

COURT FILE NUMBER 1701-0864 *4*
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF CENTURION MORTGAGE CAPITAL CORPORATION
DEFENDANT THE BRIDGES STEPS LIMITED PARTNERSHIP, by its general partner, GIUSTINI BRIDGES INC., GIUSTINI BRIDGES INC., ASSURED DEVELOPMENTS LTD., GIUSTINI DEVELOPMENT CORPORATION, SBG INVESTMENT CORP., 1670749 ALBERTA LTD., 1670759 ALBERTA LTD., CANTERRA CUSTOM HOMES INC., and JORDAN GIUSTINI

DOCUMENT BENCH BRIEF OF CENTURION MORTGAGE CAPITAL CORPORATION

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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File No.: 570945-1

BRIEF OF LAW AND ARGUMENT OF CENTURION MORTGAGE CAPITAL CORPORATION

For a hearing set to be heard on November 27, 2018 at 2:00 p.m. before Madame Justice B.E.C. Romaine.

Table of Contents

I. Introduction and Background.....	3
II. Issues	4
III. Law and Argument.....	4
IV. Conclusion.....	6
Authorities.....	7

I. INTRODUCTION AND BACKGROUND

1. This Brief is filed on behalf of the Plaintiff in the within proceeding, Centurion Mortgage Capital Corporation ("Centurion") with respect to its application filed November 19, 2018 seeking, among other things, assignment of 81 presale purchase contracts in the Project (defined herein) located on the Mortgaged Lands (defined herein).
2. The Defendants, The Bridges Steps Limited Partnership ("The Bridges") and Giustini Bridges Inc. ("GBI", together with The Bridges, the "Debtors") are indebted to Centurion in the amount of \$20,913,563.08, plus legal costs on a solicitor and own client basis (the "Indebtedness").
3. As security for the Indebtedness, Centurion holds, among other things, a first and second place mortgage (collectively, the "Mortgage") against lands owned by the Debtors located at 918 McPherson Square NE, Calgary and legally described as: PLAN 0512930, BLOCK 7, LOT 1 (the "Mortgaged Lands").¹
4. On the Mortgaged Lands, the Debtors had started construction and development of a six storey, 122 unit, multi-family condominium project (the "Project"). As of the date of the Redemption Order (defined herein) the Project is only partially constructed, comprising a below-grade parking structure.
5. Pursuant to an Order for Receiver and Manager granted by the Honourable Madam Justice M.H. Hollins on July 25, 2017 (the "Receivership Order"), Deloitte Restructuring Inc. was appointed receiver and manager ("Receiver") over the Mortgaged Lands and all of the undertakings, property and assets of the Debtors situated upon or relating to the Mortgaged Lands.
6. Pursuant to a Redemption Order Listing granted on November 27, 2018, as amended by the following orders: (i) Consent Order granted January 5, 2018; (ii) Order granted on April 20, 2018; (iii) Order granted on April 24, 2018; and (iv) Order granted on July 19, 2018 (collectively the "Redemption Order") the Mortgaged Lands have been listed for sale on an "as is where is basis" through the Judicial Listing Agent, CBRE Limited, since January 20, 2018. To date, only three offers have been received, all well below the Indebtedness.²
7. Prior to the Receivership Order, the Debtor entered into 81 presale purchase contracts with various purchasers of units in the Project (the "Purchase Contracts").³

¹ Copies of the loan and security documents granted in favour of Centurion can be found in the Affidavit of Stephen Stewart, sworn July 13, 2017, filed.

² Second and Final Report of the Receiver, dated November 19, 2018 (the "Final Report") at Appendix "A".

³ First Report of the Receiver, dated April 10, 2018 (the "First Report") at para 15; Affidavit of Stephen Stewart, sworn November 19, 2018, filed (the "Fifth Stewart Affidavit") at para 10 and Exhibit "F".

8. Pursuant to the Purchase Contracts, purchasers (each a "Purchaser") were required to provide a minimum deposit of 5%, either in cash or a bond (the "Deposit") of the total purchase price upon execution of the Purchase Contracts.⁴
9. McLeod Law LLP ("McLeod") previously held total deposits of approximately \$2.6M in trust in respect of the Purchase Contracts. Prior to the Receivership Order, Aviva Insurance Company of Canada ("Aviva") authorized the release of \$2.3 million in deposits by McLeod for Project purposes. Aviva provided deposit protection to the Debtors to ensure that any deposits Aviva authorized to be released from trust are insured.⁵
10. A deposit of approximately \$30,000 was paid into Court as a result of litigation proceedings commenced against the Debtors by a Purchaser prior to the Receivership Order.⁶
11. McLeod continues to hold the remaining deposits of approximately \$239,000 until further direction is provided by the Receiver and/or this Honourable Court.⁷
12. Centurion has made an offer to purchase the Mortgage Lands, by way of credit bid (the "Centurion Offer"). As part of the Centurion Offer, Centurion is seeking assignment of the Purchase Contracts (the "Assignment") as, absent this assignment, it may not be able to obtain financing to complete the Project.⁸

II. ISSUES

13. Can the Purchase Contracts be assigned to Centurion?

III. LAW AND ARGUMENT

14. All of the Purchasers entered into essentially the same standard form contracts which contain assignment provisions. Paragraphs 21 and 27 of the Purchase Contracts are relevant to determining the issue at hand.
15. Paragraph 21 states:

"The Purchaser shall not sell the Unit or assign this Agreement before closing and completion of this transaction without prior consent of the Vendor in writing. Should the Purchaser so sell the Unit or assign this Agreement, such as shall constitute a default of the Purchaser under this Agreement. The Vendor may assign this Agreement before closing and completion of this transaction in its

⁴ First Report, *supra* note 3 at para 15.

⁵ Final Report, *supra* note 2, at paras 13-15.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Fifth Stewart Affidavit, *supra* note 3 at paras 10 and 13.

sole discretion. This Agreement shall enure to the benefit of and be binding upon the heirs, executors, administrators and permitted assigns of the parties hereto. [underlining added]

16. Paragraph 27 (a) states:

“The Vendor and Purchaser acknowledge and agree that this Agreement constitutes the entire agreement between the parties with respect to the purchase and sale of the Unit and supersedes any prior agreements, negotiations, or discussions, whether oral or written of either the Vendor or the Purchaser....”

17. A party can consent to assign a contract they are a party to. *Chitty on Contracts* at para. 19-078 states that:

Consent of other party required for release of contracting party. Everybody has a right to choose with whom he will contract and no-one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. Consequently, the burden of a contract cannot in principle be transferred without the consent of the other party, so as to discharge the original contractor. As Sir R. Collins M.R. said in *Tolhurst v. Associated Portland Cement Manufactures Ltd.*: **“Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee.”** [emphasis added]⁹.

18. Pursuant to paragraphs 21 and 27 of the Purchase Contracts, the Purchasers expressly consented to the assignment of the Purchase Contracts.

19. As the Purchasers have expressly consented to the assignment of their respective Purchase Contracts, at the sole discretion of the Debtors, the Purchase Contracts can be assigned to Centurion. Alternatively, and additionally, the Purchasers, by their contractual representations are estopped from revoking their consent to assignment.

20. The existence of contractual consent to assignment distinguishes this case from the facts in *Lee v. Point of View Developments (Encore) Inc.*¹⁰, where the purchase contracts were silent on whether or not they could be assigned.

21. Assignment of the Purchase Contracts is a fair and reasonable approach to complete the Project that, absent assignment, is doomed to failure.

⁹ HG Beale, ed, *Chitty on Contracts*, vol.1, 29th ed (London: Sweet & Maxwell, 2015) [TAB A].

¹⁰ *Lee v. Point of View Developments (Encore) Inc.*, 2010 ABQB 558 at paras 3 and 25 [TAB B].

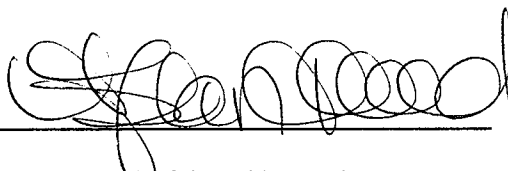
IV. CONCLUSION

22. Centurion requires the Purchase Contracts in order to obtain financing to complete the Project. The Purchase Contracts are assignable on their terms. The Purchasers have specifically turned their minds to assignment of the Purchase Contracts and expressly consented to same.
23. Centurion requests that, as part of the Centurion Offer, the Purchase Contracts be assigned to it and the Deposits held by McLeod Law and the Court be paid to Centurion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 19th day of November, 2018.

DENTONS CANADA LLP

Per: _____



David W. Mann / Afshan Naveed
Counsel for Centurion Mortgage Capital
Corporation

AUTHORITIES

<u>Tab</u>	
A	HG Beale, ed, <i>Chitty on Contracts</i> , vol.1, 29 th ed (London: Sweet & Maxwell, 2015)
B	<i>Lee v. Point of View Developments (Encore) Inc.</i> , 2010 ABQB 558

TAB A

CHITTY
ON
CONTRACTS

VOLUME II
General Principles

SIR GEORGE H. M.

THE COMMON LAW LIBRARY

**CHITTY
ON
CONTRACTS**

THIRTY-SECOND EDITION

VOLUME I
GENERAL PRINCIPLES

SWEET & MAXWELL



THOMSON REUTERS

example, a building is sold at full value along with an assignment to the purchaser of claims in contract or tort in relation to the building. The building turns out to need repairs as a result of a breach of the builder's contract with the assignor (whether that breach is prior, or subsequent, to the sale to the assignee) or of a tort (damaging the building prior to the sale). The assignee pays for the repairs. It might be argued that the assignor in that situation has suffered no loss so that, applying the governing principle that the assignee cannot recover more than the assignor, the assignee has no substantial claim. If correct, "the claim to damages would disappear . . . into some legal black hole, so that the wrongdoer escaped scot-free".²⁷³ Acceptance of the argument would also nullify the purpose of the governing principle which is to avoid prejudice to the debtor and not to allow the debtor to escape liability. Perhaps not surprisingly, therefore, that argument was rejected in *Offer-Hoar v Larkstore Ltd*.²⁷⁴ The Court of Appeal said that, in applying the principle that the assignee cannot recover more than the assignor, one should be asking what damages the assignor could itself have recovered had there been no assignment and *had there been no transfer of the land* to the assignee. Substantial damages were, therefore, recoverable where an assignor had sold its land to an assignee along with, or prior to, the assignment of the relevant cause of action relating to the land.

19-077 The problem has, in any event, normally been circumvented because of the courts' recognition that, where a third party is, or will become, owner of the defective or damaged property, there is an exception to the general rule that a contracting party can recover damages only for its own loss and not the loss of the third party.²⁷⁵ Where the exception applies, the contracting party (the assignor) is entitled to substantial damages for the loss suffered by the third party (the assignee): by the same token, there is no question of an award of substantial damages to the assignee infringing the principle that the assignee cannot recover more than the assignor.

(v) *No Assignment of Liabilities*

19-078 **Consent of other party required for release of contracting party.** Everybody has a right to choose with whom he will contract and no-one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. Consequently, the burden of a contract cannot in principle be transferred without the consent of the other party, so as to discharge the

²⁷³ *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd* (1982) S.L.T. 533, 538, per Lord Keith.

²⁷⁴ [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926. *Offer-Hoar v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926 was applied in *Landfast (Anglia) Ltd v Cameron Taylor One Ltd* [2008] EWHC 343 (TCC). See also the earlier cases of *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd* (1982) S.L.T. 533 (a Scottish delict case); *Linden Gardens Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 B.L.R. 57, 80-81, per Staughton L.J.

²⁷⁵ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518. The exception is based on *Dunlop v Lambert* (1839) 6 Cl. & F. 600 and *The Albazero* [1977] A.C. 774. For detailed discussion, see above, paras 18-051-18-070.

original contractor. As Sir R. Collins M.R. said in *Tollhurst v Associated Portland Cement Manufacturers Ltd*²⁷⁶:

"Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee."

Benefit and burden. The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations. Thus, where goods are purchased, and the seller assigns the right to the price to a credit factor, the factor is under no liability to the purchaser if the goods are defective although, in an action by the factor, the principle that assignments are subject to equities means that the purchaser will generally be able to rely on any defence or claim which he could raise against the seller.²⁷⁷ Similarly in *Pan Ocean Shipping Ltd v Creditcorp Ltd*²⁷⁸ it was held by the House of Lords that an assignee of the payment of hire under a charterparty is not liable to the debtor (the charterer), whether in contract or restitution, to repay the hire paid for a period when the ship turned out to be off-hire: rather the liability to repay the unearned hire, which on the facts was contained in an express term of the charterparty, remained exclusively with the assignor. This was so irrespective of whether the debtor would have had a defence to an action for non-payment of hire by the assignee. 19-079

Conditional benefits. However, where contractual rights are assigned, the extent of those rights will be defined by the original contract. This means that (for example) an exemption clause in the original contract may be binding on the assignee.²⁷⁹ Again, a patentee who assigned his patent by a contract which provided that certain payments were to be made to him was permitted to sue a company to which the assignees had later assigned their rights.²⁸⁰ In *Tollhurst's* case,²⁸¹ the assignee acquired the benefit of a contract to supply chalk for the manufacture of Portland cement on a particular piece of land. The assignee was not bound by the duty to take chalk from Tollhurst,²⁸² but if it did take chalk, it was bound to obtain all its requirements for the manufacture of cement on that 19-080

²⁷⁶ [1902] 2 K.B. 660, 668 CA; *C.B. Peacock Land Co Ltd v Hamilton Milk Products Co Ltd* [1963] N.Z.L.R. 576; *Hirachand Punamchand v Temple* [1911] 2 K.B. 330, 80 L.J.K.B. 1155; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 103. See also Birks and Beatson (1976) 92 L.Q.R. 188-202.

²⁷⁷ Above, paras 19-071-19-072.

²⁷⁸ [1994] 1 W.L.R. 161.

²⁷⁹ See *Britain & Overseas Trading Ltd v Brooks Wharf Ltd* [1967] 2 Lloyd's Rep. 51; *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 R.P.C. 41, 57 et seq. See also *Aspden v Seddon* (No.2) (1876) 1 Ex. D. 496, 509. In *Glencore International AG v Metro Trading International Inc* [1999] 2 All E.R. (Comm) 899, the assignee of the obligation to pay the price under a contract of sale was held "bound" by the exclusive jurisdiction clause in that contract (and such an assignment was held to fall within art.17 of the Brussels Convention, given effect to in the UK by the Civil Jurisdiction and Judgments Act 1982).

²⁸⁰ *Werdman v Société Générale d'Electricité* (1881) 19 Ch. D. 246.

²⁸¹ [1903] A.C. 414; above, para.19-056.

²⁸² *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 R.P.C. 41.

TAB B

2010 ABQB 558
Alberta Court of Queen's Bench

Lee v. Pointe of View Developments (Encore) Inc.

2010 CarswellAlta 1745, 2010 ABQB 558, [2010] A.W.L.D. 5034, [2010] A.W.L.D.
5038, 193 A.C.W.S. (3d) 1350, 324 D.L.R. (4th) 130, 35 Alta. L.R. (5th) 42

**Corinna Lee and Pro Law Inc. and Darlene Lee (Applicants)
and Pointe of View Developments (Encore) Inc. and Pointe
of View Marketing and Management Inc. (Respondents)**

General Investments Corp., Criterion Residences Inc., Christina Belseck, Marshall Cohen, David Cohen, Martin Amando, Madge Amando, Mark De Castro, Jennifer De Castro, Malcolm Chow, Kay Chow, Carol Chow, Saeed Shah, Joel Goldberg, Luise Kinsman, Ken Squirrell, 1298028 Alberta Corp., Jennifer Dear, Anna Law, Kent Law, Robin Kausner, Angela Louie, Felix Tam, Timothy Grieve, Jeffrey Grieve, Denise Grieve, Amita Sarkar, Ryan Bielefeld, Laura Bielefeld, Donna Simonson, Vernon Simonson, Tyler Knight, Farouk Dhanidina, Daniel Sharp, Kent Carter, Oleksiy Morozov, Natalya Morozova, Wilson Ma, Mathew McLeod, Wendy Lee and Hommel Abeng (Applicants) and Pointe of View Developments (Encore) Inc. and Pointe of View Marketing and Management Inc. (Respondents)

A.D. Macleod J.

Heard: May 17, 2010

Judgment: September 2, 2010

Docket: Calgary 0901-11869, 1001-01809

Counsel: Robert Schuett, Dionne Levesque for Applicants, General Investments Corp. et al
Candice A. Ross for Applicants, Corinna Lee et al.

Michael D. Aasen, Jill W. Wilkie for Respondents, Pointe of View Developments (Encore) Inc., Pointe of View Marketing Management Inc.

Subject: Property; Contracts; Civil Practice and Procedure

Headnote

Real property --- Condominiums — Miscellaneous

Assignment by developer — Condominium units under construction were purchased between January and August 2007 — There was no drop-dead possession date, but clause in agreements established that condition for completion of purchase and sale was registration of condominium plan within reasonable time — In August 2008, developer, R Corp., sent notice that due to cost escalations construction had been suspended — In November 2008, purchasers were advised that receiver manager had been appointed and that project was going to be sold and purchasers' deposits would be held in trust — In December 2008, project was sold to P Inc. — Thirty purchasers brought applications seeking declarations as to their rights — Declaration issued that contracts between parties were not assignable without consent of applicant purchasers; contracts were at end and applicants were entitled to return of their deposits — Contracts of this nature are entered into by purchases who rely upon skill, reputation and ability of builder to deliver suitable product — Case law is clear that such contracts are not assignable without purchaser's consent — This was not case where party to contract was delegating performance to someone else and remaining liable to purchaser — Developer/builder had gone into receivership and no longer had any possession or control over project — In no way was it in position to either ensure performance or be responsible for performance of its obligations — Purchasers did not consent or acquiesce to assignment, and no court order had effected such assignment without their consent — Requirement of clause in contract had not been met — By May 2010, date of applications, almost three years had passed since last sale at issue — Applicants

were free to terminate agreement under clause in question by giving 60 days notice to P Inc.; notice was given and more than 60 days had passed.

Real property --- Sale of land --- Agreement of purchase and sale --- Assignment of rights and obligations under contract --- By vendor

Condominium units under construction were purchased between January and August 2007 — There was no drop-dead possession date, but clause in agreements established that condition for completion of purchase and sale was registration of condominium plan within reasonable time — In August 2008, developer, R Corp., sent notice that due to cost escalations construction had been suspended — In November 2008, purchasers were advised that receiver manager had been appointed and that project was going to be sold and purchasers' deposits would be held in trust — In December 2008, project was sold to P Inc. — Thirty purchasers brought applications seeking declarations as to their rights — Declaration issued that contracts between parties were not assignable without consent of applicant purchasers; contracts were at end and applicants were entitled to return of their deposits — Contracts of this nature are entered into by purchases who rely upon skill, reputation and ability of builder to deliver suitable product — Case law is clear that such contracts are not assignable without purchaser's consent — This was not case where party to contract was delegating performance to someone else and remaining liable to purchaser — Developer/builder had gone into receivership and no longer had any possession or control over project — In no way was it in position to either ensure performance or be responsible for performance of its obligations — Purchasers did not consent or acquiesce to assignment, and no court order had effected such assignment without their consent — Requirement of clause in contract had not been met — By May 2010, date of applications, almost three years had passed since last sale at issue — Applicants were free to terminate agreement under clause in question by giving 60 days notice to P Inc.; notice was given and more than 60 days had passed.

APPLICATIONS by purchasers of condominium units under construction for declaration as to their rights following assignment by developer.

A.D. Macleod J.:

1 These two actions were brought by purchasers of thirty condominium units which have been under construction in the Calgary beltline at 4th Street and 10th Avenue S.W. These units were purchased at various times between January and August, 2007 and for different prices. These proceedings were commenced by Originating Notice and the Applicants seek a declaration as to their rights under Rule 410 of the *Alberta Rules of Court*. They also invoke the *Condominium Property Act* R.S.A. 2000, c. C-22 and in particular, s. 67. Section 66 specifically provides that an application under the *Act* shall be by Originating Notice. Following the hearing of these special applications on May 17, 2010 counsel submitted supplementary briefs on the question of assignability. I am grateful for all their submissions.

2 All of the purchasers entered into essentially the same standard form contract.

3 Clause 30 of the Standard Terms and Conditions provided that:

... this Agreement shall enure to the benefit of and be binding upon the parties and their respective heirs, executors, administrators, successors and permitted assigns.

While paragraph 27 restricted the rights of purchasers to assign their agreements to third parties the agreements were otherwise silent on the assignment right of the developer, Resiance Corporation, the General Partner for the Gateway Gaslight Square Limited Partnership. The project was known as the Gateway Midtown Condominium Project (the Project).

4 At the times of these transactions the Project was far from completion. Construction was underway in January 2007 and various dates of completion had been communicated to the purchasers ranging from late 2008 to early 2010. There was no drop-dead possession date in any of the agreements but clause 9 of the agreements stated as follows:

9. A condition to the obligations of both parties to complete the purchase and sale contemplated by this Agreement is registration of the Condominium Plan (to the extent required to create separate titles for the Unit and the Parking Unit) within a reasonable period of time taking into account a construction period, depending on phasing, which could last up to 22 years. If this condition is not met or satisfied by the Vendor using commercially reasonable efforts, the obligations of purchase and sale under this Agreement may be terminated and upon 60 days' notice the Purchaser shall, if then in occupation of all or any part of the Property, vacate the Property and all monies paid by the Purchaser, except for Interim Occupancy Rent (as defined in section 5 of the Standard Terms and Conditions), shall be returned to the Purchaser without interest. For clarity, interim occupancy rent shall continue to be payable and the tenancy-at-will provisions contained in sections 5 and 6 of the Standard Terms and Conditions shall continue to govern the Purchaser's occupancy of the Property. This condition may not be waived by either party.

5 Clause 33 of the Standard Terms and Conditions states that time is of the essence.

6 On or about August 20, 2008 Resiance sent a notice to the purchasers advising them that due to "dramatic cost escalations, unabated for the last 3 years" construction on the Project had been suspended.

7 In November 2008 a further notice was sent out to the purchasers advising them that a receiver manager had been appointed and that the project was going to be sold and the purchasers' deposits, which would continue to be protected by the Alberta New Home Warranty program, would be held in trust by Judy K. Wong & Company, Resiance's counsel.

8 On December 19, 2008 by an Order of this Court the Project was sold to Pointe of View Marketing and Management Inc. (POV). In April 2009, POV took possession and sent the following letter to the purchasers:

We are pleased to inform you that by Court Order, Pointe of View Developments (Encore) Inc. ("Pointe of View") is now the owner of the Gateway Midtown project. Also by Court Order, your contract has been assumed by Pointe of View and will continue in accordance with its terms. Please be assured that as the purchaser, you are not required to take any further action at this time.

Pointe of View has taken possession of the property and has recommended construction on the lower parkade levels. The schedule of development will be split into three phases: first, the parkade including the first floor retail level; second, the West Tower which is to be renamed Encore and third, the East Tower.

Pointe of View will appoint a new home sales representative to the project in the near future. Once that has occurred, purchasers will be contacted to advise on the status of the project. In the interim, if you have any questions regarding the process under which your contract was assigned to Pointe of View, please contact your legal counsel.

Thank you in advance for your understanding and continued patience during this transition.

The purchasers were not canvassed as to their views on the assignment and their affidavits all state that they would not have agreed to another developer taking over the project.

9 On May 7, 2009 a number of parties appeared before McDonald J. (then of this Court) including counsel for the mortgagee CDPQ Mortgage Investment Corporation (Mr. Collins), counsel for Resiance and counsel for Alberta New Home Warranty. Ms. Chow, on behalf of Resiance, said at page 8 of the transcript:

Ms. Chow: Yes. My Lord, as Mr. Collins has mentioned, I am the — part of the firm that is holding the deposits for the 82 contracts. The amount of the deposits in the — is in a little over the 2.5 million mark. I do just want to let the Court know that over the past probably six months or so I have been contacted by numerous purchasers. Now, many of them will be — are for contracts for which the deposits will be returned because Pointe of View is not assuming, but a number of them are the — from the purchasers who have contacts that Pointe of View is assuming.

There's been a wide range of communication, everything from just telephone calls inquiring as to the status of the contract, to letters from purchasers requesting deposits back, to calls saying, you know, "I — I never would have signed with Pointe of View," and then there are a few letters from counsel for the purchasers as well. So that's the — the background from which I'm working on right now. And I would say that in terms of letters and e-mails perhaps from purchasers, there would be in the range of ten to 15 or so, so that is a little bit more formal communication. Letters from counsel, probably about seven or — seven or eight or so. Sometimes it's just merely telephone calls from counsel as well.

So at this point in time I — I — I would like some perhaps direction from the Court on how to proceed. I understand Mr. Collins is requesting that all these deposits be transferred over, but in light of the concern of the purchasers, I'm — I'm wondering if — if — if it is appropriate at all that, you know, they be given notice so that they have an opportunity to be heard, or in light of the vesting order that is there, saying that all the contracts can be assumed, that this order that Mr. Collins is seeking is sufficient to just have them being served with the order and saying that any future concerns you can deal with Pointe of View directly.

Mr. Collins on behalf of the mortgagee said at page 9 commencing line 20:

Mr. Collins: I mean, the — the — the contracts have been assigned, and — and just by way of background, My Lord, the — the — the basis upon which the contracts were assigned was if there were no restriction on assignability in the contract, then the vesting order declared that those contracts be assigned. And these contracts Mr. Grasseffa has appended the standard terms and conditions of those contracts in his affidavit. There's a restriction on the purchaser of those units to assign the contract, but no restriction on the ability of Resiance to assign the contracts.

So what we've designed here is — is — is in paragraph 2 of the proposed form of order, My Lord, is that counsel for Resiance is to immediately provide notice to all of the purchasers that they've been assigned to Pointe of View, which is something that had to occur, in any event, and then paragraph 3 makes it very clear that they — they have all the rights that existed prior to the assignment, including the right to allege and seek a determination from the Court that they're entitled to treat the assigned agreement as being at an end and together with such other relief as the purchaser may seek and the Court may grant.

So it seems to me that that is what happened. We're stating the obvious, but because we're dealing with individual purchasers, we wanted to make it clear that they understand that whatever rights they had when these contracts were in the hands of Resiance —

— continue through this process. And so if they wish to seek a declaration that the contract has been terminated, they're — they're entitled to do so. And it may — it may be that — that some or all of the purchasers elect to do that, or some or all do not

Unfortunately, we don't have the benefit of Pointe of View here through counsel to — to advise of what they're going to do, but this — this is entirely designed to move this into Pointe of View's camp. That is to say they're going to have to deal these 82 people whose contracts have been assigned to them.

10 The Order that was signed at the end of that hearing provided that the deposits be transferred to the trust accounts of counsel for POV and further provided that counsel for Resiance should immediately provide notice to all purchasers of the assigned agreements that the agreements had been assigned to POV and to forward the Purchasers a copy of the Order.

Paragraph 3 of the Order stated as follows:

3. Purchasers under Assigned Agreements continue to have all rights that existed prior to the assignment thereof under and pursuant to Assigned Agreements including, without limitation, the right to allege and seek a determination from the Court that such purchaser is entitled to treat the an (sic) Assigned Agreement as being at an end together with such other relief as the purchaser may seek and the Court may order in respect of such determination.

11 On December 4, 2009, counsel for many of the purchasers wrote to POV's counsel demanding return of the deposits. Counsel for two others had earlier made a similar demand in May 2009.

Position of the Purchasers

12 The purchasers argue that they did not consent to the assignment of this project to POV. They argue that the obligation to build a condominium project cannot be assigned without the consent of the purchasers. They also argue that clause 9 gives them the right to terminate the contract because there is no firm completion date and the Condominium Plan is not yet registered. There are also arguments relating to whether or not the scope of the project has changed because there have been changes sought and received to the Land Use Bylaw by POV.

Position of POV

13 POV argues that it is in the same position as the Vendor, Resiance. There has been a valid assignment at law. Furthermore, Clause 9 does not give the purchasers a right to terminate because a "reasonable period of time" has not passed. It submits that the parties were aware that there was no guaranteed possession date.

Are these contracts assignable?

14 It is clear from the previous order of this Court that the purchasers are entitled to have their rights on this issue determined and if I find that these agreements require consent of the purchaser to be assigned then, absent that consent, they are at an end.

15 In determining that issue we of course start with the words of the contracts. It is clear that clause 30 provides that the agreement shall enure to the benefit of "permitted assigns". This indicates to me that the parties contemplated assignment but only in cases where they are permitted by the contract or otherwise by the parties. Certainly clause 30 does not itself give permission.

16 Typically the affidavits of the claimants provide that they were relying upon the developer Resiance to build their condominiums and would not have agreed to have POV do this. All expressed concern that under the circumstances of Resiance's insolvency they are mistrustful of POV's ability to complete the condominium in accordance with their expectations. None of the claimants have consented to POV's taking over the development; nor will they.

17 POV argues that it is common in the building industry to sub-contract out many of the constituent elements of a development such as this. As long as the purchasers receive a product which complies with the specifications and terms of the agreement, they have no right to insist on having these tasks performed by any particular entity. Moreover, POV points out that executory contracts do not automatically terminate upon insolvency.

18 The general rule is that a party to a contract may assign rights but not liabilities so as to relieve himself of a contractual obligation. In other words, unless the purchasers in this case consent to the assignment to POV they would not be bound by it.

19 There have been some inroads on this general rule. As Fridman says in *The Law of Contract in Canada* (5th ed.) (Toronto: Carswell, 2006) at page 696:

However, it was recognized by more than one English case in the nineteenth century that there could be vicarious or substituted performance where no personal considerations influenced the choice of the original debtor or obligee. This development was summarized in the following sentence from the *Tolhurst* case.

there is a clear right to assign a contract where no services depending on individual skill or personal confidence are required.

As was said by Hogg J. in the leading Ontario case of *Sullivan v. Gray*,

The law is well established that where the skill or knowledge or some other personal quality of a party with whom a contract has been made is a material ingredient of the contract, the contract can be performed by the contracting party alone, and not by an assignee.

20 This case involves the sale of yet unbuilt condominiums. One would reasonably expect prospective buyers to canvass a number of show suites and evaluate the products of competing builders. The process may include a discussion with representatives of the builder and an assessment of the workmanship and quality of finishings in show suites which have been put together by the builder. While it is generally understood that much of the work will be sub-contracted, it is the builder or developer upon whom the purchaser relies to produce the finished product in accordance with the expectations which have been created in the mind of the purchaser.

21 Moreover, the purchase of a home is a major decision and a personal one because it is probably going to be the purchaser's home for several years and we spend a lot of time in our homes. Purchasers want to know that the home, when built, will be to their taste.

22 To suggest to a purchaser that if his chosen builder goes into receivership the responsibility for building her home can be passed on to an unknown builder would undoubtedly meet with the response given by the Applicants here, which is to say, that we chose Resiance. Now that Resiance has gone into receivership we do not want to accept POV as our developer.

23 I agree with the Applicants' position that contracts of the nature of those at issue in this case are entered into by purchasers who rely upon the skill, reputation and the ability of the builder to deliver a suitable product. The case law is clear that those contracts are not assignable without the purchaser's consent. (*Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)*, 2002 MBCA 51, [2002] 7 W.W.R. 104 (Man. C.A.).

24 Furthermore, this is not a case where one party to the contract is delegating performance of the contract to someone else and remaining liable to the purchaser. Here, the builder has gone into receivership and no longer has any possession or control over the project. In no meaningful way is it in a position to either ensure performance or be responsible for performance of its obligations.

25 I am of the view that the contracts at issue here are not assignable without the consent of the purchasers. The purchasers have not consented and they have not acquiesced. No order of this Court has effected such an assignment without their consent.

26 POV points to the decision of Master Laycock in *Delberke et al v. Pointe of View Marketing and Management Inc. et al* (14 January 2010) Calgary, CVQ10DELBEKEM. In light of my conclusion that these contracts are not assignable without consent that decision is not helpful to POV.

27 I also find that the requirement of clause 9 has not been met. By May 2010, the date of the application before me, almost three years had passed since the last sale at issue. I think the purchasers were free to terminate the agreement under that clause by giving 60 days notice to POV. POV has been advised that these Applicants wish to terminate their contract and more than 60 days has passed since that notice.

28 In the result I hereby declare that the contracts between the parties before me are of such a nature that they are not assignable without the consent of the Applicant purchasers. That consent has not been obtained and the assignment has not been the subject of any acquiescence on the part of the Applicants. I declare that the contracts are at an end and that the Applicants are entitled to a return of their deposits.

29 Paragraph 3 of the Order of MacDonald J. of May 2009 provided that the purchasers may seek relief before this Court and they have done so. They have been successful and I have ruled that they are entitled to their deposits back. Those deposits were transferred to POV's counsel's trust account subject to the right of the purchasers to take issue with the assignability which they have done. Since I have found that the contracts were not assignable without the consent of the purchasers, the purchasers have had the right to receive their deposits back by the date of this Court's order of May 7, 2009. They are entitled to interest on their deposits from that day to the date of receipt in accordance with the *Judgment Interest Act* R.S.A. 2000 c. J-1.

30 The Applicants are entitled to costs which may be spoken to.

Order accordingly.

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