

Court File No. 1208/20

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

THE REGIONAL MUNICIPALITY OF DURHAM

Applicant

- and -

WILLIAM PEAK CO-OPERATIVE HOMES INC.

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 85 (7) OF *THE HOUSING SERVICES ACT*, 2011, S.O. 2011, c. 6, AS AMENDED

APPLICANT'S FACTUM

APPLICANT

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PART I
OVERVIEW

1. The applicant, the Regional Municipality of Durham, has appointed an interim receiver over William Peak Co-operative Homes Inc. which owns and runs a housing project in Pickering Ontario. The interim receivership expires on August 12, 2020 and Durham seeks an Order appointing the interim receiver as receiver, so it can complete its work.
2. Durham Region, an outside auditor, and the interim receiver have all noted and reported serious issues with respect to the governance of William Peak and conflicts of interest, financial statement accuracy, housing charges arrears and control over credit cards. Additional work is needed to address these issues.
3. Ultimately, the goal is to select candidates for a new board of directors to replace the prior board, whose terms have all expired, provide them with appropriate training, and turn control over William Peak back to a new board. The interim receiver has had difficulty completing its work partially due to the COVID-19 pandemic, and the current situation has made it impossible for the interim receiver to complete this part of its mandate
4. Other tasks that a receiver is required to complete include preparation and approval of an operating budget, a subsidy request and a deficit reduction plan, as well as preparation and approval of policies and processes.
5. The Region therefore seeks the appointment of a receiver to be able to complete the remaining tasks and ultimately return control to a new board.

PART II
STATEMENT OF MAIN FACTS

1. The Applicant, The Regional Municipality of Durham (“Durham”), is making an application for an Order appointing Deloitte Restructuring Inc. (“Deloitte”) as receiver of William Peak Co-Operative Homes Inc. (the “Respondent”) pursuant to the provisions of the *Housing Services Act* (the “Act”). In the alternative, Durham is seeking to extend Deloitte’s term as interim receiver.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 2

2. The Respondent owns and operates the William Peak Co-op social housing project and property located at 1990 Whites Road, Pickering Ontario.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 3

3. On April 9 and 10, 2019, Durham, as designated service manager under sections 11 and 68 of the Act, conducted an operational review of the Respondent. Durham found several serious and ongoing issues with the Respondent, including but not limited to issues of a financial and operational nature.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 4

4. On October 21, 2019, Durham issued a notice of triggering event (the “Notice”) pursuant to section 83 of the Act. The Notice set out the various issues identified and set a deadline of December 23, 2019 for the Respondent to respond with an action plan to address the issues set out in the Notice

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 5

5. On or about December 16, 2019 the board of directors (the “Board”) of the Respondent issued a response (the “Response”) to the Notice.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 6

6. On January 23, 2020, Prentice, Yates & Clark issues a management letter with respect to the audit of the financial statements of the Respondent’s 2019 fiscal year. The auditor noted significant deficiencies in the internal controls of the Respondent’s finances that were of “sufficient importance to merit the attention of those charged with governance” of the Respondent. This included issues with respect to conflicts of interest, financial statement accuracy, housing charges arrears and control over credit cards.

Affidavit of Joanne Cermak, sworn July 9, 2020, paras. 8 and 9

7. Taking into account the auditor’s management letter, and the issues raised in the Notice, Durham determined that the Response did not satisfactorily address the issues raised in the Notice. It decided to appoint an interim receiver in accordance with s.85, paragraph 6 of the Act.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 10

8. On February 14, 2020, Durham appointed Deloitte as interim receiver of the Respondent.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 11

9. On March 18, 2020 Deloitte as interim receiver issued its first report and noted the following areas of concern:

- i) payments to contractors and third-party vendors where payments are not commercially reasonable, or the work was not done or was not done properly;
- ii) payments to parties related to Board members;
- iii) payments that appear to be in excess of legitimate entitlements;
- iv) credit card purchases using the Respondent's card that do not appear to reflect legitimate expenses of the Respondent;
- v) conflicts of interest; and
- vi) potential misappropriation of housing charge payments.

Affidavit of Joanne Cermak, sworn July 9, 2020, paras. 12 and 13

10. Deloitte, working with Pro Edge Management Inc. ("Pro Edge"), the new property manager who had recently been engaged by the Board, prepared a cash flow forecast for the period February 28, 2020 to August 28, 2020, which forecast indicated a shortfall of \$308,307. Pro Edge also raised its own concerns with respect to the books and records of the Respondent and their integrity and thus reliability.

Affidavit of Joanne Cermak, sworn July 9, 2020, paras. 14 and 15

11. Deloitte tried to stabilize the Respondent, both from a financial and from an operational standpoint

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 20

12. The terms of the directors of the Board all expired, making it impossible to turn back control of the Respondent to a board of directors, as none existed.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 22

13. In early March, the COVID-19 pandemic complicated matters further as Deloitte could not seek out, work with and train new director candidates during the pandemic and it could not take on new responsibilities given the shutdown of many of the operations of Durham and the courts.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 21

14. On June 10, 2020, Deloitte issued its second report as interim receiver, identifying concerns with respect to the Respondent's accounting records, and specifically with respect to housing charges. In particular, Deloitte identified misallocated housing charge payments and other irregularities in 36 member units. Deloitte is working with Pro Edge and is in the process of undertaking corrective steps to rectify the issues identified and confirming the amounts that will need to be written off as uncollectible.

Affidavit of Joanne Cermak, sworn July 9, 2020, paras. 26 and 27

15. Deloitte is also pursuing an insurance claim under the Respondent's employee dishonesty and fraud policies in respect of certain improper transactions alleged to have been effected by the Respondent's former housing administrator. Deloitte has also had a preliminary meeting with Durham Police Services in respect of a criminal investigation.

Affidavit of Joanne Cermak, sworn July 9, 2020, paras. 29 and 30

16. Deloitte and Pro Edge are also actively monitoring the situation regarding the COVID-19 virus, to ensure that they take all steps necessary to implement any and all recommendations of public health and government authorities.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 32

17. There is also still more to deal with regarding the ongoing repair and maintenance issues facing the Respondent.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 35

18. Pursuant to section 95(2) of the Act, the mandate of the interim receiver automatically expires on August 12, 2020, unless the court orders otherwise.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 36

19. Given the numerous issues identified, as well as the existing restrictions surrounding the COVID-19 pandemic, and the uncertainty as to when those restrictions will be lifted, it is clear that Deloitte will not be in a position to return control of the Respondent to a reconstituted board of directors by August 12, 2020.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 38

20. The outstanding tasks to be completed before transferring control to a reconstituted board include:

- i. preparation and approval of policies and processes including board succession and training plan, disposal of asset policy, personnel policies, and internal transfer policies;
- ii. preparation and approval of operating budget, subsidy request and deficit reduction plan; and
- iii. identification, selection and training of board members.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 39

22. Deloitte and Pro Edge are also in discussions with Durham and the Co-Operative Housing Federation to determine the proper course of action with respect to member approval of budgets and board members, given the inability to hold a general members' meeting due to the COVID-19 pandemic.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 41

23. It is Durham's view that a receiver will still be required for the Respondent for some further period of time. As a result, on June 18, 2020, Durham sent Deloitte notice under s.90(6) of the Act, notifying them as interim receiver for the Respondent, that Durham had determined that a court-appointed receiver was required in order to complete the stabilization of the Respondent's operations.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 42

24. On June 19, 2020, Deloitte responded to the notice sent by Durham indicating that it would be prepared to accept an appointment as receiver by the court, if it was to be made.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 43

25. On June 25, 2020, Durham sent Deloitte notice of its decision that it would be applying for a court order to appoint a Receiver.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 44

26. Without the appointment of a receiver, the property, the housing project and the stakeholder interests will all be left in limbo, as there is no board of directors in place, and therefore no one in whose charge the Respondent can be placed.

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 49

**PART III:
LEGISLATIVE PROVISIONS AND APPLICABILITY**

27. Per sections 11 and 68 of the Act, and under Ontario Regulation 368/11 – Designated Housing Projects, Schedule 6, Item 81, Durham is designated as the service manager of the Respondent. Administration of the Respondent is one of the service manager’s duties under the Act.

Sections 11 and 68 of the Act, ON Reg 368/11, Sched 6, item 81

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 4

28. Section 83 of the Act gives the service manager certain remedies to problems if there is a “triggering event”. On October 21, 2019 Durham sent the Respondent the Notice, indicating that there was a triggering event. A triggering event can occur if

(*inter alia*) “in the opinion of the service manager, the housing provider has failed to operate a designated housing project properly.”

Section 83 of the Act

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 5

29. Section 85, paragraph 6 of the Act allows a service manager to appoint an interim receiver if there is a triggering event. On February 14, 2020 Durham appointed Deloitte as interim receiver.

Section 85 of the Act

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 11

30. Under section 95(2) of the Act, the maximum length of appointment of an interim receiver is 180 days. As such, Deloitte’s appointment as interim receiver automatically expires on August 12, 2020 unless the Court orders otherwise.

Section 95(2) of the Act

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 36

31. Under section 87 of the Act, a service manager can exercise more than one remedy, and the same or different remedies at different times, in respect of the same triggering event. In the case at bar, the same incidents that gave rise to the declaration of the triggering event are ongoing, and as such, Durham requests that the Court appoint Deloitte as receiver.

Section 87(b) of the Act

Affidavit of Joanne Cermak, sworn July 9, 2020, para. 23

32. Under s. 90(6) of the Act, the service manager must give the housing provider notice that it is seeking to have a receiver appointed or have an interim receiver extended. The housing provider must be given time to respond, and that response must be considered by the service provider. In this matter, notice was given on June 18, 2020, Deloitte responded for the housing provider on June 19, 2020, recognizing that there was no longer any operating board of directors, final notice after consideration was given by Durham on June 25, 2020.

Section 90(6) of the Act

Affidavit of Joanne Cermak, sworn July 9, 2020, paras. 42, 43 and 44

PART IV
ORDER SOUGHT

33. Durham asks this Honourable Court for

(a) an Order abridging the time for, and validating the service of, the within application, if necessary, and dispensing with the necessity of further service;

(b) an Order appointing Deloitte as receiver of the property, assets and undertakings of the Respondent pursuant to Section 85(7) of the Act;

(c) in the alternative to the relief sought in (b), an Order extending the appointment of Deloitte as interim receiver of the Respondent for a further 180 days pursuant to s. 95(3) of the Act; and

(d) such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10TH DAY OF JULY
2020.



Jeffrey Tighe

Counsel for the Applicant

SCHEDULE "A" - LEGISLATIVE EXCERPTS**Excerpts from the *Housing Services Act*, 2011, S.O. 2011, c. 6****Designation of service managers**

11 (1) The regulations shall designate the municipalities and district social services administration boards that are service managers for the purposes of this Act.

Service areas

(2) The regulations shall specify the geographic area that is the service area of each service manager for the purposes of this Act.

General duty of service manager

68 (1) A service manager shall administer and fund a transferred housing program as it relates to a housing project designated in the regulations for the purposes of this subsection.

Triggering events

83 The following are triggering events for the purposes of sections 84 to 98:

1. The housing provider contravenes this Act or the regulations.
2. The housing provider becomes bankrupt or insolvent, takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment or arrangement with its creditors.
3. Steps are taken or proceedings are commenced by any person to dissolve or wind up the housing provider.
4. The housing provider ceases or threatens to cease to carry on business in the normal course.
5. A trustee, receiver, receiver and manager or similar person is appointed with respect to the business or assets of the housing provider.
6. REVOKED: 2017, c. 2, Sched. 3, s. 5 (1).
7. Any assets of the housing provider are seized under execution or attachment.
8. The housing provider is unable to fulfil its obligations.
9. The housing provider incurs an expenditure that is, in the opinion of the service manager, substantial and excessive.
10. The housing provider incurs an accumulated deficit that is, in the opinion of the service manager, substantial and excessive.

11. **In the opinion of the service manager, the housing provider has failed to operate a designated housing project properly.**
12. The housing provider contravenes a lease under which it has a leasehold interest in a designated housing project or in land where a designated housing project is located.

Remedies

85 If a triggering event occurs, the service manager may exercise the following remedies:

6. The service manager may appoint an interim receiver or interim receiver and manager for the housing provider.
7. The service manager may seek the appointment by the Superior Court of Justice of a receiver or receiver and manager for the housing provider.

Multiple remedies allowed

87 In respect of the same occurrence of a triggering event, the service manager may,

- (a) exercise more than one remedy; or
- (b) exercise the same or different remedies at different times.

Opportunity to make submission regarding court appointed receiver

90 (6) Where a service manager is entitled to seek the appointment of a receiver or a receiver and manager under paragraph 7 of section 85, or to make an application for an extension of the appointment of an interim receiver or an interim receiver and manager under subsection 95 (3), the service manager shall not make a decision to do so unless,

- (a) the service manager has first given the housing provider a written notice that complies with subsection (7);
- (b) the service manager has given the housing provider an opportunity to make a submission to the service manager in accordance with clause (7) (c); and
- (c) the service manager has considered the submission if a submission is made, made a decision, and provided the housing provider with notice of the decision and the reasons for it.

Time limit

95 (2) The maximum period during which there may be an interim receiver or interim receiver and manager is 180 days.

Extension by court

95 (3) The Superior Court of Justice may, on application of the service manager, extend the maximum period under subsection (2).

Appointment by agreement

95 (5) The interim receiver or interim receiver and manager shall be appointed under an agreement between the service manager and the interim receiver or interim receiver and manager.

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Respondent

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PROCEEDING COMMENCED AT
Oshawa

FACTUM

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