

**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*

FACTUM OF THE RECEIVER

(motion for directions regarding the third mortgage and other relief,
returnable November 21, 2019)

October 30, 2019

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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. Onespace Limited (“**Onespace**”) 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, Onespace 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 conveyer has few remaining assets after the transfer;
- b. the conveyance was to a non-arm’s length person;
- c. the conveyer 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 conveyer 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.



R. Brendan Bissell
counsel for the Receiver

**SCHEDULE A
LIST OF AUTHORITIES**

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 \(ON SC\)](#)

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

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

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

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.

DONALD DAL BIANCO

and

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

Applicant

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced TORONTO

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

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