steps to perfect or preserve a security interest, which actions are permitted under the CCAA.

> See paragraph 12 of the Initial Order

31. The lien claimants' claims that the Settlement Agreement is tantamount to a grant of a new security is inconsistent with the clearly expressed intentions of the parties to the original agreement, the Applicants and Tarion and the statutory scheme of the Warranties Act.

(c) The Settlement Agreement Should be Approved

32. It is clear on the evidence before the Court that there is a valid and binding contract between Tarion and the Applicants, which included, among other things, the following terms:

i. a requirement that all of the parties acting as vendor/builder in connection with the Puccini Project and each lot to be constructed be properly registered with Tarion;

ii. a requirement that the registrations be maintained and renewed; and

iii. a requirement that the Applicants post Security in favour of Tarion in connection with the Puccini Project.

33. Both Tarion and the Applicants have confirmed their consensus as to the terms set out above in this proceeding and this evidence has not been disputed by the objecting parties.

34. The Applicants have now learned that due to an inadvertent mistake, they did not fully comply with the terms of the agreement by failing to properly register Puccini and seek to rectify the non-compliance by entering into the Settlement Agreement.

35. The relief being sought by the Applicants is analogous to the Court granting rectification of a contract. By granting the order sought, the Court will correct the Applicants' inadvertent mistake and give effect to the intended terms of the agreement between the Applicants and Tarion.

> See generally *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678, 2002 SCC 19 (CanLII)

36. In assessing damages the Court should strive to put the parties to the contract back in the position that they would have been had the contract been performed. Where damages are not adequate to afford a complete remedy, the Court has the jurisdiction to decree the specific performance of contracts.

> *Semelhago v. Paramadevan*, [1996] 2 SCR 415 ("***Semelhago v. Paramedevan***"), Tab 2 of the Applicants' Brief of Authorities at para. 21

37. The Supreme Court of Canada's comments in *Semelhago v. Paramedevan* on the use of specific performance are instructive to the case at hand:

> 15. Moreover, th**e claim for specific performance revives the contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is**

> **tendered.** In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement. As is elaborated in *McGregor on Damages* (13th ed. 1972), at p. 149:
>
> Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages . . . .
>
> **Thus, the claim for specific performance can be seen as reviving the contract to the extent that the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered. In this way, a claim for specific performance has the effect of postponing the date of breach.** [Emphasis added]

Ibid., *Semelhago v. Paramadeval* at para. 15

38. Damages are not adequate compensation for the Applicants' inadvertent breach in the case at hand. An award of damages would deprive Tarion of the Security that it had contracted for and that the Applicants posted in its favour and would leave Tarion with an unsecured unliquidated claim against the Applicants. The Applicants are insolvent and there are no expectations of a meaningful distribution to unsecured creditors.

39. In contrast, the Settlement Agreement is akin to an order of specific performance. Once implemented, the Settlement Agreement will restore all parties, including Tarion, the Applicants, the purchasers and the Applicants' creditors to the positions they would have been in had Puccini been properly registered under the Warranties Act, consistent with the Applicants' intentions and previous representations in these CCAA proceedings.

V – RELIEF SOUGHT

15. The Applicants respectfully requests an order for the relief set out in paragraph 1 hereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 5, 2015

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON, M2N 7E9

Maya Poliak (LSUC#54100A)
Tel: (416) 218-1161
Fax: (416) 218-1849
Email: maya@chaitons.com

Lawyers for the Applicants

SCHEDULE "A" – List of Authorities

1.	*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678, 2002 SCC 19
2.	*Semelhago v. Paramadevan*, [1996] 2 SCR 415

SCHEDULE "B"
RELEVANT LEGISLATION

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

11. General power of court

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.

1.02(1) Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2) Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3) Burden of proof on application
The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4) Restriction
Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

11.04 Persons obligated under letter of credit or guarantee
No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

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

96(1) Rules of law and equity
Courts shall administer concurrently all rules of equity and the common law.

96(2) Rules of equity to prevail
Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

96(3) Jurisdiction for equitable relief
Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

97. Declaratory orders
The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right whether or not any consequential relief is or could be claimed.

99. Damages in substitution for injunction or specific performance
A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.