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 for Stay Extension)
(Returnable March 29, 2016)

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

Michael Kril-Mascarin
(LSUC#54100A)
Tel: (416) 218-1123
Fax: (416) 218-1848
Email: michaelk@chaitons.com

Lawyers for Applicants

TO: SERVICE LIST

I – OVERVIEW

1. The Applicants bring a motion, *inter alia*, for:

a) an order extending the Stay Period, as defined in paragraph 11 of the Initial Order of the Honourable Justice Newbould (the "**Initial Order**") dated December 17, 2013 (the "**Filing Date**") to and including November 30, 2016;

b) approving the Tenth Report (the "**Tenth Report**") of Grant Thornton Limited, in its capacity as Court-appointed Monitor of the Applicants (the "**Monitor**"), and the activities described therein;

c) approving the fees and disbursements of the Monitor and its legal counsel as described in the Tenth Report; and

d) approving the Monitor's interim statement of the Applicants' receipts and disbursements from December 17, 2013 to and including February 29, 2016.

2. The Order extending the stay should be granted without the terms proposed by Argo Lumber Inc. and Newmar Window Manufacturing (collectively, the "**Opposing Lien Claimants**") for among the following reasons:

a) it is in the best interests of all stakeholders;

b) it is necessary to permit the completion of the Arbitration (as hereinafter defined);

c) it will provide the Applicants with the ability to sell the remaining lot in the Puccini Project, the proceeds of which will be for the benefit of the stakeholders;

d) On October 16, 2014, the Opposing Lien Claimants previously requested a lifting of the stay with respect to the Breach of Trust Claims (as hereinafter defined). Justice Patillo dismissed the motion subject to an order allowing for the service of pleadings in those actions. There has been no change in the circumstances since the October 16, 2014 motion.

e) The Initial Order provided for payment of the fees of counsel for the Applicants. Imran Jinnah's personal fees are not being paid for by the Estate.

II - FACTS

Background and CCAA Proceeding[1]

3. The Applicants were builders/owners of a residential development project in Richmond Hill, Ontario referred to in these proceedings as the "**Puccini Project**". The Puccini Project was comprised of four phases. With the exception of ten homes in various stages of completion, the construction of Phase I, II and III homes was substantially completed as at the Filing Date.

4. The construction of Phase IV was not commenced prior to the commencement of the CCAA proceeding. Since the commencement of this CCAA proceeding, the Phase IV lands have been sold under power of sale.

5. The Initial Order appointed Grant Thornton Limited as Monitor of the Applicants in this CCAA proceeding and granted a stay of proceedings as against the Applicants until and including January 16, 2014 or such later date as the Court may order. The stay of proceedings has been extended by previous Orders of this Court to March 31, 2016.

6. The Initial Order also provides that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, incurred both before and after the Filing Date, by the Applicants as part of the costs of these proceedings. Further, the Initial Order granted the Monitor, counsel to the Monitor and counsel to the Applicants an administrative charge over the property of the Applicants in an amount not to exceed $500,000 as security for their professional fees and disbursements.

[1] The source of all information contained in this section is the Affidavit of Imran Jinnah sworn March 8, 2016 (the "**Jinnah Affidavit**")

Puccini Homes[2]

7. At the time of the CCAA filing, there were 10 remaining homes in Phases II and III of the Puccini Project that were in various stages of completion (the "**Puccini Homes**"). The objective of the Applicants' CCAA proceeding is to complete and sell the Puccini Homes and to pay the net sale proceeds, after payment of operating costs and the costs of these proceedings, to satisfy their creditors' claims in the priority to be determined by the Court.

8. Nine of the Ten Puccini Homes have been sold and only Lot 18, Phase III of the Puccini Project ("**Lot 18**") remains unsold. Lot 18 is a vacant lot and has been marketed for sale as a vacant lot. The Applicants intend to list Lot 18 for sale in April 2016 when there is a greater likelihood of obtaining the best price for the lot.

The Claims Process[3]

9. On January 16, 2014, this Court granted, among other things, an order (the "**Claims Process Order**") approving a claims process for the purpose of determining the validity, quantum and priority of secured claims against the Applicants' Property (as defined in the Claims Process Order) (the "**Claims Process**").

10. The Applicants' loans to the senior mortgage holders have been paid in full, subject to reimbursement agreements.

11. The net proceeds from the sale of the Puccini Homes, following payment of the senior secured mortgage holders' claims and certain other settled claims are subject to a priority dispute between a group of private mortgage holders (the "**Private Mortgagees**") and construction lien claimants (the "**Lien Claimants**").

The Arbitration[4]

12. On January 8, 2015, the Court granted, among other things:

---

[2] The source of all information contained in this section is the Jinnah Affidavit.
[3] The source of all information contained in this section is the Jinnah Affidavit.
[4] The source of all information contained in this section is the Jinnah Affidavit.

a) an order, among other things, referring the determination of the priority dispute between the Private Mortgagees and the Lien Claimants to an arbitration (the "**Arbitration**"); and

b) an order extending the stay period to July 16, 2015.

13. Duncan Glaholt was appointed arbitrator by the Court with respect to the Arbitration and a number of preliminary steps have taken place in the Arbitration including examinations of the parties. Further, the hearing in the Arbitration is now scheduled for the weeks of July 11 and July 18, 2016. Once the hearing is completed, a decision will be rendered by Mr. Glaholt.

14. All parties to the Arbitration agreed that the Stay Period be extended from March 31, 2016 to permit the completion of the Arbitration.

The Lift Stay Motions[5]

15. On October 15 and 16, 2014, this Court heard two motions brought by certain of the Lien Claimants to lift the stay of proceedings in order to allow them to commence actions against two of the Applicants, their officers and directors (including Jinnah) and the Private Mortgagees for breach of trust under the *Construction Lien Act* (the "**Breach of Trust Claims**"). One of these motions was brought by the Opposing Lien Claimants.

16. At the conclusion of the motions, the Honourable Mr. Justice Patillo ordered that the stay be lifted only to allow the Breach of Trust Claims to be commenced so as to stop the running of the limitations period and for the defendants to file their statements of defence.

Stay Extension[6]

17. A decision of the arbitrator in the Arbitration is not anticipated until the fall of 2016. Pursuant to the terms of the Construction Claims Order, all parties maintain their right to appeal the determination of the arbitrator to the Divisional Court in accordance with the CCAA. Accordingly, it is not likely that there will be a final resolution of the Arbitration until the fall of 2016.

---

[5] The source of all information contained in this section is the Affidavit of Zena Hanson sworn March 17, 2016.
[6] The source of all information contained in this section is the Jinnah Affidavit.

18. Following the resolution of the Arbitration, the Applicants and/or the Monitor, as applicable, will bring a motion for an order authorizing them to make distributions in accordance with the arbitrator's decision and to terminate these CCAA proceedings and discharge the Monitor.

19. The Applicants seek an extension of the stay period to and including November 30, 2016 to: (i) allow the Arbitration to be carried out; and (ii) to sell Lot 18.

IV - LAW AND ARGUMENT

(a) Test for Lifting of the Stay

20. A stay of proceedings in a CCAA proceeding is designed to preserve the status quo among the creditors of the debtor company. The stay prevents "manouvers for positioning" among creditors and prevents one creditor from getting a "leg up" on others.

> *Canadian Airlines Corp. (Re)* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at paras. 17-19

21. Lifting a stay is a discretionary decision. The party seeking a lifting o the stay faces "a very heavy onus" in obtaining a lift stay. In considering whether to grant a lift stay, the court should consider whether there are sound reasons for lifting the stay consistent with the objectives of the CCAA, including the balance of convenience, relative prejudice to the parties and, where relevant, the merits of the proposed action.

> *Canwest Global Communications Corp. (Re.)* (2009), 61 C.B.R. (5^{th}) 2000 (SCJ) ("***Canwest***") at paras. 32-33

22. The following factors, set out first by Professor R. H. McLaren but adopted by this Court on a number of occasions, have been identified in determining whether or not to grant a lift stay:

a) When the plan is likely to fail.

b) The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

c) The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

d) The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

e) It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

f) After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

g) There is a real risk that a creditor's loan will become unsecured during the stay period.

h) It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

i) It is in the interests of justice to do so.

Canwest, supra at para. 33

(b) The Stay Extension Should be Granted Without Limitation

23. The Opposing Lien Claimants previously brought a motion in this proceeding, as did other Lien Claimants, seeking to have the stay lifted with respect to the Breach of Trust Claims. This Court, in the same circumstances that exist now, held that the stay of proceedings with respect to the Breach of Trust Claims should continue once the pleadings in those actions had been delivered. There has been no material change in circumstances since Justice Patillo ordered that the stay continue and it continues to be the Applicants' position that the lifting of the stay with respect to the Breach of Trust Claims is premature.

24. The Applicants have acted in good faith and with due diligence in these proceedings. There is no evidence that the Applicants have caused or contributed to any delay to the Arbitration proceedings.

25. The Applicants role in the Arbitration has been limited to producing Jinnah for examination for discovery and in fact, the Applicants have no stake in the outcome of the Arbitration. The purpose of the Arbitration is to determine the validity and quantum of the lien claims and resolve the priority dispute between the Lien Claimants and the Private Mortgagees. There is no possible outcome in the Arbitration that would result in a recovery for the Applicants.

26. It is not consistent with the purposes of the CCAA to allow one creditor to get ahead of all other claims before a claims process has been completed. The Arbitration will allow the adjudication of the priority disputes between the construction lien claimants and the mortgage holders within the Claims Process. If the Opposing Lien Claimants are successful in proving their claims at the Arbitration, their claims may be paid out in full and the need for pursuing the Breach of Trust Claims will be negated. It is not clear that the Opposing Lien Claimants will suffer a shortfall even if fully successful at the Arbitration.

27. The balance of convenience militates in favour of allowing the Applicants' motion in full. There is no prejudice to the Opposing Lien Claimants from the continuation of the stay of proceedings until the completion of the Arbitration. The Opposing Lien Claimants' rights in the Breach of Trust Claims are preserved by the stay of proceedings. In contrast, if the stay is lifted and the Opposing Lien Claimants are allowed to proceed with the Breach of Trust Claims, the Applicants and their principals will be forced to incur substantial legal fees in defending this proceeding in circumstances where the entire proceeding may be rendered moot upon the resolution of the Claims Process.

(c) The Applicants' Fees Should be Paid

28. In addition, the Opposing Lien Claimants seek to have the extension of the stay conditional on having the fees of the Applicants' counsel no longer paid in accordance with the Initial Order.

29. The Opposing Lien Claimants responding material refers to "Mr. Jinnah's fees" and the fees of "Mr. Jinnah's counsel". These references are in fact to the fees of counsel to the Applicants, which the Initial Order expressly provides are to be paid by the Applicants and grants priority to by way of the Administration Charge.

30. The Opposing Lien Claimants have not brought a motion to vary the Initial Order, nor is there any evidence that would support the varying of the Initial Order so that the Applicants' legal fees are not paid in the usual manner.

31. Further, the steps taken by the Applicants, including the bringing of this motion to extend the stay, are necessary steps in this proceeding and for the benefit of all stakeholders. Counsel to the debtor company in CCAA proceedings plays a vital role and should be paid its reasonable fees incurred in this role.

V – RELIEF SOUGHT

15. The Applicants respectfully requests an order for the relief set out in their Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: March 24, 2016

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

Lawyers for the Applicants

SCHEDULE "A" – List of Authorities

1.	*Canadian Airlines Corp. (Re)* (2000), 19 CBR (4^{th}) 1 (Alta QB)
2.	*Canwest Global Communications Corp. (Re)* (2009), 61 CBR (5^{th}) 2000 (SCJ)

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.

the Applicants

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

ONTARIO
SUPERIOR COURT OF ONTARIO
IN BANKRUPTCY

Proceedings commenced at TORONTO

FACTUM OF THE APPLICANTS

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

Stephen Schwartz (LSUC #29850A)
Tel: (416) 218-1132
Fax: (416) 218-1832

Michael Kril-Mascarin LSUC# 65583K
Tel: (416) 218-1123
Fax: (416) 218-1848

Lawyers for the Applicants