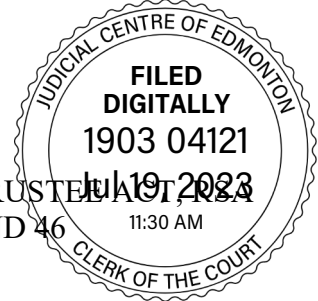


COURT FILE NUMBER 1903-04121

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE OF EDMONTON



IN THE MATTER OF THE TRUSTEE OF WESTPOINT CAPITAL  
2000, C T-8 SECTIONS 43 AND 46

APPLICANTS WESTPOINT INVESTMENT TRUST BY ITS TRUSTEE MUNIR VIRANI AND MARNIE KIEL

RESPONDENTS WESTPOINT CAPITAL CORPORATION,  
WESTPOINT CAPITAL MANAGEMENT CORPORATION,  
WESTPOINT CAPITAL SERVICES CORPORATION,  
WESTPOINT SYNDICATED MORTGAGE CORPORATION,  
CANDIAN PROPERTY DIRECT CORPORATION,  
WESTPOINT MASTER LIMITED PARTNERSHIP,  
RIVER'S CROSSING LTD., 1897869 ALBERTA LTD., 1780384 ALBERTA LTD.,  
897837 ALBERTA LTD. and THE VILLAGE AT PALDIENT LTD.

DOCUMENT **BENCH BRIEF OF SIKIN SAMANANI, SALIM SAMANANI, KAREN CHEEMA, RAJ CHEEMA, EDNA TAM AND WEI TAM**

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## I. INTRODUCTION

1. Westpoint Investment Trust ("**WIT**" or the "**Trust**") was a mutual fund trust established with the purpose of investing in mortgage and real estate assets for the benefit of its investors/unitholders pursuant to the Amended and Restated Declaration of Trust dated September 3, 2015<sup>1</sup> (the "**A&R Declaration of Trust**").

2. Approximately 1,600 unitholders invested in the Trust and are owed approximately \$18.3 million. Of the 1,600 unitholders, approximately 800 sought to redeem their units as of February 25, 2019 ("**Redeeming Noteholders**").<sup>2</sup>

3. Included in the 800 unitholders that sought redemption are Sikin Samanani, Salim Samanani, Karen Cheema, Raj Cheema, Edna Tam and Wei Tam (together the "**Contesting Noteholders**").<sup>3</sup>

4. No payment was received in response to the redemption requests and on March 8, 2019, BDO Canada Limited ("**BDO**") was appointed as Trustee (as defined below).

5. The Trustee has substantially completed its mandate and is seeking to distribute the funds in the estate in the amount of approximately \$4 million to the first 75 investors who submitted redemption requests (the "**Proposed Distribution**").

6. The Proposed Distribution is divergent from both the process contemplated under the A&R Declaration of Trust and the *pari passu* principle. Further, the Proposed Distribution would lead to a grossly inequitable result.

7. In order for the Potential Distribution to be approved, those who support such approval bear the onus of proving a legal basis for a priority; a priority that can somehow override the express language in the A&R Declaration of Trust and Schedule (as defined below) and the requisite application of the *pari passu* principle. No such basis exists in law, or in equity.

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<sup>1</sup> The A&R Declaration of Trust has a retroactive effect to June 30, 2015.

<sup>2</sup> Second Report of the Judicial Trustee dated August 4, 2022 (the "**Second Report**") at paras 41 and 44-46.

<sup>3</sup> The particulars of their holdings and Redemption Requests were appended as Exhibit 8 to the Second Report.

8. The Contesting Noteholders submit that the Court ought to exercise its discretion to deny the Proposed Distribution and, instead, order that a distribution be made on a *pro rata* basis to the Redeeming Noteholders.

9. Terms used but not otherwise defined herein have the meanings ascribed to them in the A&R Declaration of Trust or the Schedule, as the case may be.

## II. FACTS

### Background

10. WIT was established by way of a Declaration of Trustee dated June 1, 2015. The Declaration of Trustee was amended and restated by an agreement on September 3, 2015, retroactive to June 30, 2015.<sup>4</sup>

11. Prior to WIT being established, the assets of the Trust were part of two Mortgage Investment Corporations (each an "MIC" and together the "MICs"). The MICs held assets in British Columbia and Alberta and were primarily mortgages. WCC provided mortgage administration, capital raising and mortgage brokerages services to the MICs. Another corporation, WCSX, provided business support services, staffing and office space to the MICs.<sup>5</sup>

12. The Trust held beneficial interest in assets (the "**Trust Assets**") comprising mostly of mortgages and some real estate holdings, which were held by the Companies for the benefit of the Trust.<sup>6</sup> Because of the Receivership Proceedings, the Trust Assets have now been realized upon and the funds received in connection therewith have now been draw into the Trust for the benefit of its stakeholders.

13. On March 8, 2019, the Court of the Queen's Bench of Alberta<sup>7</sup> (the "**Court**") granted an Order (the "**Judicial Trustee Order**") appointing BDO as Judicial Trustee (in such capacity, the "**Trustee**") and commencing the within proceedings (the "**Trustee Proceedings**") pursuant to an

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<sup>4</sup> Second Report at para 9.

<sup>5</sup> Second Report at paras 10 and 11.

<sup>6</sup> Second Report at para 19

<sup>7</sup> As it then was.

application made on behalf of the Trust by Munir Virani and Marnie Kiel (the "**Former Trustees**").<sup>8</sup>

14. In addition to the Judicial Trustee Order, the Court also granted an Interim Receiver Order (the "**Interim Receiver Order**") appointing BDO as Interim Receiver of Westpoint Capital Corporation ("**WCC**"), Westpoint Capital Management Corporation ("**WCMC**"), Westpoint Capital Services Corporation ("**WCSC**"), Westpoint Syndicated Mortgage Corporation ("**WSMC**"), Canadian Property Direct Corporation ("**CPDC**"), Westpoint Master Limited Partnership ("**WMLP**"), River's Crossing Ltd. ("**RCL**") , 1897849 Alberta, Ltd. ("**1897849**"), 1780384 Albertald. ("**178 AB**"), and 1897837 Alberta Ltd. ("**1897837**").<sup>9</sup>

15. On April 10, 2019, the Court granted an Order (the "**Receivership Order**") appointing BDO as receiver (in such capacity, the "**Receiver**") of the companies referred to in paragraph 14, and on May 30, 2019, the Court granted a further Order, amending the Receivership Order to add The Village at Paldi Ent. Ltd. ("**Paldi**" and together with WCC, WCMC, WCSC, WSMC, CPDC, WMLP, RCL, 1897849, 178 AB and 1897837, the "**Companies**") as a party in the receivership proceedings (the "**Receivership Proceedings**").<sup>10</sup>

16. The various assets held by the Companies subject to the Receivership Proceedings were the property of the Trust by operation of the Bare Trust Agreement between WCC, Westpoint Real Estate Limited Partnership and Westpoint Real Estate General Partner Ltd. dated July 1, 2015.<sup>11</sup> The Trustee and the Interim Receiver supported the Receivership Proceedings and the appointment of the Receiver given that, among other things, the Trust Assets were beneficially owned by the Trust, and it was their belief that the most efficient and cost effective way of drawing those assets into the Trust was to appoint BDO as receiver for the purpose of managing and/or liquidating these assets and addressing the various claims in relation to those assets, including addressing the issue of priorities of claimants to the various assets.<sup>12</sup>

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<sup>8</sup> Second Report at para 1.

<sup>9</sup> Second Report at para 2.

<sup>10</sup> Second Report at para 3.

<sup>11</sup> First Report of the Judicial Trustee dated April 1, 2019 (the "**First Report**") at para 26.

<sup>12</sup> First Report at 29(a) and First Report of the Interim Receiver dated April 1, 2019 (the "**Interim Receiver's First Report**") at para 173(a).

### **The Proposed Distribution**

17. On August 10, 2022, the Trustee filed its Second Report dated August 4, 2022 (the "**Second Report**") which, among other things sought advice and direction from the Court on whether the Redeeming Noteholders (each of which, for greater certainty, is a Noteholder per the terms of the A&R Declaration of Trust) should be paid out first, and if so, if they should be paid in priority based on when they requested a redemption.<sup>13</sup>

18. In its Seventh Report to Investors dated September 23, 2022, the Trustee provided at paragraph 19 that:

*"[t]he Trustee attempted to receive advice and direction regarding the payment to the investors, specifically confirmation that investors requesting redemption of their units would be paid in priority or if all investors would receive payment proportionality. The Court determined it was premature to decide the matter without knowing the potential claims against the remaining funds".*<sup>14</sup>

19. It does not appear that such advice and direction was subsequently received, however in the Trustee's Fourth Report dated June 12, 2023 (the "**Fourth Report**"), the Trustee advised that it intends to seek, among other things, an order to proceed with the Proposed Distribution subject to an adjournment to allow the Contesting Noteholders, among others, to file responding materials.<sup>15</sup>

20. Upon learning of the within application and the Proposed Distribution, the Contesting Noteholders expeditiously retained counsel in an effort to contest the Proposed Distribution.

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<sup>13</sup> Second Report at para 4.

<sup>14</sup> Seventh Report to Investors dated September 23, 2022 at para 19.

<sup>15</sup> Fourth Report of the Judicial Trustee dated June 29, 2023 (the "**Fourth Report**") at para 42.

### III. ISSUE

21. The issue before this court is whether the Proposed Distribution should be approved.

### IV. LAW AND ARGUMENT

#### A. The Proposed Distribution Should Not Be Approved

##### 1. *The Contesting Noteholder's Interpretation of the A&R Declaration of Trust*

22. As the Trustee has previously acknowledged, both the redemption process as well as the distribution mechanics contemplated under the A&R Declaration of Trust are extraordinarily complex.<sup>16</sup> To make matters more complicated, the Trust is subject to proceedings under the *Trustee Act* and the Companies, whose assets are owned beneficially by the Trust, are subject to the Receivership Proceedings under the *Bankruptcy and Insolvency Act*.<sup>17</sup>

23. The Trustee Proceedings and the Receivership Proceedings make it clear that the Trust is subject to winding-up and liquidation. It is also clear based on the evidence that the proceeds of the assets of the Trust is less than the aggregate of Noteholder claims, Unitholder claims and the other claims as determined in accordance with the Claims Procedure that the Trust is insolvent.<sup>18</sup> This fact, alters the distribution process under the A&R Declaration of Trust that is relied upon by the Trustee in support of the Proposed Distribution.

24. In its Second Report, the Trustee notes that as of February 25, 2019, of the approximately 1,600 Unitholders, approximately 800 had redeemed their Trust Units in accordance with Article 6 of the A&R Declaration of Trust.<sup>19</sup> Section 6.1 of the A&R Declaration of Trust provides that:

*"Subject to the provision of the Schedule of Unit Rights, each Unitholder shall be entitled to require the Trust to redeem at any time or from time to time at the demand of the Unitholder all or any part of the Trust Units registered in the name of the Unitholder at*

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<sup>16</sup> Second Report at para 57.

<sup>17</sup> Second Report at paras 1-3.

<sup>18</sup> Fourth Report at paras 39-41. An "insolvent person" is defined in subsection 2(1) of the *Bankruptcy and Insolvency Act*, in relevant part, as a person: (a) who is for any reason unable to meet his obligations as they generally become due; (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due

<sup>19</sup> Second Report at para 44.

*the price determined and payments in accordance with the conditions set forth in the Schedule of Unit Rights."*

25. Pursuant to the Schedule of Unit Rights, which is appended to the A&R Declaration of Trust at Schedule "A" (the "**Schedule**"), the result of the redemption under Section 6.1 is that the Unitholders who opted to redeem their Trust Units became Noteholders in receipt of either Class D Units or Redemption Notes, as the case may be. Pursuant to section 2.1 of the Schedule, Class D Units and Redemption Notes are both considered Redemption Securities and, resultingly, Trust Notes.<sup>20</sup>

26. As the Trustee notes in its Second Report, Article 6 of the Schedule titled "Redemptions and Priorities" sets out the process for the redemption of Trust Units.<sup>21</sup> Pursuant to Section 6.4(c), in circumstances where the Trust is in receipt of more than one Redemption Request and is *permitted*, as of the relevant Redemption Date, to satisfy some or all of such Redemption Requests in cash, pursuant to Section 6.4(a)i, such redemption shall be completed and such cash payments shall be made, in priority and based on the order in which the Redemption Requests were received by the Trust, such priority and order determined by the date and time of receipt stamped on each such Redemption Request.<sup>22</sup> Further, the Trustee notes that pursuant to Section 6.5(e), where there is more than one Redemption Security outstanding, the Redemption Securities shall be placed in a queue, by order of priority based on the applicable Acceptance Time.<sup>23</sup>

27. This priority by queue is altered, however, pursuant to Section 6.4(b) and Section 6.5(f) of the Schedule, which precludes the Trustee from making such payments where it would, at the relevant time, impair the ability of the Trust to carry on its business. Any such cash payment would clearly impair and impede the ability of the Trust to carry on its business, specifically in light of the fact that the Trust is being wound-up, most, if not all, of its beneficial Trust Assets liquidated and it has insufficient funds to satisfy its obligations.

28. Section 6.8 of the Schedule sets out the priority of payments to be made by the Trust to Unitholders and Noteholders. Section 6.8 provides that:

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<sup>20</sup> Second Report at para 58.

<sup>21</sup> Second Report at paras 51-58.

<sup>22</sup> Second Report at para 54.

<sup>23</sup> Second Report at para 56.



*"Notwithstanding any other provision herein, payments shall be made by the Trust to Unitholders and Noteholders in accordance with the following order or priority:*

*(a) Firstly, to Noteholders holding Matured Notes and to Unitholders holding Class D Units for which Redemption Request has been outstanding for more than 3 years;*

*[...]"*

29. Each of the Redeeming Noteholder's Redemption Requests have been outstanding for over four years.<sup>24</sup>

30. Section 7.1 of the Schedule preserves the priority right of Trust Notes to those of Redeeming Noteholders stating that "[i]n the event of liquidation, dissolution or winding-up of the Trust, the rights of holders Trust Notes shall rank in priority to the rights of Unitholders [...]". Further, Section 7.2 of the Schedule provides as follows:

*"In the event of liquidation, dissolution or winding-up of the Trust, the rights of holders of all issued Trust Notes shall rank pari passu with one another, regardless of the respective Issue Dates thereof."*

31. The Contesting Noteholders submit that, when considering the foregoing paragraphs and reading the A&R Declaration of Trust and Schedule in whole, the Proposed Distribution is contrary to the distribution contracted for. While when operating and solvent the Trust was to prioritize redemptions based on the time when received, in a liquidation/wind-down, consistent with the *pari passu* principle, the holders of the Trust Notes were to be treated as a class and rank *pari passu* with one another. As a result, the Redeeming Noteholders ought to share *pro rata* in recoveries from the liquidation of the Trust's assets and the winding-down of the Trust.

## **2. The Pari Passu Rule is Paramount**

32. As previously noted, it is clear based on the facts that the Trust is in the process of being wound-up and is insolvent. In insolvency, the *pari passu* rule is paramount and provides that creditors of the same class must share *pro rata* in distributions. The Redeeming Noteholders' claims are in respect of the same Trust Notes, each of which were formerly Trust Units redeemed in accordance with the A&R Declaration of Trust and therefore are to be afforded the same priority

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<sup>24</sup> The particulars of their holdings and Redemption Requests were appended as Exhibit 8 to the Second Report.

and equitable treatment. There is no basis upon which to create a separate class for the first 75 Redeeming Noteholders. Each of the Redeeming Noteholders are subject to the same rights and obligations.

33. The *pari passu* principle is a fundamental tenet of insolvency law; it applies in all insolvency scenarios – and regardless of whether formal "insolvency proceedings" have been initiated. As stated by the Ontario Court of Appeal in *Nortel*:

**This [pari passu] principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada:** *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, per Blair J.2 In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 *Cambridge L.J.* 581, at p. 581. According to an article in the *Cambridge Law Journal*, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

**The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets. [Emphasis added]**<sup>25</sup>

34. The Court of Appeal of Alberta in *Capital Steel Inc. v. Chandos Construction Ltd.* placed a similar emphasis on the *pari passu* principle and the need to not deprive similarly situated creditors as any such treatment would lead to certain creditors receiving more than their fair share.<sup>26</sup> Courts have also recognized that there is a lengthy common law history to support these and similar notions and that "[t]here is no doubt that the *pari passu* rule applies in Canada".<sup>27</sup>

35. The case law demonstrates that in similar situations, investors must share *pro rata*, and a legal priority cannot be based on arbitrary issues of timing, such as the specific date and time that a Noteholder submitted their Redemption Request or the relevant Acceptance Time.

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<sup>25</sup> *Nortel Networks Corp. Re*, [2015 ONCA 681](#) at paras 23-24. See also *Nortel Networks Corp. Re*, [2014 ONSC 4777](#) at para 12: "It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment." See also *Chandos Construction Ltd v Deloitte Restructuring Inc.*, [2020 SCC 25](#) at paras 12-13 & 102 [*Chandos Construction*].

<sup>26</sup> *Capital Steel Inc v Chandos Construction Ltd*, [2019 ABCA 32](#) at para 20 [*Chandos*].

<sup>27</sup> *Ibid* at para 23. See also *Chandos Construction* at para 11.

36. The application of the *pari passu* principle results in the conclusion that the assets of the Trust must be distributed rateably and equally amongst its classes of creditors, i.e., the Redeeming Noteholders. The *pari passu* principle dictates that the Redeeming Noteholders must share *pro rata* in respect of their claims which is the only fair and equitable result.

**V. CONCLUSION**

37. The Proposed Distribution ought not be approved by the Court. The Contesting Noteholders respectfully request that:

- (a) the Proposed Distribution be denied; and
- (b) the Trustee be directed to seek an order approving a *pro rata* distribution to the Redeeming Noteholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 19<sup>th</sup> day of July, 2023.

BENNETT JONES LLP

Per: Keely Cameron  
Keely Cameron/Aiden Nelms  
Counsel for Sikin Samanani, Salim Samanani,  
Karen Cheema, Raj Cheema, Edna Tam and  
Wei Tam, the Contesting Noteholders

## **VI. TABLE OF AUTHORITIES**

### **TAB**

1. *Nortel Networks Corp, Re*, [2015 ONCA 681](#)
2. *Nortel Networks Corp, Re*, [2014 ONSC 4777](#)
3. *Chandos Construction Ltd v Deloitte Restructuring Inc*, [2020 SCC 25](#)
4. *Capital Steel Inc v Chandos Construction Ltd*, [2019 ABCA 32](#)