

Court File No: CV-11-9399-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PEOPLES TRUST COMPANY

Applicant

and

ROSE OF SHARON (ONTARIO) RETIREMENT COMMUNITY

Respondent

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*,
RSC 1985, c B-3, as amended and under Section 101 of the
Courts of Justice Act, RSO 1990, c C-43

NOTICE OF APPEAL

UNIMAC GROUP LTD. (the "Appellant"), APPEALS to the Court of Appeal from the Endorsement of the Honourable Justice D. M. Brown, dated February 6, 2014, made at Toronto, Ontario.

THE APPELLANT ASKS THAT that a judgment be granted as follows:

1. The Endorsement of the Honourable Justice D. M. Brown, dated February 6, 2014, made at Toronto, Ontario (the "Endorsement"), granting priority to Peoples Trust Company ("Peoples") with respect to the subject units (the "Units") in the Rose of Sharon (Ontario) Retirement Community (the "Property"), over the Appellant, be set aside;
2. The Endorsement, awarding partial indemnity costs to Peoples, against the Appellant, in the amount of \$8,000.00, be set aside;
3. The Endorsement be stayed pending a final determination of the within appeal; and

4. Such other and further relief as counsel may advise and the Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. The Honourable Justice D. M. Brown erred in law by misapprehending and/or disregarding the facts, evidence and law submitted by the parties in respect of the motion below by granting priority over the Units to Peoples, vis-à-vis the interest of other secured creditors, including the Appellant;
2. The Honourable Justice D. M. Brown erred in law by misapprehending and/or disregarding the facts, evidence and law submitted by the parties in respect of the motion below by finding that the combination the pledge of the Units in the Property, created by the Memorandum of Understanding and the Right to Occupy Agreements ("RTOAs"), in respect of the Units, entered into by the Appellant and Rose of Sharon (Ontario) Retirement Community ("Rose of Sharon"), created no interest in land;
3. The Honourable Justice D. M. Brown erred in law by misapprehending and/or disregarding the facts, evidence and law submitted by the parties in respect of the motion below by finding that the issue of priority of the construction liens, registered by the Appellant against the Property, could be determined separately and apart from the security interest that the Appellant held over the Units, granted to it by Rose of Sharon, when these issues formed part of the same series of events and transactions between the Appellant and Rose of Sharon;
4. The Honourable Justice D. M. Brown erred in law by misapprehending and/or disregarding the facts, evidence and law submitted by the parties in respect of the motion below by finding that the issue of priority of the construction liens in the within matter, shall be determined by a Judge on Commercial List, subsequent to the determination of priority with respect to the Units on the motion below;

5. The Appellant holds an equitable security interest in the Units of Rose of Sharon, which were pledged as security to the Appellant by Rose of Sharon, for payments due and owing to the Appellant for the construction of the Property, which formed part of the same series of events and transactions that gave rise to the Appellant's registration of its construction lien against the Property;
6. The Appellant's interest in the Units is comprised of both statutory construction lien and equitable interests, and in this regard, the priority issue, with respect to the Units, and the priority issue of the construction liens, cannot, therefore, be separated and argued, as they are part and parcel of the same series of events and transactions which took place on the Property;
7. Therefore, all priority issues, in respect of the liens and Units, should be argued together, rather than with the priority with respect to the Units being determined first, as was done on the motion below;
8. However, irrespective of and despite the foregoing, the Court below failed to provide the Appellant with sufficient opportunity to make its submissions with respect to its statutory and equitable interests in the Units, on the return of the motion below;
9. Furthermore, the Appellant was prohibited from filing further evidence on the motion below, and was, therefore, not provided with the opportunity to prove its case and its interest in the Units;
10. The Appellant was not provided with the foregoing opportunity, despite the fact that the administration of justice and the principles of fairness and due process require all relevant facts, evidence and law with respect to issues to be decided on a motion and/or proceeding to be provided to the Court, in order to render a just and informed decision thereon;

11. Accordingly, it is respectfully submitted that the Endorsement of the Honourable Justice D. M. Brown, dated February 6, 2014, has been rendered without all relevant facts, evidence and law before him, and contrary to the principles of fairness and due process;
12. There is good reason to doubt the correctness of the Endorsement of the Honourable Justice D. M. Brown, dated February 6, 2014;
13. The Endorsement of the Honourable Justice D. M. Brown, dated February 6, 2014, conflicts with other decisions in Ontario and elsewhere;
14. The proposed appeal involves matters of importance to the development of the law and to the administration of justice; and
15. Such further and other grounds as counsel for the Appellants may advise and the Honourable Court deems just.

THE BASIS FOR THE APPELLATE COURT'S JURISDICTION IS:

1. The Endorsement of the Honourable Justice D. M. Brown is a final Order of the Superior Court of Justice in an action under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA");
2. An appeal from a final Order of the Superior Court of Justice in an action under the BIA lies to the Court of Appeal, pursuant to Section 193 of the BIA;
3. Leave to appeal to the Court of Appeal is not required in the following cases, pursuant to Section 193 of the BIA:
 - (a) if the point at issue involves future rights;
 - (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars;

4. The Endorsement of the Honourable Justice D. M. Brown falls within the above-noted, enumerated categories;
5. Rules 1.03, 1.04, 1.05, 2.01, 2.03, 3, 20, 31.08, 59, 61, 62 and 63 of the *Rules of Civil Procedure* RRO 1990, Reg 194;
6. Sections 6, 19, 131, 132, and 134 of the *Courts of Justice Act* RSO 1990, c C-43;
7. Sections 2, 14, 15, 34, 36, 75, 76, 77, 78 and 85 of the *Construction Lien Act* RSO 1990, c C-30; and
8. Sections 67, 193 and 247 of the *Bankruptcy and Insolvency Act* RSC 1985, c B-3.

February 18, 2014

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PEOPLES TRUST COMPANY
Applicant

and

ROSE OF SHARON (ONTARIO) RETIREMENT COMMUNITY
Respondent

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

NOTICE OF APPEAL

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