

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

BETWEEN

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and -

BUILDING & DEVELOPMENT MORTGAGES CANADA INC.

Respondent

**APPLICATION UNDER SECTION 37 OF THE
MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT, 2006, S.O. 2006,
c. 29 and SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990 c. C.43**

**NOTICE OF MOTION
(CHAT Distribution Motion)**

FAAN Mortgage Administrators Inc., in its capacity as Court-appointed trustee (“**Trustee**”) of all of the assets, undertakings and properties of Building & Development Mortgages Canada Inc. (“**BDMC**”) pursuant to section 37 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29, as amended, (“**MBLAA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, will make a motion before a judge of the Ontario Superior Court of Justice (Commercial List) at a date and time to be set, or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order (the “**CHAT Distribution Order**”), *inter alia*:

- (a) if necessary, abridging the time for service of this Notice of Motion and the Motion Record and dispensing with service on any person other than those served; and
 - (b) authorizing the Trustee to make a distribution or distributions of 85% of the Realized Property received or receivable in respect of the CHAT Transaction (as defined below) to SML Investors (as defined below), *pro rata* to the SML Investors entitled to such funds, in accordance with paragraph 3(b) of the Realized Property Order, as amended by the Braestone Settlement Approval Order and the Harlowe Settlement Approval Order (each as defined below), and the terms of the Interlender Agreement (as defined below), or, in the alternative, as the Court may otherwise direct; and
2. Such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. Pursuant to the Order of the Court in respect of BDMC dated April 20, 2018 (the “**Appointment Order**”), FAAN Mortgage Administrators Inc. was appointed as the Trustee, without security, of all of the assets, undertakings and properties of BDMC, including, without limitation, all of the assets in the possession or under the control of BDMC, its counsel, agents and/or assignees but held on behalf of any other party, including, but not limited to, Investors (as defined below), brokers, or borrowers, in each case whether or not such property is held in trust or is required to be held in trust;
2. The purpose of the Trustee’s appointment is to protect the interests of the members of the investing public who invested in syndicated mortgage loans made by BDMC in respect of certain real estate development projects secured by mortgages (typically third-ranking or lower priority charges) registered on title to the applicable real property (the “**Investors**”);
3. The Trustee has delivered the Ninth Report of the Trustee dated July 12, 2019 (the “**Ninth Report**”), which, among other things, describes the Trustee’s activities to date in carrying out its mandate under the Appointment Order with respect to the mixed use development proposed to be constructed at 46 Charlotte Street, Toronto, Ontario (the “**CHAT Project**”). Capitalized

terms used but not defined herein have the meanings given in the Ninth Report or in other Reports of the Trustee, as applicable;

4. The Trustee has delivered eight previous reports to Court (the “**Reports**”) detailing, among other things, the Trustee’s activities during these proceedings, and providing updates to stakeholders on various projects, including the CHAT Project;

5. On October 30, 2018, this Court issued the Realized Property Order which, among other things:

- (a) required the Trustee to distribute (when aggregated with previous distributions) 70% of (I) all funds held or received by the Trustee as a result of a repayment (in whole or in part) of principal on any loan or other indebtedness administered by BDMC on behalf of Investors, whether or not (i) secured by any Real Property Charges in the name of BDMC or an RRSP Trustee, (ii) received before or after the date of the Appointment Order, or (iii) paid or payable in trust, plus (II) all interest paid or payable to BDMC or the Trustee at the time such repayment (in whole or in part) of principal is made (collectively, “**Realized Property**”);
- (b) required the Trustee to retain 30% of all Realized Property; and
- (c) authorized the Trustee to use the retained Realized Property to aid the Trustee in complying with the Appointment Order and in carrying out its mandate, as the Trustee, in its sole discretion, considered necessary or desirable for the administration of the estate;

6. On November 28, 2018, this Court issued the Braestone Settlement Approval Order, which, among other things, amended the Realized Property Order to require the Trustee to distribute (when aggregated with previous distributions) 80% of all Realized Property to Investors;

7. On December 20, 2018, this Court issued the Harlowe Settlement Approval Order which, among other things, further amended the Realized Property Order to require the Trustee to distribute (when aggregated with previous distributions) 85% of all Realized Property to Investors;

Overview of the BDMC Loan Arrangements and Recent Developments on the CHAT Project

BDMC Loan Arrangements on the CHAT Project

8. The property comprising the CHAT Project, with a municipal address of 46 Charlotte Street, Toronto, Ontario (“**CHAT Property**”), was owned by Langston Hall Development Corporation (“**Langston Hall**”) prior to being acquired by Fortress Charlotte 2014 Inc. (the “**CHAT Borrower**”);

9. In early 2010, Langston Hall entered into certain loan agreements (the “**LH1 Loan Agreements**”) with various individual lenders (“**LH1 Investors**”) or with The Bank of Nova Scotia Trust Company (“**Scotia Trust**”) in trust for such LH1 Investors, totalling \$3.3 million in aggregate (the “**LH1 Loan**”). Langston Hall granted a mortgage in the amount of \$3.3 million in the name of Pahuja Law, in trust, to secure the LH1 Loan (the “**Previous LH1 Mortgage**”);

10. Langston Hall sold the property to the CHAT Borrower in September 2014. In connection with the sale transaction: (i) the Previous LH1 Mortgage was discharged and a vendor take-back mortgage in the amount of approximately \$4 million (representing outstanding principal and accrued interest to date) was transferred to Centro Mortgage Inc. (now BDMC) and Scotia Trust (the “**LH1 Mortgage**”), in trust for the LH1 Investors, and (ii) the LH1 Investors executed individual accession agreements to an agency agreement between the LH1 Investors and Centro Mortgage Inc. pursuant to which Centro Mortgage Inc. was appointed as agent of the LH1 Investors, with the ability to, *inter alia*, exercise all rights and powers of the LH1 Investors under the LH1 Loan Agreements, the Previous LH1 Mortgage, the LH1 Mortgage and related documents;

11. On December 1, 2014, the CHAT Borrower entered into a loan agreement with Centro Mortgage Inc., in trust for certain syndicated mortgage loan investors (“**SML Investors**”) that provides for a total aggregate loan of up to \$25 million (the “**SML Loan**”, and such agreement, the “**SML Loan Agreement**”). A mortgage was granted on the CHAT Property to secure amounts owing in respect of the SML Loan to Centro Mortgage Inc. and Olympia Trust Company (“**Olympia**”) in the amount of \$4 million (which amount was subsequently increased to \$12.55 million) (“**SML Mortgage**”);

12. On June 8, 2015, the CHAT Borrower entered into an Interlender Agreement with Centro Mortgage Inc., in its capacity as lender under the SML Loan Agreement and Centro Mortgage Inc., Scotia Trust and Olympia, in their capacities as mortgagees under the LH1 Mortgage (“**Interlender Agreement**”) that, *inter alia*, provides that the LH1 Loan and the LH1 Mortgage shall be postponed and subordinated to the SML Loan and the SML Mortgage and that Centro Mortgage Inc., Scotia Trust and Olympia, in their capacities as holders of the LH1 Mortgage shall not be entitled to receive any amounts owing under the LH1 Mortgage until all obligations secured by the SML Mortgage have been fully paid and performed. A postponement was registered on title to the CHAT Property. As a result of the postponement and the Interlender Agreement, the Trustee is of the view that the SML Mortgage ranks in priority to the LH1 Mortgage;

CHAT Refinancing and Sale Transaction

13. In July 2018, Diversified Capital Inc. (“**Diversified**”), the senior lender, issued a Notice of Intention to Enforce Security pursuant to Subsection 244(1) of the *Bankruptcy and Insolvency Act*. On January 24, 2019, Diversified issued a Notice of Sale Under Mortgage in respect of matured debt owing to Diversified in excess of \$10.2 million;

14. On March 1, 2019, the Trustee agreed to subordinate and postpone the SML Mortgage and the LH1 Mortgage to replacement first priority financing in the amount of approximately \$11.8 million from 729171 Alberta Inc., in trust, which prevented the distressed sale of the CHAT Property through a process conducted by Diversified;

15. However, the CHAT Borrower had been denied certain development approvals required to continue to advance the CHAT Project and advised the Trustee that it was unable to continue the development of the Project. Following the refinancing transaction, the CHAT Borrower engaged in negotiations for the sale of the CHAT Property;

16. The Trustee was presented with an executed agreement of purchase and sale by the CHAT Borrower dated March 13, 2019 with Adelaide Square Developments Inc. (“**Adelaide Square**”) for a cash purchase price of \$15 million plus an unsecured “bonus density” payment, contingent on future development approvals. The Trustee reviewed the purchase agreement and additional transaction details. Given that a condition to the transaction was the discharge of the

SML Mortgage and the LH1 Mortgage, the Trustee was able to renegotiate certain key terms of the transaction notwithstanding the fact that it had already been executed;

17. On March 28, 2019, the Trustee, the CHAT Borrower and Adelaide Square finalized the terms of an amended agreement of purchase and sale for the purchase of the CHAT Property by Adelaide Square for \$16.5 million cash, of which approximately \$3.6 million would be payable to BDMC. The Trustee also negotiated and executed a memorandum of understanding dated April 4, 2019 (“**MOU**”) among Adelaide Square and its assignee purchaser, as well as the general partner of such purchaser and its principals, as guarantors, which provided for an additional payment to BDMC of \$1.95 million, in two installments, and up to an additional \$5.2 million payable as a further “density bonus” depending on certain development approvals, with additional security and personal guarantees granted to the Trustee in respect of such payments. This sale transaction (“**CHAT Transaction**”) resulted in a gross selling price between \$18.45 million and \$23.65 million for the CHAT Property;

18. At the time of the CHAT Transaction, approximately \$14 million (representing outstanding principal and accrued interest) was owing under the SML Loan Agreement to 243 SML Investors and approximately \$4.5 million (representing outstanding principal and accrued interest) was owing under the LH1 Loan Agreement to 58 LH1 Investors;

19. Based on the Trustee’s proposed priority of distributions, the CHAT Transaction would provide recoveries to SML Investors of approximately 45% to 88% of the principal amounts advanced by such SML Investors. Given the shortfall to SML Investors, no amounts would be payable to the LH1 Investors from the proceeds of the CHAT Transaction pursuant to the terms of the Interlender Agreement;

20. The Trustee discharged the SML Mortgage and the LH1 Mortgage in connection with the CHAT Transaction;

Need for the CHAT Distribution Order

21. The Trustee advised the Investors on the CHAT Project of the CHAT Transaction on May 1, 2019. In its notice to Investors, the Trustee indicated that, due to the terms of the Interlender Agreement, there would be no recoveries for LH1 Investors as the SML Investors would suffer a

shortfall. The Trustee advised that it expected to make distributions of the initial Realized Property (less the Administrative Holdback) received from the CHAT Transaction within two weeks of the Trustee's Court attendance scheduled for May 23, 2019;

22. Prior to the issuance of the May 1, 2019 notice, the Trustee was approached by legal counsel to Margin Music Ltd. ("**Margin Music**"), one of the LH1 Investors, who made certain inquiries with respect to the CHAT Transaction and the proposed distributions. The Trustee and its counsel have engaged in productive discussions with Mr. Wells, the principal of Margin Music, and Margin Music's counsel, but have been unable to resolve Margin Music's concerns with respect to the proposed distribution;

23. As a result of the ongoing discussions, the Trustee sent a subsequent notice to SML Investors and LH1 Investors on June 18, 2019 advising that, should the Trustee be unable to resolve the matter in the near term, the Trustee anticipated filing a motion with the Court to seek approval of a distribution of the Realized Property received to date (being approximately \$4.1 million prior to the Administrative Holdback) in accordance with the terms of the Interlender Agreement and the Realized Property Order, as amended;

24. Given that the distribution of Realized Property in respect of the CHAT Transaction has now been delayed for some time, the Trustee is bringing this motion to approve the proposed distribution to the SML Investors in accordance with the terms of the Interlender Agreement and the Realized Property Order, as amended, or, in the alternative, as the Court may otherwise direct, in order to avoid further delays in Investor distributions;

25. The Trustee understands from Mr. Wells that Margin Music intends to challenge the proposed distribution to the SML Investors. As such, the Trustee has proposed a mechanism in the Ninth Report to deal with the adjudication of the issue of the distribution of the proceeds of the CHAT Transaction in an efficient and expedient manner.

General

26. The provisions of the MBLAA, including section 37 thereof;

27. The Appointment Order;

28. The Realized Property Order;
29. The Braestone Settlement Approval Order;
30. The Harlowe Settlement Approval Order;
31. Rules 1.04, 1.05, 2.03, 3.02, 16, 37 and 41 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;
32. Sections 101 and 106 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
33. The inherent and equitable jurisdiction of this Honourable Court; and
34. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. The Ninth Report of the Trustee and the appendices thereto; and
2. Such further and other evidence as counsel may advise and this Court may permit.

July 12, 2019

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Building & Development Mortgages Canada Inc.

TO: SERVICE LIST

THE SUPERINTENDENT OF FINANCIAL SERVICES

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Applicant

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Court File No. CV-18-596204-00CL

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Proceedings commenced at Toronto

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