CITATION: Duca v. 2203824 Ontario Inc., 2020 ONSC 3119
COURT FILE NO.: CV-17-11827-00CL
DATE: 20200619

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DUCA FINANCIAL SERVICES CREDIT UNION LTD., Applicant

AND:

2203824 ONTARIO INC., Respondent

BEFORE: Dietrich J.

COUNSEL: *Brett Moldaver*, for the Respondent 22038324 Ontario Inc. and MaryLou Santaguida

Lawrence Hanson, for the Court-appointed Receiver of 2203284 Ontario Inc.

Adam Slavens, for Tarion Warranty Corporation

HEARD: November 20, 2019

Written submissions March 16 and 31, 2020

ENDORSEMENT

[1] This matter involves an atypical receivership. The receiver, msi Spergel Inc. (the "Receiver"), raised sufficient funds to pay the claim of the applicant secured creditor, Duca Financial Services Credit Union Ltd., and all the proven claims of the unsecured creditors.

[2] The respondent 2203824 Ontario Inc. (the "Debtor") and MaryLou Santaguida ("Ms. Santaguida") object to the Receiver's proposal to pay the claims of the unsecured creditors. Ms. Santaguida is the spouse of the principal of the Debtor, Luigi Santaguida. The Debtor and Ms. Santaguida allege that the claims of the unsecured creditors, other than Tarion Warranty Corporation ("Tarion"), are statute-barred. They also allege that Tarion is not an unsecured creditor or, alternatively, is not entitled to be paid in full.

[3] Ms. Santaguida, who also claims to be a creditor of the Debtor, agreed that her claims would rank behind the claims of any other creditor whose claim is ordered payable by the Receiver.

[4] The Receiver brings its Fourth Report and Supplementary Fourth Report before this court seeking an order approving its activities, including a cash collateral arrangement with Tarion, and the payment of the unsecured creditors' proven claims.

[5] For the reasons that follow, I approve the activities and conduct of the Receiver described in its Fourth Report and Supplementary Fourth Report. I find that the proven claims of the unsecured creditors are not statute-barred and that Tarion is an unsecured creditor for the purposes

of the receivership. I authorize the Receiver to pay such proven claims, including Tarion's, and to pay the funds then remaining, net of fees, to the Debtor or Ms. Santaguida as they shall, in writing, direct.

Background

[6] On June 4, 2013, the Debtor acquired real property in Hamilton, Ontario for the purposes of developing a 30-storey residential condominium (the "Property").

[7] On May 20, 2014, the Debtor entered into a vendor agreement with Tarion (the "Vendor Agreement") whereby the Debtor assumed certain obligations as a vendor under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "*ONHWPA*"). As part of the agreement, the Debtor provided Tarion with a bond issued by Guarantee Company of North America ("GCNA"). The bond provided Tarion with security for deposits or claims by unit purchasers under the *ONHWPA*.

[8] The Debtor's records show that 185 condominium units were sold pursuant to agreements of purchase and sale and that the purchasers paid deposits. Construction of the units never began.

[9] The Debtor defaulted on its mortgage loan from the applicant. Justice Conway of this court appointed the Receiver by order dated June 22, 2017 (the "Receivership Order"). The unsecured creditors, other than Tarion, that made claims in the receivership, had invoiced the Debtor for materials or services before the Receivership Order was made.

[10] Following a motion to gain access to the Debtor's offices, the Receiver commenced a sales process for the Property. On February 12, 2018, it entered into an agreement of purchase and sale.

[11] On May 16, 2018, Ms. Santaguida was ordered to provide a full explanation and accounting of all funds paid or transferred by the Debtor to Santerra Asset Management, a company she owned and controlled. The Receiver had determined that $3,457,025.19 had been so transferred. Ms. Santaguida never complied with this order. The same order set out a Deposit Claims Procedure to facilitate the return of the deposits paid by the unit purchasers.

[12] The sale of the Property was scheduled to close on June 5, 2018, but the Receiver granted three successive extensions for additional non-refundable deposits by the purchaser and extension-fee penalties. The Receiver also sought to amend certain dates contained in the Deposit Claims Procedure Order, including the deposit claims bar date, and it obtained a Fresh As Amended Deposit Claims Procedure Order on August 29, 2018.

[13] On October 5, 2018, the sale of the Property closed. The applicant was paid in full from the proceeds of sale.

[14] On October 12, 2018, the Receiver obtained a further order amending certain dates and extending the deposit claims bar date to November 30, 2018.

[15] On October 22, 2018, after the Receiver sent the Deposit Claims Procedure forms to the unit purchasers, Canada Post began a series of rotating strikes. On November 29, 2018, the

Receiver obtained a further order amending certain dates again, including an extension of the deposit claims bar date to January 31, 2019.

[16] The November 29, 2018 order also contemplated a process whereby Tarion would be entitled to hold a reserve, in lieu of a portion of the bond, to cover its liabilities. The reserve could be established by the Receiver.

[17] The Receiver carried out the Deposit Claims Procedure in accordance with the orders, including the extensions of the deposit claims bar date. Between February 13, 2019 and March 13, 2019, the Receiver completed the initial issuance and mailing of all payments for proven deposit claims.

[18] The Receiver received 173 proven deposit claims by the January 31, 2019 claims bar date and received executed consents from GCNA authorizing the Receiver to pay each proven deposit claim. The Receiver regularly provided Tarion and GCNA with a ledger of proven deposit claims paid and unpaid.

[19] At the end of the process, there remained a deposit trust fund balance of approximately $200,000 consisting of interest and unclaimed deposits.

[20] On June 6, 2019, the Receiver obtained an order referred to as the "Tarion Cash Collateral Procedure Order". This order permitted the Receiver to pay $200,000 (about 4% of the amount of the bond) to Tarion as cash collateral so Tarion could deliver the bond to GCNA for cancellation, thereby eliminating the premiums and related bond expenses. This order set out a procedure for dealing with potential claims against Tarion and the distribution of any remaining cash collateral.

[21] On the same date, the Receiver obtained a court order directing it to conduct a claims process for unsecured creditors. The order included a claims bar date of August 16, 2019.

[22] On June 12, 2019, the Receiver sent a notice to 23 known potential unsecured creditors and emailed a copy of the notice to counsel for the Debtor. On July 17, 2019, the Receiver mailed a second notice to 17 of those creditors who had not filed claims with the Receiver. The Receiver discovered that Bell Canada had been overlooked on the mailings. On August 30, 2019, it sent Bell Canada a claim form and notice to file a claim.

[23] The Debtor's financial records showed $899,747.70 of unsecured claims, not including Tarion's claim. Nine unsecured creditors submitted claims. These claims, when added to Tarion's claim, amounted to $194,278.29. Copies of each of these claims, with the exception of the Bell Canada claim, were provided to counsel for the Debtor and Ms. Santaguida on August 22, 2019, for their review. Counsel to the Debtor replied several weeks later stating that several of the claimants provided services with respect to an entity other than the Debtor, and those claims amounted to about $40,000. The Receiver reviewed the claims and found that an invoice submitted by only one of the claimants related to another project. The elimination of this claim resulted in a reduction in the total of the submitted claims, including Tarion's claim, from $194,278.29 to $190,800.71.

[24] The unsecured creditors with proven claims (the "Unsecured Creditors") and their respective claims as determined by the Receiver are as follows:

Creditor Name	*Amount Filed*	*Amount Recommended For Payment*
Bell Canada	$ 127.45	$ 127.45
Collaborative Structures Limited	5,424.00	5,424.00
GSP Group Inc.	10,805.19	10,805.19
Kaiser Lachance Communications Inc.	4,713.52	1,235.94
Krcmar Surveyors Ltd.	9,866.77	9,866.77
McCallum Sathers Architects Inc.	30,233.79	30,233.79
Paradigm Transportation Solutions Limited	4,825.10	4,825.10
Pelican Woodcliff Inc.	11,300.00	11,300.00
Terraprobe Inc.	31,828.16	31,828.16
Tarion Warranty Corporation	85,154.31	85,154.31
	$194,278.29	$190,800.71

[25] In addition to the Unsecured Creditors, Ms. Santaguida submitted mortgage discharge statements as at January 31, 2019 for $1,520,723 and $974,882.52 for two mortgages in her name, registered against the Debtor, plus per diem interest. She also submitted evidence of $1,115,500 of advances to the Debtor. The Receiver notes that the second of these mortgages appears to be for a corporation other than the Debtor. The Receiver also notes that the financial records provided by the Debtor to the Receiver on July 25, 2017, and the Debtor's March 2015 Balance Sheet, approved by Luigi Santaguida as the sole owner, officer and director of the Debtor, reflect no mortgage liabilities. Further, the Debtor's financial records appear to indicate that amounts due to Ms. Santaguida are unsecured shareholder loans.

[26] The Receiver's Interim Statement of Receipts and Disbursements as at October 9, 2019 shows total receipts of $15,194,543, total disbursements of $13,777,024, and a balance of $1,417,519 for distribution and payment. The estimated funds for further distribution after the payment of fees and the payment of the claims of the Unsecured Creditors is approximately $1,168,218.

Positions of the Parties

[27] The Receiver recommends that each of the Unsecured Creditors be paid its claims as approved by the Receiver in the claims process. It further submits that such claims should be paid irrespective of any limitation period set out in the *Limitations Act, 2002*, S.O., c. 24, Sched B, s. 4, if applicable.

[28] The Receiver submits that Tarion's claim, for legal fees it incurred in the course of the receivership, should be paid based on the indemnity provided in the Vendor Agreement. The Receiver proposes that the funds remaining following payment of the Unsecured Creditors' claims, and the payment of fees, be paid to the Debtor or to Ms. Santaguida, as the court directs.

[29] Tarion supports the Receiver's request for an order that approves the cash collateral arrangement agreed to among the Receiver, Tarion and GCNA in lieu of Tarion retaining the bond.

[30] Tarion also seeks approval of the payment of its claim for costs incurred in the receivership. It submits that it is entitled to recover the legal fees it incurred based on the indemnity given by the Debtor in the Vendor Agreement.

[31] The Debtor and Ms. Santaguida object to the Receiver's recommendation that it pay the Unsecured Creditors in accordance with their proven claims. They assert that the claims of the Unsecured Creditors, other than Tarion, are statute-barred because the two-year limitation period for each of the claims has expired. They further assert that, to be paid, each of the Unsecured Creditors would have had to commence a proceeding before the expiry of the limitation period.

[32] The Debtor asserts that Tarion is not an Unsecured Creditor and is not entitled to be indemnified for its legal fees. It submits that indemnification for its legal fees is outside the scope of the Vendor Agreement. Alternatively, it asserts that if Tarion is entitled to an indemnity, the legal fees should be assessed because they are excessive.

Issues

[33] The issues in this matter are as follows:

1. Should the claims of the Unsecured Creditors be paid notwithstanding the two-year limitation period set out in the *Limitations Act, 2002*?

2. Should the Tarion cash collateral arrangement be approved and Tarion paid as an Unsecured Creditor?

The Receivership Order

[34] Paragraphs 9 and 10 of the Receivership Order provide as follows:

> NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY
>
> 9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor 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 Debtor or the Property are hereby stayed and suspended pending further Order of this Court.
>
> NO EXERCISE OF RIGHTS OR REMEDIES
>
> 10. THIS COURT ORDERS that all rights and remedies against the Debtor, 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 Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or Debtor 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, or (iv) prevent the registration of a claim or lien.

[35] A "Proceeding" is defined in the Receivership Order as a "proceeding or enforcement process in any court or tribunal."

Analysis

Are the claims of the Unsecured Creditors (other than Tarion) ineligible for payment because they are statute-barred?

[36] Section 4 of the *Limitations Act, 2002* provides as follows:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[37] A "claim" is defined in the *Limitations Act, 2002* to mean "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission."

[38] The Debtor and Ms. Santaguida assert that all the claims of the Unsecured Creditors, other than Tarion, predate the Receivership Order of June 22, 2017, and therefore exceed the two-year limitation period under the *Limitations Act, 2002*.

[39] With respect to the claim of McCallum Sathers Architects Inc. ("McCallum"), the Debtor acknowledges that McCallum issued a Statement of Claim on October 10, 2017 (after the Receivership Order) to perfect its lien claim of February 10, 2017 and it registered a Certificate of Action. The claim and Certificate were vacated by order of this court on a motion by the Receiver. The Debtor asserts that because this lien action was not continued with leave or consent or reconstituted as an action in the ordinary course to the knowledge of the Debtor or Ms. Santaguida, the Statement of Claim does not assist McCallum in the face of a limitation defence by the Debtor. Accordingly, it asserts, McCallum is not entitled to full payment of its claim as the Receiver recommends.

[40] The Debtor and Ms. Santaguida further assert that none of the other Unsecured Creditors commenced proceedings to recover their claims prior to the receivership and, therefore, their claims too are statute-barred. In the case of the GSP Group Inc. ("GSP") claim, they submit that GSP seeks payment of invoices dated 2014 and one dated May 2015 (the "GSP claim"). They argue that these claims were statute-barred, on their face, even before the Receivership Order was granted.

[41] They submit that the claims of the Unsecured Creditors (other than Tarion) all relate to materials or services purportedly provided to the Debtor prior to the receivership, which were not paid. They further submit that neither the Debtor nor the Receiver stayed or tolled the limitation periods for these claims. They assert that there was no barrier to any of these unsecured claimants preventing them from commencing an action prior to the receivership and continuing it with leave or consent or seeking leave or consent to commence a proceeding after the receivership was put in place if the limitation period had not then expired. They submit that paragraph 10 of the Receivership Order provides that all remedies against the Debtor are stayed but does not preclude the registration of claims for lien.

[42] The Debtor and Ms. Santaguida also submit that the Receiver cannot rely on a due diligence defence on the matter of the limitation period. They assert that the Receiver cannot meet its onus by leading "cogent evidence to the effect that reasonable diligence did not require [it] to investigate further during the life of the limitation period": *Haunert-Faga v. Caprara,* 2015 ONSC 6438, at para. 45; *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80, O.J. No. 634; aff'd 2013 ONCA 474.

[43] The position taken by the Debtor and Ms. Santaguida presumes that the claims of these Unsecured Creditors are extinguished once the limitation period expires and can only be eligible for payment in the context of the receivership if the Unsecured Creditor takes steps to commence a legal proceeding with the consent of the Receiver or leave of the court.

[44] Paragraphs 9 and 10 of the Receivership Order expressly provide that a creditor is prevented from commencing a legal proceeding in respect of an unsecured claim (except with consent or leave), and to the extent that an action or application was already in progress, the Receivership Order stayed it. The Receivership Order, does not, however, extinguish or eliminate the claims of unsecured creditors, and it does not relieve the debtor of its obligation to pay them.

[45] On June 6, 2019, this court made an order directing an unsecured claims process. The Receiver complied with this order. It mailed notices to 23 potential unsecured creditors with a copy to Mr. Santaguida. The names and contact information for these creditors (excepting Tarion and one other, which was not pursued) were taken from the Debtor's own records. This would seem to suggest that the Debtor had acknowledged these debts as its liabilities.

[46] Further, earlier in the receivership, on January 29, 2019, counsel to the Debtor and Ms. Santaguida wrote to the Receiver setting out Ms. Santaguida's claims as a creditor of the Debtor. In that letter, the Debtor and Ms. Santaguida refer to a list of creditors on a schedule compiled by the Receiver. They expressly agree that certain of the creditors listed (e.g., Collaborative Structures Limited, Kaiser Lachance Communications Inc., Paradigm Transportation Solutions Limited, Pelican Woodcliff Inc., and Terraprobe Inc.) are owed the amounts shown on the schedule.

[47] The ten Unsecured Creditors listed above filed claims. Following an exchange with counsel for the Debtor and Ms. Santaguida, the Receiver reviewed the claims considering their comments and lowered the claim made by Kaiser Lachance Communications Inc. The Receiver, an officer of the court, satisfied itself that the remaining claims were owing and had been submitted with appropriate documentation.

[48] Pursuant to the basic limitation period under the *Limitations Act, 2002*, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered: s. 4. For the purposes of this case, the claim of an Unsecured Creditor would meet the definition of "claim" under *Limitations Act, 2002*. The remedy would be a judgment and the enforcement rights that flow from it.

[49] A "proceeding" as set out in the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 at r. 1.03(1), is an action or application, unless the context requires otherwise. The rule also provides the means by which an action or an application is brought (e.g., a statement of claim or a notice of application). Accordingly, the Receiver submits that in the same way as the Receivership Order creates a stay that prevents a claimant, including an unsecured creditor, from exercising its right to commence a legal proceeding (except as specifically provided), the *Limitations Act, 2002* prevents an unsecured claimant from exercising its right to commence a legal proceeding following the expiration of the limitation period.

[50] However, the Receiver also submits that the unsecured creditor's rights, including the right to be paid, and the debtor's obligation to pay the debt, continue to exist. It submits that the legislators could have extinguished or eliminated the claim, extinguished the debt, or eliminated the right to have the debt paid or the obligation of the debtor to pay it, but they did not. Instead, they precluded a person with a claim from commencing an action or an application in respect of the debt.

[51] In Ontario, there is considerable support for the view that the right to be paid is not extinguished by the *Limitations Act, 2002*, but only the remedy of commencing a proceeding in respect of the debt. See, for example, Justice G. Mew and D. Zacks on *Limitation of Actions* (2017 Edition) from *Halsbury's Laws of Canada* where the authors write the following at HLM-51: "At common law, expiry of a limitation period is not a substantive bar to the right relied on by the plaintiff, but merely a procedural ground of defence which may prevent the plaintiff from obtaining a remedy. […] Notwithstanding the common law, Newfoundland and Labrador limitations legislation specifically extinguishes legal rights if the limitation period has expired, and Ontario does so in the context of proceedings to recover land, money charged on land, and a person's title to the land or money charged on the land [pursuant to the *Real Property Limitations Act,* R.S.O. 1990, c. L.15, s. 15] [but presumably not under the *Limitations Act, 2002* or any other statute]." In *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, 1 C.L.R. (4th) 138, at para. 76, the Court of Appeal for Ontario stated that "[i]t is well-settled that a limitation period bars the remedy, but not the right."

[52] Also, in *Re Temple*, 2012 ONSC 376, 109 O.R. (3d) 374, at para. 19, Newbould J., quoting from Graeme Mew (now Justice Graeme Mew), *The Law of Limitations*, 2nd ed. (Markham, ON: Butterworths, 2004), cites the common law view that a limitation period bars a remedy but does not extinguish legal rights such as a debt:

> The common law tradition considers statutes of limitation as procedural, as contrasted with the position in most civil law countries, where limitations are regarded as substantive.

> As a result, limitation provisions found in Canadian statutes have, for the most part, been interpreted as extinguishing remedies rather than substantive legal rights. Thus, one commonly finds that an action must be commenced "within" or "within and not after" the prescribed period. As a result, although a party is barred from enforcing its remedies once the time period has expired, its legal right will survive. The rationale for this approach is explained as follows:
>
> > Extinguishing rights is not an objective of a limitations system. Rather, its objective is for the timely litigation of disputes, if there is to be litigation. Nevertheless, if, pursuant to a limitations statute, a defendant gains immunity from liability to any remedy which the law provides for the enforcement of the right upon which the claim was based, the right, although not extinguished, will become sterile.

[53] At paras. 23 and 24, Newbould J. observed that other provinces in Canada have enacted provisions in their limitations legislation that expressly provide that upon the expiry of a limitation provision, rights are extinguished, but Ontario has not in the *Limitations Act, 2002*. At para. 28, Newbould J. concluded that "in Ontario it cannot be said that a debt is extinguished if an action on the debt is not brought within two years of its being due. Rather the debt continues to be owed." At para. 28, Newbould J. held that such a debt was the basis on which an application for bankruptcy could be made, and that such a debt can also be the basis for a provable claim by a creditor in bankruptcy. At para. 29, Newbould J. stated that "the fact that no suit has been brought on a debt owing to the applicant within two years of the date of the bankruptcy application is no defence to a bankruptcy application based on that debt as the debt continues to be owed."

[54] In *Re Temple*, Newbould J. was considering a debt in the context of a bankruptcy proceeding as opposed to a receivership as in the case at bar. However, the same principles can be applied. The debts owed to the Unsecured Creditors are liabilities of the Debtor. The claims of the Unsecured Creditors (other than Tarion) were taken from the Debtor's own financial records. While the Debtor challenged the sufficiency of the proof of some of the claims, its primary basis for denying liability is the expiry of a limitation period. However, the *Limitations Act, 2002* prevents a creditor from commencing a proceeding, but does not eliminate the underlying debt or the debtor's obligation to pay it.

[55] The Receivership Order stays the claims of creditors as well as the exercise of rights and remedies but does not extinguish or eliminate underlying debt claims or the Debtor's obligation to pay them. I am satisfied that the court-authorized claims process in a receivership, overseen by a court-appointed receiver, amounts to a new and separate remedy that is not barred by the application of the *Limitations Act, 2002*. Accordingly, I find that there is no reasonable basis on which to interfere with the findings of the Receiver as to the validity of the claims that it has accepted for payment.

[56] In my view, it is not in the interest of fairness, or in keeping with the integrity of an efficient and effective management of a receivership, that unsecured creditors should be compelled to take

action to have the stay created by a receivership order lifted and to commence a proceeding in order to safeguard the right to a potential payment once creditors who rank ahead of them have been paid. A receiver does not put an unsecured creditor on notice that its claim, the right to be paid, or the debtor's obligation to pay, could be extinguished or eliminated during the course of the receivership. The duration of the receivership is unpredictable and can be affected by a variety of events (e.g., delayed closings, postal strikes), all beyond the control of the unsecured creditor.

[57] The Receiver did not notify the Unsecured Creditors that a claims process had been established until June 12, 2019. Notification was mere days before the alleged expiry of the two-year limitation period on June 22, 2019. If the *Limitations Act, 2002* were to apply in this case, it would unfairly deprive the Unsecured Creditors, whose claims were not already barred by the two-year limitation period, of access to a remedy based on a receiver-set unusually tight timeline.

[58] It is reasonable for an unsecured creditor, having provided materials or services to a debtor and submitted its claim for approval in a court-sanctioned process, to expect that if the receiver accepts its claim, it will be paid. It is also reasonable for an unsecured creditor to expect that its proven claim will be paid in priority to the debtor once the secured creditors have been paid in full.[1]

[59] According to K.P. McGuinness in *Halsbury's Laws of Canada on Receivers and Other Court Officers* (2017 Reissue), at HRC-1.1, the purpose of a receivership is "to enhance and facilitate the preservation and realization of the assets of a person [or corporation] for the benefit of all stakeholders", including creditors. The receiver is appointed to run the show with respect to the preservation and realization of the debtor's assets for the benefit of its creditors. Once a receiver is appointed and creditors are made aware of that fact, it is reasonable to expect that creditors would await instructions from the receiver on how to proceed with their claims. By contrast, it would seem unnecessary and burdensome for unsecured creditors to have to initiate their own claims process by applying to lift the stay knowing that a receiver had been appointed, and that one of the receiver's tasks would be to administer their claims. It is more realistic to assume that the creditors would put their trust in the court-appointed receiver to pursue a remedy on their behalf. A finding that the *Limitations Act 2002* applies in this case would seem to interfere with the receiver's obligation to organize an orderly claims process.

[60] Further, to require unsecured creditors to take steps, at their own expense, to have the stay lifted and to commence a proceeding to protect their rights to be paid, at some later date, if there are sufficient funds in the receivership, would add to the administrative burden and the overall costs of the receivership. Any such increase in costs would be borne ultimately by the unsecured creditors who rank last, ahead of the debtor.

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[1] If there is a principled basis for distinguishing between a claim that was statute-barred prior to the Receivership Order and one that became statute-barred during the receivership, then I would exclude the GSP claim from those to be paid by the Receiver. However, if it is correct that the *Limitations Act, 2002* does not eliminate the debt or the Debtor's obligation to pay it, then there would be no reason to exclude it.

Should the cash collateral arrangement be approved and Tarion paid as an Unsecured Creditor?

[61] The Vendor Agreement between Tarion and the Debtor deals with the Debtor's rights and obligations as a registrant/vendor under the *ONHWPA*, the regulations thereto and applicable builder bulletins issued by Tarion.

[62] The Debtor provided a bond to Tarion in connection with its registration under the *ONHWPA*. Once the Debtor went into receivership, naturally, Tarion took an interest in monitoring the activities of the Receiver in the return of deposits to valid claimants under the court-ordered Deposit Claims Procedure.

[63] Once the bulk of the deposits had been returned to the unit purchasers, Tarion considered cancelling the bond to reduce costs in the receivership. To protect itself from the risk of eligible claims by unit holders under the *ONHWPA*, and with the imprimatur of the court, Tarion negotiated a cash collateral arrangement with the Receiver and GCNA to replace the bond.

[64] The cash collateral arrangement gave Tarion access to a $200,000 reserve as cash collateral to cover claims until around March 1, 2023 after which unit purchasers could no longer assert claims against Tarion under the *ONHWPA*. Until that time, any known or unknown purchasers who did not file a deposit claim prior to the claims bar date could still assert a claim under the *ONHWPA*. There was a risk that some agreements of purchase and sale may not have been reflected on the books and records of the Debtor and therefore not available to the Receiver. There was also the possibility that the court would permit a late filed claim. It was reasonable for Tarion to enter into a security arrangement to protect itself once it released the bond for cancellation. The receivership estate benefited from the elimination of the bond premiums and other costs relating to the bond.

[65] Cash collateral orders have been used in a number of other cases, which have similarly provided for the wind-down of bond obligations in insolvency cases involving residential real estate. See, for example: *Canadian Imperial Bank of Commerce, et al. v. Urbancorp (Leslieville) Developments Inc.*, Court File No. CV-16-11409-00CL, Tarion Cash Collateral Order of Morawetz RSJ, dated April 17, 2019; *Centurion Mortgage Capital Corporation and Terrasan 327 Royal York Rd. Limited*, Court File No. CV-17-11679-00CL, Holdback and Distribution Order of Hainey J., dated August 29, 2018; *Volkan Basegmez, et al. and Ali Akman, et al.*, Court File No. CV-17-11697-00CL, Endorsement (re Cash Collateral Procedure Order) of McEwen J. dated April 15, 2019; and *Superintendent of Financial Services and Textbook Student Suites (525 Princess Street) Trustee Corporation*, Court File No. CV-16-11567-00CL, Tarion Holdback Procedure Order of Myers J. dated May 30, 2018.

[66] In my view, the use of the court-sanctioned cash collateral arrangement for the wind-down of the bond obligation was appropriate in this case involving a residential real estate insolvency. It is consistent with prior orders of this court and was aimed at reducing administrative costs to the benefit of the receivership estate.

[67] Tarion had a role to play in the receivership proceeding as long as there were unit holders with a right to make a claim against it. I do not accept the Debtor's argument that Tarion was not

required to monitor the receivership to ensure that deposits were returned to valid claimants. Tarion's involvement in the receivership arose out of the Vendor Agreement, under which it is entitled to be indemnified by the Debtor for its costs.

[68] The Debtor submits that the Vendor Agreement does not explicitly provide for an indemnity for legal fees or external professional costs incurred by Tarion in carrying out its duties under that Agreement. I disagree. The Vendor Agreement provides, at sections 2.1 and 2.2, that the Debtor is obligated to indemnify Tarion for costs it incurs resulting from the Debtor's failure to perform obligations set out in the Vendor Agreement. Those obligations include the obligations in the agreements of purchase and sale with the unit holders. Accordingly, I find that the Debtor is required to indemnify Tarion for legal costs incurred as a result of its involvement in the receivership relating to the rights of the unit holders, including the cash collateral arrangement. The Receiver reviewed and approved Tarion's claim as part of the claims process. Tarion is, therefore, an Unsecured Creditor entitled to have its claim paid.

Disposition

[69] For the reasons given, I am satisfied that the recommendations made by the Receiver in its Fourth Report and Supplementary Fourth Report are appropriate, fair and in the interest of justice. They seek to balance the interests of the various stakeholders and constitute an efficient and cost-effective means of bringing the receivership to a conclusion.

[70] An Order shall issue on the following terms:

(a) approving the activities and conduct of the Receiver as described in its Fourth Report and Supplementary Fourth Report;

(b) approving the Receiver's Interim Statement of Receipts and Disbursements as at October 9, 2019 and its Projection of Funds Available for Distribution as set out in its Supplementary Fourth Report;

(c) approving and authorizing payment of the fees and disbursements of the Receiver from May 1, 2018 to and including September 30, 2019 in the amount of $373,960.75 plus applicable HST of $48,614.90 as well as an accrual for completion of the administration of the estate up to $25,000 plus applicable HST;

(d) approving and authorizing the payment of the accounts of the Receiver's legal counsel for the period from April 28, 2018 to September 26, 2019, in the amount of $85,218.23 for fees and disbursements plus applicable HST of $11,323.43 as well as an accrual for completion of the administration of the estate up to $15,000 plus applicable HST;

(e) authorizing and directing the Receiver to pay, in the amounts indicated, following unsecured creditors:

Creditor Name		*Amount*
Bell Canada	$	127.45
Collaborative Structures Limited		5,424.00

GSP Group Inc.	10,805.19
Kaiser Lachance Communications Inc.	1,235.94
Krcmar Surveyors Ltd.	9,866.77
McCallum Sathers Architects Inc.	30,233.79
Paradigm Transportation Solutions Limited	4,825.10
Pelican Woodcliff Inc.	11,300.00
Terraprobe Inc.	31,828.16
Tarion Warranty Corporation	85,154.31
	$190,800.71

(f) authorizing and directing the Receiver to pay the Remaining Funds to the Debtor and/or MaryLou Santaguida as they shall, in writing, direct;

(g) effective upon the filing of a certificate by the Receiver certifying that all outstanding matters to be attended to in connection with the Receivership of the Debtor have been completed to the satisfaction of the Receiver, discharging msi Spergel Inc. as the Receiver of the undertaking, property and assets of the Debtor, provided however that notwithstanding its discharge (a) the Receiver shall remain the Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership, and (b) the Receiver shall continue to have the benefit of the provisions of all orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of msi Spergel Inc. in its capacity as Receiver; and

(h) releasing and discharging msi Spergel Inc. from any and all liability, of any nature whatsoever, that msi Spergel Inc. has or, may hereafter, have by reason of, or in any way related to or arising out of, the acts or omissions of msi Spergel Inc. while acting in its capacity as Receiver, including, without limitation, any and all dealings with the Property, save and except for any gross negligence or wilful misconduct and, without limiting the generality of the foregoing, msi Spergel Inc. is forever released and discharged from any and all liability relating to matters that were raised, or which reasonably could have been raised, in the receivership, save and except for any gross negligence or wilful misconduct on its part.

Dietrich J.

Dietrich J.

Date: June 19, 2020