ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00714813-00CL **DATE: November 18, 2024**

NO. ON LIST: 6

TITLE OF PROCEEDING: HILLMOUNT CAPITAL MORTGAGE HOLDINGS INC. v. 1703306 ONTARIO INC. et al

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

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Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE CONWAY:

[1] On September 24, 2024, Justice Penny granted two approval and vesting orders for the sale of 12 of the 15 lots that are the subject of this receivership. He scheduled today's motion to determine the priority issue as between three lien claimants (Turkstra, Cotton, Keizer – the "**Lien Claimants**") and the first mortgagee ("**Hillmount**"). The Receiver has been holding $1 million of the sale proceeds pending determination of this issue. Since the liens were vested off pursuant to Justice Penny's orders, the proceeds of sale stand in the place of the property that was sold.

[2] The Lien Claimants submit that they have overall priority over the Hillmount mortgage pursuant to s. 78(1) of the *Construction Act*, R.S.O 1990, Chapter C. 30 (the "**Act**") because the exception in s. 78(3) does not apply. I reject that submission. The Receiver has filed evidence of the purchase price of the property ($3,350,000) and an appraisal of $4.2 million. Hillmount has priority under s. 78(3) of the Act equal to the lesser of the actual value of the premises when the liens arose and the amounts advanced under the mortgage - $1,650,000 on closing and just over $500,000 in subsequent advances before the liens arose.

[3] Part of the Hillmount facility was a building mortgage, under which Hillmount advanced $512,000. In a building mortgage, the liens have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner: s. 78(2) of the Act. In its First Report dated September 12, 2024 and its Supplementary Report dated November 12, 2024, the Receiver sets out its calculation of the 10% holdback for each of the Lien Claimants as required under s. 22(1) of the Act.[1]

[4] The Lien Claimants take issue with the Receiver's calculation of these holdbacks. The Receiver has calculated the holdbacks based on the individual contractual arrangements between the Lien Claimants and R.O. Beam & Son Construction Limited ("**RO Beam**"), which oversaw the construction on the property. The Receiver's calculations are made on the basis that RO Beam was an owner of the property for purposes of the Act.[2] According

[1] S. 22(1) reads: Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

[2] "owner" means any person, including the Crown, having an interest in a premises at whose request and,

(a) upon whose credit, or

(b) on whose behalf, or

to *RSG Mechanical Incorporated v. 1398796*, 2015 ONCA 2070, paras 69, "…where there is a contract between an owner and only one supplier, there is no class and there is no pool of funds. There is only the 10% holdback to be retained on behalf of the single supplier."

[5] The Lien Claimants assets that R.O. Beam was not an owner of the property but instead a general contractor pursuant to a contractual arrangement with the owner of the property, 1703306 Ontario Inc. ("**170**"). Therefore, they say that the 10% holdback should be calculated based on the entire cost of the development project to date, and not on the services provided by them under their individual contractual arrangements.

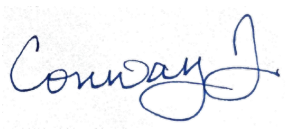
[6] I accept the Receiver's calculations and the basis therefor. The definition of an owner for purposes of the Act is broad. It is not restricted to a registered owner of land and there may be more than one person that fits into the definition: *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc*., 2009 ONCA 256 at paras. 31 and 32.

[7] In paragraph 27 of its Supplemental Report, the Receiver itemizes numerous factors that bring RO Beam within this definition for purposes of calculating the 10% holdback. Those include the non-arm's relationship between 170 and RO Beam and the common directors, officers and shareholders of the two companies, the provision of the deposit funds for the purchase of the Hodgkins lots by RO Beam, the entering into of agreements by RO Beam with purchasers of the lots, RO Beam's receipt of deposits from those purchasers, tax filings, and leasing arrangements entered into by RO Beam. There is no contract between 170 and RO Beam in the record. The mere fact that Hillmount initially advanced the mortgage funds to 170 is not, in my view, sufficient to displace the preponderance of evidence that brings RO Beam within the statutory definition of an owner for purposes of calculating the 10% holdback.

[8] Turkstra asserts that the sale proceeds constitute trust funds. However, s. 9 of the Act states that the trust arises only to funds that are net of the funds needed to discharge any mortgage indebtedness. Further, there is no evidentiary basis to invoke the doctrine of marshalling here.

[9] With respect to the request for security for costs, it is the holdback provisions that determine the security of the Lien Claimants and their priority over the mortgage indebtedness.

[10] Accordingly, I accept the Receiver's calculations as set out in the Supplemental Report.



(c) with whose privity or consent, or
(d) for whose direct benefit,
an improvement is made to the premises but does not include a home buyer.