

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF SECTION 60 OF THE *TRUSTEE ACT*, R.S.O. 1990, C. T.23, AS
AMENDED, AND RULE 10 OF THE ONTARIO *RULES OF CIVIL PROCEDURE*, R.R.O
1990, REG. 194, AS AMENDED**

**AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF
ADELAIDE STREET LOFTS INC.**

**FACTUM OF LANTERRA DEVELOPMENTS LIMITED
(Re Amendment of Minutes of Settlement and Agreement of Purchase and Sale)
(Returnable April 22, 2020)**

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PART I - OVERVIEW

1. Hi-Rise Capital Ltd. ("**Hi-Rise**"), has brought a motion seeking the approval of (a) the Minutes of Settlement dated December 20, 2019 (the "**Minutes of Settlement**") among Lanterra Developments Limited ("**Lanterra**"), Adelaide Street Lofts Inc. ("**Adelaide**") and certain other parties, and (b) an Agreement of Purchase and Sale dated December 20, 2019 between Lanterra, in trust, and Adelaide (the "**APS**") for the purchase of a mixed-use commercial and residential property located at 263 Adelaide Street West in Toronto, Ontario (the "**Property**"). Hi-Rise is the administrator and trustee of a Syndicated Mortgage over the Property. The Minutes of Settlement and the APS contemplate a closing date of May 14, 2020 (the "**Closing Date**") for the sale.

2. This factum is filed by Lanterra in support of Lanterra's cross-motion seeking an order substantially in the form of the draft order attached as Tab 3 of Lanterra's Cross-Motion Record:

- (a) amending the Minutes of Settlement to revise the definition of the Closing Date in section 3(a)(iii) of the Minutes of Settlement to a date that is the earlier of (i) the date to which the Parties agree, (ii) the date that is 8 weeks following the lifting of the Declaration of Emergency issued by the Province of Ontario pursuant to the *Emergency Management and Civil Protection Act* (the "**Declaration of Emergency**"), and (iii) December 15, 2020; and
- (b) amending the APS to revise the definition of the Closing Date in section 1.1(7) of the APS to the earlier of (i) the date to which the Parties agree, (ii) the date that is 8 weeks following the lifting of the Declaration of Emergency and (iii) December 15, 2020.

3. Since the Minutes of Settlement and the APS were negotiated and executed, the world's economy, including the ability of property developers to raise financing for, physically construct, and sell real estate projects in Toronto, has been severely disrupted by the COVID-19 pandemic. Notwithstanding Lanterra's commitment to the project, the Closing Date is no longer commercially feasible.

4. As a result, Lanterra is seeking relief from the Court in order to extend the Closing Date.

PART II - THE FACTS

5. The facts with respect to this motion are more fully set out in the affidavit of Noor Al-Awqati sworn April 1, 2020 (the "**Al-Awqati Affidavit**") and the affidavit of Christopher J.

Wein sworn April 16, 2020 (the “**Wein Affidavit**”). All capitalized terms not otherwise defined herein are as defined in the Al-Awqati Affidavit.

Wein Affidavit, Lanterra Cross-Motion Record, Tab 2A ; Al-Aqwati Affidavit, Lanterra Cross Motion Record, Tab 2B.

A. Background

6. Lanterra is a developer of high-end commercial condominium projects whose operations include land acquisition, development, design, construction, marketing, rental management and support services for residential condominium and mixed use projects in the Greater Toronto Area.

Wein Affidavit at para 3, Lanterra Cross-Motion Record, Tab 2.

7. A comprehensive background setting out the circumstances leading to the Minutes of Settlement and the APS is contained in the Al-Awqati Affidavit. Pursuant to section 3(a) of the Minutes of Settlement, Lanterra entered into the APS with Adelaide to purchase the Property for a total purchase price of \$69 million with a Closing Date of May 14, 2020. Section 6.1 of the APS provides that the Sale will close at 2:00pm on the Closing Date.

Wein Affidavit at paras 4-5, Lanterra Cross-Motion Record, Tab 2; Minutes of Settlement, Hi-Rise Motion Record, Tab 2B ; APS, Hi-Rise Motion Record, Tab 2L.

8. On April 1, 2020, Hi-Rise served motion materials seeking approval of the Minutes of Settlement and authorizing the sale of the Property pursuant to the Minutes of Settlement and the APS.

Wein Affidavit at para 6, Lanterra Cross-Motion Record, Tab 2.

B. Impact of the COVID-19 Pandemic on Ability to Close the Sale

9. On March 17, 2020, the Province of Ontario declared a State of Emergency, and on March 24, 2020, the Province mandated the closure of all non-essential businesses in Ontario. On April 4, 2020, all non-essential construction was removed from the list of essential businesses. Lanterra's business has been directly impacted by the Declaration of Emergency, which has recently been extended until May 12, 2020, and is expected to be extended for several more weeks.

10. Since April 4, 2020, Lanterra, and all developers of residential condominiums, are prohibited by the Government of Ontario from active construction of projects for which the developer does not have above-grade structural permits. For Lanterra, this required the immediate suspension of construction of over 2,000 residential units and tens of thousands of square feet of commercial development. These restrictions prevent all construction activity on the Property.

Wein Affidavit at para 8, Lanterra Cross-Motion Record, Tab 2.

11. Lanterra's business operations have also been inhibited drastically by, amongst other things:

- a) an inability to effectively diligence potential projects, including to obtain off-title responses and conduct physical due diligence;
- b) an inability to finalize crucial zoning by-laws, seek site plan approvals and receive notice of approval conditions;
- c) deferred rent payments from commercial and residential tenants throughout its portfolio;
- d) decreased access to capital from financial institutions and equity partners;

- e) forced closure of its sales offices and a decreased ability to market properties effectively; and
- f) delayed closings of the sale of completed condominiums.

Wein Affidavit at para 9, Lanterra Cross-Motion Record, Tab 2.

12. On April 7, 2020, Lanterra wrote to Representative Counsel (the “**Representative Counsel Letter**”) summarizing the adverse impact of the COVID-19 pandemic on Lanterra’s operations, and seeking Representative Counsel’s consent to an extension of the Closing Date until the date which is eight weeks following the resumption of normal commercial business activity within the City of Toronto and the Province of Ontario with a potential outside date of December 15, 2020.

Wein Affidavit at para 11; Lanterra Cross-Motion Record, Tab 2 ; Representative Counsel Letter, Lanterra Cross-Motion Record, Tab 2B.

13. Lanterra remains committed to closing the transaction contemplated by the Minutes of Settlement and the APS. Since June 2019, and as recently as April 15, 2020, Lanterra has entered into a number of agreements with design, engineering, architectural, energy, marketing and transportation consulting firms, which financially obligates Lanterra to more than \$2.5 million in commitments. However, the impact of the COVID-19 restrictions on the businesses of all developers of residential condominiums in Ontario prevents Lanterra from being able to close the sale on the Closing Date.

Wein Affidavit at para 10, Lanterra Cross-Motion Record, Tab 2.

PART III - ISSUE

14. The issue raised by Lanterra’s cross-motion is whether, in light of all of the circumstances:

- a) this Court should amend the definition of Closing Date in the Minutes of Settlement and the APS; or
- b) in the alternative, this Court should direct that Hi-Rise's motion for approval of the Minutes of Settlement and the APS shall not be granted without an amendment to the definition of Closing Date in the Minutes of Settlement and the APS.

PART IV - THE LAW

A. This Court has Jurisdiction to Amend the Minutes of Settlement and the APS

15. Pursuant to Rule 1.05 of the *Rules of Civil Procedure* (Ontario) (the "**Rules**"), when making an order under the Rules, "the court may impose such terms and give such directions as are just." The power given by Rule 1.05 is general and extends to any situation where a court is making an order under the Rules. The court has recognized that Rule 1.05 can be used to give directions and impose terms regarding the closing date of a purchase and sale transaction.

Rules of Civil Procedure, R.R.O. 1990 Reg. 194, r. 1.05; *McLeod v. Schmidt*, 2007 CarswellOnt 5037, [2007] O.J. No. 3039 at para 31 [*McLeod*], *Lanterra Book of Authorities* ("**BOA**") Tab 1.

16. Further, this Court retains an inherent jurisdiction to take the necessary steps to ensure that justice is done between the parties. Inherent jurisdiction has been described as follows:

"inherent jurisdiction exists as a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." [Emphasis Added]

K. Yamauchi, "The Courts' Inherent Jurisdiction and the CCAA: A Beneficent or Bad Doctrine?", (2004) *Canadian Business Journal*, 40 CBLJ 250 citing I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, BOA Tab 2.

17. This Court has the authority under Rule 1.05 and its inherent jurisdiction to require the amendment of the Minutes of Settlement and the APS to revise the definition of the Closing Date in the manner set out in paragraph 2 herein.

18. The COVID-19 pandemic has caused an unprecedented level of disruption to normal business operations in Ontario and globally. Upon the extension of the State of Emergency to residential real estate construction on April 4, 2020, Lanterra was forced to immediately suspend construction of over 2,000 residential units and tens of thousands of square feet of commercial development. Lanterra has also been prevented from continuing due diligence on the Property and other potential projects, has been unable to finalize crucial zoning by-laws, seek site plan approvals and receive notice of approval conditions, and has been forced to consent to the deferral of rent payments from commercial and residential tenants. The onset of the COVID-19 pandemic has forced Lanterra to delay the closings of the sale of completed condominium units, forced closure of its sales offices and hindered its ability to market properties effectively and access capital from financial institutions and equity partners.

Wein Affidavit at para 9; Lanterra Cross-Motion Record, Tab 2.

19. The adverse impact of the COVID-19 pandemic and the ensuing declaration of a State of Emergency on the commercial and residential real estate market have been extraordinary, and historically unique. Due to circumstances beyond Lanterra's control, which were beyond the reasonable contemplation of the parties at the time the Minutes of Settlement and the APS were signed in December 2019, the Closing Date is no longer commercially feasible.

Wein Affidavit at para 7; Lanterra Cross-Motion Record, Tab 2.

20. In the circumstances, it would not be in the best interests of the parties to the Minutes of Settlement to approve the Minutes of Settlement and the APS requiring the transaction to close on May 14, 2020. It is just and equitable for the Court to exercise its jurisdiction to amend the Minutes of Settlement and the APS and approve a transaction that can close successfully.

B. Lanterra Should be Granted Relief from Forfeiture due to the Unprecedented Circumstances Caused by COVID-19

21. Relief from forfeiture refers to the power of the court to protect a party against the loss of an interest or a right because of a failure to perform a covenant or condition in an agreement. It is an equitable, discretionary remedy.

Courts of Justice Act, s. 98, R.S.O. 1990 c. C. 43; *Kozel v. Personal Insurance Co.*, 2014 CarswellOnt 1790, 2014 ONCA 130, at paras 28-29, BOA Tab 3.

22. The Supreme Court of Canada has stated that in exercising their discretion to grant relief from forfeiture, courts should consider (a) the conduct of the applicant, (b) the gravity of the breach, and (c) the difference between the value of the property forfeited and the damage caused by the breach. Courts have recognized that relief from forfeiture does not require an existing default, but can be granted in circumstances of an anticipatory breach.

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co., 1994 CarswellAlta 769, [1994] 2 S.C.R. 490 at para 32, BOA Tab 4; *Hatami v. 1237144 Ontario Inc.*, 2018 CarswellOnt 1740, 2018 ONSC 668 at paras 53-55 (relief denied on other grounds), BOA Tab 5.

23. The application of the above-noted factors indicates that the Court should exercise its discretion and grant Lanterra relief from forfeiture based on the anticipated inability of Lanterra to close the transaction on May 14, 2020, and direct a new Closing Date. Such an

application of discretion would be in the best interests of all parties to the Minutes of Settlement.

McLeod, supra, at para 31, BOA Tab 1.

24. Lanterra has not acted maliciously. There is no evidence that Lanterra has not acted in good faith since the Minutes of Settlement and the APS were signed. In fact, the evidence is that Lanterra has proceeded to incur significant financial obligations consistent with closing the transaction up to and including last week. The COVID-19 pandemic and the declaration of a State of Emergency were not within the parties' contemplation when the Minutes of Settlement and APS were signed, and have made the closing on May 14, 2019 commercially unfeasible due to circumstances beyond Lanterra's control.

Wein Affidavit at paras 7-10, Lanterra Cross Motion Record, Tab 2 ; *Voortman v. SPCVC Investments Inc.*, 2018 CarswellOnt 9632, 2018 ONSC 3602 at para 28, BOA Tab 6.

25. The harm that may be caused by an extension of the Closing Date - a delay in receiving funds measured in weeks or months - is far less than the harm that would be visited upon the parties to the Minutes of Settlement, especially the most vulnerable parties- the Investors, by not preserving the negotiated transaction. As noted in the Al-Awqati Affidavit, the transaction contemplated by the APS is the culmination of the completion of two robust, lengthy sale processes, and was negotiated following the failure of the Investors to approve a previous transaction and the commencement of a threatened receivership proceeding, which Hi-Rise, Adelaide and Representative Counsel were concerned would reduce sale proceeds for the Property. It is Hi-Rise's stated position that the transaction contemplated by the APS maximizes the recovery to Investors.

Al-Awqati Affidavit at paras 16- 75, Lanterra Cross Motion Record, Tab 2B.

26. Amending the Minutes of Settlement and the APS to change the definition of the Closing Date to the date that is earlier of (a) the date to which the Parties agree, (b) the date that is 8 weeks following the lifting of the Declaration of Emergency and (c) December 15, 2020, will avoid the potential prejudice to the parties to the Minutes of Settlement that would arise if the transaction contemplated by the APS were to fail.

27. The delay of the Closing Date will not affect the first secured creditor on the Property, Meridian, who is secured three times over and will obtain a full recovery on its debt regardless of when the transaction closes. While there will be a delay in distributions to the other parties to the Minutes of Settlement, including the Investors, the benefit of the APS to those parties would be maintained, which should be a significant comfort in the unprecedented circumstances and large scale disruption to the residential real estate industry caused by COVID-19.

PART V - ORDER SOUGHT

28. For the foregoing reasons, Lanterra respectfully requests the relief described in paragraph 2 hereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of April, 2020.

“Stikeman Elliott”

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *McLeod v. Schmidt*, 2007 CarswellOnt 5037, [2007] O.J. No. 3039
2. K. Yamauchi, "The Courts' Inherent Jurisdiction and the CCAA: A Beneficient or Bad Doctrine?", (2004) Canadian Business Journal, 40 CBLJ 250
3. *Kozel v. Personal Insurance Co.*, 2014 CarswellOnt 1790, 2014 ONCA 130
4. *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CarswellAlta 769, [1994] 2 S.C.R. 490
5. *Hatami v. 1237144 Ontario Inc.*, 2018 CarswellOnt 1740, 2018 ONSC 668
6. *Voortman v. SPCVC Investments Inc.*, 2018 CarswellOnt 9632, 2018 ONSC 3602

SCHEDULE "B"
RELEVANT STATUTES

Rules of Civil Procedure, R.R.O 1990, Reg. 194

ORDERS ON TERMS

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

Courts of Justice Act, RSO 1990, c C.43

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

Jurisdiction for equitable relief

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C.43, s. 98; 1993, c. 27, Sched.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

HI-RISE CAPITAL LTD.
Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES
Respondent

Court File No.: CV-19-616261-00CL

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF LANTERRA DEVELOPMENTS
LIMITED**

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