

Court of Appeal File No. C68214

Commercial List Court File No.: CV-18-598657-00CL

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**DONALD DAL BIANCO**

Appellant (Applicant)

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondents (Respondents)

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**MOTION RECORD**  
**(re: directions on jurisdiction and venue)**

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July 16, 2020

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**R. Brendan Bissell** (LSUC#: 40354V)  
Tel: 416.597.6489  
Fax: 416.597.3370  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon** (Ontario Student-at-Law, Member  
of the Bar of Quebec)

Lawyers for the Receiver, Crowe Soberman Inc.

**TO: THE SERVICE LIST**

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**TAB 1**

**NOTICE OF MOTION**

Court of Appeal File No. C68214

Commercial List Court File No.: CV-18-598657-00CL

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**DONALD DAL BIANCO**

Appellant (Applicant)

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondents (Respondents)

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**NOTICE OF MOTION**  
**(re: directions on jurisdiction and venue)**

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Crowe Soberman Inc. (the “**Receiver**”) in its capacity as court-appointed receiver of the property municipally known as 215 and 219 Lexington Road, Waterloo, Ontario N2K 2E1 (the “**Property**”), the assets and undertakings of Deem Management Services Limited related to the Property, and the property, assets and undertakings of The Uptown Inc., will make a motion to a Judge of the Court of Appeal for Ontario at 10:00am or as soon thereafter as the motion can be heard on Tuesday July 28, 2020.

**THE PROPOSED METHOD OF HEARING:** The motion is to be heard orally via teleconference or Zoom videoconference, as directed by the Court.

**THE MOTION IS FOR:**

- (a) directions on whether the appeal in this matter from the order dated March 10, 2020 of Madam Justice Gilmore (the "**Order**", reasons reported at 2020 ONSC 1500) properly lies to the Court of Appeal or to the Divisional Court; and
- (b) if the appeal in this matter properly lies to the Divisional Court, whether this proceeding should be transferred to that Court.

**JURISDICTION:** This motion may be heard by, and the relief requested may be granted by, a single Judge of this Court pursuant to section 7(2) of the *Courts of Justice Act*.

**THE GROUNDS FOR THE MOTION ARE:**

- (a) The order appealed from (the "**Order**", reasons reported at [2020 ONSC 1500](#)) was made on a motion within a receivership proceeding under the *Bankruptcy and Insolvency Act* (the "**BIA**") to determine priorities under s. 78 of the *Construction Act* ("**CA**") as between the Appellant, on account of a mortgage (the "**Mortgage**") registered on title to the property in question, and the claims of lien claimants.
- (b) The Order declared that, pursuant to CA s. 78, the Mortgage has no priority over the claims of lien claimants, which were not otherwise determined on the motion and therefore remain to be agreed upon or adjudicated.
- (c) The Appellant has brought his appeal to this Court, however the Appellant now takes the position that it ought to have been taken to the Divisional Court instead, which the other parties oppose, and conversely the other parties initially asserted that any appeal should go to the Divisional Court and now say that it lies to this Court;
- (d) Section 71 of the CA provides that "an appeal lies to the Divisional Court from a judgment... under this Act."
- (e) Section 193 of the BIA provides that an appeal under that Act goes to the Court of Appeal (perhaps with leave, but the parties by agreement are not preparing argument on that unless it is determined that the appeal properly lies to this Court).

- (f) The parties and the Receiver agree and prefer that the issue of the proper jurisdiction and hence the venue for this appeal should be determined before further substantive steps are taken.
- (g) The parties and the Receiver also agree that, if this appeal properly lies to this Court, any issue of whether leave to appeal is required under the BIA shall be determined on a further motion.
- (h) Sections 7(2) and 110 of the *Courts of Justice Act*;
- (i) Section 71 of the *Construction Act*.
- (j) Section 193 of the *Bankruptcy and Insolvency Act*.
- (k) Rule 61.16 of the *Rules of Civil Procedure*.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) the agreed statement of facts filed in first instance;
- (b) the Order and the reasons dated March 10, 2020 of Madam Justice Gilmore;
- (c) the Factum of the Receiver dated March 4, 2020.
- (d) Notice of Appeal dated March 19, 2020.
- (e) Appointment order dated May 31, 2018 of Mr. Justice Wilton-Siegel.
- (f) Notice of Motion dated February 8, 2019 of the Receiver.
- (g) the Third Report of the Receiver dated February 8, 2019 (without appendices).
- (h) the Supplementary Report to the Third Report the Receiver, dated October 30, 2019 (without appendices).
- (i) the Factum of the Receiver dated October 30, 2019.
- (j) the Endorsement dated November 21, 2019 of Mr. Justice Penny.

- (k) the Endorsement dated January 29, 2020 of Mr. Justice Hainey.
- (l) such other evidence as counsel may advise and this Honourable Court may permit.

July 16, 2020

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**R. Brendan Bissell (LSUC#: 40354V)**  
Tel: 416.597.6489  
Fax: 416.597.3370  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon** (Ontario Student-at-Law, Member  
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Lawyers for the Receiver, Crowe Soberman Inc.

**TO: THE SERVICE LIST**

DONALD DAL BIANCO

and

Applicant

DEEM MANAGEMENT SERVICES LIMITED and THE  
UPTOWN INC.

Respondents

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**COURT OF APPEAL FOR ONTARIO**

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**NOTICE OF MOTION**  
(re: directions on jurisdiction and venue)

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**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto ON M5G 1V2

**R. Brendan Bissell (LSO #: 40354V)**  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon** (Ontario Student-at-Law, Member  
of the Bar of Quebec)

Lawyers for Crowe Soberman Inc. as Receiver

## **TAB 2**

**Order and Reasons of Madam Justice Gilmore dated March 10, 2020**  
(order appealed from)

Court File No. CV-18-598657-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

THE HONOURABLE ) TUESDAY, THE 10<sup>TH</sup> DAY  
JUSTICE C. GILMORE )  
 ) OF MARCH, 2020

**B E T W E E N:**

DONALD DAL BIANCO

Applicant

- and -

DEEM MANAGEMENT SERVICES LIMITED and  
THE UPTOWN INC.

Respondents

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act* and Section 101 of the *Court of Justice Act*

**ORDER**

**THIS MOTION** for an Order to determine competing priorities under s. 78 of the *Construction Act* (the “**Act**”) between certain construction liens and a registered real property mortgage, was heard on March 6, 2020 at 330 University Avenue, Toronto, Ontario.

**ON READING** the Agreed Statement of Fact, and on hearing the submissions of counsel for Crowe Soberman Inc. as Receiver, Donald Dal Bianco (“**Dal Bianco**”) and Maxion Management Services (“**Maxion**”), and in the presence of counsel for Deep Foundations Inc. and

EXP Services Inc. but not making oral submissions, and no one else appearing for any other person on the service list, although duly served.

1. **THIS COURT ORDERS AND DECLARES** that the claims of Maxion, Kieswetter Excavating Inc., Deep Foundations Inc., Onospace Limited, and EXP Services Inc. to the extent of the validity of their liens (which is not decided herein) have priority over the claims under the real property mortgage granted to Dal Bianco on February 14, 2018, and registered on February 23, 2018 against the Property as instrument no. WR1099051 (the validity of which is not decided herein) in respect of the Property and the proceeds of sale of the Property that are held by the Receiver.

2. **THIS COURT FURTHER ORDERS** that Dal Bianco shall pay costs in the agreed upon amount of \$25,000.00, inclusive of HST, to Maxion.

THIS ORDER BEARS INTEREST AT THE RATE OF 3.0% PER ANNUM FROM ITS DATE.

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**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED et al.**

Respondents

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*ONTARIO*  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

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**ORDER**

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**BLANEY MCMURTRY LLP**  
Barristers & Solicitors  
2 Queen Street East, Suite 1500  
Toronto ON M5C 3G5

**John Wolf** (LSO #30165B)  
Tel: (416) 593-2994  
Fax: (416) 596-2044  
E-mail: [jwolf@blaney.com](mailto:jwolf@blaney.com)

**David T. Ullmann** (LSO #42357I)  
Tel: (416) 596-4289  
Fax: (416) 594-2437  
E-mail: [dullmann@blaney.com](mailto:dullmann@blaney.com)

Lawyers for Donald Dal Bianco

**CITATION:** Dal Bianco v. Deem Management Services et al., 2020 ONSC 1500  
**COURT FILE NO.:** CV-18-598657-00CL  
**DATE:** 20200310

## ONTARIO

## **SUPERIOR COURT OF JUSTICE**

## BETWEEN:

Donald Dal Bianco ) *D. Ullman for the Applicant*

Applicant )

— and —

Deem Management Services Limited and  
The Uptown Inc. ) *Eric Gonet and Andrew Wood, for the Lien*  
 ) *Claimant Maxion Management Services Inc.*  
 ) *General Contractor*

Respondents )

Crowe Soberman as Receiver ) *D. Brendan Bissell, counsel for the Receiver*

Appearances also by *Harold Rosenberg* on

) Appearances also by *Harold Rosenberg* on behalf of subtrade liaison claimant Deep

## Foundations

Found  
and

) -and-  
) *Jeffrey A. Arnett* for the liaison claimant EXP

Jeffrey A. Averitt  
Services, Inc.

) ) HEARD: March 6, 2020

C. GILMORE, J.

## REASONS ON RECEIVER'S MOTION

## OVERVIEW

[1] This is a motion initiated by the Receiver to determine competing priorities under s.78 of the *Construction Act* (“the Act”) between registered lien claimants and a registered mortgage. Through various court attendances it was agreed that this motion would be separated from the other issues in dispute in the Receivership so that the priority dispute could be determined on an Agreed Statement of Facts. Excerpts from the Agreed Statement of Facts are set out below.

[2] The parties agreed Maxion Management Services Inc (“Maxion”) would be the moving party on this motion, that Mr. Dal Bianco would respond, and that the Receiver would also make

submissions. Counsel for some of the other lien claimants appeared on this motion but did not make submissions or file material. They are aligned with the position taken by Maxion.

### Receivership Background

[3] On May 31, 2018, pursuant to an order of the Honourable Mr. Justice Wilton-Siegel, Crowe Soberman Inc. was appointed as Receiver (the “**Receiver**”) of:

- (i) the property known municipally as 215 and 219 Lexington Road, Waterloo, Ontario N2K 2E1 (the “**Real Property**”),
- (ii) the assets and undertakings of Deem Management Services Limited (“**Deem Management**”) related to the Real Property, and
- (iii) the property, assets and undertakings of the Uptown Inc. (the “**Uptown**”)(collectively referred to as the “**Property**”).

[4] The background to the Property was more fully set out in the Receiver’s First Report dated June 8, 2018. In the Third Report, the Receiver has provided the following “overview”:

- a) Deem Management is a company that has been working for many decades in the Ontario nursing home and retirement home sector. It was the registered owner of the Real Property.
- b) A portion of the Real Property was vacant land where the Project had started. The remaining land contained the operating Pinehaven Nursing Home, which is an unrelated third-party nursing home business. Part of Deem Management’s business involved the collection of rent from Pinehaven.
- c) The Uptown operated a presentation centre located on the Real Property and was engaged in the planning related to the redevelopment of the Real Property as a seniors’ retirement residence called the Uptown Residences. The work carried out by the Companies had primarily been in the nature of obtaining approvals relative to Phase 1 of the Project, and the excavation and installation of caissons necessary for that part of the development.
- d) Both Deem Management and the Uptown are owned by Rob Dal Bianco, who is the sole director of the Companies, and is the son of the applicant, Donald Dal Bianco (“**Dal Bianco**”)
- e) Maxion was the general contractor on the Project. The Receiver understands that Maxion is owned by Paul Michelin. The Receiver was advised by counsel for Michelin and Maxion that its clients assert a joint venture ownership claim, is a shareholder in Uptown, and therefore claim a beneficial interest in the Project.

- f) The Receiver understands that Maxion was advised to cease construction by Rob?? in the early winter of 2018. Shortly after construction ceased, various service providers registered construction liens against title to the Property commencing on March 7, 2018 totaling \$7,673,672.48.
- g) In addition to the amounts claimed by the construction lien claimants, the Application Record dated May 28, 2018, outlined various mortgages and loans registered against title to the Property which exceed \$20 million.

[5] For purposes of this Agreed Statement of Facts and the Priority Motion, the construction Improvement that is the subject of these proceedings will be referred to as "**the Uptown Project**".

[6] Through the Receivership process, and various Court Orders, the Uptown Project was sold by the Receiver in the summer of 2018. After making certain distributions, including payment of the First and Second Ranking Mortgages described below, the Receiver still holds in trust the sum of \$5,477,224.57 (inclusive of interest but exclusive of the fees of the Receiver and its counsel) from the proceeds of sale.

[7] The Receiver has not been able to distribute these remaining funds as a result of the competing priority claims between the constructions lien claimants and the Dal Bianco 3<sup>rd</sup> Mortgage.

#### The First and Second Ranking Mortgages

[8] IMC was the holder of the first-ranking mortgage, which was registered on May 9, 2017 and which amounted to \$8,299,346.58.

[9] Dal Bianco was the holder of the second ranking mortgage (by virtue of postponement to IMC), which was registered on June 25, 2015 and which amounted to \$5,002,656.45;

[10] The first-ranking mortgage of IMC and the second-ranking mortgage of Dal Bianco have been paid out in this Receivership, subject to some small disputes that are not relevant to this motion.

#### The Dal Bianco "third-ranking" Mortgage

[11] The third-ranking mortgage was granted by Deem Management to Don Dal Bianco on February 14, 2018 and registered on February 23, 2018 as instrument no. WR1099051.

[12] The Dal Bianco 3rd Mortgage secured the principal amount of \$7,978,753.45.

[13] The amounts secured by the Dal Bianco 3<sup>rd</sup> Mortgage were all advanced between 2012 and 2015 without security having been registered. The first advance was made on April 22, 2012 and the final advance was made on January 22, 2015.

[14] All of the funds advanced by Dal Bianco that were secured by the Dal Bianco 3<sup>rd</sup> Mortgage were intended, and were in fact used, in an Improvement within the meaning of s. 78 of the *Construction Act* on the real property through the Uptown Project.

### The Registered Construction Lien Claims

[15] Kieswetter Excavating Inc. (“**Kieswetter**”) registered its construction lien on March 7, 2018 in the amount of \$1,827,409.

[16] Deep Foundations Inc. (“**Deep**”) registered its construction lien on March 14, 2018 in the amount of \$918,432.

[17] Onespace Limited (“**Onespace**”) registered its construction lien on March 19, 2018 in the amount of \$68,580.

[18] Maxion registered its first construction lien on March 29, 2018 in the amount of \$4,522,597.

[19] EXP Services Inc. (“**EXP**”) registered its construction lien on April 12, 2018 in the amount of \$336,654.

[20] Maxion registered its second construction lien on July 13, 2018 in the amount of \$560,283.

[21] The parties have not agreed upon, and the Court is not being asked to make any determination of the timeliness or quantum of any of the above registered lien claims, however all parties agree that at least some amount of the above lien claims will be valid and owing to one or more of the registered lien claimants.

[22] Even though the liens were registered on title to the Real Property on the dates referred to in paragraphs [15] to [20], above, for purposes of the *Construction Act* the first construction lien arose and took effect with respect to the Uptown Project prior to the Dal Bianco 3<sup>rd</sup> Mortgage being registered on title.

### Analysis

[23] Section 15 of the *Construction Act* sets out that:

15. A person’s lien arises and takes effect when the person first supplies services or materials to the improvement.

[24] The relevant sections of Section 78 of the *Construction Act* sets are set out below:

Priority over mortgages, etc.

**78 (1)** Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the

owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

#### Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

#### Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
  - (i) advanced in the case of a mortgage, and
  - (ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

#### Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

#### Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

[25] It is important to note the general intention of s.78 which is to give priority to lien claimants over mortgages with certain defined exceptions. The issue to be determined on this motion is whether or not any of the exceptions in s.78 are triggered which would deprive the lien claimants of their priority status.

[26] Given the *prima facie* priority of lien claimants, it is clear that the onus falls upon the mortgagee to prove that its mortgage falls within one of specified exemptions under s.78.

[27] In *Boehmers v. 794561 Ontario Inc.* (1993), affirmed 1995 CanLII 660 (ONCA), the court said:

Section 78(1) is the overarching principle of the regime of the Act for the determination of priorities. It is, if you will, the central interpretative principle for the adjudication of conflicts of this type before the court in this case. Surely, it necessarily implies that, as here, the burden must be on the mortgagee to persuade the court that it somehow falls clearly within a specified exception to the generalized priority of the liens.

[28] This principle was adopted in *Jade-Kennedy Development Corp., Re*, 2016 ONSC 7125 at para 54 (ONSC) upheld on appeal 2017 ONSC 3421(Div. Crt.) (*Jade-Kennedy*) and *XDG Ltd. v. 1099606 Ontario Ltd.*, 2002 CarswellOnt 4535 (*XDG*).

[29] Broadly speaking, s. 78 provides protection to lien holders and should be interpreted in that sense. In *Jade-Kennedy* at para 43, the court emphasized the burden on the mortgagee to persuade the Court that it falls within one of the exceptions to the general priority of lien claimants.

[30] There is no dispute that the 3<sup>rd</sup> mortgage was registered after the time when the first lien arose and is therefore a “subsequent mortgage” within the meaning of the *Act*. Given that it is a subsequent mortgage it is subject to s.78(1) which would give the lien claimants general priority, s.78(5) which gives lien claimants a special priority for deficiencies in any holdbacks and s.78(6) which gives subsequent mortgages priority for specific advances in certain circumstances. In this case, Dal Bianco also relies on s.78(2) claiming that his mortgage falls within the exception for building mortgages.

[31] It is this court’s view that s.78(6) does not apply to give the 3<sup>rd</sup> mortgagee priority in this case. This section is one which contemplates a mortgage registered after a project has commenced. The only way in which a mortgagee can gain priority over lien claimants in this scenario is if the advances were made “in respect of that mortgage,” there were no preserved or protected liens at the time of the advance, and the mortgagee has had written notice of any lien at the time of the advance. The last two conditions do not apply to this case.

[32] In *XDG*, the court addressed the issue of whether a mortgage registered on title as collateral security for a prior indebtedness gained priority. In considering s.78(6), the court made a distinction between “amounts secured” and “amounts advanced.” Given that the monies were advanced under a different financial arrangement and then subsequently secured by a mortgage, s.78(6) was not engaged and no priority was gained over the lien claimants.

[33] *XDG* was appealed to the Divisional Court and upheld. In their reasons, the Divisional Court held that the trial judge’s reasoning was correct in holding that the mortgagee’s priority was limited to the extent of any advance made in respect of the mortgage. Since the advances in that case were made in relation to a credit agreement and not the mortgage, the lien claimants’ priority was not disturbed.

[34] In *Jade-Kennedy* the court relied on the reasoning in *XDG* with respect to monies **advanced** in relation to a mortgage rather than **secured**. Further, it is important to note that in *Jade-Kennedy*, the court referred to *XDG* and held that it “was not necessary to go further and address whether or not the monies advanced under the mortgage benefitted the guarantor and I do not read the decision as doing so” (para 45). The court in *XDG* held that there was no case law cited to demonstrate that proceeds of an advance had to create any “benefit” to the borrower and that such an interpretation of s.78(6) could therefore not be supported (para 46).

[35] In the case at bar, the parties agree that all of the advances made by Dal Bianco between 2012 and 2015 benefitted the project. Dal Bianco argues that it would be absurd for his mortgage not to have priority given that the advances were clearly in relation to and for the benefit of the project. Respectfully, I disagree. As per *Jade-Kennedy*, I find that there is nothing in the wording of s.78 that carves out an exception on that basis. The section speaks to advances as opposed to amounts secured. Further, there is nothing in the section which would permit a lender to gain priority by retrospectively securing previously advanced sums whether in relation to the project or, in the case of *XDG*, a loan agreement.

[36] I also rely on *561861 Ontario Ltd. v. 1085043 Ontario Inc.* 1998, CarswellOnt 2935. In that case, a sister advanced \$100,000 to a brother in order for him to buy out his estranged wife’s

interest in his farm. A first mortgage for this sum was registered on the property. The brother sold the farm property to a golf course and a new first mortgage was placed on the golf course property with the sister's mortgage re-registered and ranking second. The original mortgage was discharged. The golf course project went into receivership and lien claims arose. The sister claimed she had priority over the lien claimants as her mortgage was registered prior to the liens arising. The Court did not agree and found that all monies had been advanced in relation to the prior mortgage which had been discharged. As such, the lien claimants retained their priority. The Court held at para 24 "...all monies had been advanced on the prior mortgage in 1991 which was subsequently discharged."

[37] In summary, I do not find that Dal Bianco's mortgage fits into the exclusion of a "subsequent mortgage" as the mortgage (notwithstanding its wording) does not secure advances. All the advances were already made.

[38] Turning to Dal Bianco's arguments in relation to s.78(2), he submits that his mortgage is a "building mortgage" and therefore loses priority only to the extent of any deficiency in the holdbacks. It is clear that s.78 of the *Act*, in addition to providing a form of blanket priority to lien claimants, carves out a number of exceptions to exceptions. That is, even if a mortgagee is able to prove that it falls within one of the exceptions to gain priority, that priority is still subject to the priority created for holdbacks.

[39] Interestingly, the *Act* does not contain a definition for the term "building mortgage." As such, it is important to carefully review the initial wording of that section which says: "Building mortgage – Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement...." The interpretation of this section must be consistent with the overall intention of s.78 which is to grant priority to lien claimants. The section denotes a future intention on the part of a mortgagee; an intention to secure financing.

[40] I agree with Maxion's counsel that using that form of construction, the section should be taken to mean that the mortgage is registered and then funds are advanced in the normal course. What happened in this case was the reverse, and in this Court's view, not what was intended by 78(2).

[41] I also agree with Maxion's counsel that the position taken by Dal Bianco would mean that if a mortgagee gained priority under s.78(2) as a building mortgage, it would mean that the mortgagee would also have priority as a subsequent mortgagee under s.78(6). Taken to its most concerning conclusion, this could mean that a building mortgage could have priority over registered lien claimants.

[42] Finally, an important point must be made in this case regarding the overall priority of lien claimants and subsequent mortgagees. Particularly in large projects, sub trades must be able to adequately assess their risk before undertaking work. If mortgagees are entitled to "lie in the weeds" while advancing funds for the project and then attempt to gain priority later by registering mortgages after liens arise, this would be unfair to lien claimants and contrary to the overall protection intended by the *Act*.

**ORDERS AND COSTS**

[43] Maxion's motion is granted. The lien claimants shall have priority over the registered third mortgage.

[44] As agreed by the parties, the successful party will receive costs of \$25,000. Therefore, Dal Bianco shall pay costs to Maxion of \$25,000.

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C. Gilmore, J.

**Released:** March 10, 2020

**CITATION:** Dal Bianco v. Deem Management Services et al., 2020 ONSC 1500

**COURT FILE NO.:** CV-18-598657-00CL

**DATE:** 20200310

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Donald Dal Bianco

Applicant

**– and –**

Deem Management Services Limited and The Uptown  
Inc.

Respondents

Crowe Soberman as Receiver

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**REASONS ON RECEIVER'S MOTION**

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C. Gilmore, J.

**Released:** March 10, 2020

## **TAB 3**

**Notice of Appeal dated March 19, 2020**  
(in respect of the herein appeal)

**Court of Appeal No.:**

**Commercial List Court File No.:** CV-18-598657-00CL

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

DONALD DAL BIANCO

Applicant

(Appellant)

- and -

DEEM MANAGEMENT SERVICES LIMITED

and THE UPTOWN INC.

Respondents

(Respondent)

**NOTICE OF APPEAL**

**THE APPELLANT**, DONALD DAL BIANCO, **APPEALS** to the Court of Appeal from the decision of the Honourable Madam Justice Gilmore dated March 10, 2020, made at Toronto (the “**Decision**”) in the Receivership of Deem Management Services et al.

**THE APPELLANT ASKS** that the Decision be set aside and an Order be granted as follows (all defined terms not otherwise defined herein shall be as defined in the Decision):

1. Setting aside the Decision and declaring that the 3<sup>rd</sup> Mortgage grants the Appellant an interest in the funds being held by the Receiver, Crowe Soberman Inc. (the “**Receiver**”), which is in priority to the interest of any of the lien claimants except to the extent of the deficiency in the holdback (as that term is understood under the *Construction Act*, R.S.O. 1990 c. C.30), if any;
2. Costs of this appeal in favour of the Appellant on a substantial indemnity basis;
3. Costs of the Motion below in favour of the Appellant in the agreed upon amount of \$25,000 which was awarded to the Respondent, Maxion Management Services Inc. (“**Maxion**”) at the Motion; and
4. Such further or other relief as this Honourable Court deems just.

**THE GROUNDS OF APPEAL** are as follows:

5. The Motion proceeded on the basis of an Agreed Statement of Facts and therefore the facts at the Motion were not disputed nor is any finding of fact being appealed.
6. The facts are correctly set out in the decision. They can be summarized as follows:

- (a) The amounts secured by the Dal Bianco 3<sup>rd</sup> Mortgage were all advanced between 2012 and 2015 without security having been registered. The first advance was made on April 22, 2012, and the final advance was made on January 22, 2015.
- (b) All of the funds advanced by Dal Bianco that were secured by the Dal Bianco 3<sup>rd</sup> Mortgage were intended, and were in fact used, in an Improvement within the meaning of s. 78 of the *Construction Act* on the Real Property through the Uptown Project.
- (c) On February 23, 2018, the Applicant registered the 3<sup>rd</sup> Mortgage, in respect of advances made to the Uptown Project in the amount of \$7,978,753.45.
- (d) There were no registered liens on the Uptown Project at the time of the registration of the 3<sup>rd</sup> Mortgage.
- (e) On March 7, 2018, construction liens began to be registered against the Uptown Project. The final construction lien was registered on July 13, 2018.
- (f) Six (6) liens were ultimately registered on the Uptown Project, amounting to an aggregate total of \$8,233,955.00.

(g) On May 31, 2018, the Receiver was appointed by the Appellant, pursuant to an Order of the Honourable Mr. Justice Wilton-Siegel. The Uptown Project was subsequently sold by the Receiver.

(h) The Receiver continues to hold in trust the sum of approximately \$5,500,000 from the proceeds of that sale (the “**Proceeds**”).

7. The distribution of the Proceeds is suspended pending the outcome of this appeal (and other outstanding issues raised by the lien claimants, including whether or not the 3<sup>rd</sup> Mortgage was a preference or a fraudulent conveyance, which are being dealt with separately in a different Motion in this same matter before the Ontario Superior Court Commercial List but they are not the subject of this appeal as that Motion has not yet been heard).
8. The Receiver brought a Motion for advice and directions in order to decide how to distribute the Proceeds.
9. At the direction of the Honourable Mr. Justice Hainey (as set out in His Honour’s endorsement dated January 29, 2020), the parties proceeded to schedule a motion, arguing whether s. 78 of the *Construction Act* provided a complete priority to the lien claimants above the 3<sup>rd</sup> Mortgage, which could limit the issues otherwise to be dealt with in this matter.
10. The Receiver, Maxion (as the representative counsel for the various lien claimants), and the Appellant made submissions at the hearing of the Motion.

11. At that Motion, Justice Gilmore decided, as set out in the Decision, that the lien claimants had complete priority over the 3<sup>rd</sup> Mortgage to the Proceeds.

12. In concluding that the lien claimants were entitled to complete priority over the 3<sup>rd</sup> Mortgage, the learned motion judge made the following errors of law:

- (a) The Court did not properly consider, if at all, the legislative history of section 78 of the *Construction Act*, despite that legislative history being presented in the responding Record of the Receiver and in the submissions of the Receiver and the limited case law available on this issue.
- (b) The Court did not properly consider, if at all, the submissions of the Receiver, despite the fact that the matter was brought in response to a Motion by the Receiver and the Receiver filed a Factum and made submissions at the Motion, which supported the opposite conclusion than that which was made by the Court.
- (c) The Court did not properly consider the law as stipulated in section 78 of the *Construction Act*, its purpose or meaning.
- (d) The Court erroneously found that section 78 creates a “blanket priority” in favour of the lien claimants. In fact, the section only creates a priority for the lien claimants over a mortgage registered after the first lien arose in three (3) specific

circumstances, namely:

- (i) where a mortgagee makes an advance, in the face of a registered lien;
- (ii) where a mortgagee makes an advance, in the face of notice of a lien;
- (iii) in all other cases, the priority of the lien claimants is limited to the deficiency of the holdback, if any.

(e) The Court further misinterpreted s. 78(2) of the *Construction Act*. Specifically, the Court erroneously held that s. 78(2) requires that a “building mortgage” can only have priority where it is registered before any advances are made. Nothing in the statute provides that direction, nor did the Court cite any decision in support of that limitation on building mortgages;

(f) The Court further erred at law in interpreting s. 78(2). Specifically, the Court erred by finding that the phrase “intention to secure the financing” requires the parties to have a future intention to *lend*, rather than an intention to *secure* loans to be made or already made.

(g) The Court erroneously relied on the decisions in *Jade-Kennedy Development Corp*,

*Re*, 2016 ONSC 7125, 2016 CarswellOnt 19127 (Ont. S.C.J.) (“*Jade Kennedy*”), and *XDG Ltd. v. 1099606 Ontario Ltd.*, [2002] O.J. No. 5307 (Ont. S.C.J.), aff’d [2004] O.J. No. 1695, 2004 CarswellOnt 1581 (Ont. Div. Ct.) (“*XDG*”), when each of the Receiver and the Appellant urged the Court to find that those decisions were wrongly decided in their submissions.

- (h) The Court erroneously relied on the decisions in *Jade Kennedy* and *XDG* when it was clear that those cases were clearly distinguished from the case before the Court. In the case before the Court, it was an agreed fact that all of the advances secured by the 3<sup>rd</sup> Mortgage were in fact advanced to the subject Real Property, unlike the two cases relied upon by the Court.
- (i) In considering the phrase “to the extent of any advance made in respect of that conveyance, mortgage” set out in s. 78(6) of the *Construction Act*, the Court erroneously failed to see a distinction between the phrase “in respect of” a mortgage and “under” or “on account of” a mortgage.
- (j) The Court erroneously relied on the decision *561861 Ontario Ltd. v. 1085043 Ontario Inc.*, [1998] O.J. No. 2925, 1998 CarswellOnt 2935 (Ont. Bkcy.) as holding that old advances could not be secured by a subsequent mortgage. This case does not support the conclusion made by the Court.

- (k) The Court erroneously held that section 78 of the *Construction Act* only provides protection to a mortgage lender in respect of advances made after the registration of the mortgage.
- (l) The Court did not properly consider the fact that the Provincial Legislature has already provided a remedy to creditors in other statutes, namely the *Assignments and Preferences Act*, R.S.O. 1990, c. A. 33, as amended, and the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, as amended, and that Parliament had considered that issue in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), solely to address the security which is granted within close proximity of an insolvency, and, as such, there was no basis to add a new remedy in this regard to the interpretation of the *Construction Act*.
- (m) The Court erred in determining that it had inherit jurisdiction to contravene the express provisions of the *Construction Act* and/or in finding that there was a “gap” in the *Act* into which inherit jurisdiction could apply.

**THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:**

13. Subsection 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c C43, as amended, as the Order under appeal is a final order of a judge of the Superior Court of Justice and is not an order referred to in section 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act;

14. The Decision appealed from arises from the Motion initiated by the Receiver and in the receivership proceedings under the *BIA*.

15. It is submitted that ss. 193(a)-(c) of the *BIA* entitle the Appellant to appeal of right to this Honourable Court.

16. First, the question to be raised on appeal involves future rights in the proceeding as the Decision will impact the priorities of the various other creditors in the proceeding and the distribution of funds to various parties, including the Appellant. The Decision is itself in respect of only a subset of a larger Motion brought by the Receiver to address how to deal with those funds;

17. As was considered, the proposed appeal is likely to affect other cases of a similar nature in the bankruptcy proceedings; and

18. The Motion involved the distribution of property which exceeded \$10,000 in value as the judgment impacts how the Receiver may distribute over more than \$5,000,000 of Proceeds currently held in trust in respect of the amounts owing to the lien claims (if proven) to the detriment of the Appellant.

19. As such, leave to appeal is not required.

20. The question as to the interaction between secured mortgage lenders and lien claimants and their respective priorities must be understood to allow the proper operation of the law of insolvency in Canada and the law of construction in Canada. Section 78 of the *Construction Act*, which addresses this issue and the uncertainty surrounding that section even in a circumstance where the facts are agreed to, has not been considered fully by the Court of Appeal previously.

21. The interaction between the rule suggested by the Decision and the other existing statutory regimes related to challenging possible preferences or reviewable transactions requires clarification by this Honourable Court in order to provide certainty to lenders who wish to lend or borrow funds related to a construction project, which might potentially face future solvency issues, imminent or otherwise.

22. In the alternative, if leave to appeal is required under section 193(e) of the *BIA*, it is respectfully submitted that the proposed appeal meets the test for leave under s. 193(e) of the *BIA* on the basis that it raises issues of general importance to the practice, and is of significance to the action itself. It is further submitted that the proposed appeal is *prima facie* meritorious. Moreover, it will not unduly hinder the progress of the action.

23. Should leave be required, the Appellant seeks leave to appeal for the reasons set out above, and requests that the Motion for leave be heard at the same time as the appeal.

**Date:** March 19, 2020

**BLANEY MCMURTRY LLP**

Barristers & Solicitors  
2 Queen Street East, Suite 1500  
Toronto ON M5C 3G5

**John Wolf** (LSO #30165B)

Tel: (416) 593-2994  
Fax: (416) 596-2044  
Email: [jwolf@blaney.com](mailto:jwolf@blaney.com)

**David T. Ullmann** (LSO #42357I)

Tel: (416) 596-4289  
Fax: (416) 594-2437  
Email: [dullmann@blaney.com](mailto:dullmann@blaney.com)

Lawyers for the Appellant

**TO:** **DOOLEY LUCENT LLP**  
Barristers & Solicitors  
10 Checkley Street  
Barrie, ON, L4N 1W1

**Eric O. Gionet**

Tel: 1 (705) 792-7963  
Fax: 1 (705) 792-7964  
Email: [egionet@dllaw.ca](mailto:egionet@dllaw.ca)

**Andrew Wood**

Tel: 1 (705) 792-7963  
Fax: 1 (705) 792-7964  
Email: [awood@dllaw.ca](mailto:awood@dllaw.ca)

Counsel for lien claimant, Maxion Management Services Inc.

**AND TO:** **GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, ON M5G 1V2

**R. Brendan Bissell**

Tel: (416) 597-6489  
Fax: (416) 597-9922  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joel Turgeon**  
Tel: (416) 597-6486  
Fax: (416) 597-9922  
Email: [turgeon@gsnh.com](mailto:turgeon@gsnh.com)

Lawyers for the Receiver, Crowe Soberman LLP

**AND TO:** **Crowe Soberman Inc.**  
2 St. Clair East, Suite 1100  
Toronto, ON M4T 2T5

**Hans Rizarri**  
Tel: (416) 963-7175  
Fax: (416) 929-2555  
Email: [hans.rizarri@crowesoberman.com](mailto:hans.rizarri@crowesoberman.com)

**Graeme Hamilton**  
Tel: (416) 963-7140  
Fax: (416) 929-2555  
Email: [graeme.hamilton@crowesoberman.com](mailto:graeme.hamilton@crowesoberman.com)

The Receiver

**AND TO:** **KOSKIEMINSKY**  
20 Queen Street West  
Suite 900  
Toronto, ON, M5H 3R3

**Jeffrey A. Armel**  
Tel: (416) 595-2069  
Fax: (416) 204-2826  
Email: [jarmel@kmlaw.ca](mailto:jarmel@kmlaw.ca)

Counsel for the lien claimant, EXP Services Inc.

**AND TO:** **BATTISTON & ASSOCIATES**  
Barristers & Solicitors  
1013 Wilson Avenue, Suite 202  
Toronto, ON M3K 1G1

**Eddy Battiston** (LSO #15534B)  
Tel: (416) 630-7151 ext. 230  
Fax: (416) 630-7472

Email: [e.battiston@battistonlaw.com](mailto:e.battiston@battistonlaw.com)

**Flavio Battiston** (LSO #22965F)  
Tel: (416) 630-7151 ext. 229  
Fax: (416) 630-7472  
Email: [f.battiston@battistonlaw.com](mailto:f.battiston@battistonlaw.com)

**Harold Rosenberg** (LSO #24219T)  
Tel: (416) 630-7151 ext. 227  
Fax: (416) 630-7472  
Email: [h.rosenberg@battistonlaw.com](mailto:h.rosenberg@battistonlaw.com)

Lawyers for Deep Foundations Contractors Inc.

**AND TO:** **WAGNER SIDLOFSKY LLP**  
181 University Avenue, Suite 1800  
Toronto, ON M5H 3M7

**Bradley Phillips** (LSO #43552T)  
Tel: (416) 366-6743  
Fax: (416) 364-6579  
Email: [bphillips@wagnersidlofsky.com](mailto:bphillips@wagnersidlofsky.com)

Lawyers for the Respondents, Deem Management Services Limited and The Uptown Inc.

**AND TO:** **BENJAMIN SALSBERG BARRISTER  
PROFESSIONAL CORPORATION**  
Sheraton Centre  
Suite 400, Richmond Tower  
100 Richmond Street West

**Benjamin Salsberg** (LSO #22882P)  
Tel: (416) 362-0555  
Fax: (647) 436-7318  
Email: [ben@bensalsberglaw.com](mailto:ben@bensalsberglaw.com)

Lawyers for Maxion Management Services Inc.

**AND TO:** **OLDFIELD, GREAVES, D'AGOSTINO & SCRIVEN**  
Barristers and Solicitors  
172 King Street South  
Waterloo, ON N2J 1P8

**Edward L. D'Agostino** (LSO # 32631H)  
Tel: (519) 576-7200  
Fax: (519) 576-0131

Email: [edagostino@watlaw.com](mailto:edagostino@watlaw.com)

Lawyers for Kieswetter Excavating Inc.

**AND TO: SOPPELSA & ASSOCIATES**

Weston Law Chambers  
4040 Steeles Avenue West  
Unit 2  
Vaughan, ON, L4Y 4Y5

**Frank Miceli**

Tel: (905) 856-3700 ext 270  
Fax: (905) 856-1213  
Email: [fmiceli@westonlaw.ca](mailto:fmiceli@westonlaw.ca)

Counsel for Onespacel Limited

**AND TO: ATTORNEY GENERAL OF CANADA**

Department of Justice  
The Exchange Tower  
130 King Street West, Suite 3400  
Toronto, ON M5X 1K6

**Diane Winters**

Tel: (416) 973-3172  
Fax: (416) 973-0810  
Email: [diane.winters@justice.gc.ca](mailto:diane.winters@justice.gc.ca)

Counsel for the Canada Revenue Agency

**AND TO: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE**

Legal Services Branch  
777 Bay Street, 11th Floor  
Toronto, ON M5G 2C8

**Kevin J. O'Hara**

Tel: (416) 327-8463  
Fax: (416) 325-1460  
Email: [kevin.ohara@ontario.ca](mailto:kevin.ohara@ontario.ca)

Counsel for Her Majesty the Queen in Right of Ontario

**Schedule “A” – Statute****Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3****Appeals****Court of Appeal**

**193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193, 1992, c. 27, s. 68.

**Construction Act, R.S.O. 1990, c. C.30****Priority over mortgages, etc.**

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

**Building mortgage**

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

***Prior mortgages, prior advances***

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
  - (i) advanced in the case of a mortgage, and
  - (ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

***Prior mortgages, subsequent advances***

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

**Special priority against subsequent mortgages**

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

**General priority against subsequent mortgages**

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

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

**6** (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause

19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1.

Court of Appeal No.:  
Commercial List Court File No.: CV-18-598657-00CL

**DONALD DAL BIANCO**  
Applicant (Appellant)

- and -

**DEEM MANAGEMENT SERVICES LIMITED et al.**  
Respondents (Respondent)

**COURT OF APPEAL FOR ONTARIO**  
Proceeding commenced at Toronto

**NOTICE OF APPEAL**

**BLANEY MCMURTRY LLP**  
Barristers & Solicitors  
2 Queen Street East, Suite 1500  
Toronto ON M5C 3G5

**John Wolf** (LSO #30165B)  
Tel: (416) 593-2994  
Fax: (416) 596-2044  
E-mail: [jwolf@blaney.com](mailto:jwolf@blaney.com)

**David T. Ullmann** (LSO #423571)  
Tel: (416) 596-4289  
Fax: (416) 594-2437  
E-mail: [dullmann@blaney.com](mailto:dullmann@blaney.com)

Lawyers for the Appellant

## **TAB 4**

### **Agreed Statement of Facts** (filed and used in first instance)

Court File No.CV-18-598657-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**DONALD DAL BIANCO**

(Applicant)

-and-

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

(Respondents)

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act*  
and Section 101 of the Courts of Justice Act

## **AGREED STATEMENT OF FACTS**

**WHEREAS** a motion is scheduled for **Friday March 6, 2020** in Toronto Commercial Court to determine competing priorities pursuant to section 78 of the *Construction Act* [not including subsection 78(3)] between various registered construction lien claims and a registered mortgage, as more fully set out herein (“**the Priority Motion**”);

**NOW THEREFORE** for purposes of the Priority Motion only, the Parties hereto agree on the following Facts:

### **RECEIVERSHIP BACKGROUND**

1. On May 31, 2018, pursuant to an order of the Honourable Mr. Justice Wilton-Siegel, Crowe Soberman Inc. was appointed as Receiver (the “**Receiver**”) of:
  - (i) the property known municipally as 215 and 219 Lexington Road, Waterloo, Ontario N2K 2E1 (the “**Real Property**”),

(ii) the assets and undertakings of Deem Management Services Limited (“**Deem Management**”) related to the Real Property, and

(iii) the property, assets and undertakings of the Uptown Inc. (the “**Uptown**”)  
(collectively referred to as the “**Property**”).

2. The background to the Property was more fully set out in the Receiver’s First Report dated June 8, 2018. In the Third Report, the Receiver has provided the following “overview”:

- a) Deem Management is a company that has been working for many decades in the Ontario nursing home and retirement home sector. It was the registered owner of the Real Property.
- b) A portion of the Real Property was vacant land where the Project had started. The remaining land contained the operating Pinehaven Nursing Home, which is an unrelated third party nursing home business. Part of Deem Management’s business involved the collection of rent from Pinehaven.
- c) The Uptown operated a presentation centre located on the Real Property and was engaged in the planning related to the redevelopment of the Real Property as a seniors retirement residence called the Uptown Residences. The work carried out by the Companies had primarily been in the nature of obtaining approvals relative to Phase 1 of the Project, and the excavation and installation of caissons necessary for that part of the development.
- d) Both Deem Management and the Uptown are owned by Rob Dal Bianco, who is the sole director of the Companies, and is the son of the applicant, Donald Dal Bianco (“**Dal Bianco**”)
- e) Maxion Management Services Inc. (“**Maxion**”) was the general contractor on the Project. The Receiver understands that Maxion is owned by Paul Michelin. The Receiver was advised by counsel for Michelin and Maxion that its clients assert a joint venture ownership claim, is a shareholder in Uptown, and therefore claim a beneficial interest in the Project.
- f) The Receiver understands that Maxion was advised to cease construction by Rob in the early winter of 2018. Shortly after construction ceased, various service providers registered construction liens against title to the Property commencing on March 7, 2018 totalling \$7,673,672.48.

- g) In addition to the amounts claimed by the construction lien claimants, the Application Record dated May 28, 2018, outlined various mortgages and loans registered against title to the Property which exceed \$20 million.

3. For purposes of this Agreed Statement of Facts and the Priority Motion, the construction Improvement that is the subject of these proceedings will be referred to as "**the Uptown Project**".
4. Through the Receivership process, and various Court Orders, the Uptown Project was sold by the Receiver in the summer of 2018. After making certain distributions, including payment of the First and Second Ranking Mortgages described below, the Receiver still holds in trust the sum of \$5,477,224.57 (inclusive of interest but exclusive of the fees of the Receiver and its counsel) from the proceeds of sale.
5. The Receiver has not been able to distribute these remaining funds as a result of the competing priority claims between the constructions lien claimants and the Dal Bianco 3<sup>rd</sup> Mortgage.

**The First and Second Ranking Mortgages.**

6. IMC was holder of the first-ranking mortgage, which was registered on May 9, 2017 and which amounted to \$8,299,346.58.
7. Donald Dal Bianco was holder of the second ranking mortgage (by virtue of postponement to IMC), which was registered on June 25, 2015 and which amounted to \$5,002,656.45;
8. The first-ranking mortgage of IMC and the second-ranking mortgage of Donald Dal Bianco have been paid out in this Receivership, subject to some small disputes that are not relevant to this motion.

**The Dal Bianco “third-ranking” Mortgage**

9. The third-ranking mortgage was granted by Deem Management to Don Dal Bianco on February 14, 2018 and registered on February 23, 2018 as instrument no. WR1099051, a copy of which is attached as **TAB A** (“**the Dal Bianco 3rd Mortgage**”).
10. The Dal Bianco 3rd Mortgage secured the principal amount of \$7,978,753.45.
11. The amounts secured by the Dal Bianco 3<sup>rd</sup> Mortgage were all advanced between 2012 and 2015 without security having been registered. The first advance was made on April 22, 2012 and the final advance was made on January 22, 2015. A schedule setting out all of the advances is attached at **TAB B**.
12. All of the funds advanced by Dal Bianco that were secured by the Dal Bianco 3<sup>rd</sup> Mortgage were intended, and were in fact used, in an Improvement within the meaning of s. 78 of the *Construction Act* on the real property through the Uptown Project.

**The Registered Construction Lien Claims**

13. Kieswetter Excavating Inc. (“**Kieswetter**”) registered its construction lien on March 7, 2018 in the amount of \$1,827,409.
14. Deep Foundations Inc. (“**Deep**”) registered its construction lien on March 14, 2018 in the amount of \$918,432.
15. Onespace Limited (“**Onespace**”) registered its construction lien on March 19, 2018 in the amount of \$68,580.
16. Maxion registered its first construction lien on March 29, 2018 in the amount of \$4,522,597.
17. EXP Services Inc. (“**EXP**”) registered its construction lien on April 12, 2018 in the amount of \$336,654.
18. Maxion registered its second construction lien on July 13, 2018 in the amount of \$560,283.

19. The parties have not agreed upon, and the Court is not being asked to make any determination of the timeliness or quantum of any of the above registered lien claims, however all parties agree that at least some amount of the above lien claims will be valid and owing to one or more of the registered lien claimants.
20. Even though the liens were registered on title to the Real Property on the dates referred to in paragraphs 13 to 18, above, for purposes of the *Construction Act* the first construction lien arose and took effect with respect to the Uptown Project prior to the Dal Bianco 3<sup>rd</sup> Mortgage being registered on title.

THE ABOVE FACTS ARE AGREED by:



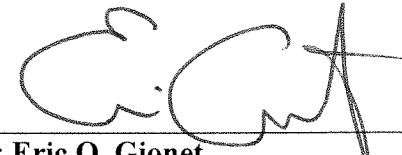
Per: **Brendan Bissell**

Counsel for **Crowe Soberman Inc.**  
in its capacity as Court-appointed  
Receiver of Deem Management Services Limited  
and The Uptown Inc., and not in its personal  
capacity



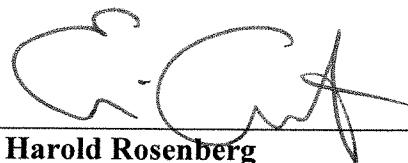
Per: **David Ullmann**  
Counsel for **Donald Dal Bianco**

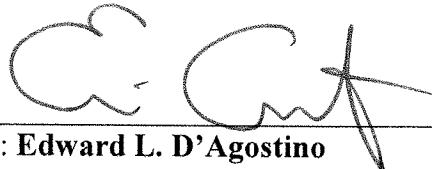
*Agent for:*

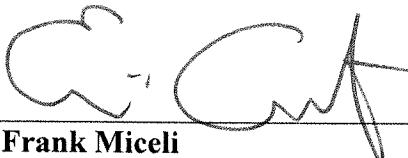


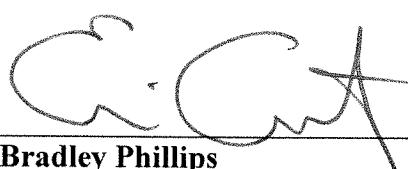
Per: **Eric O. Gonet**  
Counsel for **Maxion Management Services Inc.**

*Agent for*   
Per: **Jeffrey Armel**  
Counsel for EXP Services Inc.

*Agent for*   
Per: **Harold Rosenberg**  
Counsel for Deep Foundations Inc.

*Agent for*   
Per: **Edward L. D'Agostino**  
Counsel for Kieswetter Excavating Inc.

*Agent for*   
Per: **Frank Miceli**  
Counsel for Onospace Limited

*Agent for*   
Per: **Bradley Phillips**  
Counsel for Deem Management and The Uptown

## **TAB 5**

**Factum of the Receiver dated March 4, 2020**  
(filed in respect of the hearing for the order appealed from)

Court File No. CV-18-598657-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondents

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act*  
and Section 101 of the *Courts of Justice Act*

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**FACTUM OF THE RECEIVER**  
(*Construction Act* s. 78 Priority Motion returnable March 6, 2020)

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March 4, 2020

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
TORONTO, ON M5G 1V2  
Fax: 416-597-3370

**R. Brendan Bissell (LSO #: 40354V)**  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon (Ontario Student-at-Law, Member of  
the Bar of Quebec)**  
Tel: 416-597-6486  
Email: [turgeon@gsnh.com](mailto:turgeon@gsnh.com)

Lawyers for Crowe Soberman Inc. as Receiver

**TO: THE SERVICE LIST**

## **PART I – INTRODUCTION AND OVERVIEW**

1. This motion is to determine whether what is referred to in these proceedings as the “Third Mortgage” can have any priority, under the provisions of s. 78 of the *Construction Act*<sup>1</sup> (the “Act”), over the lien claimants’ interests in the property that was sold.
2. Depending on how the litigation unfolds, there are also other possible issues in this proceeding based on the Act, including (i) whether the amounts payable on all the mortgages on the property could be limited by subs. 78(3) of the Act, and (ii) the amount of the holdback priority that lien claimants would have over all mortgages, but those are not before the Court on this motion.
3. The Receiver had originally brought a broader motion to seek directions about the validity of the Third Mortgage. This was because the Third Mortgage had been granted in February of 2018 to secure amounts loaned earlier in 2012-2015, and because the project in question then ended up being subject to liens in March of 2018 and was placed into receivership on May 31, 2018. The Receiver accordingly identified possible reviewable transaction issues under the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act*.
4. Whether s. 78 of the Act might also affect the validity of the Third Mortgage (as argued on this motion) was initially going to be part of that motion by the Receiver, but the parties asked that the s. 78 issue proceed separately (because the reviewable transaction issues involve facts that may be disputed and may require trial of an issue) and Justice Hainey so directed in a case conference on January 29, 2020.
5. For purposes of this motion, the parties have agreed that Maxion Management Services Inc. (“Maxion”), which was the general contractor on the project, will act as moving party. The subtrades (Kieswetter Excavating Inc., Deep Foundations Inc., Onospace Limited and EXP Services Inc.) will support Maxion’s position. Don Dal Bianco (“Dal Bianco”), as the holder of the Third Mortgage, will respond.

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<sup>1</sup> R.S.O. 1990, c. C.30.

6. This factum by the Receiver is delivered to attempt to provide assistance to the Court on the legal issues that are principally being litigated by Maxion and Dal Bianco.

## **PART II – FACTS**

7. The facts that the parties wish the Court to consider for this motion have been set out in an Agreed Statement of Fact (“ASF”).
8. The core facts are that:
  - a) the Third Mortgage was only granted in 2018 but secured \$7,978,753.45 paid by Dal Bianco in 2012 to 2015 to (or on behalf of) the mortgagor under a previously unsecured loan;<sup>2</sup>
  - b) the funds secured by the Third Mortgage were used for the project at the property in question;<sup>3</sup>
  - c) work had started on the project before the Third Mortgage was registered, which means that for purposes of s. 78 of the Act the (possible) liens of trades had “arisen” by that time;<sup>4</sup>
  - d) Maxion and the subtrades have all registered liens in the total amount of \$5,002,880<sup>5</sup> and although the validity and amount of those liens has not been determined yet, the parties agree that at least some of the liens will be valid, such that the s. 78 issues are engaged;<sup>6</sup> and
  - e) after payment of the first and second ranking mortgages in 2018, the Receiver now holds \$5,477,224.57.<sup>7</sup>

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<sup>2</sup> ASF, paras. 9-11.

<sup>3</sup> ASF, para. 12.

<sup>4</sup> ASF, para. 20.

<sup>5</sup> ASF, paras. 13-18.

<sup>6</sup> ASF, para. 19.

<sup>7</sup> ASF, para. 4.

**PART III – ISSUES AND THE LAW**

9. The issue is whether the Third Mortgage can have any priority over the interests of lien claimants under s. 78 of the Act.

**a. Position of Maxion and the trades**

10. Maxion asserts that the Third Mortgage cannot have any priority over the liens because subs. 78(6) of the Act only gives mortgagees priority for “any advance made in respect of that [...] mortgage”.
11. That principle has for example been used to hold that collateral mortgages over one’s property for amounts loaned to other parties cannot take priority over lien claims in the former’s property, because no advance is made to the collateral mortgagor (instead, any advance are to what is usually a related entity under a different loan facility).
12. Maxion states that the same reasoning ought to apply to deny the Third Mortgage any priority over the liens in this case because at the time of the advances in question they could not have been “in respect of” the Third Mortgage, since it did not exist then.

**b. Position of Dal Bianco**

13. Dal Bianco disputes that s. 78(6) of the Act should be interpreted in that manner in this case, and moreover states that even if it did apply that way then another subsection – subs. 78(2) – is actually the one that governs because the amounts at issue in the Third Mortgage had been used for the project and were therefore “financing an improvement” within the meaning of subs. 78(2) of the Act.
14. Since subs. 78(2) of the Act does not speak in terms of “any advance made in respect of that [...] mortgage”, and instead speaks to a mortgage being taken “with the intention of financing an improvement”, Dal Bianco asserts that at least when one is dealing with funds that actually went to the project then the possible issues in subs. 78(6) that Maxion relies upon do not apply.

c. **Submissions of the Receiver**

15. The following are additional matters that may be of assistance to the Court on this motion.

i. **Section 78 of the Act: Rationale and Legislative History**

16. Section 78 was first enacted as s. 80 in the 1983 version of the Act (then the *Construction Lien Act*), which replaced the former *Mechanics Lien Act*. Apart from minor grammatical adjustments in the French version in 2017,<sup>8</sup> what is now s. 78 has not been amended.

17. The 1983 legislation followed two reports by the Ministry of the Attorney General in 1980 and 1982, which have been referred to in several judicial decisions interpreting various provisions of the Act. Those reports illustrate the concerns in the then prevailing practice and case law that was to be addressed by new legislation. Relevant to this case, those reports focussed on the rights of lien claimants to holdback amounts.

18. In November 1980, the Ministry of the Attorney General of Ontario released a Discussion Paper entitled *The Draft Construction Lien Act*<sup>9</sup> (the “**1980 Discussion Paper**”). A primary objective of the 1980 Discussion Paper’s draft *Act* was to secure the lien claimants’ rights in holdback amounts, being portions of the amounts payable for construction work but not paid until the end of the project to attempt to provide some funding for trades in the event of solvency issues. The 1980 Discussion Paper explains the issue as follows:

The holdback represents money already earned by those who have supplied services or materials to a construction project. Despite this fact, very often those persons find that the owner has not set aside this money and that their claim to a lien against the premises is lower in priority to those of other secured creditors of the owner. Although the Act gives constructors a right to enforce their claim against the premises, this right will often be subordinate to the claims of mortgagees. If the

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<sup>8</sup> *Construction Lien Amendment Act, 2017*, S.O. 2017, c. 24 (Bill 142), s. 53(1) and 70, available at: [ontario.ca/laws/statute/s17024](http://ontario.ca/laws/statute/s17024).

<sup>9</sup> An excerpt is provided at Tab 1 of the Receiver’s Brief of Authorities (the “**Receiver’s Brief**”), and an electronic copy of the full report is available at: [ia800601.us.archive.org/11/items/mag\\_00001036/mag\\_00001036.pdf](http://ia800601.us.archive.org/11/items/mag_00001036/mag_00001036.pdf).

value of the mortgage, including accrued interest, exceeds the value of the premises, then the right of the lien claimant against the premises is illusory.<sup>10</sup>

[Emphasis added.]

19. The later 1982 *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act*<sup>11</sup> (the “**1982 Report**”) explained the reference to “occasional subordination” made in the 1980 Discussion Paper. The 1982 Report noted that this issue of lien claims stemmed from the 1981 decision of the Supreme Court of Canada in *Dorbern Investments Ltd. v Provincial Bank of Canada*,<sup>12</sup> upholding a 1978 judgment of the Ontario Court of Appeal:<sup>13</sup>

Subsection 5 [of the 1982 Report’s proposed section 80, which was enacted word for word and is now s. 78 of the Act] is proposed by the Committee to redress what it believes to be a major inequity in the law resulting from the decision of the Supreme Court of Canada in *Dorbern Investments Ltd. v Provincial Bank of Canada*, a case which dealt with the priority between a subsequent collateral mortgage and the lien. Under the *Mechanics’ Lien Act*, an advance made under a mortgage that is registered subsequent to the time when the work on an improvement commences, has priority over the liens arising from that improvement, unless there was a preserved lien against the premises at the time when the advance is made, or the mortgagee had received written notice of a lien before making the advance. In the case of a collateral mortgage, all “advances” on that mortgage may have been made long before the registration of the mortgage, as in *Dorbern* where the mortgage was given to secure past indebtedness. As a result, in the *Dorbern* case, the mortgagee was held to have priority over the lien claimants: the lien claimants’ interest in the premises was totally subordinated to

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<sup>10</sup> 1980 Discussion Paper, Tab 1 of the Receiver’s Brief, p. 13.

<sup>11</sup> An excerpt is provided at Tab 2 of the Receiver’s Brief and an electronic copy of the full report is available at: [\[archive.org/details/mag\\_00000953/page/176/mode/2up/search/78\]](http://archive.org/details/mag_00000953/page/176/mode/2up/search/78)

<sup>12</sup> *Dorbern Investments v Provincial Bank*, [1981] 1 S.C.R. 459, [1981 CanLII 45](http://canlii.ca/t/1981CanLII45), Tab 3 of the Receiver’s Brief.

<sup>13</sup> *Dorbern Investments v Provincial Bank*, (1978) 23 O.R. (2d) 649 (CA), [1978 CanLII 58](http://canlii.ca/t/1978CanLII58), Tab 4 of the Receiver’s Brief.

the interest of the mortgagee, even though the property had been free of this encumbrance at the time when the making of the improvement commenced.<sup>14</sup>

[Emphasis added.]

20. The 1980 Discussion Paper draft *Act*'s suggested solution was to require private owners, upon contracting for construction work exceeding \$150,000 in value, to pre-pay the holdback amount into a trust account held jointly in the name of the owner and the general contractor as trustees for the benefit of all persons entitled to liens.<sup>15</sup>
21. The Advisory Committee, in the 1982 Report, "strongly" recommended against such a proposal.<sup>16</sup> Rather, the Committee submitted an "entirely rewritten"<sup>17</sup> provision, i.e. s. 80 of the *Committee's Proposal for the Construction Lien Act*. This section 80, intended to resolve the "major inequity" resulting from the "total" subordination of lien claimants' interests to that of a subsequent mortgagee, would be enacted in 1983, word for word, and is now s. 78 of the Act. The 1982 Report describes the general operation of the section as follows:

We agree that there have been numerous occasions on which lien claimants have found the owner's interest in the premises to be insufficient to satisfy claims in respect to the holdback. In the experience of the Committee, this situation normally arises as a result of erosion of the owner's equity in the premises as a result of the accumulation of arrears in interest, where the owner defaults in the payment of a mortgage. Since the relative priority between mortgages and the liens are the cause of the problem, we believe that the best way to resolve the problem is to adjust those relative priorities so as to protect the lien claimant's rights in the premises. To do this, we propose to give lien claimants priority to the extent of any deficiency in the holdback over every mortgagee who takes a mortgage for the purpose of securing the financing of the improvement ("building mortgage"), and also over any mortgagee who acquires an interest in the premises subsequent to the

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<sup>14</sup> 1982 Report, Tab 2 of the Receiver's Brief, p. 183.

<sup>15</sup> 1980 Discussion Paper, Tab 1 of the Receiver's Brief, p. 13.

<sup>16</sup> 1982 Report, Tab 2 of the Receiver's Brief, p. xxxv.

<sup>17</sup> 1982 Report, Tab 2 of the Receiver's Brief, p. 178.

commencement of the making of the improvement, irrespective of the purpose of that mortgage.<sup>18</sup>

[Emphasis in original.]

**ii. subsequent judicial commentary in *XDG* and *Jade Kennedy* goes beyond holdback priority**

22. While the focus of the 1982 Report was on ensuring payment of holdback amounts to lien claimants, the case law since that time has arguably expanded the impact of s. 78 in certain ways.
23. One such way has been by limiting mortgage priority to circumstances where the owner actually gets the funds under the mortgage.
24. That was one of several grounds on which a collateral mortgage against the owner in *XDG* was invalidated, because there had been no “advance made in respect of the [...] mortgage” within the meaning of subs. 78(6). Other grounds included reviewable transaction issues and the fact that the owner was providing financial assistance to a related party in circumstances when the corporation was or would be insolvent within the meaning of s. 20 of the Ontario *Business Corporations Act*.<sup>19</sup>
25. That was also the basis on which one of the mortgages in *Jade-Kennedy* was given no priority as against lien claimants. One of the mortgages in that case was solely collateral for a mortgage on a different project, and the owner of the project subject to the collateral mortgage had not received the advances that went to the other project. There the Court held that there was again no compliance with subs. 78(6) of the Act and the collateral mortgage would therefore have no priority over the interests of the liens.<sup>20</sup>

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<sup>18</sup> 1982 Report, Tab 2 of the Receiver’s Brief, p. xxxvi-xxxvii.

<sup>19</sup> *XDG Ltd. v 1099606 Ontario Ltd.*, 2002 CarswellOnt 4535 ([2002 CanLII 22043 \(ON SC\)](#)), affirmed, [2004 CanLII 15997 \(ON SCDC\)](#). Copies provided in Maxion’s brief of authorities in support of its factum (“**Maxion’s Brief**”), at tabs 4 and 5, respectively.

<sup>20</sup> *Jade-Kennedy Development Corporation (Re)*, [2016 ONSC 7125](#) (“**Jade-Kennedy**”), affirmed, *Dircam Electric v Am-Stat Corp.*, [2017 ONSC 3421 \(Div. Ct.\)](#). Copies provided in Maxion’s Brief, at tabs 6 and 7, respectively.

26. In so holding, the Court in *Jade-Kennedy* drew a distinction between three circumstances when it came to securing advances under a mortgage, namely (i) securing funds advanced to someone other than the owner of the land in a collateral mortgage or something similar, (ii) securing an advance made to the owner of the land, and (iii) whether the advance actually benefitted the land. The Court held that the latter of those did not need to be proven in order for a mortgagee to be able to take advantage of subs. 78(6) of the Act. In commenting on *XDG*, the Court held:

The decision is based on the requirement in section 78(6) that monies be “advanced” in respect of the mortgage, rather than merely secured. It was not necessary to go further to address whether or not the monies advanced under the mortgage benefitted the guarantor and I do not read the decision as doing so. Insofar as the trial judge and the Divisional Court considered that the language under section 78(6) requires demonstration of a benefit, they limited that requirement to demonstration that the borrower received the proceeds of the advance. Neither the trial court judge nor the Divisional Court required the mortgagee to demonstrate that the proceeds of the advance were actually applied to improve the lands under construction against which the lien claimants asserted their claims.<sup>21</sup>

### **iii. The “special circumstances” mentioned in *Jade-Kennedy***

27. There is an additional aspect to the decision in *Jade-Kennedy* that may warrant consideration on this motion.

28. Namely, in holding that there was no priority under subs. 78(6) for a collateral mortgage where there had not been funds “advanced”, the Court in that case left open the question whether different facts could merit a different result, by stating:

Absent special circumstances, I am not persuaded that an advance under a mortgage loan, or a secured loan facility, constitutes an “advance made in respect of” a

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<sup>21</sup> *Jade-Kennedy*, para. 45.

collateral mortgage given to secure a guarantee by a third party of a borrower's obligations under the mortgage loan or the secured loan facility.<sup>22</sup>

[emphasis added]

29. In the facts of this case where all of the money that the Third Mortgage seeks to secure actually did go into the project – as agreed by the parties in the ASF – the nature and extent of the Court's references to a “special circumstances” exception in *Jade-Kennedy* may merit consideration on this motion. Unfortunately, *Jade-Kennedy* provides no commentary on what would qualify as such circumstances.

**PART IV – RELIEF REQUESTED**

30. The Receiver takes no position on the substantive merits of the motion and solely seeks the Court's direction on the issue.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 4<sup>th</sup> day of March, 2020.



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<sup>22</sup> *Jade Kennedy* at para. 55.

## SCHEDULE A – LIST OF AUTHORITIES

1. MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO, *The Draft Construction Lien Act*, 1980
2. MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO, *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act*, 1982
3. *Dorbern Investments v Provincial Bank*, [1981] 1 S.C.R. 459, [1981 CanLII 45](#)
4. *Dorbern Investments v Provincial Bank*, (1978) 23 O.R. (2d) 649 (CA), [1978 CanLII 58](#)
5. *XDG Ltd. v 1099606 Ontario Ltd.*, 2002 CarswellOnt 4535 (ON SC) ([2002 CanLII 22043](#)), affirmed, [2004 CanLII 15997 \(ON SCDC\)](#)
6. *Jade-Kennedy Development Corporation (Re)*, [2016 ONSC 7125](#), affirmed, *Dircam Electric v Am-Stat Corp.*, [2017 ONSC 3421 \(Div. Ct.\)](#)

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## **SCHEDULE B – RELEVANT STATUTES**

*Mechanics' Lien Act*, R.S.O. 1980, c 261:

**15 (1)** The lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien has been given to the person making such payments or after registration of a claim for the lien as hereinafter provided, and, in the absence of such notice in writing or the registration of a claim for lien, all such payments or advances have priority over any such lien.

Construction Act, R.S.O. 1990, c. C.30

### **Priority over mortgages, etc.**

**78 (1)** Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

### **Building mortgage**

**(2)** Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

### **Prior mortgages, prior advances**

**(3)** Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

**(a)** the actual value of the premises at the time when the first lien arose; and

**(b)** the total of all amounts that prior to that time were,

**(i)** advanced in the case of a mortgage, and

**(ii)** advanced or secured in the case of a conveyance or other agreement.

### **Prior mortgages, subsequent advances**

**(4)** Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made

in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

### **Special priority against subsequent mortgages**

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

### **General priority against subsequent mortgages**

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

### **Advances to trustee under Part IX**

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

### **Where postponement**

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

- (a) the postponed lien; and

**(b)** where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

### **Saving**

**(9)** Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

### **Financial guarantee bond**

**(10)** A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

**(a)** a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

**(b)** a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

### **Home buyer's mortgage**

**(11)** Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

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DONALD DAL BIANCO and DEEM MANAGEMENT SERVICES LIMITED and  
THE UPTOWN INC.

Court File No. CV-18-598657-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**Proceeding commenced in TORONTO**

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**FACTUM OF THE RECEIVER**  
(*Construction Act* s. 78 Priority Motion returnable  
**March 6, 2020**)

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**GOLDMAN SLOAN NASH & HABER**  
480 University Avenue, Suite 1600  
TORONTO, ON M5G 1V2  
Fax: 416-597-3370

**R. Brendan Bissell (LSO #: 40354V)**  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon (Ontario Student-at-Law, Member  
of the Bar of Quebec)**  
Tel: 416-597-6486  
Email: [turgeon@gsnh.com](mailto:turgeon@gsnh.com)

Lawyers for Crowe Soberman Inc. as Receiver

## **TAB 6**

**Order of Mr. Justice Wilton-Siegel dated May 31, 2018**  
(appointing the receiver)

Court File No.

CV-17-598657-  
DOC L

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

THE HONOURABLE MR.  
JUSTICE H. J. WILTON-SIBBOLD

)  
)  
)

WEDNESDAY, THE 30<sup>th</sup> ~~HAWK~~

DAY OF MAY, 2018



DONALD DAL BIANCO

Applicant

- and -

DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.

Respondents

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act*  
and Section 101 of the *Courts of Justice Act*

**ORDER**  
(Appointing Receiver)

**THIS APPLICATION** made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing Crowe Soberman Inc. ("Crowe Soberman") as receiver (in such capacity, the "Receiver") without security, of the real property known as 215 and 229 Lexington Road, Waterloo, Ontario N2K 2E1, the legal description of which is further set out in the title search attached hereto and marked as **Schedule "A"** to the Receiver's Certificate (hereinafter referred to as the "Real Property") and all other property, assets and undertakings of Deem Management Services Limited (the "Deem Management") related thereto, and the property, assets and undertakings The Uptown Inc. ("Uptown") (collectively, the "Property"), was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Affidavit of Donald Dal Bianco, sworn May 27<sup>th</sup>, 2018, and the exhibits thereto, and, on hearing the submissions of counsel for the Applicant and all other counsel listed on the counsel slip, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Ariyana Botejue, filed;

## **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

## **APPOINTMENT**

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, Crowe Soberman is hereby appointed Receiver, without security, of the Property, including all proceeds thereof.

## **RECEIVER'S POWERS**

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated to, act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to, in consultation with the Applicant, do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, property managers, real estate agents, brokers, listing agent, counsel and such other persons (each a “**Consultant**”) from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (d) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets as the Receiver deems reasonably necessary in order to carry out the powers conferred on the Receiver in this Order;
- (e) to receive and collect all monies and accounts now owed or hereafter owing to the Deem Management or Uptown (collectively, the “Debtors”) with respect to the Property, and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors, including, as may be necessary, to collect funds currently or hereafter in the hands of the Debtors or any Person (as defined below) related thereto;
- (f) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;
- (g) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate in consultation with the Applicant;
- (h) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court, and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act* or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

- (i) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (j) to report to, meet with, consult and discuss with the Applicant and or Institutional Mortgage Capital Canada Inc. ("IMC"), and such other affected Persons (as defined below) as the Receiver deems appropriate, on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (k) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (l) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;
- (m) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any Property owned or leased by the Debtors; and
- (n) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

#### DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons

acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

## **NO PROCEEDINGS AGAINST THE RECEIVER**

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

## **NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY**

8. **THIS COURT ORDERS** that no Proceeding, against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court. This paragraph 8 shall not prevent IMC from enforcing its rights and remedies, if any, against 209 Lexington Road, Waterloo, Ontario (PIN 22291-0011 LT), including commencing any Proceedings against the Debtors in connection with the same.

9. **THIS COURT ORDERS** that no party other than the Receiver or its Consultants shall advertise, market for sale or sell all or any part of the Property, without the written consent of the Receiver and Applicant, or further order of this Court.

10. **THIS COURT ORDERS** that nothing in paragraph 9, above, shall require Cushman & Wakefield ULC ("C&W") to withdraw any marketing materials in connection with the Property or to delist the Property for sale, provided that, without in any way limiting paragraphs 5 and 6, above, C&W shall provide full disclosure of all information and documents relating to its marketing efforts to the Receiver and that C&W shall further comply with any directions given by the Receiver pending the return of a motion by the Receiver for an order regarding a sales process for the Property, which the Receiver shall bring and make returnable on June 8, 2018 on *AKW-1* no less than three days' notice to the Service List.

## **NO EXERCISE OF RIGHTS OR REMEDIES**

11. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the

Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien or (v) prevent IMC from enforcing its rights and remedies in respect of the Real Property in the event Deem Management defaults in its obligation to make payments when due with respect to IMC's mortgage of the Real Property with Deem Management (the "**IMC Mortgage**"), upon IMC providing 5 days prior written notice of such default to the Receiver.

#### **NO INTERFERENCE WITH THE RECEIVER**

12. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

#### **CONTINUATION OF SERVICES**

13. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors or in respect of the Property are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

## RECEIVER TO HOLD FUNDS

14. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

## EMPLOYEES

15. **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA.

## PIPEDA

16. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

## LIMITATION ON ENVIRONMENTAL LIABILITIES

17. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

## LIMITATION ON THE RECEIVER'S LIABILITY

18. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

## RECEIVER'S ACCOUNTS

19. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, limited to the amount of \$250,000 as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's

Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

20. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice

21. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

### **FUNDING OF THE RECEIVERSHIP**

22. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable provided that the outstanding principal amount does not exceed \$500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for: i) the purpose of funding amounts which fall due hereafter under the IMC Mortgage (a "Mortgage Payment Loan") or ii) the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures (a "Expenses Loan"). The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the Mortgage Payment Loan, together with interest and charges thereon (provided the interest is in no event greater than 5% without the consent of IMC), in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Subordinate Receiver's Borrowings Charge**") as security for the payment of the Expenses Loan, together with interest and charges thereon, subordinate to the right of IMC pursuant to the IMC Mortgage, but in priority to all other security interests, trusts, liens, charges

and encumbrances, statutory or otherwise, in favour of any Person, and subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA and the Receiver's Borrowing Charge.

23. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

25. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

#### **SERVICE AND NOTICE**

26. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission.

27. **THIS COURT ORDERS** that the Applicant, the Receiver, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time in accordance with the Protocol, and the Receiver may post a copy of any or all such materials on its website, *at*. *Amend*

28. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors's creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or notice by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

## **GENERAL**

34. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

36. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

29. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

37. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis

to be paid by the Receiver from the Debtors's estate with such priority and at such time as this Court may determine.

38. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

W. Korn-Wil J.

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

MAY 31 2018

PER/PAR:

NB

**SCHEDULE "A"**  
**RECEIVER CERTIFICATE**

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

THIS IS TO CERTIFY that Crowe Soberman LLP, the receiver (the "**Receiver**") of certain real property registered on title as being owned by Deem Management Services Limited (the "**Debtors**") and that is listed on Schedule "A" hereto (collectively, the "**Real Property**") and of all the assets, undertakings and properties of the Debtors acquired for or used in relation to the Real Property (together with the Real Property, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 30th day of May, 2018 (the "**Order**") made in an action having Court file number •, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$ \_\_\_\_\_, being part of the total principal sum of \$500,000 which the Receiver is authorized to borrow under and pursuant to the Order.

The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the \_\_\_\_\_ day of each month] after the date hereof at a notional rate per annum equal to the rate of \_\_\_\_\_ per cent above the prime commercial lending rate of Bank of \_\_\_\_\_ from time to time.

Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_\_ day of \_\_\_\_\_, 2018.

CROWE SOBERMAN LLP, solely in its capacity as Receiver of the Property, and not in its personal capacity

Per:

Name:

Title:

**SCHEDULE "A" TO THE RECEIVER'S CERTIFICATE  
LEGAL DESCRIPTION OF THE REAL PROPERTY**

PIN: 22291-0628 (LT)

Property Description: PT. BLOCK A PLAN 1313, BEING PTS. 1,4,5 ON 58R-6774 & PT.3 ON 58R-2194. S/T EASEMENT IN GROSS OVER PT. 1 ON 58R-17857, AS IN WR853469; CITY OF WATERLOO

Address: 215 and 229 Lexington Road, Waterloo, Ontario, N2K 2E1

DEEM MANAGEMENT SERVICES LIMITED and THE  
UPTOWN INC.

and

DONALD DAL BIANCO

Applicant

Respondents

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER  
(Appointing Receiver)

**BLANEY MCMURTRY LLP**

Barristers & Solicitors  
2 Queen Street East, Suite 1500  
Toronto ON M5C 3G5

**David T. Ullmann** (LSUC #423571)

Tel: (416) 596-4289  
Fax: (416) 594-2437

**John Wolf** (LSUC [insert])

Tel: (416) 596-4289  
Fax: (416) 594-2969

**Alexandra Teodorescu** (LSUC #63889D)

Tel: (416) 596-4279  
Fax: (416) 594-2437

Lawyers for the Applicant, Donald Dal Bianco

## **TAB 7**

**Receiver's Notice of Motion dated February 8, 2019**  
(larger motion of which the order appealed from is a carveout)

Court File No.: CV-18-598657-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondents

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act*  
and Section 101 of the *Courts of Justice Act*

**NOTICE OF MOTION**  
**Seeking Advice and Directions and Approval of Fees and Activities**  
**(returnable on a date to be set at a 9:30 a.m. appointment)**

Crowe Soberman Inc. in its capacity as receiver (the “**Receiver**”) of the property known municipally as 215 and 219 Lexington Road, Waterloo, Ontario N2K 2E1 (the “**Real Property**”), the assets and undertakings of Deem Management Services Limited (“**Deem Management**”) related to the Real Property (the “**Related Deem Assets**”), and the property, assets and undertakings (the “**Uptown Assets**”) of The Uptown Inc. (the “**Uptown**”, together with Deem Management the “**Debtors**”), will make a motion to a Judge at 10:00 a.m. or as soon after that time as the motion can be heard on a date to be set by a Judge of the Commercial List at a 9:30 a.m. appointment, at 330 University Ave., Toronto, Ontario.

**THE PROPOSED METHOD OF HEARING:** The motion is to be heard:

- in writing under subrule 37.12.1(1) because it is made without notice;
- in writing as an opposed motion under subrule 37.12.1(4); or
- orally.

**THE MOTION IS FOR AN ORDER:**

- (a) if necessary, abridging the time for service of the Notice of Motion and Motion Record in respect of this motion and dispensing with further service thereof;
- (b) approving the Third Report of the Receiver dated February 8, 2019 (the “**Third Report**”) and the Receiver’s conduct and activities described therein;
- (c) approving the fees and disbursements of the Receiver and the fees and disbursements of its legal counsel, Goldman Sloan Nash & Haber LLP (“**GNSH**”) to January 31, 2019;
- (d) seeking the advice and directions of this Court regarding the enforceability of the third ranking mortgage granted to Donald Dal Bianco; and
- (e) such further and other relief as counsel may request and this Honourable Court deem just;

**THE GROUNDS FOR THE MOTION ARE:****Background**

- (a) on May 31, 2018 the Receiver was appointed over the Real Property, the Related Deem Property and over the Uptown pursuant to an order of the Honourable Mr. Justice Wilton-Siegel (the “**Receivership Order**”);
- (b) Deem Management is a property holding and real estate development company and was the registered owner of the Real Property;
- (c) The Uptown operates a presentation centre located on the Real Property and was engaged in planning related to the redevelopment of the Real Property as a seniors retirement residence project called the Uptown Residences (the “**Project**”);
- (d) on August 30, 2018, this Court approved an Amended Approval and Vesting Order authorizing the Receiver to agree to amend the sale price under an agreement of purchase and sale for the Real Property and conclude the sale transaction;

- (e) the sale transaction closed on August 31, 2018;

### **Interim Distributions**

- (f) this Court granted an Order on August 14, 2018, authorizing the Receiver to pay the amounts owing under the first ranking mortgage in favour of Institutional Mortgage Capital Canada Inc. and under the second ranking mortgage of Donald Dal Bianco, subject to certain conditions, and directing the Receiver not to make further distributions except those authorized by the Court;
- (g) after the closing of the sale transaction, the Receiver made the distributions as authorized by the Court;

### **Enforceability of Third Ranking Mortgage**

- (h) the Receiver has identified a number of possible issues to resolve in order for the proper distributions to be determined for the remainder of the proceeds from the sale of the Real Property;
- (i) the Receiver believes the first of the issues that should be addressed is the enforceability of the third-ranking mortgage granted to Donald Dal Bianco;
- (j) counsel for Donald Dal Bianco, as well as counsel for the lien claimants agree with this approach;
- (k) in order to seek direction from the Court on the enforceability of the third-ranking mortgage, the Receiver has investigated the circumstances that may apply to whether the third-ranking mortgage is valid;
- (l) the details of such circumstances have been more particularly described in the Third Report;
- (m) counsel for the Receiver has also provided an opinion regarding the validity of the third-ranking mortgage granted to Donald Dal Bianco, which has been appended to the Third Report;

**Receiver's Report, Activities and Fees**

- (n) the Third Report sets out the activities of the Receiver since the date of the Second Supplementary Report, including, a report on the sale of the Real Property and the interim distributions made by the Receiver;
- (o) the activities of the Receiver have been in accordance with the Receivership Order and have provided assistance to the Court;
- (p) the fees and disbursements of the Receiver from May 31, 2018 to January 31, 2019 total \$243,703.71, inclusive of HST;
- (q) the fees of the Receiver are fair and reasonable and justified in the circumstances, and accurately reflect the work completed by the Receiver;
- (r) the fees and disbursements of GSNH, legal counsel to the Receiver, from May 31, 2018 to January 31, 2019 total \$350,647.10, inclusive of HST;
- (s) the fees of GSNH are fair and reasonable and justified in the circumstances, and accurately reflect the work completed on behalf of the Receiver by GSNH;

**General**

- (t) Rules 3 and 37 of the *Rules of Civil Procedure*; and
- (u) such further and other grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) the Third Report;
- (b) the Affidavit of Hans Rizarri, sworn February 7, 2019;
- (c) the Affidavit of R. Brendan Bissell, sworn February 8, 2019; and

(d) such further and other evidence as counsel may advise and this Honourable Court may permit.

February 8, 2019

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, Ontario M5G 1V2  
Fax: 416-597-6477

**Michael B. Rotsztain (LSUC #: 17086M)**  
Tel: 416-597-7870  
Email: [rotsztain@gsnh.com](mailto:rotsztain@gsnh.com) sw

**R. Brendan Bissell (LSUC#: 40354V)**  
Tel: 416.597.6489  
Fax: 416.597.3370  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

Lawyers for the Receiver, Crowe Soberman Inc.

**TO: THE SERVICE LIST**

DONALD DAL BIANCO

and

Applicant

DEEM MANAGEMENT SERVICES LIMITED and THE  
UPTOWN INC.

Respondents

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
**Proceeding commenced TORONTO**

**NOTICE OF MOTION**  
**Seeking Advice and Directions and**  
**Approval of Fees and Activities**  
**(returnable on a date to be set at a 9:30 a.m.**  
**appointment)**

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto ON M5G 1V2

**Michael B. Rotsztain (LSUC #: 17086M)**  
Tel: 416-597-7870  
Email: [rotsztain@gsnh.com](mailto:rotsztain@gsnh.com) SW

**R. Brendan Bissell (LSUC No. 40354V)**  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

Lawyers for the Receiver, Crowe Soberman Inc.

## **TAB 8**

**Third Report of the Receiver dated February 8, 2019 (without appendices)**  
(in respect of the Receiver's motion dated same)

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondent

**THIRD REPORT OF CROWE SOBERMAN INC. in its capacity as Court-appointed Receiver of DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

**DATED FEBRUARY 8, 2019**

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## APPENDICES

Appendix A Receivership Order dated March 31, 2018

Appendix B First Report of the Receiver dated June 8, 2018, without appendices

Appendix C Second Report of the Receiver dated July 9, 2018, without appendices

Appendix D Supplementary Report dated August 13, 2018 to the Second Report of the Receiver, without appendices

Appendix E Order (Interim Distribution) dated August 14, 2019

Appendix F Endorsement of the Honorable Regional Senior Justice Morawetz dated August 14, 2018

Appendix G Receiver Certificate filed August 31, 2018

Appendix H Notice of Assessment for September 2018

Appendix I Receiver's Interim Statement of Receipts and Disbursements for the period May 31, 2018 to January 31, 2019

Appendix J Third Ranking Mortgage granted by Deem Management to Don Dal Bianco dated February 23, 2018

Appendix K Schedule of Advances between 2012 and 2015

Appendix L Demand Letter dated January 30, 2018

Appendix M Email from Peter Cass dated February 1, 2018 regarding Demand Letter

Appendix N Email from John C. Wolf dated February 5, 2018 attaching proposed security documents

Appendix O Email from Jeffrey Warren dated February 6, 2018 attaching draft Forbearance Agreement

Appendix P Letter from Jeffrey Warren dated February 28, 2018 enclosing signed Forbearance Agreement

Appendix Q Email from Paul Michelin of Maxion to Phil Reimer of Dentons Canada LLP on November 24, 2017 regarding an intended transaction with Lalu Canada

Appendix R Email from Paul Michelin of Maxion to Phil Reimer of Dentons Canada LLP on December 21, 2017 regarding a possible engagement of Envoy International Inc.

Appendix S Email exchange between Adam Patterson of Maxion and Michael Warner of Firm Capital dated January 19, 2018

Appendix T Emails among Adam Patterson of Maxion, Peter Murphy of Maxion, and Robb Cacovic of Bridging Finance Inc. regarding possible financing and data room dated January 23, 2018

Appendix U Email from Paul Michelin of Maxion to Phil Reimer of Dentons on January 28, 2018 regarding a proposed engagement of Stroll Enterprises LLC

Appendix V Email from Paul Michelin of Maxion to Rob Dal Bianco dated January 28, 2018 regarding potential transaction with Firm Capital

Appendix W Email from Adam Patterson of Maxion to Rob Dal Bianco on February 2, 2018 that Trez Capital had expressed interest in lending

Appendix X Letter of intent from Firm Capital Corporation dated February 12, 2018

Appendix Y Emails among Paul Michelin of Maxion, Adam Patterson of Maxion, and Eli Gutstadt dated March 16, 2018

Appendix Z Email from Paul Michelin of Maxion to Phil Reimer of Dentons Canada LLP dated March 23, 2018 regarding Core developments consideration of investment

Appendix AA Email from Adam Patterson of Maxion to Rob Dal Bianco dated April 6, 2018 regarding preferred debt and equity possible transactions

Appendix BB Emails between Bosco Chan of Livesolar Capital and Paul Michelin of Maxion dated April 23, and 24, 2018 regarding a mortgage commitment

Appendix CC Email from Paul Michelin to Rob Dal Bianco dated May 11, 2018 regarding a PricewaterhouseCoopers engagement and term sheet

Appendix DD Independent Security Opinion dated February 8, 2019

File No. CV-18-598657-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondent

**APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT* AND SECTION 101 OF THE COURTS OF JUSTICE ACT**

**THIRD REPORT OF THE RECEIVER**

**FEBRUARY 8, 2019**

**INTRODUCTION**

1. On May 31, 2018, pursuant to an order of the Honourable Mr. Justice Wilton-Siegel, made on an application by Donald Dal Bianco (“**Dal Bianco**”), Crowe Soberman Inc. was appointed as Receiver (the “**Receiver**”) of (collectively the “**Property**”):
  - (i) the property known municipally as 215 and 219 Lexington Road, Waterloo, Ontario N2K 2E1 (the “**Real Property**”),
  - (ii) the assets and undertakings of Deem Management Services Limited (“**Deem Management**”) related to the Real Property, and
  - (iii) the property, assets and undertakings of the Uptown Inc. (the “**Uptown**”, together with Deem Management the “**Companies**”).

2. A copy of Justice Wilton-Siegel's Order dated May 31, 2018 (the "**Receivership Order**") is attached hereto as **Appendix "A"**.
3. This report (the "**Third Report**") is filed by Crowe Soberman Inc. in its capacity as the Receiver of the Property of the Companies.
4. The orders and reports referred to in this report, together with related Court documents, are posted on the Receiver's website, which can be found at:

<https://crowesoberman.com/insolvency/engagements/deem-management-services-limited/>

## **BACKGROUND**

5. The background to the Property is more fully set out in the First Report dated June 8, 2018, a copy of which is attached hereto without appendices as **Appendix "B"**. By way of overview:
  - a) Deem Management is a company that has been working for many decades in the Ontario nursing home and retirement home sector. It was the registered owner of the Real Property.
  - b) A portion of the Real Property was vacant land where the Project had started. The remaining land contained the operating Pinehaven Nursing Home, which is an unrelated third party nursing home business. Part of Deem Management's business involved the collection of rent from Pinehaven.
  - c) The Uptown operated a presentation centre located on the Real Property and was engaged in the planning related to the redevelopment of the Real Property as a seniors retirement residence called the Uptown Residences. The work carried out by the Companies had primarily been in the nature of obtaining approvals relative to Phase 1 of the Project, and the excavation and installation of caissons necessary for that part of the development.
  - d) Both Deem Management and the Uptown are owned by Rob Dal Bianco, who is the sole director of the Companies, and is the son of Dal Bianco.
  - e) Maxion Management Services Inc. ("**Maxion**") was the general contractor on the Project. The Receiver understands that Maxion is owned by Paul Michelin. The Receiver was advised by counsel for Michelin and Maxion that its clients assert a

joint venture ownership claim, is a shareholder in Uptown, and therefore claim a beneficial interest in the Project.

- f) The Receiver understands that Maxion was advised to cease construction by Rob in the early winter of 2018. Shortly after construction ceased, various service providers registered construction liens against title to the Property commencing on March 7, 2018 totalling \$7,673,672.48.
- g) In addition to the amounts claimed by the construction lien claimants, the Application Record dated May 28, 2018, outlined various mortgages and loans registered against title to the Property which exceed \$20 million.

## **PROCEDURAL HISTORY OF THE RECEIVERSHIP**

### **Sales Process**

6. Following its appointment, the Receiver filed its First Report with the Court. The purpose of the First Report was to approve a proposed sales process, which substantially continued a prior sales process that had been begun by the Companies.
7. Through the sales process, letters of intent were delivered and subsequently the Receiver sought proposed agreements of purchase and sale from two possible purchasers.

### **Approval of sale**

8. The preferred purchaser was disclosed on July 9, 2018 when the Receiver filed its Second Report with the Court to seek an approval and vesting order for the sale with that purchaser. A copy of the Second Report without appendices is attached hereto as **Appendix “C”**. An Approval and Vesting Order was granted by the Honourable Justice McEwen on July 17, 2018.

### **Partial Distribution Authorization**

9. The Second Report had also sought authority to pay the amounts owing under the first ranking mortgage in favour of Institutional Mortgage Capital Canada Inc. (“IMC”) and under the second ranking mortgage in favour of Donald Dal Bianco.

10. In response, certain construction lien claimants advised the Receiver of their concerns on the proposed distributions, including whether the holdback obligations of the Companies may be greater than the amount being proposed to be reserved, and what impact repaying the first and second mortgage may have on their claims as set out in the *Construction Act*.
11. The Receiver accordingly adjourned the distribution part of its motion to August 14, 2018 in order to gather more information from those lien claimants and to consult with the stakeholders.
12. On August 13, 2018 the Receiver filed its Supplementary Report to the Second Report with the Court. A copy of the Supplementary Report without appendices is attached hereto as **Appendix “D”**. The purpose of the Supplementary Report was to report on the Receiver’s review of the mortgagee and lien claimant priority issues and to request authority for the Receiver to pay the IMC mortgage and the second ranking mortgage of Don Dal Bianco subject to maintaining a reserve of at least \$2,355,904.10 as well as the amounts necessary to pay the professional fees owing to the Receiver and its counsel, and amounts required to complete the administration of the estate.
13. The Receiver did not at that time seek authority to make any distributions to the third-ranking mortgage in favour of Don Dal Bianco, because the circumstances of how and when it was granted required examination. There was also a corresponding set of objections from other creditors.
14. The Honourable Regional Senior Justice Morawetz granted an order to that effect on August 14, 2018 (the “**August 14th Order**”), which also directed the Receiver not to make any other distributions except those authorized by the Court. A copy of the August 14<sup>th</sup> Order is attached as **Appendix “E”**, and the associated endorsement is attached as **Appendix “F”** along with a typewritten transcription.

**Amendment to the agreement of purchase and sale**

15. The agreement of purchase and sale with the proposed purchaser that had been approved by the Court was subject to a due diligence provision where information and reports from third parties were provided for review. The culmination of that process was a notice of

claimed costs that was sent to the Receiver outlining the items that the purchaser asserted should reduce the purchase price

16. Following the August 14<sup>th</sup> Order, the Receiver continued to work through the due diligence process with the purchaser and held a series of meetings in order to understand the basis for revising the purchase price and its objection to those claims.
17. After extensive negotiations the purchaser and the Receiver agreed on a mutually acceptable adjustment to the purchase price under the agreement, subject to approval by this Court. An assignment to a related company was also agreed upon by the Receiver and the purchaser.
18. On August 27, 2018 the Receiver filed its Second Supplementary Report with the Court. The purpose of the Second Supplementary Report was to support the Receiver's motion for an order authorizing the Receiver to agree to amend the price under the APS and conclude the transaction with the assignee of the purchaser.
19. There was no objection to the approval of the amended transaction with the Purchaser, and the Honourable Justice Hainey accordingly issued an amended approval and vesting order dated August 30, 2018.

## **PURPOSE**

20. The purpose of this Third Report is to:
  - a) Report to the Court on the activities of the Receiver since the date of the Second Supplementary Report to the Second Report;
  - b) Report on the completion of the sale of the Property;
  - c) Report on the interim distributions made by the Receiver;
  - d) Provide the Court with a summary of the Receiver's cash receipts and disbursements for the period May 31, 2018, January 31, 2019;
  - e) Seek an Order:

- i. Approving the Third Report and the Receiver's conduct and activities described therein; and
- ii. Approving the fees and disbursements of the Receiver and of the Receiver's counsel to January 31, 2019; and

f) Seek directions regarding the enforceability of the third ranking mortgage granted to Donald Dal Bianco;

## **TERMS OF REFERENCE**

21. In developing this Third Report, the Receiver has relied upon certain unaudited financial information prepared by the Companies' management and staff, the Companies' books and records and discussions with their management, staff, agents and consultants. The Receiver has not performed an audit or other verification of such information. The Receiver expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Report, or relied upon by the Receiver in preparing this Third Report.

## **ACTIVITIES SINCE THE SECOND SUPPLEMENTARY REPORT**

22. Following the granting of the Amended Approval and Vesting Order the Receiver and its counsel diligently worked with the purchaser and assignee and completed the Transaction on August 31, 2018. A copy of the Receiver Certificate filed with the Court is attached hereto as **Appendix “G”**.

23. After closing, the Receiver made distributions as authorized by the August 14<sup>th</sup> Order as follows:

- a) to Donald Dal Bianco in respect of Receiver's Certificates of \$293,694.55;
- b) to IMC of \$8,299,346.58; and
- c) to Donald Dal Bianco in respect of the second-ranking mortgage of \$5,002,656.45.

24. There remains a disputed portion of \$90,350.22 out of the amounts claimed by Donald Dal Bianco in connection with the second-ranking mortgage, which is claimed as a three month

default fee. The Receiver is reviewing the appropriateness of that claimed amount and intends to discuss it further with counsel for Donald Dal Bianco.

25. The Receiver collected HST from the Purchaser, because a portion of assets sold by the Receiver was not exempt from HST. The Receiver remitted HST to the Canada Revenue Agency in the amount of \$180,724.31 and completed the HST returns for the Receivership estate to date. A copy of the Notice of Assessment for the HST return of the Uptown for the month of September 2018 is attached hereto as **Appendix “H”**.
26. The Receiver assisted in all ancillary matters as it related to the completion of the transaction, and facilitating communication between the Purchaser and the relevant stakeholders.

#### **RECEIVERS INTERIM STATEMENT OF RECEIPTS AND DISBURSEMENTS**

27. Attached to this report as **Appendix “I”**, is the Receiver’s Interim Statement of Receipts and Disbursements for the period May 31, 2018 to February 6, 2019. During this period, receipts were \$20,327,575.31 while disbursements were \$14,870,341, resulting in an excess of cash receipts over disbursements of \$5,457,198.90.

#### **DIRECTIONS REGARDING THE THIRD RANKING MORTGAGE**

28. The Receiver has identified a number of possible issues related to the distribution of the remainder of the proceeds of sale of the Property.

#### **The secured creditors**

29. In order to discuss the distribution issues, a summary of the secured creditors of the Companies will assist, which is as follows:
  - a) IMC was holder of the first-ranking mortgage by virtue of postponement, which was registered on May 9, 2017 and which amounted to \$8,299,346.58;
  - b) Donald Dal Bianco was holder of the second ranking mortgage by virtue of postponement, which was registered on June 25, 2015 and which amounted to \$5,002,656.45;

- c) Donald Dal Bianco as holder of the third ranking mortgage by time of registration, which was registered on February 23, 2018, the principal amount of which is \$7,978,753.45;
- d) Kieswetter Excavating Inc. (“**Kieswetter**”) for a construction lien registered on March 7, 2018 in the amount of \$1,827,409;
- e) Deep Foundations Inc. (“**Deep**”) for a construction lien registered on March 14, 2018 in the amount of \$918,432;
- f) Onospace Limited (“**Onospace**”) for a construction lien registered on March 19, 2018 in the amount of \$68,580;
- g) Maxion for a construction lien registered on March 29, 2018 in the amount of \$4,522,597;
- h) EXP Services Inc. (“**EXP**”) for a construction lien registered on April 12, 2018 in the amount of \$336,654; and
- i) Maxion for a further construction lien registered on July 13, 2018 in the amount of \$560,283.

30. As noted above, the first-ranking mortgage of IMC and the second-ranking mortgage of Donald Dal Bianco have been paid, subject to the disputed three-month interest claim by Mr. Dal Bianco on the second-ranking mortgage as noted above.

31. Maxion has advised, by its counsel, that its lien claims include the claims of Kieswetter, Deep, Onospace and EXP. The total amount of the lien claims is therefore the sum of Maxion’s two lien claims, or \$5,082,880.

### **Possible issues for further distributions**

32. As noted above, the undistributed proceeds of sale of the Property is \$5,457,198.90.

33. The following are issues that the Receiver has identified may apply to the distribution of those amounts (less further costs of the estate):

- a) Construction holdback: The interests of lien claimants have priority over the interests of all mortgages for holdback for work done for the project at the Property under subsection 78(2) of the *Construction Act*. This holdback obligation has priority over IMC as the first-ranking mortgage, because that mortgage was partially intended for the purpose of financing construction, which then leads to priority of the holdback obligation over the second-ranking Donald Dal Bianco

mortgage by virtue of postponement and priority over the third-ranking Donald Dal Bianco mortgage by virtue of time of registration.

There is a dispute about the proper amount of the holdback obligation. Maxion asserts that this is \$2,377,918.60, based on what it says is the total amount of work done on the site since January/February of 2010.

The Receiver is uncertain whether the nature of the project and the work done, including periodic stops and changes, means that all work since 2010 was necessarily on the same project for purposes of calculating the holdback. Identifying whether all or a lesser amount of that work is the same project, and what is the value of that work, will be required to fully determine this issue.

- b) When work on this project started: Another impact of the uncertainty over when the work on this project started is that a possible limitation on the value of the payments to mortgagees arises in subsection 78(3) of the *Construction Act*. If that work started subsequently to the IMC mortgage, it would be necessary to determine whether the amounts owing under the second-ranking Donald Dal Bianco mortgage and the amounts owing for the non-construction parts of the IMC mortgage exceeded the value of the property when that work began.

This possible issue is factually incongruous with the holdback claims of Maxion, which are based on work having started in 2010, rather than after May 9, 2017 when the IMC mortgage was placed.

- c) Validity of lien claims: There are procedural requirements in the *Construction Act* for the prosecution of lien claims. The claims for lien have not yet been reviewed by the Receiver as to whether they have been registered on title and supported by a Statement of Claim within the requisite time periods, which is a pre-requisite for having a secured claim.
- d) Quantification of lien claims: The lien claims have also not been reviewed for whether the amounts claimed are properly supported. In that regard, the Receiver notes that it has been advised by Rob Dal Bianco, the principal of Deem Management, that it is his assertion that the claims of Maxion have been improperly inflated and that Maxion may in fact owe Deem Management a refund for amounts that were previously overpaid.
- e) Involvement of Paul Michelin in Maxion: The Receiver has determined that Mr. Michelin is undischarged from his second bankruptcy. Mr. Michelin is a principal actor at Maxion, and it is unclear whether he is a legal or *de facto* director of that company. If so, the consequences of being a director when disqualified from doing so under the *Business Corporations Act* require review.
- f) The third-ranking mortgage to Donald Dal Bianco: As will be discussed further below, the circumstances in which the third-ranking mortgage was granted lead to questions about its enforceability.

34. The Receiver believes that the first of those issues that should be addressed is item (f), the enforceability of the third-ranking mortgage. If that mortgage is not valid, the priority issues between the liens and the mortgages will fall away, because there will be sufficient funds to pay the liens in full even if their full amounts are owing.
35. Counsel for Donald Dal Bianco as well as counsel for all the lien claimants agree with this approach.
36. The Receiver has therefore examined the circumstances that may apply to whether the third-ranking mortgage granted to Donald Dal Bianco is valid, in order to seek direction from the Court on that issue. As noted above, the timing and method of how that mortgage was granted lead to questions about its enforceability.
37. In preparing this Third Report, the Receiver has discussed with the stakeholders that it would set out its review to-date of the relevant facts, after which the stakeholders may submit evidence, reply evidence to that of other stakeholders, and conduct any cross-examinations felt to be necessary. Following those further steps, the Receiver will provide a further report to attempt to provide further information and, if appropriate, recommendations regarding the issues raised.

### **The circumstances of the third-ranking mortgage**

#### *The third mortgage*

38. The third-ranking mortgage was granted by Deem Management to Don Dal Bianco on February 14, 2014 and registered on February 23, 2018 as instrument no. WR1099051, a copy of which is attached as **Appendix “J”**. It secured the principal amount of \$7,978,753.45, with interest of \$689,461.20 stated in the mortgage as having accrued between April 1, 2012 to January 26, 2018 at the rate of 5% per annum. Interest was stated as accruing at the rate of the prime rate of Toronto-Dominion Bank plus 2% per annum after January 26, 2018.

*The advances under the third mortgage*

39. Don Dal Bianco has advised the Receiver that amounts owing under this mortgage had been advanced between 2012 and 2015. A schedule of the advances as provided by Mr. Dal Bianco is attached as **Appendix “K”**.
40. The principal amount shown in that schedule of advances is \$7,718,944.47, which is different than the total secured in the mortgage of \$7,978,753.45.
41. Mr. Dal Bianco advised the Receiver that the reason for these advances was for loans to Deem Management for the development and construction project at the Property.
42. Mr. Dal Bianco advised that before February of 2018 there were no documents concerning this loan. The verbal arrangements between him and Deem Management were that the loan was payable on demand, and that Deem Management was the borrower.
43. Mr. Dal Bianco further advised that all of these advances were, to his knowledge, used by Deem Management for the project at the Real Property and to make payments to Maxion or entities affiliated with it or as it directed.

*Demand prior to the third mortgage*

44. The third mortgage was granted after Mr. Dal Bianco made demand on Deem Management in that regard by letter dated January 30, 2018 from his counsel, Peter Cass, a copy of which is attached as **Appendix “L”**. The demand was for \$9,765,538.94, which the Receiver was advised by Mr. Dal Bianco was the principal amount of \$7,978,753.45 plus interest of \$1,786,785.49.
45. The January 30, 2018 demand letter was emailed by Mr. Cass’ office to Rob Dal Bianco of Deem Management, as well as John Wolf of Blaney McMurtry LLP, who were counsel to Deem Management at that time. As noted above, Rob Dal Bianco is Mr. Dal Bianco’s son.
46. At the time that this demand was made, Mr. Dal Bianco appears to have been a director and officer of Deem Management. His counsel emailed counsel for Deem Management

on February 1, 2018 to advise that Mr. Dal Bianco was resigning those positions, a copy of which is attached as **Appendix “M”**.

47. Mr. Dal Bianco advises that prior to making formal demand through his counsel in the January 30, 2018 letter, he met with Rob Dal Bianco on behalf of Deem Management to indicate that he would be taking those steps. Mr. Dal Bianco advises that Rob Dal Bianco told him at that point that all construction on the project at the Real Property had stopped or would do so immediately.

*The third mortgage was granted as part of a forbearance agreement and arrangements*

48. The demand by Mr. Dal Bianco led to forbearance agreement discussions between counsel for Mr. Dal Bianco and counsel for Deem Management. Drafts of some of the proposed additional security documents were forwarded by counsel for Mr. Dal Bianco on February 5, 2018, a copy of which is attached as **Appendix “N”**. Counsel for Deem Management confirmed on February 6, 2018 that a forbearance arrangement was being sought and attached a draft agreement in that regard, a copy of which is attached as **Appendix “O”**.
49. The Receiver has been provided with a set of the correspondence between counsel for Mr. Dal Bianco and counsel for Deem Management leading up to the final forbearance agreement and associated documents. There were 15 further emails between counsel regarding the terms of the forbearance, which shows that several items were negotiated, including:
  - a) setting a fixed date of August 14, 2018 before which Mr. Dal Bianco would not be entitled to take enforcement steps in the absence of an event of default under the forbearance agreement;
  - b) reducing the rate of the interest that was to be payable on the principal amounts, with Mr. Dal Bianco having sought 8% per annum and Deem Management successfully bargaining for 5% per annum to January 26, 2018 and the TD bank prime rate plus 2% thereafter; and
  - c) as a result of (b), a reduction in the interest owing to January 26, 2018 from the amount claimed of \$1,786,785.49 to the \$689,461.20 stated in the third mortgage.
50. The final form of the forbearance agreement was signed on or about February 28, 2018 when it was sent by counsel for Deem Management to counsel for Mr. Dal Bianco by letter,

a copy of which is attached as **Appendix “P”**. That package also included the other security documents granted in favour of Mr. Dal Bianco under the forbearance arrangements, including:

- a) the third mortgage on the Real Property;
- b) a general security agreement from Deem Management;
- c) a guarantee from a separate company called Deem Management Limited (note that Deem Management’s full name is Deem Management Services Limited) for the obligations of Deem Management;
- d) a general security agreement from Deem Management Limited;
- e) an agreement amending a pre-existing charge granted by Deem Management Limited in favour of Mr. Dal Bianco over a different property located at 990 Edward Street in Prescott, Ontario for the obligations of Deem Management;
- f) a guarantee from The Uptown Inc. for the obligations of Deem Management;
- g) a general security agreement from The Uptown Inc.;
- h) a guarantee by Rob Dal Bianco (personally) for the obligations of Deem Management;
- i) a pledge by Rob Dal Bianco of shares owned in Deem Management and Deem Management Limited; and
- j) a loan agreement between Deem Management and Mr Dal Bianco dated as of Feb. 14, 2018 but effective as of April 1, 2012.

51. The Receiver has no information regarding the recovery, if any, that Mr. Dal Bianco has obtained in respect of the amounts secured by the third mortgage against the other collateral noted at items (b), (c), (d), (e), (h) or (i), above.

52. The Receiver notes that Blaney McMurtry LLP acted for Deem Management in the course of the forbearance negotiations and agreements, but has acted for Don Dal Bianco against Deem Management in the application that led to the Receiver’s appointment. The Receiver was advised that Deem Management retained separate counsel, Wagner Sidlofsky LLP, and consented to Blaney McMurtry LLP so acting.

*Deem Management's project at the Real Property*

53. The Receiver has inquired of Mr. Dal Bianco as to what he understood was the status of Deem Management's project at the Property at the time that the forbearance arrangements, including the third mortgage, were concluded.
54. Mr. Dal Bianco has advised that he was informed by Rob Dal Bianco on several occasions that Deem Management and Maxion, with whom it had a contractual relationship for the development of the property as contractor among other things, were pursuing a number of lending and equity injection opportunities.
55. Mr. Dal Bianco inquired of Rob Dal Bianco for particulars of those opportunities, and provided the Receiver with a set of 63 emails, text messages and documents exchanged among Deem Management, Maxion and various third party brokers, lenders, or equity advisors between December 6, 2016 and May 18, 2018. Some examples of these that are closer in time to the time when the forbearance agreement and third mortgage were entered into include:
  - a) an email from Paul Michelin of Maxion to Phil Reimer of Dentons Canada LLP on November 24, 2017 regarding an intended transaction with Lalu Canada, a copy of which is attached as **Appendix "Q"**;
  - b) an email from Paul Michelin of Maxion to Phil Reimer of Dentons Canada LLP on December 21, 2017 regarding a possible engagement of Envoy International Inc. a copy of which is attached as **Appendix "R"**;
  - c) an email exchange between Adam Patterson of Maxion and Michael Warner of Firm Capital dated January 19, 2018, a copy of which is attached as **Appendix "S"**;
  - d) emails among Adam Patterson of Maxion, Peter Murphy of Maxion, and Robb Cacovic of Bridging Finance Inc. regarding possible financing and data room dated January 23, 2018, a copy of which is attached as **Appendix "T"**;
  - e) an email from Paul Michelin of Maxion to Phil Reimer of Dentons on January 28, 2018 regarding a proposed engagement of Stroll Enterprises LLC, a copy of which is attached as **Appendix "U"**;
  - f) an email from Paul Michelin of Maxion to Rob Dal Bianco dated January 28, 2018 regarding potential transaction with Firm Capital, a copy of which is attached as **Appendix "V"**;

- g) an email from Adam Patterson of Maxion to Rob Dal Bianco on February 2, 2018 that Trez Capital had expressed interest in lending, a copy of which is attached as **Appendix “W”**;
- h) a letter of intent from Firm Capital Corporation dated February 12, 2018, a copy of which is attached as **Appendix “X”**;
- i) emails among Paul Michelin of Maxion, Adam Patterson of Maxion, and Eli Gutstadt dated March 16, 2018 regarding Up Town investment, a copy of which is attached as **Appendix “Y”**;
- j) email from Paul Michelin of Maxion to Phil Reimer of Dentons Canada LLP dated March 23, 2018 regarding Core developments consideration of investment, a copy of which is attached as **Appendix “Z”**;
- k) email from Adam Patterson of Maxion to Rob Dal Bianco dated April 6, 2018 regarding preferred debt and equity possible transactions, a copy of which is attached as **Appendix “AA”**;
- l) emails between Bosco Chan of Livesolar Capital and Paul Michelin of Maxion dated April 23, and 24, 2018 regarding a mortgage commitment, a copy of which is attached as **Appendix “BB”**; and
- m) an email from Paul Michelin to Rob Dal Bianco dated May 11, 2018 regarding a PricewaterhouseCoopers engagement and term sheet, a copy of which is attached as **Appendix “CC”**.

#### **Independent opinion as to validity of the third mortgage**

- 56. Counsel for the Receiver has provided an opinion regarding the validity of the third-ranking mortgage granted to Don Dal Bianco, which has concluded that, subject to the normal qualifications and assumptions, this mortgage would constitute a valid charge on subject Real Property of Deem Management in accordance with its terms. A copy of that opinion is attached as **Appendix “DD”**.
- 57. The applicability of those normal qualifications and assumptions in light of the facts noted in this Report is a matter for direction from the Court.

#### **PROFESSIONAL FEES**

- 58. Pursuant to the Receivership Order, the Receiver and its counsel, were granted a Receiver’s Charge against the Property as security for their fees and disbursements and were directed

to seek approval for such fees and disbursements. The Receiver and its counsel report on those fees to date and seek such approval.

**Fees of the Receiver- Crowe Soberman Inc. (“CSI”)**

59. From May 31, 2018 to January 31, 2019 the total fees incurred by CSI were \$215,667.00 plus HST in the amount of \$28,036.71 for a total of \$243,703.71.
60. Attached separately as part of the Receiver’s motion materials is the affidavit of Hans Rizarri sworn January 31, 2019, which includes a detailed summary of services, time charges and applicable hourly rates related to CSI’s detailed statements of account for the period May 31, 2018 to January 31, 2019.

**Fees of Counsel to the Receiver- Goldman, Sloan, Nash & Haber LLP (“GSNH”)**

61. From May 31, 2018 to January 31, 2019 the total fees incurred by GSNH were \$307,496.00 plus HST in the amount of \$40,272.81 for a total of \$350,647.10.
62. Attached separately as part of the Receiver’s motion materials is the affidavit of Brendan Bissell sworn February 8, 2019, which includes a detailed summary of services, time charges and applicable hourly rates related to GSNH’s detailed statements of account for the period May 31, 2018 to January 31, 2019.

All of which is respectfully submitted this 8<sup>th</sup> day of February, 2019

**Crowe Soberman Inc.  
in its capacity as Court-appointed  
Receiver of Deem Management Services Limited  
and The Uptown Inc., and not in its personal capacity**

  
per

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Per: Hans Rizarri CPA, CA, CIRP

## **TAB 9**

**Supplementary Report to the Third Report the Receiver  
dated October 30, 2019 (without appendices)**

File No. CV-18-598657-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondent

**SUPPLEMENTARY REPORT TO THE THIRD REPORT OF CROWE  
SOBERMAN INC. in its capacity as Court-appointed Receiver of DEEM  
MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

**DATED OCTOBER 30, 2019**

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## TABLE OF APPENDICES

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Appendix A	Copy of timetable leading up to July 17, 2019 for the delivery of evidence, reply materials, supplementary reports, factums, and examinations between all stakeholders
Appendix B	Copy of new timetable providing for a deadline for materials from the Companies as well as further evidence from Dal Bianco.
Appendix C	Copy of correspondence from counsel to the Receiver to counsel for Dal Bianco and Deem dated May 2, 2019
Appendix D	Copy of correspondence from counsel to the Receiver to counsel for Maxion dated June 11, 2019

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File No. CV-18-598657-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondent

**APPLICATION UNDER SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY  
ACT AND SECTION 101 OF THE COURTS OF JUSTICE ACT**

**FOURTH REPORT OF THE RECEIVER**

**OCTOBER 15, 2019**

**INTRODUCTION AND PURPOSE**

1. This report (the “**Supplementary Report**”) is filed by Crowe Soberman Inc. in its capacity as the Receiver of the Property of the Companies (as defined below) to supplement its Third Report dated February 9, 2019 (the “**Third Report**”).
2. The orders and reports referred to in this report, together with related Court documents, are posted on the Receiver’s website, which can be found at:

<https://crowesoberman.com/insolvency/engagements/deem-management-services-limited/>

3. This Supplementary Report is subject to the same Terms of Reference as those described in the Third Report.

## **BACKGROUND**

4. On May 31, 2018, pursuant to an order of the Honourable Mr. Justice Wilton-Siegel made on an application by Donald Dal Bianco (“**Dal Bianco**”), Crowe Soberman Inc. was appointed as Receiver (the “**Receiver**”) of:
  - a) the property known municipally as 215 and 219 Lexington Road, Waterloo, Ontario N2K 2E1 (the “**Real Property**”),
  - b) the assets and undertakings of Deem Management Services Limited (“**Deem Management**”) related to the Real Property, and
  - c) the property, assets and undertakings of the Uptown Inc. (“**Uptown**”, and together with Deem Management, the “**Companies**”).

(collectively, the “**Property**”)
5. A copy of Justice Wilton-Siegel’s Order dated May 31, 2018 is attached as Appendix “A” to the Third Report.
6. On February 8, 2019 the Receiver prepared its Third Report which reported on the closing of a transaction to sell the Property, the interim distributions made by the Receiver, the Receiver’s Interim Statement of Receipts and Disbursements, the professional fees of the Receiver and its legal counsel, and sought directions regarding the validity of a third-ranking mortgage granted by Deem to Dal Bianco on the Real Property.

## **ACTIVITIES SINCE THE THIRD REPORT**

7. Since the date of its appointment, the Receiver has continued to work alongside all stakeholders as it carries out its primary mandate regarding the Real Property. In addition, the activities of Receiver since the date of the Third Report have included:
  - a) opening bank accounts under the Receiver’s name and arranging for the balance of the sale proceeds to be held in an interest-bearing term deposit,
  - b) establishing new statutory accounts with the CRA and coordinating the completion of HST returns for the Companies,

- c) responding to inquiries from stakeholders, including addressing questions or concerns of parties who contacted the Receiver,
- d) requesting the books and records of the Companies,
- e) assisting the Purchaser with various requests,
- f) preparing this Supplementary Report, and
- g) attending to other matters pertaining to the administration of the receivership proceedings.

### **PROCEDURAL MATTERS SINCE THE THIRD REPORT**

8. Following the Receiver filing its Third Report, the Receiver consulted with counsel for the various parties and attended before the Honourable Justice McEwen on April 24, 2019 to establish a timetable for the delivery of evidence, reply materials, supplementary reports, factums, and examinations between all stakeholders. The parties agreed on a schedule leading up to a hearing date on July 17, 2019, a copy of which is attached as **Appendix “A”**.
9. Thereafter, the lien claimants provided evidence and adhered to the agreed upon timelines established by the consent timetable with respect to evidence of timeliness of liens. The Receiver’s review of the materials submitted indicates that at least some of the lien claims met the timeliness and validity requirements under the applicable provisions of the *Construction Act*. Since for the purpose of the motion regarding the validity of the third mortgage it was only necessary to conclude that there are other secured claims in competition with that mortgage, the Receiver has not reviewed the lien claims beyond that point.
10. Maxion also provided further records on the possible issue of its principal, Paul Michelin, being an undischarged bankrupt. Those records indicate that this does not appear to be the case.
11. On May 31, 2019, Maxion Management Services Inc. (“**Maxion**”) provided its own evidence and a Notice of Motion for an Order that the third-ranking Dal Bianco mortgage

is null and void, as it was granted without good or valid consideration and to defraud Maxion of its equitable ownership interests in the Real Property (the “**Maxion Motion**”).

12. Following the Maxion Motion, counsel for the Companies contacted the service list on June 13, 2019 to advise that it had not been advised, nor consulted on the timetable established, and wished to file responding materials and have the timetable altered to facilitate the involvement of the Companies.
13. Counsel for Dal Bianco also raised an issue that email correspondence that had been sent to the Receiver by Bryan Pilutti regarding his involvement in the Dal Bianco third mortgage should be admitted into evidence.
14. The parties re-attended before the Honourable Justice McEwen on June 21 and 28, 2019, which resulted in a new timetable being set, a copy of which is attached as **Appendix “B”**, which provided for a deadline for materials from the Companies as well as further evidence from Dal Bianco.
15. The parties attended before the Honourable Justice Hainey on October 18, 2019 to reschedule the hearing date for the Receiver’s motion to November 21, 2019.

## **MATERIALS FILED BY STAKEHOLDERS**

16. Below is a summary of the various materials that were filed by the stakeholders.

### **Lien Claimants**

17. By May 31, 2019, the Receiver had been provided materials by Maxion, Kieswetter Excavating Inc. (“**Kieswetter**”), EXP Services Inc. (“**EXP**”), Onospace Unlimited Inc. (“**Onospace**”), and Deep Foundations Contractors Inc. (“**Deep**”) (collectively the “**Lien Claimants**”). The Lien Claimants submitted their materials to support the timeliness of liens in order for the Receiver to confirm and quantify which claims would be considered as secured claims under the *Construction Act*. The materials provided included invoices, project log details, and time sheets. No materials were required to be in affidavit form, unless requested.

*Maxion Materials*

18. As part of the Maxion Motion, an Affidavit from Michelin sworn May 31, 2019 (the “**Michelin Affidavit**”) was included. The Michelin Affidavit stated that the amounts advanced by Dal Bianco, were never a loan, but instead payment for 7,852,043 preferred shares of the Uptown (the “**Preferred Shares**”). To support this point, the Michelin Affidavit included the financial statements of the Uptown for the years 2015 and 2016 that are said to reflect the issuance of the Preferred Shares.
19. The second argument advanced in the Michelin Affidavit centres on the ownership of the Real Property. Despite the fact that Deem owns title to the Real Property, the Michelin Affidavit states that Maxion is the equitable owner of 50% of the equity in the Project and the Real Property pursuant to an oral agreement.
20. Following the Michelin Affidavit, a second affidavit was filed to correct certain statements dated June 5, 2019 (the “**Correction Affidavit**”). Specifically, the Correction Affidavit sought to clarify the ownership argument by clarifying that Deem holds title to the Real property in trust for Uptown, and that Deem holds 50% of the common shares of Uptown in trust for Maxion, or its nominee.

*Bryan Pilutti Materials*

21. Bryan Pilutti (“**Pilutti**”) is the accountant for Dal Bianco and the Companies. He sought to clarify certain aspects of the financial statements of the Companies as described in the Michelin Affidavit. Various memos, emails, and notes made by Pilutti were distributed on June 21, 2019, (the “**Piliutti Materials**”). The Pilutti Materials appear to indicate that the Companies were wrestling with the various options as to how the amounts advanced by Dal Bianco to Deem should be treated. This was done in the context of attempting to secure construction financing from various third party lenders for the Project. Pilutti’s materials do not confirm that the Preferred Shares were ever issued.

*Responding Record of the Companies*

22. On July 31, 2019, the Companies provided their responding materials, including the Affidavit of Rob Dal Bianco sworn July 31, 2019 (the “**Rob Affidavit**”). The Rob Affidavit denies the ownership claims in the Michelin Affidavit, and comments that while various structures were discussed, nothing was ever formally agreed upon coupled with the challenges facing the Project.
23. The Rob Affidavit contains various emails and documents that were used to obtain construction financing, described as placeholder agreements. The Rob Affidavit also raises concerns about the accounting and use of funds by Maxion and how the Companies were billed.

*Affidavit of Reg Meechum*

24. Mr. Reg Meechum is a portfolio manager at Scotia Wealth and acts as the financial advisor to Dal Bianco. Mr Meechum swore an affidavit dated August 3, 2019 (the “**Meechum Affidavit**”). The Meechum Affidavit provides a response to the Michelin Affidavit where Mr. Meechum states that no Preferred Shares were ever issued or received by Dal Bianco.
25. Mr. Meechum further attests that he advised Dal Bianco to take steps to enforce on his debt based on factors other than the state of the Project, primarily estate planning.

*Michelin Reply Materials*

26. Michelin provided a reply affidavit sworn September 10, 2019 (the “**Michelin Responding Affidavit**”). The Michelin Responding Affidavit sought to refute the claims surrounding the ownership of the Real Property raised in the Rob Affidavit, the options surrounding the presentation of the Dal Bianco debt raised in the Pilutti Materials, and the denial of the issuance of Preferred Shares raised in the Meechum Affidavit.

## **ATTEMPTS BY THE RECEIVER TO SECURE THE COMPANIES' RECORDS**

27. In response to requests and information from stakeholders, the Receiver has attempted to secure certain corporate and financial records of the Companies, because those records appear to relate to matters in dispute among Maxion, the Companies, and Dal Bianco.
28. After being advised by counsel for Maxion that the corporate records of the Companies were in the possession of Dal Bianco or Deem, counsel for the Receiver wrote to counsel for Dal Bianco and Deem, respectively, on May 2, 2019, to request production of certain financial and corporate records, or information where such records could be found. A copy of that correspondence is attached as **Appendix "C"**.
29. The Receiver was thereafter advised by counsel for Dal Bianco and Deem that the corporate records were not in the possession of Dal Bianco or Deem, and that they had been in the possession of Richard Lardner as the previous accountant for the Companies and may thereafter have been given to Michelin. Counsel for the Receiver accordingly wrote to counsel for Maxion on June 11, 2019 to ask for production of those records, a copy of which is attached as **Appendix "D"**. The Receiver is unaware of any response to that request.

## **REVIEW OF THE STAKEHOLDERS' MATERIALS AND ISSUES ARISING FROM THEM**

30. The Receiver's review of the materials filed as well the issues that it believes are before the Court is set out in its factum.

All of which is respectfully submitted this 30<sup>th</sup> day of October, 2019

**Crowe Soberman Inc.  
in its capacity as Court-appointed  
Receiver of Deem Management Services Limited  
and The Uptown Inc., and not in its personal capacity**



Per: Hans Rizarri CPA, CA, CIRP

## **TAB 10**

**Factum of the Receiver dated October 30, 2019**  
(in respect of the Receiver's motion dated February 8, 2019)

Court File No.: CV-18-598657-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(COMMERCIAL LIST)

**DONALD DAL BIANCO**

Applicant  
- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondents

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act*  
and Section 101 of the *Courts of Justice Act*

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**FACTUM OF THE RECEIVER**  
(motion for directions regarding the third mortgage and other relief,  
returnable November 21, 2019)

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October 30, 2019

**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
TORONTO, ON M5G 1V2

**R. Brendan Bissell (LSO #: 40354V)**  
Tel: 416-597-6489  
Fax: 416-597-3370  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

Lawyers for Crowe Soberman Inc. as Receiver

**TO: THE SERVICE LIST**

## PART I – INTRODUCTION

1. This is a motion by the Receiver (as defined below) for advice and directions concerning the enforceability of a third ranking mortgage granted to the Applicant, Donald Dal Bianco (“**Dal Bianco**”). The stakeholders in this matter disagree on that matter and on various issues relating to it.
2. The motion also seeks approval of the Receiver’s Third Report and its fees and disbursements as well as those of its counsel to January 31, 2019. The Receiver is unaware of any objection to that relief.

## PART II – OVERVIEW

3. The third mortgage was granted by Deem Management Services Limited (“**Deem**”), which was the registered owner of property at 215 and 219 Lexington Road in Waterloo (the “**Real Property**”), on February 23, 2018 for the principal amount of \$7,978,753.45 (the “**Third Mortgage**”). The principal of Deem, Rob Dal Bianco, is the son of the Applicant, Dal Bianco.
4. The Third Mortgage was granted after Dal Bianco had made demand on Deem for amounts claimed to be owing for unsecured advances made between 2012 and 2015. The demand was resolved through a forbearance agreement between Deem and Dal Bianco, which called for the grant of the Third Mortgage (among other security) for the previously unsecured amounts. Part of the negotiations also resulted in a lower rate of interest than Dal Bianco had claimed, which then led to a reduction of more than \$1.1 million in the amounts owing.

5. Construction liens were registered against the Real Property starting on March 7, 2018 through April 12, 2018, which totaled \$4,522,597 being the claim by Maxion Management Services Inc. (“**Maxion**”). Maxion was the general contractor on the project at the Real Property and therefore included the amounts owing to subcontractors in its claim.
6. The receivership was later put in place by the Court on May 31, 2018. The Real Property and other assets related to the development were subsequently sold by the Receiver to a third party on August 31, 2018 after a sales process.
7. Net of payments for prior ranking charges and expenses, and before payment of ongoing expense, the Receiver now holds more than \$5.4 million in an interest-bearing account pending the determination of the competing claims to those proceeds.
8. Among the salient issues that arise is whether the Third Mortgage is valid and enforceable, which the Receiver believes is an issue that should be determined first so that the degree to which other issues need to be determined can be assessed. The Receiver therefore brings this motion for directions and the stakeholders are making arguments on that issue.
9. The Receiver also understands that Maxion may make arguments about whether Dal Bianco was owed anything for what the Third Mortgage secured or whether those amounts were instead equity, as well as whether the manner of advance and registration of the Third Mortgage results in a total loss of priority under the provisions of the *Construction Act* as against the liens.

## PART III – FACTS

### A. The parties

10. Deem was the registered owner of the Real Property. The other debtor, The Uptown Inc. (“Uptown”), was involved in the planned development of the Real Property as a seniors’ residence.

Third Report of the Receiver dated February 8, 2019 (the “**Third Report**”), para. 5; Receiver’s Motion Record, Tab 2, page 14.

11. Rob Dal Bianco is the registered owner of both Deem and Uptown. He is the son of Dal Bianco.

Third Report, para. 5(d); Receiver’s Motion Record, Tab 2, page 14.

12. As of the appointment of the Receiver, a summary of the secured creditors of Deem and the Uptown was as follows:

- a. Institutional Mortgage Capital Canada Inc. (“**IMC**”) was holder of the first-ranking mortgage by virtue of postponement, which was registered on May 9, 2017 and which amounted to \$8,299,346.58;
- b. Dal Bianco was holder of the second ranking mortgage by virtue of postponement, which was registered on June 25, 2015 and which amounted to \$5,002,656.45;
- c. Dal Bianco was holder of the Third Mortgage, which held that priority by time of registration, and which was registered on February 23, 2018, in the principal amount of \$7,978,753.45;
- d. Kieswetter Excavating Inc. (“**Kieswetter**”) for a construction lien registered on March 7, 2018 in the amount of \$1,827,409;

- e. Deep Foundations Inc. (“**Deep**”) for a construction lien registered on March 14, 2018 in the amount of \$918,432;
- f. Onespacel Limited (“**Onespacel**”) for a construction lien registered on March 19, 2018 in the amount of \$68,580;
- g. Maxion for a construction lien registered on March 29, 2018 in the amount of \$4,522,597;
- h. EXP Services Inc. (“**EXP**”) for a construction lien registered on April 12, 2018 in the amount of \$336,654; and
- i. Maxion for a further construction lien registered on July 13, 2018 in the amount of \$560,283.

Third Report, para. 29; Receiver’s Motion Record, Tab 2, pages 19-20.

13. Maxion’s first claim for lien includes the amounts sought by Kieswetter, Deep, Onespacel and EXP. The total amount of lien claims is therefore the sum of Maxion’s two lien claims, or \$5,082,880.

Third Report, para. 29; Receiver’s Motion Record, Tab 2, pages 19-20.

## **B. The prior proceedings in the Receivership**

14. The Receiver conducted a sales process and ultimately sold the Real Property and related development assets to a third party.

Third Report, para. 22; Receiver’s Motion Record, Tab 2, page 18.

15. As a result of a prior order permitting interim distributions, the IMC mortgage and the second-ranking mortgage to Dal Bianco were repaid after closing, although there remains

a small amount of interest (\$90,350.22) claimed by Dal Bianco under the second mortgage that the Receiver has not yet accepted and therefore may remain in dispute.

Third Report, paras. 23-24; Receiver's Motion Record, Tab 2, pages 18-19.

16. The Receiver held \$5,457,198.90 as of the date of the Third Report. Those funds are being held by the Receiver in an interest-bearing trust account, so they have increased somewhat since that time. There are also ongoing costs of the Receiver and its counsel that have not yet been paid.

### **C. Issues with further distributions**

17. The following are issues that the Receiver identified in the Third Report that may apply to the distribution of those amounts (less further costs of the estate):

- a. Construction holdback: The interests of lien claimants have priority over the interests of all mortgages for holdback for work done for the project at the Property under subsection 78(2) of the *Construction Act*. This holdback obligation has priority over IMC as the first-ranking mortgage, because that mortgage was partially intended for the purpose of financing construction, which then leads to priority of the holdback obligation over the second-ranking Donald Dal Bianco mortgage by virtue of postponement and priority over the third-ranking Donald Dal Bianco mortgage by virtue of time of registration.

There is a dispute about the proper amount of the holdback obligation. Maxion asserts that this is \$2,377,918.60, based on what it says is the total amount of work done on the site since January/February of 2010.

The Receiver is uncertain whether the nature of the project and the work done, including periodic stops and changes, means that all work since 2010 was necessarily on the same project for purposes of calculating the holdback. Identifying

whether all or a lesser amount of that work is the same project, and what is the value of that work, will be required to fully determine this issue.

- b. When work on this project started: Another impact of the uncertainty over when the work on this project started is that a possible limitation on the value of the payments to mortgagees arises in subsection 78(3) of the *Construction Act*. If that work started subsequently to the IMC mortgage, it would be necessary to determine whether the amounts owing under the second-ranking Donald Dal Bianco mortgage and the amounts owing for the non-construction parts of the IMC mortgage exceeded the value of the property when that work began.

This possible issue is factually incongruous with the holdback claims of Maxion, which are based on work having started in 2010, rather than after May 9, 2017 when the IMC mortgage was placed.

- c. Quantification of lien claims: The lien claims have also not been reviewed for whether the amounts claimed are properly supported. In that regard, the Receiver notes that it has been advised by Rob Dal Bianco, the principal of Deem Management, that it is his assertion that the claims of Maxion have been improperly inflated and that Maxion may in fact owe Deem Management a refund for amounts that were previously overpaid.
- d. The Third Mortgage: As will be discussed further below, the circumstances in which the third-ranking mortgage was granted lead to questions about its enforceability.

Third Report, para. 33; Receiver's Motion Record, Tab 2, pages 20-21.

- 18. The Receiver believes that the first of those issues that should be addressed is item (d), the enforceability of the Third Mortgage. If that mortgage is not valid, the priority issues

between the liens and the mortgages will fall away, because there will likely be sufficient funds to pay the liens in full even if their full amounts are owing.

Third Report, para. 34; Receiver's Motion Record, Tab 2, page 22.

19. Counsel for Donald Dal Bianco as well as counsel for all the lien claimants agree with this approach.

Third Report, para. 35; Receiver's Motion Record, Tab 2, page 22.

20. The Receiver had earlier noted two other possible issues. One concerned the validity of the lien claims in terms of their compliance with the formalities required for liens, but since the Third Report the lien claimants have provided some evidence of timeliness of their liens, such that the Receiver now concludes that at least some liens are timely. Since for purposes of this motion it is only necessary to show that there is another competing secured claim with the Third Mortgage, the Receiver has not reviewed that issue further. Another concerned evidence that had suggested that the principal of Maxion was an undischarged bankrupt, but documents provided to the Receiver subsequently by Maxion indicate that appears not to be the case.

Supplementary Report to the Third Report (the "Supplementary Report"), paras. 9-10; Receiver's Supplementary Motion Record, Tab 1, page

#### **D. The Third Mortgage**

21. The Third Mortgage was granted by Deem to Dal Bianco on February 14, 2014 and registered on February 23, 2018. It secured the principal amount of \$7,978,753.45, with interest of \$689,461.20 stated in the mortgage as having accrued between April 1, 2012 to

January 26, 2018 at the rate of 5% per annum. Interest was stated as accruing at the rate of the prime rate of Toronto-Dominion Bank plus 2% per annum after January 26, 2018.

Third Report, para. 38; Receiver's Motion Record, Tab 2, page 22.

22. Dal Bianco advised that the amounts secured by the Third Mortgage had been advanced between 2012 and 2015 and were for the purpose of the development at the Real Property including making payments to Maxion or as it directed. He further advised that there were no documents for that loan before February of 2018, and that it was a verbal agreement with Deem for a loan payable on demand.

Third Report, paras. 39-43; Receiver's Motion Record, Tab 2, page 23.

23. The Third Mortgage was granted after Dal Bianco made demand on Deem in that regard by letter dated January 30, 2018 from his counsel. The demand was for \$9,765,538.94, which the Receiver was advised by Dal Bianco was the principal amount of \$7,978,753.45 plus interest of \$1,786,785.49.

Third Report, para. 44; Receiver's Motion Record, Tab 2, page 23.

24. At the time that this demand was made, Dal Bianco appears to have been a director and officer of Deem. His counsel emailed counsel for Deem on February 1, 2018 to advise that Dal Bianco was resigning those positions.

Third Report, para. 46; Receiver's Motion Record, Tab 2, pages 23-24.

25. The demand by Dal Bianco led to forbearance agreement discussions between counsel for Dal Bianco and counsel for Deem. Those discussions resulted in a forbearance agreement and negotiated terms that included:

- a. setting a fixed date of August 14, 2018 before which Mr. Dal Bianco would not be entitled to take enforcement steps in the absence of an event of default under the forbearance agreement;
- b. reducing the rate of the interest that was to be payable on the principal amounts, with Mr. Dal Bianco having sought 8% per annum and Deem Management successfully bargaining for 5% per annum to January 26, 2018 and the TD bank prime rate plus 2% thereafter; and
- c. as a result of (b), a reduction in the interest owing to January 26, 2018 from the amount claimed of \$1,786,785.49 to the \$689,461.20 stated in the third mortgage.

Third Report, paras. 48-49; Receiver's Motion Record, Tab 2, page 24.

26. At the time that the forbearance agreement and Third Mortgage were entered into, Deem had been engaged in several discussions between November of 2017 and May of 2018 with possible lenders or equity participants about whether loans or capital for construction of the planned project could be available. Ultimately none of those came to fruition.

Third Report, paras. 53-55; Receiver's Motion Record, Tab 2, pages 26-27.

#### **E. The involvement of Dal Bianco and Maxion in the project**

27. Since the filing of the Receiver's Third Report, several of the parties have filed affidavits on a number of issues. There have not been cross-examinations on any of those affidavits.

28. Some of the affidavits raise issues of whether Maxion had an interest in the project beyond being general contractor. Maxion's affiant asserts that Deem held the Real Property in

Trust for Uptown, and that Deem held 50% of the shares in Uptown in trust for Maxion Group Inc. under a verbal agreement. Deem's affiant asserts that those were either "placeholder arrangements" or were subject to terms not met.

Affidavit of Rob Dal Bianco affirmed July 31, 2019, para. 13, 15 and 17; Responding Motion Record of Deem, tab 1.

Affidavits of Paul Michelin sworn May 31, 2019 paras. 5, 10 and June 5, 2019 para. 4.

29. Some of the affidavits also raise issues of whether the amounts claimed by Dal Bianco as loans secured by the Third Mortgage were in fact equity in the project, perhaps in the form of preference shares. Maxion's affiant asserts that is the case. Deem's affiant says that a conversion of that debt to equity had been discussed for purposes of presentation to third party investors or lenders, but was never completed, which is echoed in affidavits filed by Dal Bianco's accountant and financial advisor.

Affidavit of Paul Michelin sworn May 31, 2019 paras. 4, 7 and 13.

Affidavit of Rob Dal Bianco affirmed July 31, 2019, paras. 23 and 25; Responding Motion Record of Deem, tab 1.

Affidavit of Reg Meechum sworn August 6, 2019, para. 7.

Affidavit of Bryan Pilutti sworn August 4, 2019, paras. 2 and 7.

30. On the issue of Dal Bianco's position relative to Deem, the Receiver has made demand on both Dal Bianco and Deem on the one hand, and on Maxion on the other, for certain books and records of Deem and Uptown, including both the corporate minute books and a series of financial statements. Dal Bianco and Deem responded to advise that the corporate minute books were not in their possession and were believed to have been in the possession

of a prior accountant and subsequently with Maxion. Maxion has not responded to the Receiver's demand.

Supplementary Report, paras. 26-28; Receiver's Supplementary Motion Record, Tab 1, page 11.

31. Dal Bianco's financial advisor further says that he advised Dal Bianco to make demand on the loans in January of 2018 for reasons pertaining to estate planning and not in relation to the financial position of Deem or Uptown. Dal Bianco's affidavit in support of the original application indicated that he was concerned about being repaid as of the Fall of 2017.

Affidavit of Reg Meechum sworn August 6, 2019, para. 8.

Affidavit of Don Dal Bianco sworn May 27, 2018, para. 29.

#### **PART IV – ISSUES AND THE LAW**

32. There are two main issues in this motion:
  - A. whether the Receiver's Third Report and the fees and disbursements of the Receiver and its counsel should be approved; and
  - B. whether the Third Mortgage is valid and enforceable.

**A. Should the Receiver's Third Report and the fees and disbursements of the Receiver and its counsel be approved?**
33. On the issues of the Third Report and fee approval, there is no known objection on either issue. The Receiver therefore seeks that relief on the basis that it has reported to the Court and the stakeholders on its activities and has disclosed the basis for the fee claims in detail through affidavits in the usual form.

**B. Is the Third Mortgage valid and enforceable?**

34. The issue of the validity of the Third Mortgage appears to in turn involve a number of sub-issues, as follows:

- i. is the grant of security in the Third Mortgage reviewable?
- ii. is there any debt secured by the Third Mortgage, or is Dal Bianco's claim one of an equity position?
- iii. does the Third Mortgage lose priority to the lien claimants as a result of the terms of the *Construction Act*?

35. The Receiver will attempt to highlight the issues and evidence that the Court may wish to consider on these issues in the following sections. The stakeholders are likely to augment the Receiver's commentary with argument for and against the results that they seek.

**i. Is the grant of security in the Third Mortgage reviewable?**

36. The issue here is whether the timing of the grant of the Third Mortgage may engage legislation that gives the Court authority to declare it of no force and effect.

37. Neither Deem nor Uptown have yet been adjudged a bankrupt, so any consideration of these issues will involve provincial legislation rather than the *Bankruptcy and Insolvency Act*.

38. The provincial legislation to consider is the *Fraudulent Conveyances Act* (the “FCA”) and the *Assignments and Preferences Act* (the “APA”).

39. Section 2 of the FCA provides that any conveyance of real property made with an intent to

defeat, hinder, delay or defraud is void. “Conveyance” is defined in s. 1 of the FCA to include a charge on, encumbrance of, and limitation of use of real or personal property, which therefore captures a mortgage.

40. Section 4 of the APA is similar but adds an insolvency condition. It provides that any conveyance of real or personal property made by a person insolvent, unable to pay its debts in full or knowingly “on the eve” of insolvency, is void if made either (i) with an intent to defeat, hinder, delay or prejudice creditors or (ii) with an intent to give an unjust preference.
41. Established case law is clear that the FCA and the APA should be interpreted liberally.

*Royal Bank v North American Life Assurance Company et al.*, [\[1996\] 1 S.C.R. 325](#), Tab 1 of the Receiver’s Brief of Authorities (the “**Receiver’s Brief**”), at 365.

42. The Court of Appeal held that FCA s. 2’s intent “to defeat, hinder, delay or defraud” and APA s. 4’s intent “to defeat, hinder, delay or prejudice [or] to give... an unjust preference” are equivalent and analyzed in the same manner.

*Montor Business Corporation v Goldfinger*, [2016 ONCA 406](#) (“**Montor**”), Tab 2 of the Receiver’s Brief, paras. 82 and 87.

43. Courts have interpreted the APA such that both the conveying party and the conveyed party must be proven to have had a fraudulent intent.

*Central Guaranty Trust Co. v Bruncor Leasing Inc.*, [1992 CanLII 8609 \(ON SC\)](#), Tab 3 of the Receiver’s Brief, paras. 15-17;

*Krates v Crate*, [2018 ONSC 2399](#) (“**Krates**”), Tab 4 of the Receiver’s Brief, para. 38;

*633746 Ontario Inc. (Trustee of) v Salvati*, [1990 CanLII 6740 \(ON SC\)](#), Tab 5 of the Receiver’s Brief, p. 24.

44. Proof of intent by inference is possible, but the normal proof on a balance of probabilities must be satisfied. As to proof by inference, the Courts have recognized the following “badges of fraud”, i.e. “suspicious facts or circumstances [that] are evidentiary indicators of fraudulent intent”:

- a. the conveyor has few remaining assets after the transfer;
- b. the conveyance was to a non-arm’s length person;
- c. the conveyor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking (indeed, insolvency or being knowingly “on the eve” of insolvency is a requirement of APA s. 4 itself);
- d. the consideration for the conveyance was grossly inadequate;
- e. the conveyor remained in possession of the property for his own use after the conveyance;
- f. the agreement contained a self-serving and unusual provision;
- g. the conveyance was secret;
- h. the conveyance was effected with unusual haste; and
- i. the conveyance was made in the face of an outstanding judgment against the debtor.

*Conte v Farber et als.*, [2002 CanLII 20177 \(ON SC\)](#), Tab 6 of the Receiver’s Brief, paras. 21, 43 and 46;

*Krates*, Tab 4 of the Brief, para. 35;

*Montor*, Tab 2 of the Brief, para. 73;

*Prodigy Graphics Group Inc. v Fitz-Andrews*, [\[2000\] O.J. No. 1203 \(ON SC\)](#), Tab 7 of the Receiver’s Brief, paras. 152-153;

*XDG Limited v 1099606 Ontario Ltd. et al.*, [2002 CanLII 22043 \(ON SC\)](#), Tab 8 of the Receiver’s Brief, paras. 63-64;

*Mutual Trust Co v Stornelli et al., XLO Investments Ltd. v Hurontario Management Services at al., 1996 CanLII 8122 (ON SC)*, Tab 9 of the Receiver's Brief, paras. 45-47 and 53.

45. Consideration of the evidence of Rob Dal Bianco on behalf of Deem as to the state of Deem's ability to pay and perceived future prospects will likely affect the issues of whether Deem was insolvent or on the eve of being so as well as whether Deem had the requisite intent under the FCA or the APA.
46. Consideration of the evidence of Dal Bianco, his financial advisor and his accountant will likely affect the issue of whether Dal Bianco also had the requisite intent under the FCA or the APA.

**ii. Is there any debt secured by the Third Mortgage, or is Dal Bianco's claim one of an equity position?**

47. This appears to be a largely factual issue.
48. The Receiver notes that the parties have not chosen to conduct cross-examinations on affidavits that appear, on their face, to contradict each other on the issue of whether Dal Bianco had agreed to take a preference share position in Uptown or Deem for the amounts claimed to be owing under the Third Mortgage. In the absence of the corporate minute books for Deem or Uptown, the Receiver has been unable to determine whether the corporate records of either company were ever altered to so indicate.

iii. **Does the Third Mortgage lose priority to the lien claimants as a result of the terms of the *Construction Act*?**

49. As the Receiver understands it, Maxion intends to argue (among other things) that the facts of when the Third Mortgage was advanced and when it was registered will mean that it has no priority as against the lien claimants as a result of the terms of the *Construction Act*.

50. The argument may be that s. 78 of the *Construction Act* sets out the priorities as between registered mortgages and liens. That section commences as follows:

**Priority over mortgages, etc.**

**78 (1)** Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

51. That section then goes on to prescribe the priorities for:

- a. a building mortgage (subs. 2),
- b. a mortgage registered before the first work was done (or the first lien arose) as well as advanced before that time (subs. 3);
- c. a mortgage registered before but advanced after the first work was done (subs. 4); and
- d. a mortgage registered after the first work was done, subject to a lien being registered or the lender being notified of one (subss. 5 and 6).

52. The argument may therefore be that since the Third Mortgage was registered after the first work was done on the Real Property, but the advances were made in 2012-2015 before that

time, this does not meet any of the subsections after subs. 78(1) of the *Construction Act*, with the result that the general priority for lien claimants in subs. 78(1) would apply.

53. There may be several issues to consider with such an argument:

- a. the provisions of subss. 78(2), (5) and (6) do not refer to time of advance, and instead are solely dealing with a building mortgage in the case of subs. (2) and mortgages registered subsequent to the first work in subss. (5) and (6), and the Third Mortgage might meet those criteria; and
- b. if s. 78 of the *Construction Act* might mean that a mortgage registered subsequently to first work but for advances made before first work has no priority against lien claimants, the basis for Maxion's lien claim is that it started work in 2010, which if true would mean that the Third Mortgage was for advances also made subsequently to first work (albeit before registration).

#### **PART V – ORDER REQUESTED**

54. The Receiver accordingly seeks

- a. an order approving the Third Report, the Supplementary Report, and the fees and expenses of the Receiver and of its counsel, and
- b. directions regarding the enforceability of the Third Mortgage.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2019.**



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R. Brendan Bissell  
counsel for the Receiver

**SCHEDULE A**  
**LIST OF AUTHORITIES**

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*633746 Ontario Inc. (Trustee of) v Salvati*, [1990 CanLII 6740 \(ON SC\)](#)

*Central Guaranty Trust Co. v Bruncor Leasing Inc.*, [1992 CanLII 8609 \(ON SC\)](#)

*Conte v Farber et als.*, [2002 CanLII 20177 \(ON SC\)](#)

*Krates v Crate*, [2018 ONSC 2399](#)

*Montor Business Corporation v Goldfinger*, [2016 ONCA 406](#)

*Mutual Trust Co v Stornelli et al.*, *XLO Investments Ltd. v Hurontario Management Services at al.*, [1996 CanLII 8122 \(ON SC\)](#)

*Prodigy Graphics Group Inc. v Fitz-Andrews*, [\[2000\] O.J. No. 1203 \(ON SC\)](#)

*Royal Bank v North American Life Assurance Company et al.*, [\[1996\] 1 S.C.R. 325](#)

*XDG Limited v 1099606 Ontario Ltd. et al.*, [2002 CanLII 22043 \(ON SC\)](#)

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**SCHEDULE B**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

➤ *Construction Act, R.S.O. 1990, c. C.30 as amended*

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**Priority over mortgages, etc.**

**78 (1)** Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

**Building mortgage**

**(2)** Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

**Prior mortgages, prior advances**

**(3)** Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

**(a)** the actual value of the premises at the time when the first lien arose; and

**(b)** the total of all amounts that prior to that time were,

**(i)** advanced in the case of a mortgage, and

**(ii)** advanced or secured in the case of a conveyance or other agreement.

**Prior mortgages, subsequent advances**

**(4)** Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

**(a)** at the time when the advance was made, there was a preserved or perfected lien against the premises; or

**(b)** prior to the time when the advance was made, the person making the advance had received written notice of a lien.

**Special priority against subsequent mortgages**

**(5)** Where a mortgage affecting the owner's interest in the premises is registered after the time

when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

#### **General priority against subsequent mortgages**

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

#### **Advances to trustee under Part IX**

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

#### **Where postponement**

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

- (a) the postponed lien; and
- (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

#### **Saving**

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

#### **Financial guarantee bond**

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of

the liens created by subsections (2) and (5) where,

- (a) a bond of an insurer licensed under the Insurance Act to write surety and fidelity insurance; or
- (b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

### **Home buyer's mortgage**

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

➤ *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29

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### **Definitions**

1. In this Act,

“conveyance” includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise; (“cession”)

“personal property” includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein; (“*biens meubles*”)

“real property” includes lands, tenements, hereditaments and any estate or interest therein. (“*biens immeubles*”)

### **Where conveyances void as against creditors**

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

➤ *Assignments and Preferences Act*, R.S.O. 1990, c. A.33

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### **Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors**

4 (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person

knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

### **Unjust preferences**

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

### **When there is presumption of intention if transaction has effect of unjust preference**

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

### **Idem**

(4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of the creditors, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

### **“Creditor” for certain purposes to include surety and endorser**

(5) The word “creditor” when used in the singular in subsections (2), (3) and (4) includes any surety and the endorser of any promissory note or bill of exchange who would upon paying the debt, promissory note or bill of exchange, in respect of which the suretyship was entered into or the endorsement was given, become a creditor of the person giving the preference within the meaning of those subsections.

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**DONALD DAL BIANCO**

and

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Applicant

Respondents

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST  
Proceeding commenced TORONTO**

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**FACTUM OF THE RECEIVER**  
(motion for directions regarding the third mortgage  
and other relief, returnable November 21, 2019)

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**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto ON M5G 1V2  
Fax: 416-597-3370

**R. Brendan Bissell (LSUC No. 40354V)**  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

Lawyers for the Receiver, Crowe Soberman Inc.

## **TAB 11**

**Endorsement of Mr. Justice Penny dated November 21, 2019**  
(case management – acknowledgement re: cross-examinations)

Court File No.: CV-18-598657-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**DONALD DAL BIANCO**

Applicant

- and -

**DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.**

Respondents

**APPLICATION UNDER** Section 243(1) of the *Bankruptcy and Insolvency Act*  
and Section 101 of the *Courts of Justice Act*

**ENDORSEMENT OF JUSTICE PENNY**  
**DATED NOVEMBER 21, 2019 (UNOFFICIAL TYPED VERSION)**

At the outset of what was to be a full day of argument on the validity of a mortgage, both I and counsel raised issue about whether the matter could be resolved without some *viva voce* evidence.

It appears there are going to be some credibility issues around parties' knowledge and interest relating to improvements on the project and the reason for and timing of the mortgage.

Parties shall conduct cross-examinations of the affidavits to highlight the specific issues around which there are material disputes about the facts. This shall be completed by January 15, 2020.

There shall be a 1 hour case conference before a judge of the Commercial List to resolve the issues on which there needs to be a trial and any other matters required to be resolved. This shall take place on January 29, 2020.

In anticipation of a three day mini trial I have asked the Commercial List office to tentatively reserve three days, March 30 to April 2, 2020 for this trial.

This is with the expectation that by January 29, the parties will commit finally to the hearing proceeding on those days.

For purposes of s. 37 of the *Construction Act* all perfected liens are deemed to have been set down for trial.

Penny .J.

**DONALD DAL BIANCO**

and

Applicant

**DEEM MANAGEMENT SERVICES LIMITED and THE  
UPTOWN INC.**

Respondents

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST  
Proceeding commenced TORONTO**

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**ENDORSEMENT OF JUSTICE PENNY  
DATED NOVEMBER 21, 2019  
(UNOFFICIAL TYPED VERSION)**

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**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto ON M5G 1V2  
Fax: 416-597-3370

**R. Brendan Bissell (LSUC No. 40354V)**  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

Lawyers for the Receiver, Crowe Soberman Inc.

## **TAB 12**

**Endorsement of Mr. Justice Hainey dated January 29, 2020**  
(setting down a hearing re: section 78)

COUNSEL SLIP

## COURT FILE

NO.: CV-18-00598657-00CLDATE: JAN 29, 2020

NO. ON LIST

①

TITLE OF  
PROCEEDING

BIANCO v. DEEM MANAGEMENT et al.

COUNSEL FOR:

PLAINTIFF(S)  
 APPLICANT(S)  
 PETITIONER(S)

R.B. Bissell & J. Turgeon (student)  
for the ReceiverPHONE 416-597-9922  
FAX 416-597-3870  
EMAIL bissell@gsuh.com  
turgeon@gsuh.comCOUNSEL FOR:

DEFENDANT(S)  
 RESPONDENT(S)

B. Phillips - counsel for Deem

PHONE 416-366-3153  
FAX 416-369-6575  
EMAIL \_\_\_\_\_JUDICIAL NOTES:

Harold Rosenberg  
 Counsel for Deep Foundation ph: 416-630-7151  
 Lien Clément fax: 416-630-7472  
 e: harold.rosenberg@bottstarklaw.com

ERIC Gionet  
 construction / in Counsel 705-792-7963  
 for MAXON 705-792-7964  
 egionet@dlaw.ca

D. Ullmann for Don Del Bianco 416 596-4289  
 416 593-2437

January 29, 2020

Section 78 hearing  
 scheduled for  $\frac{1}{2}$  day  
 on March 6, 2020.

Court - accommodations  
preference issue to  
be conducted during  
the 1st two weeks  
in April

3-day hearing on  
preference issue

Scheduled on June 15, 16, 17.

The Novel 30 - April 2  
dates are vacated.

Harry J.

**DONALD DAL BIANCO, Appellant (Applicant), and DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC., Respondents (Respondents)**

**Court of Appeal File No. C68214**  
Commercial List Court File No.: CV-18-598657-00CL

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**COURT OF APPEAL FOR ONTARIO**

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**RECEIVER'S MOTION RECORD**  
(re: directions on jurisdiction and venue)

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**GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto (ON) M5G 1V2

**R. Brendan Bissell** (LSO# 40354V)  
Tel: 416-597-6489  
Email: [bissell@gsnh.com](mailto:bissell@gsnh.com)

**Joël Turgeon (Member of the Bar of Quebec;  
Ontario Student-at-Law)**

Lawyers for Crowe Soberman Inc., in its capacity  
as Receiver