

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.) MONDAY, THE 15TH DAY
JUSTICE MCEWEN) OF APRIL, 2019



BETWEEN:
VOLKAN BASEGMEZ, CEM BLEDA BASEGMEZ, ANIL RUKAN BASEGMEZ,
BA&B CAPITAL INC., SERDAR KOCTURK
and KAAN 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.

**ORDER
(Tarion Cash Collateral Procedure Order)**

THIS MOTION, made by KPMG Inc. (“**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 such effects and estate, together with the Construction Property (as defined below), collectively, the “**Property**”), 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 and 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**”, and such assets, undertakings and properties, the “**Construction Property**”) 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 Liquidator, for an order approving the Tarion Cash Collateral Procedure (as defined herein) was heard this day in Toronto, Ontario.

ON READING the Notice of Motion dated April 9, 2019, the Seventh Report of the Liquidator and the Fifth Report of the Receiver dated April 9, 2019, and on hearing the submissions of counsel for the Liquidator, Receiver, Tarion Warranty Corporation (“**Tarion**”) and The Guarantee Company of North America (“**The Guarantee Company**”) and the other counsel on the counsel slip, attached, no one appearing for any other person on the service list, although properly served with the Motion Record as appears from the Affidavit of Service sworn April 11, 2019, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

INTERPRETATION

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

- (a) “**Business Day**” means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;
- (b) “**Claimant**” means a Person asserting a Tarion Claim;
- (c) “**Claims Procedure Order**” means the Claims Procedure Order of the Court dated April 13, 2018;

- (d) “**Construction Property**” has the meaning ascribed thereto in the preamble to this Order;
- (e) “**Court**” means the Ontario Superior Court of Justice (Commercial List);
- (f) “**Deposit Return Procedure Order**” means the Deposit Return Procedure Order of the Court dated June 14, 2019
- (g) “**Encumbrances**” has the meaning ascribed thereto in paragraph 7(b);
- (h) “**KPMG**” has the meaning ascribed thereto in the preamble to this Order;
- (i) “**ONHWPA**” means the *Ontario New Home Warranties Plan Act* (Ontario), R.S.O. 1990, c. O.31, as amended, and the regulations promulgated thereunder;
- (j) “**Order**” means this Order;
- (k) “**Outside Date**” means October 2, 2024;
- (l) “**Person**” 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;
- (m) “**Project**” means all phases and parts of the contemplated, but not completed, residential condominium development located at 2035 Kennedy Road, Toronto, Ontario, and sometimes known as “*The Kennedys*”;
- (n) “**Property**” has the meaning ascribed thereto in the preamble to this Order;
- (o) “**Receiver**” has the meaning ascribed thereto in the preamble to this Order;
- (p) “**Receivership Order**” has the meaning ascribed thereto in the preamble to this Order;
- (q) “**Tarion**” has the meaning ascribed thereto in the preamble to this Order;
- (r) “**Tarion Bonds**” means, collectively: (i) bond no. TM5120189 dated June 7, 2016, in the original amount of \$7,120,000.00; and (ii) bond no. TM5193638 dated July 13, 2016, in the original amount of \$5,400,000.00, each issued by The Guarantee Company in favour of Tarion;
- (s) “**Tarion Cash Collateral**” has the meaning ascribed thereto in paragraph 4;

- (t) “**Tarion Cash Collateral Balance**” has the meaning ascribed thereto in paragraph 7(c);
- (u) “**Tarion Cash Collateral Charge**” has the meaning ascribed thereto in paragraph 13;
- (v) “**Tarion Cash Collateral Claims**” means amounts claimed in respect of accepted Tarion Claims, administration fees, legal fees, interest and other fees and costs paid or incurred by Tarion in connection with the administration of the Tarion Cash Collateral Procedure and any other amounts to which Tarion is entitled pursuant to the Tarion Bonds;
- (w) “**Tarion Cash Collateral Procedure**” means the procedures outlined in this Order, including, without limitation, in connection with the payment, holding, administration, and release of the Tarion Cash Collateral;
- (x) “**Tarion Claim**” means any right or claim of any Person against Tarion under the ONHWPA in respect of the Project;
- (y) “**Tarn Construction**” has the meaning ascribed thereto in the preamble to this Order;
- (z) “**Tarn Financial**” has the meaning ascribed thereto in the preamble to this Order;
- (aa) “**The Guarantee Company**” has the meaning ascribed thereto in the preamble to this Order;
- (bb) “**The Guarantee Distribution**” has the meaning ascribed thereto in paragraph 8; and
- (cc) “**Winding-Up Order**” has the meaning ascribed thereto in the preamble to this Order.

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

TARION CASH COLLATERAL

4. **THIS COURT ORDERS** that the Liquidator shall pay, within five (5) Business Days of the granting of this Order, the amount of \$600,000.00 to Tarion (the “**Tarion Cash Collateral**”),

against which amount Tarion may make, and process payments in respect of, Tarion Cash Collateral Claims in accordance with this Order.

5. **THIS COURT ORDERS** that upon Tarion's receipt of the Tarion Cash Collateral pursuant to paragraph 4, Tarion shall deliver to The Guarantee Company the Tarion Bonds for immediate cancellation and neither Tarion nor The Guarantee Company shall have any further obligations or liability whatsoever in respect of the Tarion Bonds, the Property or the Project (in the case of Tarion, subject only to any Tarion Claims that are to be dealt with pursuant to paragraph 7.

6. **THIS COURT ORDERS** that the Receiver shall no longer be required to provide Tarion and The Guarantee Company a Statutory Declaration every two weeks in the form attached as Schedule "G" to the Deposit Return Procedure Order.

TARION CLAIMS

7. **THIS COURT ORDERS** that:

(a) Tarion shall:

- (i) review any Tarion Claim filed prior to the Outside Date and not already satisfied as of the date hereof, and accept, revise or reject them in accordance with Tarion's ordinary claims review procedures provided, however, that Tarion shall have the right, but not the obligation, to consult with the Receiver during its review of a Tarion Claim;
- (ii) advise: (A) the Receiver and the Liquidator; or (B) such other person as Ordered by this Court, of the particulars of the payment of any Tarion Claim within ten (10) days after the payment of any such Tarion Claim, and
- (iii) provide a report to: (A) the Receiver and the Liquidator; or (B) such other person as Ordered by this Court, as to the Tarion Claims received, Tarion Claims and Tarion Cash Collateral Claims paid and the amount of Tarion

Cash Collateral remaining as at the date of such report, with such reports due on October 2, 2019, October 2, 2020, October 2, 2021, October 2, 2022, October 2, 2023, and October 2, 2024;

- (b) Tarion shall be entitled to utilize the Tarion Cash Collateral and process payments therefrom on account of accepted Tarion Claims and Tarion Cash Collateral Claims free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts, or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, rights of distraint, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, “**Encumbrances**”), and without further authorization from any Person or this Court;
- (c) the balance of the Tarion Cash Collateral (the “**Tarion Cash Collateral Balance**”), if any, shall be paid by Tarion to the Liquidator or such other person as Ordered by this Court, within ten (10) Business Days following the later of:
 - (i) the Outside Date;
 - (ii) the completion of the review by Tarion of all Tarion Claims filed prior to the Outside Date;
 - (iii) in the event that Tarion revises or rejects any Tarion Claim, the resolution of such Tarion Claim in accordance with the procedures provided for in the ONHWPA; and
 - (iv) the processing and payment by Tarion of any Tarion Claims and Tarion Cash Collateral Claims from the Tarion Cash Collateral; and
- (d) Tarion shall have no further obligations or liability whatsoever in respect of the Tarion Cash Collateral Balance following Tarion’s payment of the Tarion Cash Collateral Balance to the Liquidator.

THE GUARANTEE COMPANY DISTRIBUTION

8. **THIS COURT ORDERS** that the Liquidator is authorized and directed to make a distribution to The Guarantee Company in full and final satisfaction of all amounts owing by Tarn Construction and secured by security granted by Tarn Financial to The Guarantee Company as determined in accordance with the Claims Procedure Order (such distribution, “**The Guarantee Distribution**”).

9. **THIS COURT ORDERS** that upon payment of The Guarantee Distribution and the delivery of the Tarion Bonds to The Guaranty Company for immediate cancellation, The Guarantee Company and its successors, assigns and agents shall not have any:

- (a) further right whatsoever to claim any further amount derived from or related to the Project; and
- (b) remaining interest whatsoever in the Property.

THE GUARANTEE COMPANY, TARIION AND THE RECEIVER

10. **THIS COURT ORDERS** that none of The Guarantee Company, Tarion, the Liquidator or the Receiver shall incur any liability or obligation as a result of the carrying out of the provisions of this Order, other than in respect of any gross negligence or wilful misconduct on their respective parts, and that no proceeding or process in any court or tribunal shall be commenced or continued against any of The Guarantee Company, Tarion, the Liquidator or the Receiver in connection with the carrying out of the provisions of this Order except with the written consent of The Guarantee Company, Tarion, the Liquidator or the Receiver, as applicable, or with leave of this Court on seven (7) Business Days’ notice to The Guarantee Company, Tarion, the Liquidator or the Receiver, as applicable. This Order is without prejudice to any other limitation of liability or protection afforded to The Guarantee Company, Tarion, the Liquidator or the Receiver by order of the Court or otherwise.

11. **THIS COURT ORDERS** that, subject to paragraphs 13 to 15 of this Order, and in connection with the payment or receipt of any funds described herein, the Person receiving such funds shall do so free and clear of and from any and all Encumbrances.

12. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings, the Receivership Order or the Winding-Up Order; and
- (b) any assignment in bankruptcy made in respect of Tarn Construction, Tarn Financial, the Property or the Project,

the Tarion Cash Collateral Procedure and its implementation pursuant to this Order shall be binding on any trustee in bankruptcy, receiver, receiver and manager or interim receiver of Tarn Construction and/or Tarn Financial, the Property or the Project and shall not be void or voidable by creditors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended, or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

TARION CASH COLLATERAL CHARGE

13. **THIS COURT ORDERS** that Tarion shall be entitled to the benefit of, and is hereby granted, a fixed and specific charge and security interest (the “**Tarion Cash Collateral Charge**”) in the Tarion Cash Collateral.

14. **THIS COURT ORDERS** that the Tarion Cash Collateral Charge shall rank in priority to all Encumbrances against the Tarion Cash Collateral from time to time.

15. **THIS COURT ORDERS** that the filing, registration, recording or perfection of the Tarion Cash Collateral Charge shall not be required and that the Tarion Cash Collateral Charge shall be valid and enforceable for all purposes including, without limitation, as against any Encumbrances filed, registered, recorded or perfected subsequent to the Tarion Cash Collateral Charge coming into existence notwithstanding any failure to file, register, record or perfect the Tarion Cash Collateral Charge. The Tarion Cash Collateral Charge may be enforced by Tarion upon the terms and conditions as may be agreed to between the Receiver and the Liquidator and Tarion.

MISCELLANEOUS

16. **THIS COURT ORDERS** that each of Tarion, the Liquidator and the Receiver may from time to time apply to this Court for advice and directions in respect of the terms of this Order and in carrying out the terms of this Order.

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States to give effect to this Order and to assist Tarion, the Liquidator, the Receiver and their 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 Tarion, the Liquidator or the Receiver and their respective agents, as may be necessary or desirable to give effect to this Order or to assist Tarion, the Liquidator, the Receiver and their respective agents, in carrying out the terms of this Order.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
E / DANS LE REGISTRE NO:

APR 15 2019

PER / PAR: 

Volkan Basegmez et al.
Applicants

and Ali Akman et al.
Respondents

Court File No.: CV-17-11697-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**ORDER
(TARION CASH COLLATERAL PROCEDURE ORDER)
(APRIL 15, 2019)**

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Corporation and Court-appointed Receiver of
Tarn Construction Corporation.