

Feb. 27, 2009

Court File No. 07-CL-7109

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended
AND IN THE MATTER OF the Plan of Compromise and Arrangement of SAPPHIRE TOWER DEVELOPMENT CORP.

Mr. Dowdall and Mr. Williams p 1

Mr. Dowdall for the Monitor and Interim Receiver;

*Mr Page for the Plaintiff Creditors;
Mr Chow for Jay Rayan and Usha Rayan
the Respondents. The Respondents claim
an equitable lien against the lands previously
owned by STDC and therefore against the
proceeds of sale of those lands as a result
of which they assert that they have the status
of secured creditors of STDC in respect of
the money owed by them towards their
purchase pursuant to their agreement of
purchase and sale dated Feb 4, 2005/4. "APC"
Under para 1 of the APS the Respondents agreed
to purchase a designated unit... together
with an undivided interest in the common
elements... as set out in the declaration.
The project never got to the stage of
there being a declaration*

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

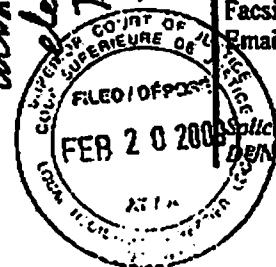
Proceedings Commenced at Toronto

MOTION RECORD

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Solicitors for the Monitor and Interim Receiver, BDO
DENWOODY LIMITED



the "Unit" is defined in the APS as "the unit being purchased herein as set out on page 1 hereof together with an undivided interest in the common elements in the percentage to be allocated to the unit in Schedule 'D' to the Declaration ..."

The intended building was never built. There is no Unit as such (ie ^{with} ^{out} reference to the common elements). With respect to the common elements, all that exists is the land on which the building was to have been built. The land cannot be said to be "common elements" for purposes of the definition of Unit and therefore for the APS because there has been no determination, as contemplated by the definition of Unit of the "common elements in the percentage to be allocated to the unit in Schedule 'D' of the Declaration". Paragraph 51 of the APS provides that the Purchaser does not have any interest in the Unit prior to the Unit Transfer Date and the payment of the balance of the purchase price due on said Unit Transfer Date. It was implicit in the submissions that the Unit Transfer Date as defined in the APS never occurred. To put the matter in simple terms, the

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The Respondents agreed to purchase property in the nature of a condominium unit, including the interest in real property to which was to be part of or associated with the unit when that unit came into existence through the completion of the condominium project, including the allocation of percentages in the common elements to the units at that time. The Respondents, by para 51, had no interest in the Unit, i.e. including its associated percentage of the common elements until the Unit Transfer Date, which did not occur. The specific property the Respondent purchased agreed to purchase did not come into existence and they agreed they had no interest in the Unit until the Unit Transfer Date. It is common ground that the equitable lien is a lien against lands that are the subject of purchase. Here the lands that were to be the subject of purchase, i.e. the percentage allocated to the Unit had not been determined and could not be determined since no closing occurred to allow that to be done, and in any event and at least

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they had no

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as significantly the Respondents had agreed that the interest in the property to be acquired until a future event that did not occur. Accordingly, the Respondents do not have an equitable lien and are not able to claim as a secured creditor.

The Master and Receiver is directed to act in accordance with the above ~~decision~~ ^{determination} in response to its request in this motion as item 5 of the Notice of Motion requests directions in this matter.

Order to go as above and as requested by the Master and Receiver in items 1, 2, 3, 4 and 6 of the Notice of Motion.

Written admissions as to costs in respect of the respondents' claim may be made if necessary

Spencer

ENDORSEMENT
BY JUSTICE SPENCE – MARCH 3, 2009

Mr. Dowdall and Mr. Williams for the Monitor and Receiver; Mr. Page for the Unsecured Creditors, Mr. Chang for Jay Rayan and Usha Rayan, the Respondents. The Respondents claim an equitable lien against the lands previously owned by STDC and therefore against the proceeds of sale of those lands as a result of which they assert that they have the status of secured creditors of STDC in respect of the moneys paid by them towards their purchase pursuant to their Agreement of Purchase and Sale dated February 4, 2008 (the "APS"). Under paragraph 1 of the APS, the Respondents agreed to purchase a designated "Unit"...together with an undivided interest in the common elements...as set out in the Declaration". The project never got to the stage of there being a Declaration. "Unit" is defined in the APS as "the unit being purchased herein as set out on page 1 hereof together with an undivided interest in the common elements in the percentage to be allocated to the unit in Schedule "D" to the Declaration...". The intended building was never built. There is no Unit as such (i.e. with or without reference to the common elements). With respect to the common elements, all that exists is the land on which the building was to have been built. The land cannot be said to be "common elements" for purpose of the definition of Unit and therefore for the APS because there has been no determination, as contemplated by the definition of Unit, if the "common elements in the percentage to be allocated to the unit in Schedule "D" of the Declaration". Paragraph 51 of the APS provides that the Purchaser does not have any interest in the Unit prior to the Unit Transfer Date and the payment of the balance of the Purchase Price due on said Unit Transfer Date. It was apparent in the submissions that the Unit Transfer Date as defined in the APS never occurred. To put the matter in simple

terms, the Respondents agreed to purchase property in the nature of a condominium unit, including the interest in real property which was to be part of or associated with the unit when that unit came into existence through the completion of the condominium project, including the allocation of percentages in the common elements to the units at that time. The Respondents, by paragraph 51, had no interest in the Unit, i.e. including its associated percentage of the common elements until the Unit Transfer Date, which did not occur. The specific property the Respondents agreed to purchase did not come into existence and they agreed they had no interest in the Unit until the Unit Transfer Date. It is common ground that the equitable lien is a lien against lands that are the subject of purchase. Here the lands that were to be the subject of purchase, the percentage allocated to the Unit had not been determined and could not be determined since no closing occurred to allow that to be done and, in any event, and, at least as significantly, the Respondents had agreed that they had no interest in the property to be acquired until a future event that did not occur. Accordingly, the Respondents do not have an equitable lien and are not able to claim as a secured creditor. The Monitor and Receiver is directed to act in accordance with the above determination in response to its request in this motion at item 5 of the Notice of Motion requesting directions in this matter.

Order to go as above and requested by the Monitor and Receiver in items 1, 2, 3, 4 and 6 of the Notice of Motion.

Written submissions as to costs in respect of the Respondent's claim may be made if necessary.

Spence J.