

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

THE HONOURABLE ) WEDNESDAY, THE 9<sup>th</sup> DAY  
 )  
JUSTICE MCEWEN ) OF MAY, 2018

**BETWEEN:**

VOLKAN BASEGMEZ, CEM BLEDA BASEGMEZ, ANIL RUKAN BASEGMEZ,  
BA&B CAPITAL INC., SERDAR KOCTURK  
and KAAH HOLDINGS INC.

**Applicants**

– and –

ALI AKMAN, SAMM CAPITAL HOLDINGS INC.  
and TARN FINANCIAL CORPORATION

**Respondents**

**APPLICATION UNDER** Sections 207 and 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

**DISPUTED DEPOSITS RESOLUTION PROCEDURE ORDER**

**THIS MOTION**, made by KPMG Inc. (“**KPMG**”), in its capacity as Court-appointed receiver and manager (in such capacities, the “**Receiver**”) of all of the assets, undertakings and properties of Tarn Construction Corporation (“**Tarn Construction**”) pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended and appointed pursuant to the Order of Justice McEwen dated April 13, 2018 (the “**Receivership Order**”), upon the application of KPMG in its capacity as Court-appointed liquidator (in such capacity, the “**Liquidator**”) pursuant to section 207 of the Ontario *Business Corporations Act* of the effects and estate of Tarn Financial Corporation (“**Tarn Financial**”), and appointed pursuant to the Winding Up Order of Justice Lederman dated September 15, 2017 (the “**Winding Up Order**”), which appointment was effective on September 25, 2017, for an Order establishing a procedure for the resolution of Disputed Deposits (as defined below) asserted by purchasers of proposed

condominium units in the contemplated residential condominium development located at 2035 Kennedy Road, Toronto, Ontario, known as the “The Kennedys” was heard May 1, 2018 at 330 University Avenue, Toronto, Ontario.

**ON READING** the Third Report of the Liquidator and the First Report of the Receiver dated April 24, 2018 and on hearing the submissions of counsel for the Receiver, and such other counsel as were present as indicated on the Counsel Slip, no one appearing for any other person on the Service List, although properly served as appears from the Affidavit of Service sworn April 25, 2018, filed:

### **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion is hereby abridged and validated such that this Motion is properly returnable today, and further service of the Notice of Motion is hereby dispensed with.

### **DEFINITIONS AND INTERPRETATION**

2. **THIS COURT ORDERS** that for the purposes of this Order, the following terms shall have the following meanings:

- (a) **“Additional Deposit”** means a Deposit paid after March 31, 2018;
- (b) **“Amended and Restated Deposit Statement”** means the document delivered to Purchasers restating the Deposit remitted by a Purchaser up to and including March 31, 2018 and setting out any Additional Deposit remitted by a Purchaser, as prepared by the Receiver, with the assistance of the Deposit Trustee, in the form substantially attached as Schedule “B” to the Deposit Confirmation Procedure Order;
- (c) **“APS”** means an agreement of purchase and sale between Tarn Construction and a Purchaser for the sale and purchase of a Proposed Unit at the contemplated Development Project;
- (d) **“Business Day”** means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Toronto, Ontario;

- (e) **“Court”** means the Ontario Superior Court of Justice, Commercial List;
- (f) **“Deposit”** means any monies including, without limitation, deposit monies and monies on account of extras and upgrades paid by a Purchaser pursuant to an APS for a Proposed Unit at the Development Project;
- (g) **“Deposit Confirmation Bar Date”** means 5:00 PM Eastern Standard Time on May 15, 2018 with respect to the Deposits set out on the Deposit Statement and thirty (30) calendar days after the date set out on the Amended and Restated Deposit Statement with respect to the Additional Deposits, or such later date as may be ordered by this Court;
- (h) **“Deposit Confirmation Procedure”** means the procedure outlined in the Deposit Confirmation Procedure Order in connection with the confirmation and assertion of Deposits remitted to Tarn Construction, as amended or supplemented by further Order of the Court;
- (i) **“Deposit Confirmation Procedure Order”** means the Order approving the Deposit Confirmation Procedure granted on April 13, 2018 by the Court in these proceedings;
- (j) **“Deposit Statement”** means the document delivered to Purchasers setting out the Deposit remitted by a Purchaser up to and including March 31, 2018, as prepared by the Receiver, with the assistance of the Deposit Trustee, in the form substantially attached as Schedule “A” to the Deposit Confirmation Procedure Order;
- (k) **“Deposit Trustee”** means Bennett Jones LLP;
- (l) **“Development Project”** means the contemplated residential condominium development located at 2035 Kennedy Road, Toronto, Ontario, known as the “The Kennedys”;
- (m) **“Disputed Deposit”** means a Deposit that a Purchaser has disputed for any reason by delivering a Notice of Dispute of Deposit Statement or Notice of Dispute of



Amended and Restated Deposit Statement, as applicable, to the Receiver in accordance with the Deposition Confirmation Procedure Order;

- (n) **Disputed Deposit Resolution Procedure**” means the procedure outlined in this Order for determining Proven Deposits and resolving Disputed Deposits;
- (o) **“Known Additional Deposit”** means a Purchaser’s Additional Deposit known by the Receiver based on the books and records of Tarn Construction and the Deposit Trustee, and as set out in the Amended and Restated Deposit Statement prepared by the Receiver;
- (p) **“Known Deposit”** means a Purchaser’s Deposit known by the Receiver based on the books and records of Tarn Construction and the Deposit Trustee, and as set out in the Deposit Statement prepared by the Receiver;
- (q) **“Notice of Dispute of Amended and Restated Deposit Statement”** means a notice disputing the Amended and Restated Deposit Statement, substantially in the form attached as “Schedule D” to the Deposit Confirmation Procedure Order;
- (r) **“Notice of Dispute of Deposit Statement”** means a notice disputing the Deposit Statement, substantially the form attached as Schedule “C” to the Deposit Confirmation Procedure Order;
- (s) **“Proposed Unit”** means a residential condominium unit at the Development Project;
- (t) **“Proven Deposit”** means the amount and/or validity of a Deposit as finally determined by the Receiver, in consultation with The Guarantee Company, in accordance with this Disputed Deposits Resolution Procedure Order, and for greater certainty a Proven Deposit will be “finally determined” for the purposes of this definition if any one of the following circumstances applies:
  - (i) the Receiver has delivered a Deposit Statement or Amended and Restated Deposit Statement to a Purchaser and the applicable time period for filing a Notice of Dispute of Deposit Statement and/or Notice of Dispute of

Amended and Restated Deposit Statement under the Deposit Confirmation Procedure Order has expired without such notice being filed by the Purchaser with the Receiver;

- (ii) a Disputed Deposit has been reviewed by the Receiver, in consultation with the Deposit Trustee and The Guarantee Company, and then consensually resolved with the Purchaser in accordance with this Disputed Deposit Resolution Procedure Order;
- (iii) the Purchaser has failed to bring a motion in accordance with the timelines set out in paragraph 12 of this Order to determine the amount and/or validity of a Disputed Deposit that has not been consensually resolved;
- (iv) the Court has made a determination with respect to the amount and/or validity a Disputed Deposit, and no appeal or application for leave to appeal therefrom has been taken or served, or where such appeal or application for leave to appeal has been dismissed, determined or withdrawn;
- (u) **“Purchaser”** means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity, that has entered into an APS and/or has paid a Deposit, as indicated by the books and records of Tarn Construction and/or the Deposit Trustee; and
- (v) **“The Guarantee Company”** means The Guarantee Company of North America;

3. **THIS COURT ORDERS** that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. Toronto time on such Business Day unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word “including” shall mean “including without limitation”, and that all references to the singular herein include the plural, the plural include the singular, and that any gender includes all genders.

5. **THIS COURT ORDERS** that the Disputed Deposits Resolution Procedure be and is hereby approved. The Receiver is hereby authorized and directed to implement the Disputed Deposit Resolution Procedure, in conjunction with the Deposit Trustee and The Guarantee Company.

#### **ROLE OF THE RECEIVER**

6. **THIS COURT ORDERS** that the Receiver, in addition to its prescribed rights and obligations under the Receivership Order, shall administer the Disputed Deposit Resolution Procedure provided for herein and is hereby directed and empowered to take such actions and fulfill such other roles as are contemplated by this Order.

#### **DETERMINATION OF PROVEN DEPOSITS**

7. **THIS COURT ORDERS** that if the Receiver does not receive a Notice of Dispute of Deposit Statement from a Purchaser by the Deposit Confirmation Bar Date in accordance with the Deposit Confirmation Procedure Order, then the Known Deposit set forth in the Deposit Statement shall be a Proven Deposit.

8. **THIS COURT ORDERS** that if the Receiver does not receive a Notice of Dispute of Amended and Restated Deposit Statement from a Purchaser by the Deposit Confirmation Bar Date in accordance with the Deposit Confirmation Procedure Order, then the Known Additional Deposit set forth in the Amended and Restated Deposit Statement shall be a Proven Deposit.

9. **THIS COURT ORDERS** that following the Deposit Confirmation Bar Date, the Receiver, in consultation with the Deposit Trustee, shall review all Notices of Dispute of Deposit Statement and Notices of Dispute of Amended and Restated Deposit Statement received on or before the applicable Deposit Confirmation Bar Date and shall send copies of same to The Guarantee Company.

#### **RESOLUTION OF DISPUTED DEPOSITS**

10. **THIS COURT ORDERS** that, as soon as reasonably practicable, the Receiver, in consultation with the Deposit Trustee and The Guarantee Company, may attempt to resolve the classification, amount or nature of the Disputed Deposit with the Purchaser on a consensual basis.

11. **THIS COURT ORDERS** that if a Disputed Deposit is resolved by consent between the Receiver, The Guarantee Company and the Purchaser, then the Receiver may deliver a revised Deposit Statement or revised Amended and Restated Deposit Statement, as applicable, setting out the agreed amount of the Known Deposit and/or Additional Known Deposit, as applicable and such settled Known Deposit and/or Known Additional Deposit shall be a Proven Deposit.

12. **THIS COURT ORDERS** that in the event the Receiver, The Guarantee Company and the Purchaser are not able to resolve the Disputed Deposit or any matters arising pursuant to the Notice of Dispute of Deposit Statement and/or Notice of Dispute of Amended and Restated Deposit Statement, as applicable, the Purchaser shall schedule a motion before the Court, supported by an Affidavit setting out the basis for the Purchaser's Disputed Deposit, to be heard not later than 45 calendar days following the applicable Deposit Confirmation Bar Date. The Purchaser must serve the motion materials upon the Receiver and The Guarantee Company as set out in the Service List posted to the website in respect of these proceedings at: [www.kpmg.com/ca/tarn](http://www.kpmg.com/ca/tarn).

13. **THIS COURT ORDERS** that in the event the Purchaser fails to schedule the motion by the deadline set out in paragraph 12 of this Order, the Purchaser shall be deemed to accept the amount of the Known Deposit as set forth in the Deposit Statement and/or the Known Additional Deposit as set forth in the Amended and Restated Deposit Statement and such Known Deposit and/or Additional Known Deposit shall be a Proven Deposit.

#### **SERVICE AND NOTICE**

14. **THIS COURT ORDERS** that, except as set out in this Order, any notice or document to be given under this Order by the Receiver to a Purchaser shall be in writing and may be delivered by prepaid ordinary mail, by courier, by delivery, by facsimile transmission or electronic mail to the Purchaser to such address, facsimile number or e-mail address, as applicable, for such Purchaser as shown on the books of Tarn Construction or the Deposit Trustee. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Ontario, the fifth Business Day after mailing within Canada (other than within Ontario) and the tenth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by



facsimile transmission or email by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

15. **THIS COURT ORDERS** that if, during any period during which notices or other communications are being given pursuant to this Order a postal strike or postal work stoppage of general application should occur, such notices or other communications then not received or deemed received shall not, absent further Order of this Court, be effective. Notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, delivery, facsimile transmission or electronic mail in accordance with this Order.

#### **GENERAL PROVISIONS**

16. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in connection with the discharge or variation of its powers and duties under this Order.

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its respective agents in carrying out the terms of this Order.



18. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.



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LE / DANS LE REGISTRE NO:

MAY 10 2018

PER / PAR:



**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**DISPUTED DEPOSIT  
RESOLUTION PROCEDURE ORDER  
(DATED MAY 9, 2018)**

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