

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

**IN THE MATTER OF AN APPLICATION UNDER SECTION 116(1) 6  
OF THE *SOCIAL HOUSING REFORM ACT, 2000*, S.O. 2000, c. 27**

**AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. 43**

**THE REGIONAL MUNICIPALITY OF YORK**

Applicant

- and -

**THORNHILL GREEN CO-OPERATIVE HOMES INC.**

Respondent

**FACTUM OF THE RESPONDING PARTY,  
THE RECEIVER, MINTZ & PARTNERS LIMITED  
(RE: Cross-Motion of the Respondent)**

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

**IN THE MATTER OF AN APPLICATION UNDER SECTION 116(6)  
OF THE *SOCIAL HOUSING REFORM ACT, 2000, S.O. 2000, c.27***

**AND SECTION 101 OF THE *COURTS OF JUSTICE ACT, R.S.O. 1990, c.C.43***

**B E T W E E N:**

**THE REGIONAL MUNICIPALITY OF YORK**

Applicant

- and -

**THORNHILL GREEN CO-OPERATIVE HOMES INC.**

Respondent

**FACTUM OF THE RESPONDING PARTY,  
THE RECEIVER, MINTZ & PARTNERS LIMITED**

**PART I: NATURE OF THE MOTION**

1. The Respondent brings a cross-motion seeking to:
  - (a) Discharge Mintz & Partners Limited (“MPL”) as the Court-appointed Receiver and Manager (the “Receiver”) of Thornhill Green Co-operative Homes Inc. (“Thornhill Green” or the “Respondent”);
  - (b) In the alternative, discharge the Receiver and return Thornhill Green to the control of the board of directors (the “Board”) as a receiver and manager is not needed given the current status of Thornhill Green; and,
  - (c) Add the Co-operative Housing Federation of Canada (“CHF”) as a party Respondent to this proceeding.

2. The Respondent has also brought a motion for an interim injunction enjoining HYI from purchasing the Property and adjourning the Receiver's motion and the Cross-Motion pending the determination of the Respondent's intended judicial review application of the decision by The Regional Municipality of York (the "Region") to appoint the Receiver in July 2006.

**PART II: OVERVIEW**

3. The Receiver was appointed by this Honourable Court to act as Receiver and Manager of Thornhill Green. The Receiver is an officer of this Honourable Court and takes its appointment very seriously. Further, this Receiver is very experienced in dealing with receiverships of social housing projects and thus is very aware of its obligations to this Honourable Court and to the various stakeholders in these proceedings. The Receiver would not do anything that would be inconsistent with its statutory or other legal duties, nor would it do anything that would undermine its appointment or the authority of this Honourable Court.

4. The Receiver denies that it has breached any duties or obligations as court-appointed Receiver and Manager for Thornhill Green. From the commencement of its appointment as Receiver, MPL has acted properly and in good faith at all times, taking into account the interests of all stakeholders, including the interests of the residents of Thornhill Green.

5. Further, the Receiver's mandate has not yet been completed, such that further and continued supervision is required to preserve, protect and maintain the assets of Thornhill Green for the benefit of all stakeholders, including the residents.

6. As such, the Receiver disputes the contentions of the Respondent that the Receiver ought to be removed at this time and that there is no longer any need for a receiver to deal with the assets of Thornhill Green.

7. The Respondent's motion for an injunction does not appear to seek any relief against the Receiver. However, the Receiver has set out in its three reports to this Honourable Court that any further delay of this proceeding and, in particular, the transfer the housing assets located at 51-95 Inverlochy Boulevard, Markham, Ontario (the "Property") to HYI will jeopardize the remaining capital repairs and maintenance work required at the Property (the "Work").

8. Pursuant to its mandate, under the Order of the Honourable Justice Pepall, dated June 26, 2006 (the "Appointment Order") and the *Social Housing Reform Act, 2000*, S.O. 2000, c. 27, as amended ("SHRA"), the Receiver is the sole party responsible for protecting and maintaining the Property and the assets of Thornhill Green. As such, it falls to the Receiver to advise this Honourable Court that any further delay in the actual hearing of the Receiver's motion to transfer the Property will cause serious and actual prejudice to Thornhill Green and its residents.

9. Thus, while no relief is sought, per se, against the Receiver, it is the Receiver's view, nonetheless, that the injunction motion is prejudicial to the rights of the residents of Thornhill Green and will cause serious harm to the assets in question.

10. Similarly, any delay that may result from the addition of CHF to these proceedings will also impact on the Work to be done, should this Honourable Court approve the transfer of the Property to HYI. The Receiver is concerned about any such delays, and their impact on the Property and its residents.

### **PART III: THE FACTS**

#### **The Cross-Motion to Remove the Receiver**

11. The Respondent's Cross-Motion, while styled as a motion to "discharge the Receiver" is in reality a motion to "remove" the Receiver, on the basis that the Receiver has "substantially violated its fiduciary duties"<sup>1</sup>. There is no basis to "discharge" the Receiver at this point in time, as the Receiver has not completed its mandate.

12. The Respondent has put forward the Second Affidavit of Nicholas Gazzard, Executive Director of CHF, as the principal affidavit in support of its Cross-Motion. Mr. Gazzard admits he is not qualified to give legal opinions, but nonetheless states his personal view that "it appears to me that the Receiver has been significantly unfair to the interests of Thornhill Green and other non-profit housing co-operatives"<sup>2</sup>.

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<sup>1</sup> Notice of Motion, Cross-Motion Record of the Respondent ("CMR"), Tab 1, pp. 2-3; Third Report to the Court of the Receiver, dated July 11, 2008 ("Third Report"), Motion Record of the Responding Party, the Receiver ("RMR"), Tab 1, p. 2, para. 4.

<sup>2</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 147, paras. 4-5.

13. The Second Gazzard Affidavit contains no admissible evidence of any kind to support Mr. Gazzard's personal views. Mr. Gazzard does state that the basis for his opinions and argument regarding the conduct of the Receiver include:

- (a) The Receiver stated in its First Report that the Board does not have specialized knowledge with respect to construction and has not had any involvement with the construction of Thornhill Green<sup>3</sup>;
- (b) The Receiver stated that even if control of Thornhill Green was returned to a new Board comprised of existing members, there is insufficient financing available to fund the Work, and the Board would not be able to use the alleged equity in the Property to obtain financing<sup>4</sup>;
- (c) The Receiver characterized the various actions of members as "not acting in the collective interest of Thornhill Green", including that:
  - i. The members focused on individual complaints and concerns rather than the management of the Property for the collective interest of all members<sup>5</sup>;
  - ii. The members failed to come forward and participate in the management of the Property with the Receiver<sup>6</sup>;
  - iii. The members put forward a proposal in 1998 to convert the co-operative to a condominium and take advantage of the equity in the Property for their own personal benefit<sup>7</sup>;
  - iv. The members do not have sufficient experience and knowledge to operate the Property in a more efficient manner than HYI<sup>8</sup>; and,

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<sup>3</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 148, para. 6.

<sup>4</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 148, para. 7-8.

<sup>5</sup> Second Gazzard Affidavit, CMR, Tab 4, pp. 148-149, paras. 9-10.

<sup>6</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 149, para. 11.

<sup>7</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 149, para. 12.

- v. The Board would not have sufficient experience to increase monthly rent as required to correct Thornhill Green's financial difficulties<sup>9</sup>.
- (d) Mr. Gazzard's view that there will be substantial changes to the rights of the residents of Thornhill Green if the Property were sold to HYI, as their occupancy rights as members of a co-operative would be replaced by tenancy rights as tenants of HYI<sup>10</sup>;
- (e) Mr. Gazzard's interpretation of the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35 ("CCA") and that pursuant to the CCA, upon the dissolution of Thornhill Green, its assets may potentially be distributed to other Ontario non-profit housing co-operatives<sup>11</sup>;
- (f) Mr. Gazzard's view that Thornhill Green is not in financial difficulty and the sale of the Property is therefore not justified<sup>12</sup>;
- (g) The Receiver's view that the past financial issues of Thornhill Green are due to the failures of the Board<sup>13</sup>; and,
- (h) Mr. Gazzard's view that the Receiver is merely advancing the offer proposed by the Region "without any real critical analysis or examination of alternatives"<sup>14</sup>.

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<sup>8</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 150, para. 13.

<sup>9</sup> Second Gazzard Affidavit, RMR, Tab 4, p. 150, para. 14.

<sup>10</sup> Second Gazzard Affidavit, RMR, Tab 4, p. 150, para. 15.

<sup>11</sup> Second Gazzard Affidavit, RMR, Tab 4, p. 151, para. 16-17.

<sup>12</sup> Second Gazzard Affidavit, RMR, Tab 4, p. 151-152, paras. 18-19.

<sup>13</sup> Second Gazzard Affidavit, RMR, Tab 4, p. 152-153, paras. 20-23.

<sup>14</sup> Second Gazzard Affidavit, CMR, Tab 4, p. 153, para. 24.

14. The Affidavit of Susan F.J. Daniel, President of the Board (the “Daniel Affidavit”) and the Affidavit of Diane Miles (the “Miles Affidavit”), also filed by the Respondent as part of its Cross-Motion Record, do not speak to the issue of the removal of the Receiver.

15. The Daniel Affidavit contains allegations regarding a dispute with the Region and the value of Thornhill Green as a co-operative housing project. There is no allegation by Ms. Daniel that the Receiver has breached any duty and needs to be removed or discharged.

16. The Miles Affidavit also deals with a subsidy dispute with the Region, as well as her personal view that CHF ought to be added a respondent to the within proceeding as 91% of the 550 non-profit housing co-operatives in Ontario are members of CHF, and CHF is the organization with the resources to represent all of these co-operatives with respect to this matter<sup>15</sup>.

17. However, the Miles Affidavit contains no allegation that the Receiver has breached any duty and needs to be removed or discharged.

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<sup>15</sup> Affidavit of Diane Miles, affirmed June 30, 2008 (the “Miles Affidavit”), CMR, Tab 5, pp. 156-157, paras. 4-6.

### **No breach of duty by the Receiver**

18. The Receiver delivered its Third Report to the Court, dated July 11, 2008, in response to the Respondent's Cross Motion and the Affidavits contained in the Cross-Motion Record. The Receiver noted in the Third Report that:

- (a) There was no evidence to support the grounds listed in the Notice of Motion and the Receiver disputes all such contentions<sup>16</sup>;
- (b) The Respondent and CHF are raising these issues now for the first time. Neither the Respondent nor CHF ever raised any objection to the receivership or the Receiver's activities and conduct despite the fact that:
  - i. As early as February 2006, CHF was aware of the difficulty facing Thornhill Green<sup>17</sup>;
  - ii. CHF was aware of the Region's Notice of Triggering Events and attended the meeting with the Region and MPL on July 19, 2006 following the appointment of the Receiver by the Region, and a general members' meeting on July 20, 2006 when the receivership was announced to the members<sup>18</sup>;
  - iii. A representative of CHF attended two members' meetings convened by the Receiver and one meeting convened by the Region to discuss capital projects<sup>19</sup>;

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<sup>16</sup> Third Report, RMR, Tab 1, p. 3, para. 6.

<sup>17</sup> First Gazzard Affidavit, CMR, Tab 3, p. 60, para. 96; Miles Affidavit, CMR, Tab 5, p. 159, para. 17

<sup>18</sup> Miles Affidavit, CMR, Tab 5, p. 159, paras. 18 and 20; Minutes of the Members' Meetings convened by the Receiver, being Appendix "G" to the Second Report to Court of the Receiver, dated June 27, 2008 (the "Second Report"), Supplementary Motion Record ("SMR"), Tab 1G, p. 53.

<sup>19</sup> Second Report, SMR, Tab 1, pp. 17-18, paras. 59-62; Minutes of the Members' Meetings convened by the Receiver, being Appendix "G" to the Second Report, SMR, Tab 1G, pp. 53 and 57.

- iv. Neither CHF nor the Board took any steps to object to the appointment of the Receiver at the July 19, 2006 meeting<sup>20</sup>; and,
  - v. The Board took no steps to oppose the appointment of MPL as Court-appointed Receiver and Manager in June 2007 despite having been served with the Region's Application materials, including the draft Appointment Order, and despite having been aware that the powers of the Receiver included the power to sell the Property<sup>21</sup>;
- (c) As set out in its previous reports, the Receiver has considered the interests of all stakeholders in this matter, including the residents<sup>22</sup>; and,
- (d) The Receiver has acted in good faith at all times in accordance with its obligations to the Court<sup>23</sup>.

19. It appears that the Respondent, by way of CHF, is now attacking the Receiver's conduct, based on the fact that the Respondent simply disagrees with the Receiver's recommendation<sup>24</sup>.

20. The Receiver also notes that the Respondent fails to appreciate the reality of the situation facing the Receiver – that is, that there are no funds or alternative funding options available to finance the urgent, necessary and substantial Work, and the Receiver's powers and mandate are governed by the Appointment Order and the SHRA<sup>25</sup>.

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<sup>20</sup> Daniel Affidavit, CMR, Tab 2, p. 23, para. 52.

<sup>21</sup> Daniel Affidavit, CMR, Tab 2, p. 23, paras. 54, 59 and 61-62.

<sup>22</sup> Third Report, RMR, Tab 1, p. 3, para. 8.

<sup>23</sup> Third Report, RMR, Tab 1, pp. 3-4, para. 9.

<sup>24</sup> Third Report, RMR, Tab 1, p. 4, para. 10.

<sup>25</sup> Third Report, RMR, Tab 1, p. 5, para. 12.

51. At no time did the Receiver merely prefer the position of the Region. The Receiver has carried out its mandate as Court-appointed Receiver and Manager and has taken reasonable and diligent steps in making its recommendations to this Honourable Court<sup>26</sup>.

**Receiver's work not done**

52. The Receiver has noted the need for someone to continue to act for and on behalf of the Respondent until a reasonable, viable and stable solution is found to address the needs of the Property and its residents, as well as the ongoing supervision of the financial affairs of Thornhill Green<sup>27</sup>.

53. Any further delay, either by way of adding additional parties to the proceeding or adjourning the Receiver's motion pending the Respondent's intended judicial review application, may prejudice the commencement and completion of the Work and lead to additional costs<sup>28</sup>.

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<sup>26</sup> Third Report, RMR, Tab 1, pp. 6-7, para. 18.

<sup>27</sup> Third Report, RMR, Tab 1, p. 7, paras. 19-20.

<sup>28</sup> Third Report, RMR, Tab 1, p. 11, paras. 35-37.

## PART IV: ISSUES, THE LAW AND ARGUMENT

### Issue #1 – Should MPL be removed as the Court-appointed Receiver and Manager of Thornhill Green?

54. It is clear that a receiver:

- (a) Is a fiduciary as to all interests of concerned parties and as such it is to act as an appointee of the Court in good faith, with candour; disclosing all relevant material facts affecting the parties, avoiding any real or objectively perceived conflicts of interest; and,
- (b) Has a general duty to exercise its obligations with prudence, diligence, due care and skill<sup>29</sup>.

55. Any party seeking to remove a court-appointed receiver has a very heavy onus - heavier than that on a party seeking to oppose the court appointment of the receiver in the first place<sup>30</sup>.

56. In *Canada Trustco*, Justice Farley, sitting in the Commercial List, held that the Court will replace a receiver “if a receiver is engaged in blatant intentional action contrary to the interests of one involved group...However the measuring of the action of the receiver is one that must take place as of the events as they unfold – not with the benefit of the ever perfect hindsight.<sup>31</sup>”

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<sup>29</sup> *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.*, (1992) 12 C.B.R. (3d) 220, at 221; *YBM Magnex International Inc. (Re)* [2000] A.J. No. 1118, (A.C.Q.B.) at para. 32.

<sup>30</sup> *Royal Bank of Canada v. Vista Homes Limited*. (1985), 57 C.B.R. (N.S.) 80, at para. 26; *Canada Trustco*, supra, at 222.

<sup>31</sup> *Canada Trustco*, supra, at 222.

57. Further, the Court requires evidence from the moving party that, “to an objective observer after a reasonable investigation”, the Receiver can be found to be the “handmaiden of the lenders”<sup>32</sup>.

### **No evidence to support the removal of the Receiver**

58. The Respondent and CHF have made serious and unsupported allegations regarding the conduct of the Receiver, but have put forward no evidence whatsoever to support those allegations. In particular, the Respondent alleges that the Receiver has preferred the interests of York Region to those of the residents of the co-operative; however, the Respondent has not provided anything to this Court to substantiate such allegations. The Receiver disputes the allegations and has noted that it arrived at its recommendation following an extensive investigation and review of the facts facing Thornhill Green.

59. Further, the Receiver has been present at the Property for some two years now, and has had the benefit of all of the information, financial and otherwise, available to it in coming to its recommendation to this Honourable Court. It does not appear to the Receiver that CHF or Mr. Gazzard have any direct knowledge of the situation or the specific problems facing Thornhill Green.

60. Finally, it ought to be clear that the mere fact that the Region agrees with or supports the Receiver’s recommendation is not evidence of the Receiver preferring the interests of the Region, much less blatantly or intentionally preferring its interests.

### **Motion brought too late and for an improper purpose**

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<sup>32</sup> *Canada Trustco*, supra, at 225.

61. Further, it is too late for the Respondent to be alleging unfairness on the part of the Receiver at this stage of the proceedings. At no point prior to the bringing of the motion to transfer the Property by the Receiver did anyone at the Respondent, including the Board members, or CHF, take any steps to challenge or even question the actions of the Receiver. It was only following the service of the motion materials herein by the Receiver that anyone began to challenge the Receiver's actions or conduct.

62. The motion to remove the Receiver is being brought at the same time as the Respondent:

- (a) has opposed the Receiver's motion to transfer the Property;
- (b) brought an injunction to prevent the completion of the transaction of purchase and sale, as contemplated in the Receiver's motion;
- (c) has stated its intention to bring an application for judicial review of the decision by the Region to appoint the Receiver back in July 2006, some two years after the fact; and,
- (d) has sought to add CHF as a party respondent in the overall proceedings.

63. It appears clear to the Receiver that the Respondent and CHF are bringing this motion to remove the Receiver at this time as part of a concerted strategic response to the Receiver's motion to transfer the Property, and thus for an improper purpose, and not based on any proper grounds for the removal of the Receiver.

**Issue #2 – Will the delay caused by the granting of any injunction sought by the Respondent prejudice the Receiver and the Respondent?**

64. The Respondent's motion for an interim injunction does not claim any relief per se against the Receiver. It seeks an injunction preventing the Region (sic) or HYI from purchasing the Property from the Receiver (the intended purchaser in the proposed transaction of purchase and sale is HYI, not the Region).

65. However, it is the Receiver's mandate, as set out in the Appointment Order and pursuant to the SHRA, to protect and preserve the assets of Thornhill Green, including the Property. The Receiver is therefore required to bring to the Court's attention any matter that may jeopardize the assets of Thornhill Green.

66. The Receiver has identified in its reports to this Honourable Court the need for the Receiver's motion to be heard and determined promptly so that, in the event the transfer of the Property is approved by this Honourable Court, the transaction of purchase and sale can be completed, and the Work at the Property can then be commenced and completed during the current construction season.

67. The effect of the granting of any injunction, preventing the completion of the transaction of purchase and sale, will only serve to delay the necessary and urgent construction at the Property, which, in turn, will only serve to cause further damage to the Property, jeopardizing the Property itself and the residents.

68. Indeed, until this proceeding is determined and the Property transferred to HYI, the Receiver is unable to commence and carry out the Work, as there is no funding available to carry out those steps.

69. If the proceeding is delayed and ultimately only determined months into the future, the delay in proceeding with the Work will force the Receiver to have to repeat certain repairs and maintenance, and increase the overall cost of the Work.

70. The Receiver therefore sees no benefit to the Respondent or its residents from delaying the completion of the necessary Work at the project, but does see harm coming to the housing assets and the Property itself if any injunction is granted.

**Issue 3# - Should CHF be added as a respondent to the proceeding?**

71. Similarly, the Receiver raises the impact on Thornhill Green and the Property from any delay caused by the addition of CHF as a party to the proceeding.

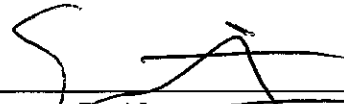
72. Should the Receiver's motion and this proceeding be adjourned or delayed as a result, the impact on the Property will be serious and real. There is the danger that the entire construction season will be lost, such that the Work cannot be completed this year. This could also cause the Receiver to incur increased costs to commence and complete the Work following the transfer of the Property to HYI, if the transfer to HYI is approved in the future.

**PART V: ORDER SOUGHT**

73. The Receiver therefore respectfully requests that the Respondent's Cross-Motion be dismissed.

July 16, 2008

ALL OF WHICH IS RESPECTFULLY  
SUBMITTED BY

  
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**Mervyn D. Abramowitz**  
Of counsel for the Receiver

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**SCHEDULE "A"**

1. **Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.**  
(1992) 12 C.B.R. (3d) 220
2. **YBM Magnex International Inc. (Re)**, [2000] A.J. No. 1118, (A.C.Q.B.)
3. **Royal Bank v Vista Homes Ltd.** (1985), 57 C.B.R. (N.S.) 80

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**Applicant**

**Respondent**

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

**PROCEEDINGS COMMENCED AT TORONTO**

**FACTUM OF THE RESPONDING PARTY, THE  
RECEIVER, MINTZ & PARTNERS LIMITED**

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