1 of 2 DOCUMENTS

Case Name:

Toronto Standard Condominium Corp. No. 1703 v. 1 King West Inc.

RE: Toronto Standard Condominium Corporation No. 1703, and 1 King West Inc. et al

[2009] O.J. No. 4216

Court File No. 07-CV-329252PD1

Ontario Superior Court of Justice

Master B.T. Glustein

Heard: August 21 and September 22, 2009.
Judgment: October 9, 2009.

(227 paras.)

Counsel:

Mark H. Arnold and Syed A. Ahmed (student-at-law) for the plaintiff.

Patricia M. Conway and S. Nasseri for the defendants 1 King West Inc., King West Developments Inc. and Projectcore Inc.

Richard Conway and Andrew Gray for the proposed defendant Honest Ed's Limited.

REASONS FOR DECISION

MASTER B.T. GLUSTEIN:--

Overview

1 The plaintiff Toronto Standard Condominium Corporation No. 1703 ("TSCC 1703") brings a motion (the "Motion") to amend the amended statement of claim (the "Existing Claim"). The proposed claim is set out in the "Amended Amended Statement of Claim" (the "Proposed Claim") attached to TSCC 1703's Supplementary Motion Record. In the Proposed Claim, TSCC 1703 seeks:

(i) to add the proposed defendant Honest Ed's Limited ("HEL"). TSCC 1703 seeks a declaration that mortgages granted by the defendant 1 King West Inc. ("1KW") to HEL which were registered in respect of 30 and 6 residential condominium units on December 23, 2005 and November 24, 2006 respectively (the "Mortgages"), are void against TSCC 1703 as a fraudulent conveyance; and

(ii) to amend the Existing Claim against the defendants 1KW and King West Developments Inc. (collectively, the "King West Defendants")[1]. In addition to the claim by TSCC 1703 in the Existing Claim for damages for breach of warranty[2], TSCC 1703 seeks damages against the King West Defendants on the basis of the fraudulent conveyance of the Mortgages, breach of fiduciary duty, and constructive trust.

2 HEL submits that the Motion ought to be dismissed because the Proposed Claim:

(i) is statute-barred against HEL under section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24 (the "*Limitations Act, 2002*") since it was brought more than two years after the claim was discovered or ought to have been discovered,
(ii) is not tenable since it fails to plead the required elements of a fraudulent conveyance claim,
(iii) is an abuse of process because it is brought for an improper purpose of freezing assets before judgment and inverting priorities with TSCC 1703 when TSCC 1703 failed to obtain a Mareva injunction in which it sought an order freezing the assets of 1KW for the benefit of its construction deficiency action, and
(iv) would result in non-compensable prejudice.

3 The King West Defendants submit that the Motion ought to be dismissed because:

(i) The fraudulent conveyance claims on the Mortgages are statute-barred and not tenable on the basis of the submissions of HEL;
(ii) The Proposed Claim fails to disclose a tenable cause of action for either the breach of fiduciary duty or constructive trust claim;
(iii) The proposed amendments are an abuse of process for the reasons submitted by HEL; and
(iv) Joinder of the causes of action is not appropriate because it would unduly delay and complicate the litigation.

4 For the reasons I discuss below, I find that:

(i) The Proposed Claim is statute-barred as against HEL and the King West Defendants. The alleged fraudulent conveyance of the Mortgages is a "claim" subject to the *Limitations Act, 2002*. The evidence establishes that TSCC 1703 ought to have known of the requisite elements to discover the fraudulent conveyance claim against HEL and the King West Defendants more than two years prior to delivering the first version of the Proposed Claim to HEL and the King West Defendants on December 5, 2008[3]. For these same reasons, the claim against the King West Defendants based on the fraudulent conveyances of the Mortgages cannot stand[4];

(ii) The proposed amendments against the King West Defendants based on breach of fiduciary duty cannot stand. It is settled law that there is no "overarching" fiduciary relationship between a purchaser and vendor of a condominium (*Peel Condominium Corporation No. 505 v. Cam-Valley Homes Ltd.*, 2001 CarswellOnt 579 (C.A.) ("*Cam-Valley Homes*") at para. 43), and that relationship does not, "in itself, give rise to fiduciary duties" (*Simone v. Daley*, 1999 CarswellOnt 551 (C.A.) ("*Simone*"), at para. 14). Instead, that relationship is a "normal contractual relationship" (*Simone*, at para. 14) unless there are facts pleaded that establish a fiduciary relationship. There are no such facts pleaded in the Proposed Claim. The basis of the alleged breach of fiduciary duty of the alleged obligation to create a fund to pay warranty claims is the contract itself. These "contractual" facts cannot establish a fiduciary relationship;
(iii) The proposed amendments against the King West Defendants based on constructive trust are tenable. Even if I accept the King West Defendants' submission that TSCC 1703 cannot base its claim for a fund to pay warranty claims on their contractual rights (an issue I do not decide), a claim in equity for a fund to pay contractual warranty claims is "legally plausible", "arguably maintainable", "conceivable" or "within the bounds of legal possibility" (the low threshold required for an amendment motion under *Panalpina Inc. v.*

Sharma, [1988] O.J. No. 1401 (S.C.J. - Mast.) ("*Panalpina*")). Even when there is no contractual language addressing whether a reserve fund needs to be created, courts have held that the obligation to fund a warranty could be set-off against a holder of security (*Mercantile Bank of Canada v. Leon's Furniture Ltd.*, [1989] O.J. No. 61 (H.C.J.) at paras. 65-66 ("*Leon's Furniture*"); reversed on the issue of whether the *Bank Act*, R.S.C. 1985, c. B-1, precluded the application of principles of equitable set-off). I accept TSCC 1703's position that an argument by analogy might be possible, although a court would have to consider the applicable warranty provision and evidence of the purchasers.

A claim for constructive trust would not be an abuse of process, since it is not trying to freeze assets as in the Mareva injunction hearing, nor seek an order contrary to the finding of Pollak J. in her endorsement dated August 8, 2008 that payments from 1KW to HEL were in the ordinary course. Instead, TSCC 1703 seeks a priority, after trial, over the claims of a secured creditor, and TSCC 1703 remains free to deal with its assets in the ordinary course as ordered by Justice Pollak. Further, such a claim would not unduly complicate the hearing either in time or evidence nor require any significant additional examinations for discovery.

5 Given my conclusion summarized above, I do not address the other arguments raised by the parties.

Facts

(i) Background to the project

(a) Initial development of the project and funding by HEL (1999-2001)

6 This action arises from the development of a real estate project starting in the late 1990s located at the southwest corner of King and Yonge Streets in Toronto. In brief[5], the project was identified by Harry Stinson ("Stinson"), who obtained financing from David Mirvish ("Mirvish") through certain of his companies. The project included the formation of both a residential condominium corporation (TSCC 1703) and a commercial condominium corporation (Toronto Standard Condominium Corporation No. 1726). The concept of the project was that the residential condominium units could be rented and pooled to form part of a hotel operation.

7 HEL is a Mirvish-controlled company. In October, 2000, HEL incorporated 1KW (also controlled by Mirvish) to take title to the property at 1 King Street West which it purchased for $22 million.

8 1KW was the "declarant" for the project, a single purpose company used to develop the large real estate project. Mr. J. Robert Gardiner ("Gardiner"), a lawyer at the plaintiff's law firm Gardiner Miller Arnold LLP ("GMA"), swore an affidavit dated April 23, 2009 in support of this Motion (the "Gardiner Affidavit"), in which he stated that "almost inevitably, declarants are single-purpose shell companies with no assets other than the remaining unsold units which they can sell or mortgage before having to fix the construction deficiencies or reimburse the condominium corporation for the cost thereof".

9 Gardiner agreed on his cross-examination that the concern arising from a single-purpose shell company is that "the assets of the declarant, if sold or mortgaged, may be put out of the reach of the condominium corporation and not available to satisfy a claim".

10 Mirvish invested a considerable amount in the project. On April 13, 2009, Mirvish was examined as a witness for the Motion under Rule 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"). His evidence was that HEL contributed approximately $45 million and invested those funds "from the beginning"[6].

(b) Warranty obligations under the Agreements of Purchase and Sale

11 Purchasers who acquired residential units in the project signed an Agreement of Purchase of Sale which provided that the warranty provisions under the Ontario New Home Warranty Program did not apply and that they were responsible for all maintenance and repair obligations to the condominium. However, under the Agreement of Purchase and Sale, 1KW provided a contractual warranty as a term of the agreement (set out in bold in the agreement of purchase of sale):

> **Notwithstanding the foregoing, the vendor agrees to provide to the Purchaser and to the Condominium Corporation, with respect to the Unit and the common elements of the Condominium, a two year warranty with respect to any new construction (only) or other construction with respect to the renovation of 1 King Street West ... it being understood and agreed that there is no other representation, warranty, guarantee, collateral agreement or condition precedent herein relating to design, workmanship or materials in respect of any aspect of the construction of the Condominium (including the Unit) under this Agreement or at law or in equity or by any statute insofar as the Vendor, its directors, officers, agents, employees, successors, assigns and affiliates are concerned, save as aforesaid.**

12 The evidence of Mr. Brian Smith ("Smith")[7], President of the Board of Directors of TSCC 1703, is that he "expected that the Warranty included similar protection for any warranty claims that I might otherwise make were my unit covered by the statutory warranty" and he "further expected that a portion of the purchase price for my condominium unit would be set aside and preserved in a separate account to pay for any potential claims made under the Warranty".

13 While Smith acknowledged on his cross-examination that there is nothing in the agreement that provides for a portion of the purchase price to be set aside for warranty claims, he maintained his position that he expected that the builder would have set aside such a fund.

(c) Financing from CDPQ Mortgage Corporation (June 2001)

14 The most significant financing for the project came from a loan of over $82 million from CDPQ Mortgage Corporation ("CDPQ") (a branch of the Caisse de Dépôt du Québec)[8]. Mirvish's evidence is that HEL "funded the building of 1 King West", since CDPQ required that Mirvish "fund first".

15 In CDPQ's loan agreement dated June 28, 2001 (the "CDPQ Agreement"), CDPQ required a first-ranking mortgage and charge inthe amount of $82,460,000, with funds to be provided on a 'cost-to-complete" basis, in advances of not less than $1 million and "such advances not to be made more than once a month". Prior to each advance, the borrower was required to provide evidence to satisfy CDPQ that the unadvanced portion of the loan was sufficient to pay the projected cost to complete the project.

16 Mirvish and another Mirvish company, Ed Mirvish Enterprises Limited ("EMEL") were the covenantors on the agreement, and 1KW was the borrower. Mirvish's evidence is that the money EMEL gave came from HEL. The covenantors agreed to a joint and several guarantee of the loan and to be responsible for all cost overruns. Further, CDPQ would only loan funds if it had evidence to its satisfaction that "the total equity invested or available by [1KW] in the Project from its own monies and those of the purchasers deposits is not less than" $38,531,000.

17 In addition, CDPQ required that the borrower or covenantors (*i.e.* 1KW, Mirvish, or EMEL) could not register a mortgage against the property, as security for the funds they advanced to the property, without CDPQ's prior written consent. The CDPQ Agreement provided that "The Borrower shall disclose to the Lender all existing or proposed financing related to the Property and the property used in connection therewith and shall not pledge, charge or otherwise encumber its interest in the Property nor such property to any party other than the Lender, without the prior written consent of the Lender".

18 Under the CDPQ Agreement, when the unadvanced funds were insufficient to cover the then-projected cost to complete, the insufficiency had to be made up by further advances by the borrower to the project.

(ii) Evidence relevant to discoverability of the Mortgages

19 For the purposes of this Motion, HEL does not contest (i) Smith's evidence that he did not learn of the Mortgages until some time in November, 2007, when an employee at GMA's office searched title to three units and discovered that HEL had a mortgage on the unsold units or (ii) Gardiner's evidence that he did not learn of the Mortgages until the autumn of 2008.

20 However, the issue on the Motion is whether TSCC 1703 could reasonably have discovered the material facts on which tobase its proposed fraudulent conveyance claim within two years prior to December 5, 2008. Consequently, I review in some detail below the evidence on this issue.

(a) Turnover meeting (December 6, 2005)

21 Following TSCC 1703's registration in September 2005, there was a "turnover meeting" on December 6, 2005, at which 1KW turned over control of the building to those unit holders elected by the residential condominium owners at that turnover meeting (pursuant to section 43 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "*Condominium Act, 1998*"). The turnover was required to take place not more than 21 days after the declarant ceased to be the registered owner of the majority of the units.

22 As required under section 43(4)(f) of the *Condominium Act, 1998*, 1KW provided the condominium board with "The Corporation's current register listing the names and addresses of unit owners, employees, and mortgagees and any notices of leased units as of December 6, 2005". This information, required to be maintained under section 47(2) of the *Condominium Act, 1998*, provided the board with a record of the owners and mortgagees. Such information is necessary for the board to communicate with unit holders.

23 At the meeting, TSCC 1703's property manager, Yehudi Hendler ("Hendler"), acknowledged receipt of the register. In particular, at the meeting, TSCC 1703 delivered a list of 30 unsold units.

24 Consequently, as of December 6, 2005, TSCC 1703 had the information necessary to know which units were still owned by 1KW.[9]

(b) The Mortgages

(1) HEL places mortgage on property (December 23, 2005)

25 As discussed above, Mirvish's evidence is that HEL could only obtain its mortgage upon prior written consent from CDPQ. He stated that "it was made clear ... that the Caisse would not allow me to place a mortgage behind them to protect our investment in the property" and that "as we came to the end of the project, we came back to the Caisse who on the understanding that once they were fully discharged would allow us to have a mortgage, allowed us to put it in place".

26 Mirvish's evidence is that "it was always our intention to have the mortgage, only prevented by the form of financing we did, and that therefore Harry Stinson knew how unhappy I was that I couldn't place the mortgage right behind the Caisse and that he was aware from the very beginning of our needing a mortgage" since it was "[Mirvish's] intention that [HEL] be able to secure the money it was advancing for this project".

27 Mirvish's evidence is that he was only able to place the mortgage on title in late December 2005 because "we were at the stage of, I think, having pretty much delivered to all of the buyers, and we were in the final stages of receiving the money in, and we - and although we were allowed to put the mortgage in place, my understanding is that it stood behind the Caisse for the last little bit of money they were to receive and until they were fully paid out, ... we weren't able to take possession of our security". Mirvish's evidence is that CDPQ would have been paid out at a time "very close to the time of that mortgage because if they hadn't been paid most of it, they would have never allowed us to put it into place".

(2) HEL registers the mortgage on 6 unsold units (November 24, 2006)

28 On November 24, 2006, HEL registered the same mortgage on 6 unsold units. The mortgage was registered on these few additional units at a later point in time because HEL believed those units were to have been sold and did not want to take the step to register them at the time the first $45 million mortgage was registered. Consequently, HEL registered the Mortgages[10] on 36 units, for a collective amount of $45 million. The Mortgages were registered to secure the money loaned by HEL, which has several sources of funds including EMEL.

(c) Events leading up to the litigation

(1) TSCC 1703 retains GMA and discovers the alleged construction deficiencies (January to July 2006)

29 In early January 2006, the TSCC 1703 board retained GMA "to provide legal counsel to the corporation and represent its legal interests". GMA represents itself on its website as "one of a handful of Ontario law firms who are condominium law experts".

30 At a board meeting on January 20, 2006, GMA recommended that a performance audit be conducted. TSCC 1703 then retained experts to review and advise on any construction deficiencies.

31 By July 2006, TSCC 1703 discovered the alleged construction deficiencies. Gardiner's evidence is that "as of July 28, 2006, the board of directors of 1703 had made our firm aware of the fact that 1703 was suffering serious building deficiencies".

(2) The July 27, 2006 TSCC 1703 board meeting

32 TSCC 1703 held a board meeting on July 27, 2006, in which it authorized litigation against 1KW. TSCC 1703 gave GMA broad discretion to take the steps necessary to protect its interests.

33 At the board meeting, TSCC 1703 resolved that GMA prepare a notice under section 23(2) of the *Condominium Act, 1998* to advise "all persons whose names are in the record of the corporation" of the "general nature of the action".

34 Gardiner's evidence is that GMA "were empowered to [litigate] if we wanted to litigate,but we always have that in our pocket when we negotiate", since "it was becoming clear at that stage that the declarant was not going to be willing to cooperate".

35 Further, GMA provided the TSCC 1703 board with a draft of a letter to be sent by Mark Arnold ("Arnold")[11] to 1KW. A litigation contingency fund of $130,000 was created.

(d) The GMA Letter and the Miller Thomson Letter

(1) The GMA Letter (July 28, 2006)

36 On July 28, 2006, Gardiner wrote a letter addressed to 1KW and sent to the attention of Mirvish (the "GMA Letter"). The GMA Letter was signed "per Mark H. Arnold" under the initials "jrg".

37 GMA advised that "we have been retained by [TSCC 1703] to resolve a long list of significant building deficiencies that exist at TSCC 1703's building at 1 King Street West, Toronto" and that "it appears that the cost to rectify [the deficiencies] will be substantial, likely exceeding $10 million".

38 The GMA Letter was the first legal notice of the deficiency claims. The only other notice of which Gardiner was aware was a claim dealing with a portico with an approximate value of $40,000.

39 GMA also stated that it had "learned" 1KW intended tomortgage its remaining units and that TSCC 1703 had "instructed" GMA "to commence appropriate proceedings to set aside those transactions as a fraudulent conveyance and/or an unjust preference".

40 GMA made the following statements in the GMA Letter:

(i) **"We have also learned that 1KWI[12] plans to sell or mortgage its remaining units at TSCC 1703, as listed on Schedule "A" attached hereto"**;

(ii) **"TSCC 1703 considers the remaining units as assets that should be secured so as to satisfy 1KWI's obligations to rectify those deficiencies"**;

(iii) "Be advised that, if it appears that 1KWI is attempting to defeat TSCC 1703's claims by dissipating or heavily encumbering 1KWI's only remaining assets, TSCC 1703 will obtain injunctive relief from the Court to halt any further dealings with the remaining units";

(iv) **"Please also ensure that all proceeds of sale, mortgaging or disposition of any remaining units are set aside in a separate interest-bearing trust fund so that the proceeds can be applied on account of TSCC 1703's building deficiency claims against 1KWI"**; and

(v) **"Please be advised that, in the event any proceeds arising from the mortgage or sale of any of the remaining units are paid to any related or associated company or any director, officer, shareholder, employee (or their spouses),** or the proceeds of any other assets of 1KWI are or are otherwise paid or conveyed to any other creditor or person, **TSCC 1703 has instructed us to commence appropriate proceedings to set aside those transactions as a fraudulent conveyance and/or an unjust preference".** [emphasis added]

41 Gardiner's evidence was that the GMA Letter was his "usual pre-litigation approach". Gardiner did not recall "any specific or background information pertaining to" his statement that "We have also learned that 1KWI plans to sell or

mortgage its remaining units at TSCC 1703". Gardiner believed that the statement was made without any specific knowledge and only as part of a general understanding that "all declarants typically plan to sell or mortgage their remaining units".

42 Gardiner's evidence is that "I had no knowledge whatsoever of any mortgage registered against 1KWI's remaining units in 2006", and that Gardiner was not aware of any attempt by 1KW "to defeat TSCC 1703's claims by dissipating or heavily encumbering 1KWI's only remaining assets", as referred to in the GMA Letter.

43 Further, Gardiner's evidence is that GMA had no knowledge of whether "any proceeds arising from the mortgage or sale of any of the remaining units" were paid to any related or associated company", as referred to in the GMA Letter.

44 Consequently, Gardiner's evidence is that the GMA Letter is a generic letter sent without any knowledge of the facts alleged therein.

(2) The Miller Thomson Letter (August 2, 2006)

45 By letter dated August 2, 2006, Ms. Patricia Conway ("Conway")[13] of Miller Thomson LLP responded to the Letter (the "Miller Thomson Letter"). Conway objected to GMA's direct contact with Mirvish through the GMA Letter. Conway stated that Arnold was "well aware that [Miller Thomson] is retained by 1 King West Inc. in respect of the subject project".

46 Conway expressly rejected GMA's position that it hold any security for the alleged deficiency claims. Conway stated:

> Our client will continue to sell the remaining inventory of units in the residential condominium in the normal course. If the condominium corporation attempts in any way to prevent 1 King West from doing so, rest assured that out client's response will be swift, and definitive. **Your client has no right nor legal basis for attempting to instruct our client on how it may sell its inventory, nor what use is made of the proceeds of sale.**
>
> Our client does not appreciate your so called "usual pre-litigation warnings". They are distasteful and unwarranted. If your client wishes to work towards a negotiated solution in good faith, it has made a very poor start. [emphasis added]

(d) The litigation

(1) TSCC 1703 brings the action (March 2007)

47 TSCC 1703 brought its construction deficiency action in March 2007. In its initial statement of claim, TSCC 1703 sought injunctive relief to prevent the King West Defendants from transferring or encumbering condominium units.

48 TSCC 1703 amended its claim in May 2008 to withdraw its claim for injunctive relief, as a result of an agreement with 1KW that 1KW would not dispense any of the gross proceeds of sale of the units in question without providing TSCC 1703 an opportunity to bring a motion for an order that the proceeds be secured by having them paid into court or held in a separate trust account.

49 Counsel for TSCC 1703 acknowledged at the hearing that the agreement was reached (and the injunctive relief withdrawn) since it was not the unit holders' intention to prevent the sale of unsold units, but rather to ensure the opportunity to protect their claim through freezing proceeds of further sales.

(2) TSCC 1703 seeks a Mareva injunction (August 8, 2008)

50 After being advised by 1KW that it intended to make payments from proceeds of sale of previously unsold units, TSCC 1703 sought a Mareva injunction to require that the "gross proceeds of the sale of condominium units owned by [1KW] be held in the trust account of [1KW]'s legal counsel until a further Order of the court".

51 In his affidavit filed in support if the motion for a Mareva injunction, Smith swore that:

> **I have real concerns that 1KWI will not be able to satisfy any judgment that TSCC 1703 might obtain in this actionif the proceeds of the unit sales are paid to HEL, which would render any decision of the Court a practical nullity.** This multi-million dollar shortfall would be borne by the unit owners at TSCC 1703 (most of whom are private individuals). **1KWI, meanwhile, will have succeeded in making itself judgment-proof by way of a manoeuver to shift money from one closely-related company to another so as to keep the money out of the reach of TSCC 1703.**
>
> **There is no doubt that HEL, EME and 1KWI are related companies and are controlled to varying degrees by David Mirvish. ...**
>
> While it may be true that 1KWI owes money to its related companies, the fact is that 1KWI has a significant potential liability to TSCC 1703 and its owners, and **it would be manifestly unjust for 1KWI to escape liability under its warranties and promises on the basis of settling its internal inter-company accounts.** ...
>
> **TSCC 1703 and its owners** have no interest in the intricacies of the finances between the various companies related to 1KWI, but **wish only to ensure that 1KWI does not divest itself of its final remaining assets so as to defeat the claim made in this lawsuit, as now appears to be the case. ... In lieu of [injunctive] relief, however, TSCC 1703 would be content if HEL and EME agreed to guarantee payment of any judgment that may be given in favour of TSCC 1703 against 1KWI in this action.** [emphasis added]

52 TSCC 1703 sought an adjournment of its motion, upon terms that the *status quo* be maintained until the return of the motion. Pollak J. heard the request for the adjournment on August 8, 2009 and released her endorsement that day.

53 Pollak J. refused to order terms of the adjournment. She properly characterized the "term of the adjournment" sought by TSCC 1703 as a "Mareva injunction".

54 Pollak J. held that (i) "there is no evidence to support the allegation that [1KW] is doing anything out of the ordinary course of business by paying its mortgage" and (ii) TSCC 1703 failed to establish the "compelling evidence" required that 1KW "is attempting to move assets out of the jurisdiction or out of the reach of creditors".

55 Pollak J. granted the adjournment without terms. TSCC 1703 never brought the motion back before the court.

(e) The various versions of the Proposed Claim and the evidentiary responses by TSCC 1703 (December 5, 2008 to May 2009)

56 The first version of the Proposed Claim to add HEL and plead the new claims against the King West Defendants was delivered by counsel for TSCC 1703 on December 5, 2008. That version made no allegation relating to when TSCC 1703 discovered the Mortgages. Consequently, on its face, the first version of the claim was statute-barred with respect to the fraudulent conveyance claims.

57 The second version of the Proposed Claim is dated January 7, 2009, and alleges that TSCC 1703 "first discovered the [Mortgages] on or around June 10, 2008, when it became aware of the closing of the sale of condominium units by [1KW]". However, TSCC 1703 filed no evidence[14] in its motion record seeking the amendments.

58 After TSCC 1703 received HEL's factum prior to the February 19, 2009 return date, in which HEL submitted that a moving party must lead evidence in order to amend a statement of claim outside a limitation period, the February 19, 2009 motion date was adjourned to May 1, 2009.

59 The third version of the Proposed Claim, and the one that is before this court on this Motion, was served with the TSCC 1703 Supplementary Motion Record returnable May 1, 2009. That Motion Record contained the Smith Affidavit. In the Proposed Claim, TSCC 1703 alleges that the Mortgages were discovered on November 23, 2007.

60 Prior to the May 1, 2009 date for the return of the motion, HEL's counsel filed a revised factum in which HEL submitted that even though TSCC 1703 provided evidence (through the Smith Affidavit) of when it discovered the Mortgages, the claim remained statute-barred because of discoverability, *i.e.* TSCC 1703 could have learned of the material facts on which to base its cause of action more than two years prior to December 5, 2008. HEL relied on the

GMA Letter and the Miller Thomson Letter, which Arnold marked as an exhibit when he examined Mirvish on April 13, 2009 as a witness under Rule 39.03.

61 TSCC 1703 then sought leave to file the Gardiner Affidavit, which Gardiner swore on April 23, 2009. I heard the motion for leave on May 1, 2009, and I granted that motion by reasons dated May 7, 2009. TSCC 1703 filed the Gardiner Affidavit in a Second Supplementary Motion Record for the Motion returnable on August 21, 2009.[15]

(f) Smith and Gardiner's evidence related to the discovery of the Mortgages

62 As I discuss at paragraph 19 above, for the purposes of this Motion, HEL does not contest Smith's evidence that he did not discover the Mortgages until November 23, 2007, nor Gardiner's evidence that he did not discover the Mortgages until the autumn of 2008.

63 Smith's evidence is that "to the best of my knowledge, information and belief, TSCC 1703 first became aware that [1KW] had granted a non-arm's length mortgage to [HEL] on or around November 23, 2007, in conjunction with an agreement reached with [1KW] with respect to the disbursement of the gross proceeds from the sale of its unsold units in the condominium building".

64 Smith relies on a letter dated November 23, 2007 from Arnold to Conway which set out their agreement that "1 King West Inc. will not in any manner disperse any of the gross proceeds from the sale of the units that it presently holds and which form part of [TSCC 1703] without providing the condominium corporation an opportunity to bring a motion to court for an order that these proceeds be secured by having them paid into court or held in a separate trust account". In that letter, Arnold referred to the title search he had conducted and expressly referred to the "blanket mortgage registered on title on December 23, 2005 in the amount of $45 million to Honest Ed's Ltd. as mortgagee".

65 In the November 23, 2007 letter, Arnold confirmed that "this agreement would also prohibit any money being paid out against that mortgage from the proceeds of sale until the issue has been determined by the court". Arnold advised that he would amend the statement of claim issued March 9, 2007 by removing the claim for injunctive relief, provided he received confirmation of acceptance of the offer.

66 The Gardiner Affidavit and his cross-examination also address the issue of discovery of the Mortgages (which Gardiner says that he did not learn of until the autumn of 2008). Given Smith's evidence that he learned of the Mortgages as of November 23, 2007, and the evidence that GMA searched title on November 13, 2007, I accept for the purposes of this Motion that the Mortgages were not discovered until mid-November 2007.

67 However, the issue before the court on the Motion to add HEL as defendants (and to bring the fraudulent conveyance claim against the King West Defendants) is when the fraudulent conveyance claims based on the Mortgages were "discoverable", not when they were "discovered". In addition to the evidence I discuss above, I set forth the additional evidence related to "discoverability" below.

(g) Additional evidence related to "discoverability" of the fraudulent conveyance claims based on the Mortgages

68 TSCC 1703 relies on the following evidence to support its position that it could not have discovered the fraudulent conveyance claim within two years prior to December 5, 2008: (i) the Smith Affidavit, (ii) the Gardiner Affidavit, (iii) the Casciato Affidavit and his cross-examination and (iv) emails from Robert Martin ("Martin"), a forensic accountant retained by TSCC 1703 (the "Martin Emails"). HEL and the King West Defendants rely on the Gardiner cross-examination as additional evidence that the fraudulent conveyance claim was discoverable more than two years prior to December 5, 2008.

69 I review this evidence below.

(1) The Smith Affidavit

70 On April 7, 2009, Smith filed evidence that the claim did not "crystallize" until some date after June 2008:

> [I]t was with the commencement of the sale of unsold units in June 2008, the affidavit of Camillo Casciato and the statements received from the condominium corporations' [sic] accountant, Robert Martin, that issues with respect to the priority of the warranty claims over the non-arm's-length security crystallized as an issue in this lawsuit.

(2) The Gardiner Affidavit

71 The evidence from Gardiner with respect to discoverability is at paragraphs 8 and 13 of his affidavit. Gardiner states:

> **[I]t would have been fruitless to incur the time or expense to search title to 575 units in order to ascertain which units were for sale or whether they were mortgaged because, realistically, our client had no right to register a Caution or Certificate of Pending Litigation in such a scenario. In any event, a title search would inevitably only reveal that each of the units may have been encumbered by a huge blanket construction mortgage in the range of $60,000,000 - $100,000,000 for such a building.** Moreover, declarants usually have sold their unit assets by the time a condominium corporation can enforce any of its remedies and declarants typically drag out building deficiency lawsuits until their units are sold. (para. 8)
>
> The last sentence in the sixth paragraph on page 3 of our letter to 1KWI states: "TSCC 1703 has instructed us to commence appropriate proceedings to set those transactions aside as a fraudulent conveyance and/or an unjust preference." The "appropriate proceedings" to set "those transactions" aside obviously could only arise in the event such a fraudulent conveyance and/or unjust preference were to come to the knowledge of 1703 or our firm, but there was no way we could ascertain that information simply from the registration of a mortgage from 1KWI to HEL on title to 1KWI's units, even if we had become aware of the registrations on the day they were made. We could only expect to find a construction mortgage registered on title to the unsold units. **No basis for a fraudulent conveyance or similar claim could be ascertained until the cross-examination of Camillo Casciato, which revealed the unimaginable lack of records pertaining to the purported mortgage advance by HEL to 1KWI, and until we could obtain the analysis of 1703's forensic accountant.** (para. 13) [emphasis added]

72 In essence, Gardiner relies on two bases to support TSCC 1703's submission that the claim was not discoverable:

(i) as set out in paragraph 8 of his affidavit, Gardiner states that it was not reasonable to conduct a search prior to November 2007 because TSCC 1703 could not have filed a certificate of pending litigation or caution and in any event, it would have been fruitless to do so because of the large number of units and the "inevitable" limited knowledge of only a "huge blanket construction mortgage"; and as such the Mortgages were not discoverable until November 2007 when Arnold directed GMA's employee to do a search of three units owned by 1KW and actually discovered the Mortgages; and

(ii) it was not until TSCC 1703 cross-examined Casciato on his affidavit and received the Martin Emails that TSCC 1703 could reasonably have discovered an intent to defraud in connection with the Mortgages.[16]

73 I address the evidence on each of these bases below, in the context of Gardiner's cross-examination.

(3) The Gardiner Cross-Examination

74 With respect to the first basis of the Gardiner "discoverability" evidence, Gardiner acknowledged on his cross-examination that it would not have been fruitless to conduct a search to discover the Mortgages. Gardiner acknowledged:

(i) No time and expense would have been required to search 575 units "in order to ascertain which units were for sale or whether they were mortgaged", because TSCC 1703 knew since turnover in December2005 which units 1KW owned, and therefore was always capable of searching title on those units to discover the Mortgages;

(ii) The search in November 2007 was comprised of three contiguous unsold units. Arnold acknowledged that the search was not a "random" search, although he refused to speculate whether the units were selected from a list of 1KW-owned units which would have been available from the turnover date in December 2005;

(iii) GMA had access to enable an electronic search of title to the unsold units to be conducted in its office; and

(iv) It would not have been "fruitless" to conduct a search since had TSCC 1703 or its counsel done so, they would have discovered the Mortgages, and not merely a blanket construction mortgage.

75 With respectto the second basis of the Gardiner "discoverability" evidence, it is necessary to review the evidence from the Casciato cross-examination and affidavit and the Martin Emails.

(4) The Casciato Cross-Examination and Affidavit

76 In its factum and in its submissions before the court, counsel for TSCC 1703 referred to no part of the Casciato cross-examination as a basis for Gardiner's statement that he could not discover the alleged fraudulent intent of the Mortgages until such cross-examination. Instead, TSCC 1703 relied on the Casciato Affidavit, and in particular, on paragraphs 6, and 9 to 14.

77 The Casciato Affidavit was sworn August 1, 2008 and filed by the King West Defendants in relation to the Mareva injunction. The Casciato Affidavit sets out the history of EMEL and HEL providing funds for the project. Casciato refers to the existence of the Mortgage registered on December 23, 2005 (a fact which was already known to TSCC 1703 as it was the subject of the attempted Mareva injunction). In particular, Casciato states (quoted *verbatim* from paras. 6 and 9-14 of his affidavit)[17]:

> Thereafter, the loan [from CDPQ] was advanced in sums of not less than 1 million, no more frequently than once monthly. The agreement required that prior to each advance, the Borrower provide evidence to satisfy the CDPQ that the unadvanced portion of the Loan was sufficient to pay the projected cost to complete the Project. Where the unadvanced funds were insufficient to cover the then-projected cost to complete, the insufficiency had to be made up by further advances by the Borrower to the Project. This is set out in Paragraph 10.3 of the agreement; (para. 6)
>
> During the construction of the Project, the costs went up, and the Borrower was required to put money into the project to comply with the terms of the CDPQ agreement; (para. 9)
>
> The source of money was Ed Mirvish Enterprises Limited ("EMEL") and Honest Ed's Limited ("HEL"). The transfers are evidenced by balances shown on the consolidated books of the companies, and by bank statements showing cash transfers; (para. 10)
>
> During the course of construction, additional money was required for the project, for example, to furnish the suites in the short term rental program, and to set up and appropriately fixture and furnish the commercial condominium which was created to facilitate the rental management program. These additional funds were not part of the original Project which CDPQ had agreed to fund; (para. 11)
>
> Therefore, the money to purchase and build what was required for the short term rental program was put into the project through another company incorporated for that purpose, 1 King West Developments Inc. The source of those funds was once again EMEL and HEL; (para. 12)
>
> After registration of TSCC 1703, the sales of units were completed, and the proceeds were used to pay down the CDPQ loan. At that time, 1 King West Inc. owed HEL and EMEL some $45,000,000. With the payout of the CDPQ mortgage, it was possible to register a mortgage to secure the monies advanced to 1 King West Inc. for the project, and a mortgage was registered on December 23, 2006[18] securing the sum of $45,000,000 against the remaining unsold units in the project; (para. 13) and
>
> As at December 31, 2007, 1 King West Inc. owed EMEL and HEL $23,400,000 plus interest. (para. 14)

78 The Casciato Affidavit also sets out (i) the financing background to the project from CDPQ as well as from HEL and EMEL, and (ii) 1KW's intent to make "proper disbursements of the proceeds to the mortgagee".

(5) The Martin Emails

79 Martin is a partner with PricewaterhouseCoopers LLP ("PwC"). He is in the Dispute Analysis & Valuations Practice of PwC, and specializes in loss quantification, business valuation and investigation services in a litigation context.

80 Martin did not file an affidavit in support of this Motion. Consequently, there is no evidence from him as to whether Martin discovered any facts which disclosed the possibility of a fraudulent conveyance claim.[19]

81 Instead, Gardiner relies on a series of emails from Martin in December 2008 as evidence upon which Gardiner statesthat he learned of the "basis for a fraudulent conveyance or similar claim".

82 In a December 19, 2008 email (received after the December 5, 2008 first version of the Proposed Claim), Martin advises Arnold that there is an "inconsistency of the answers received or statements made with respect to specific balances at points in time", and sets out purported discrepancies with respect to the balances.

83 In the December 19, 2008 email, Martin advises Arnold that "I have little confidence at this time on the reported total balances of funds advanced" and that "I do have a concern that funds could be paid out under the security that may not be covered under the security". Martin further states that "there is a risk that the monies being paid out under the security are not just repayment of secured advances". Martin asks Arnold to obtain "an accurate listing of general ledger entries and balances to work from in order to make a selection and review".

84 In a December 12, 2008 email (also received after the December 5, 2008 first version of the Proposed Claim), Martin refers to his attempts to obtain a reconciliation of the amounts identified at paragraphs 13 and 14 of the Casciato Affidavit and the "balances reflected in the ledger attached to the September 9, 2008 letter from Miller Thomson".

85 There is no email from Martin to GMA prior to the December 5, 2008 first version of the Proposed Claim that sets out a concern about a reconciliation issue. The earliest email in the string relied upon by Gardiner is dated December 4, 2008, but refers only to a request by Martin to Casciato for the "requested information".

Analysis

86 Given my conclusions summarized at paragraph 4 above, I consider the following issues on this Motion:

(i) whether the proposed fraudulent conveyance claims against HEL and the King West Defendants are statute-barred under the *Limitations Act, 2002*, because the claims were brought more than two years after the alleged fraudulent conveyances at issue could reasonably have been discovered;
(ii) whether the breach of fiduciary duty and constructive trust claims against the King West Defendants disclose a tenable cause of action;
(iii) if either the breach of fiduciary duty or constructive trust claims against the King West Defendants disclose a tenable cause of action, whether such tenable claims are an abuse of process; and
(iv) if the tenable claims are not an abuse of process, whether such claims against the King West Defendants unduly delay and complicate the litigation.

87 HEL further argued that even if I found that TSCC 1703 had met its evidentiary onus to establish a genuine issue on discoverability, I should dismiss the Motion on the basis that:

(i) It is an abuse of process (based on *Covia Canada Partnership v. PWA Corp.*, [1993] O.J. No. 1757 (C.A.) and *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (C.A.));
(ii) The fraudulent conveyance pleadings fail to disclose a cause of action (based on the failure to plead the necessary elements for the cause of action as set out in *Gauthier v. Woollatt*, [1940] O.J. No. 38 (H.C.J.), *IAMGOLD v. Rosenfeld*, [1998] O.J. No. 4690 (Gen. Div.), and summarized by Paul Perell (as he then was) in "A Pragmatic Approach to Fraudulent Conveyances", (2005) 30 Advocates Quarterly 373 at 382-83); and
(iii) HEL would suffer non-compensable prejudice if added as a defendant.

88 Given my conclusion that the fraudulent conveyance claim is statute-barred as against HEL and the King West Defendants, I do not address the remaining arguments of HEL set out at paragraph 87 above.

89 I now address each of the issues set out at paragraph 86 above.

Issue 1: Whether the fraudulent conveyance claims against HEL and the King West Defendants are statute-barred

90 TSCC 1703 submits that there is a genuine issue for trial that its claims based on the alleged fraudulent conveyance of the Mortgages are not statute-barred. TSCC 1703 submits that even if such claims would be statute-barred against HEL, they could still be maintained against the King West Defendants.

91 I address the limitations period issues with respect to HEL and the King West Defendants respectively, below.

(i) The claims against HEL

92 HEL submits[20] that:

(i) The proposed fraudulent conveyance claim against HEL is governed by sections 4 and 5 of the *Limitations Act, 2002*; and
(ii) The proposed fraudulent conveyance claim against HEL is statute-barred under sections 4 and 5 of the *Limitations Act, 2002*, because the first version of the Proposed Claim was delivered[21] more than two years after the alleged fraudulent conveyances at issue could reasonably have been discovered.[22]

93 TSCC 1703 makes two submissions in favour of its position that the fraudulent conveyance claim against HEL is not statute-barred:

(i) The claim is not governed by sections 4 and 5 of the *Limitations Act, 2002*, and
(ii) Even if the claim is governed by sections 4 and 5 of the *Limitations Act, 2002*, it was only discovered and discoverable within two years prior to the first version of the Proposed Claim delivered December 5, 2008.

94 The parties agree that if the proposed fraudulent conveyance claim is not governed by the *Limitations Act, 2002*, no limitation period arises and I would notneed to consider whether the claim was discoverable[23] within two years prior to the first version of the Proposed Claim delivered December 5, 2008.

95 I address these arguments below.

(a) The applicability of sections 4 and 5 of the *Limitations Act, 2002*

96 TSCC 1703 submits that sections 4 and 5 of the *Limitations Act, 2002* do not apply because:

(i) The court has no discretion to add a necessary party since the language of Rule 5.03(1) is mandatory;
(ii) In the alternative, TSCC 1703 does notbring a "claim" against HEL since it does not seek a remedy for an injury, loss or damage that occurred as a result of an act or omission of HEL (as defined under section 1 of the *Limitations Act, 2002*);
(iii) In the further alternative, the claim against HEL is only for declaratory relief, and as such there is no limitation period under section 16(1)(a) of the *Limitations Act, 2002*; and
(iv) In the further alternative, the claim is governed by section 4 of the *Real Property Limitations Act*, R.S.O. 1990,c. L. 15 (the "*Real Property Limitations Act*"), and as such the *Limitations Act, 2002* does not apply (pursuant to section 2(1) of the *Limitations Act, 2002*).

97 I address each of these arguments below.

(1) Whether HEL must be added as a necessary party

98 TSCC 1703 submits that Rule 5.03(1) is mandatory and requires that the court grant leave to amend unless the party opposing the amendment can establish that the claim is untenable. TSCC 1703 submits that as a result of the mandatory nature of Rule 5.03(1), the court has no discretion to consider whether the limitation period has expired.

99 Rule 5.03(1) provides:

> Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

100 However, the purpose of Rule 5.03(1) is to set out the general rule that parties to an action shall join every party necessary to adjudicate effectively and completely. It does not require the court to add a party for that purpose after the limitation period expires.

101 Rule 5.03(4) provides the court with discretion to add a necessary party. Rule 5.03(4) provides:

> **The court may order that any person who ought to have been joined as a party** or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding **shall be added as a party**. [emphasis added]

102 TSCC 1703 relies on an alleged "admission" by Mirvish's counsel made during the Mirvish Rule 39.03 examination that HEL is a necessary party. However, the statement at issue by Mirvish's counsel was that HEL would be a necessary party only "to the extent the court grants the amendments ... that seek to invalidate the mortgages" since HEL has "an interest that is vitally affected by the relief the plaintiff is seeking in the amendments". Consequently, counsel for HEL never agreed that HEL was a necessary party. Rather, HEL's counsel stated only that if the amendments were granted, HEL would be a necessary party since its interests would be affected.

103 Further, HEL submits that Rule 5.04(2) applies, in that TSCC 1703 seeks to add HEL as a party, andas such the court must consider whether the limitation period has expired. HEL relies on the decision of Master Dash in *Wong v. Adler*, [2004] O.J. No. 460 (S.C.J. - Mast.) ("*Wong*"), affirmed [2005] O.J. No. 1400 (Div. Ct.).

104 However, regardless of whether HEL is added as a "necessary" party under Rule 5.03(4) or simply as a "party" under Rule 5.04(2), the discretion under Rule 5.03(4) is similar to the discretion to add parties under Rule 5.04(2). In both cases, the court must consider whether the limitation period has expired, as part of its analysis of whether the pleadings disclose a tenable cause of action.

105 If TSCC 1703's argument were accepted, a plaintiff could add a party whose presence is allegedly necessary to the action at any time. Such an approach would be inconsistent with the settled law that the court should consider the issue of limitation periods when asked to add a party. In this regard, I adopt the passage from Master Dash in *Wong* (*Wong*, at paras 45-46):

> **What is the approach a judge or master should take on a motion to add a defendant where the plaintiff wishes to plead that the limitation period has not yet expired because she did not know of and could not with due diligence have discovered the existence of that defendant? In my view, as is clearly implied in *Zapfe*, the motions court must examine the evidentiary record before it to determine if there is an issue of fact or of credibility on the discoverability allegation, which is a constituent element of the claim.** If the court determines that there is such issue, the defendant should be added with leave to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor, were actually known to the plaintiff or her solicitor more than two years before the motion to amend, the motion should be refused.
>
> **If the court does not look at the evidentiary record to determine if there is a basis for the claim that a limitation period has not expired because the plaintiff was unaware of the existence of a tortfeasor, and could not with due diligence have earlier discovered that information, then all a plaintiff has to do is say the magic word "discoverability" and the motions court will act as a "rubber stamp" and add the proposed defendant at any time without special circumstances and leave to a trial or summary judgment court the question of the date the cause of action accrued.** [emphasis added]

106 Consequently, regardless of whether Rule 5.03(4) or Rule 5.04(2) applies, the court should review the evidentiary record to determine if there is an issue of fact or credibility on the discoverability allegation, which is a constituent element of the claim.

(2) Whether the claim against HEL is a "claim" as defined under section 1 of the *Limitations Act, 2002*,*i.e.* to "remedy" an "injury, loss or damage that occurred as a result of an act or omission" of HEL

107 TSCC 1703 relies on section 1 of the *Limitations Act, 2002*, which defines a "claim" as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". TSCC 1703 submits that if the court has discretion to add HEL as a defendant, then the *Limitations Act, 2002* does not apply because there is no claim for a remedy against HEL and no act or omission of HEL at issue in the Proposed Claim, but rather an act or omission of 1KW in entering into the alleged fraudulent conveyance.

108 With respect to its claim against 1KW, TSCC 1703 has identified an injury or damage that it suffered (the alleged building deficiencies) and its loss ($10 million). However, TSCC 1703 has also pleaded a separate claim against 1KW and HEL with respect to the alleged fraudulent conveyance. TSCC 1703 pleads that:

(i) "The defendants, 1 King West Inc., King West Developments Inc., and Honest Ed's Limited, are all affiliated companies of which David Mirvish is an officer, director and controlling mind";

(ii) The Mortgages were non arm's-length and were granted "without adequate, or alternatively, any consideration and for the purpose of defeating, or establishing a priority over, the warranty claims of the plaintiff" and "in so doing, the mortgages were not granted in good faith by the defendant 1 King West Inc., and are thereby void as against the plaintiff";

(iii) "[I]n granting and registering the aforesaid mortgages, it was the intention of the defendant, 1 King West Inc. to defeat, hinder or delay the plaintiff's claims"; and

(iv) "[A]t the time of registration of the aforesaid mortgages, the assets of 1 King West Inc. consisted entirely of approximately 36 unsold condominium units forming part of the plaintiff condominium corporation and a leasehold interest in one remaining unit having a total estimated value of $31,084,060. The aforesaid mortgages in the amount of $45,000,000.00 exceed the value of the assets of 1 King West Inc. and were registered when the defendant was insolvent or unable to pay its debts in full, or, alternatively, when that defendant knew that it was on the eve of insolvency. The aforesaid mortgages are therefore void as against the plaintiff pursuant to Sections 1 and 2 of the *Fraudulent Conveyances Act*,R.S.O. 1990, c. F.29[24], to the extent of the claims made herein".

109 On the basis of the above allegations, TSCC 1703 seeks in its prayer for relief a "declaration" of priority against HEL. TSCC 1703 seeks a declaration that "the claims made by [TSCC1703] and the damages that may be ordered against [1KW] take priority over the aforesaid mortgages", on the basis that the Mortgages were fraudulent conveyances.

110 The allegations relating to HEL identify a separate loss, *i.e.* a loss of TSCC 1703's ability to obtain satisfaction of any award of damages against 1KW because assets have been put out of reach (or 1KW has been rendered judgment-proof) as a result of the alleged fraudulent conveyance of the Mortgages. The "priority" sought against HEL is a"claim", since it seeks a remedy against HEL for the damages TSCC 1703 allegedly suffered from the fraudulent conveyance of the Mortgages. TSCC 1703 will suffer a loss, as pleaded, if it does not obtain the "remedy" of priority over funds held by HEL.

111 TSCC 1703's argument fails to acknowledge the essence of the claim against HEL; *i.e.* TSCC 1703 seeks priority for its damages claims over HEL's Mortgages since HEL was a non arm's-length party controlled by the same individual (Mirvish) who controlled1KW, and HEL received a benefit through a fraudulent conveyance which gave it an improper priority over TSCC 1703. TSCC 1703 seeks a "remedy" for HEL's alleged "act or omission", which constitutes the basis for a "claim" under section 1 of the *Limitations Act*.

112 Consequently, I reject this submission of TSCC 1703.

(3) Whether the claim against HEL is only for declaratory relief

113 TSCC 1703 submits that if I find that the request for declaratory relief against HEL is a claim under section 1 of the *Limitations Act, 2002*, then section 16(1)(a) of the *Limitations Act, 2002* applies such that there is no limitation period for the claim against HEL.

114 However, section 16(1)(a) sets no limitation period only if no consequential relief is sought in a proceeding for a declaration. Section 16(1)(a) provides:

> There is no limitation period in respect of,
>
> (a) a proceeding for a declaration **if no consequential relief is sought**. [emphasis added]

115 In the present case, TSCC 1703 seeks more than just a declaration that the Mortgages were fraudulently conveyed. At paragraph 1(a)c. of its Proposed Claim, TSCC 1703 "claims on its own behalf and on behalf of its unit owners as against [HEL]":

> a declaration that the claims made by the plaintiff and the damages that may be ordered against the defendant, 1 King West Inc., take priority over the aforesaid mortgages.

116 As HEL counsel stated in his alleged "admission" that HEL would be a necessary party if the amendments were allowed, HEL has "an interest that is vitally affected by the relief the plaintiff is seeking in the amendments". The Mortgages which HEL obtained as security toallegedly advance $45 million to the project would be subject to priority for the full amount of TSCC 1703's claim, if TSCC 1703 is successful at trial.

117 A court order for priority over a mortgage is more than declaratory relief. It is a claim for consequential relief, *i.e.* relief that has consequences for the proposed defendant HEL.

118 In *Ontario v. Wills*, [2008] O.J. No. 4672 (S.C.J.) ("*Wills*"), a case relied upon by TSCC 1703, the plaintiffs sought repayment by the defendant Richard Wills of$1.2 million, which fees were paid by the government for "state-funded counsel" when Richard Wills was allegedly impecunious subsequent to his arrest for murder. The plaintiffs sought a declaration that the transfer of assets from the husband to the wife was a fraudulent conveyance. However, the declaration had no consequences against the wife as recipient of the alleged fraudulently conveyed assets, since the plaintiffs did not seek repayment from the spouse Joanne Wills.[25]

119 Because no relief was claimed against Joanne Wills, the court held that there was no consequential relief sought and as such no limitations period applied under section 16(1)(a). MacDonnell J. held (*Wills*, at para. 6):

> The interest of the moving party Joanne Wills is engaged only by certain of the declarations sought by the plaintiffs. Section 16(1)(a) of the *Limitations Act* provides that "there is no limitation period in respect of ... a proceeding for a declaration if no consequential relief is sought". **The statement of claimdoes not seek any relief beyond a declaration of the status under law of the conveyances in issue.** For present purposes, it is sufficient to say that the moving party has not established that it is plain and obvious that the declarations sought by the plaintiffs are barred by any provision of the *Limitations Act*. [emphasis added]

120 TSCC 1703 also relies on the earlier decision of the Court of Appeal in *Perry, Farley & Onyschuk v. Outerbridge Management Ltd. et al*, [2001] O.J. No. 1698 (C.A.) ("*Perry*"), in which Sharpe J.A. held that a claim under the *Fraudulent Conveyances Act* was not a claim in damages or for compensation for loss (*Perry*, at paras. 20 and 30).

121 However, the issue in *Perry* was whether the prior limitation periods (before the *Limitations Act, 2002*) of either "simple contract" or "action upon the case" applied to a fraudulent conveyance claim. This distinction does not arise under the *Limitations Act, 2002*.

122 Under the *Limitations Act, 2002*, the issue of the applicability of the *Act* depends on whether a party is bringing a "claim" seeking to "remedy" an "injury" it has suffered. The current legislation does not distinguish between the basis for a cause of action[26], but rather whether there is a "claim" against a party. For the reasons I discuss above, I find that TSCC 1703's request for (i) a declaration that the Mortgages are void as against TSCC 1703 as a fraudulent conveyance and (ii) as such, a declaration for a priority over funds received by HEL from the Mortgages, constitutes a "claim".

123 My conclusion that TSCC 1703 has a "claim", regardless of how the fraudulent conveyance action is classified under law (the issue which was relevant in *Perry*) is confirmed by the opening words at paragraphs 1 and 1A of the Proposed Claim in which the "plaintiff claims" relief "on its own behalf and on behalf of its unit holders" against HEL and the King West Defendants, and asks the court for a remedy for the injury it allegedly suffered as a result of the impugned Mortgages.

124 Finally, the fact that a claim for declaratory relief which seeks no consequential relief is expressly exempted from a limitation period (under section 16(1)(a) of the *Limitations Act. 2002*), is consistent with my earlier conclusion at paragraphs 107 to 112 above that an action for declaratory relief which does seek consequential relief is intended to be bound by the two-year limitation period under section 4 of the *Limitations Act, 2002*, and that the prior distinctions based on the cause of action for fraudulent conveyance which were relevant in *Perry* do not apply under the present legislation.

125 Consequently, I reject this submission of TSCC 1703.

(4) Whether the claim is under the *Real Property Limitations Act*

126 In the further alternative, TSCC 1703 relies on section 2(1) of the *Limitations Act, 2002*, which exempts from its application claims under certain legislation, including the *Real Property Limitations Act*. TSCC 1703 submits that if the declaratory relief is a claim and is not exempted under section 16(1)(a) of the *Limitations Act, 2002*, then section 4 of the *Real Property Limitations Act* applies and sets out a 10-year limitation period. Section 4 provides:

> No person shall ... bring an action to recover any land or rent, but within 10 years next after the time at which the right to ... bring such action ... first accrued to some person through whom the person making or bringing it claims ...

127 TSCC 1703 also relies on section 1 of the *Real Property Limitations Act* which defines "land" to include "money to be laid out in the purchase of land".

128 However, TSCC 1703 cited no authority that an action to set aside a fraudulent conveyance of a mortgage is an action to "recover any land". Instead, it relies on the decision of Master Dash in *Bayerische Landesbank Gironzentrale v. Sieber*, [2008] O.J. No. 2372 (S.C.J. - Mast.) ("*Sieber*"), in which Master Dash restored an action to the trial list when the action was by a bank to set aside transfers of land as fraudulent conveyances. Master Dash expressly declined to decide the issue of whether such an action was subject to the *Real Property Limitations Act* (*Sieber*, at paras. 51-52).

129 As Master Dash noted in *Sieber*, the claim before him was to "set aside transfers of property", such that the effect would be to "restore title to the transferor" (*Sieber*, at para. 51). In the present case, the claim against 1KW is for damages arising from construction deficiencies, and in no way seeks a remedy against the land. TSCC 1703's claim for priority on the Mortgages is relief sought against HEL to protect recovery on a judgment, and is not "an action to recover any land or rent" as contemplated by section 4 of the *Real Property Limitations Act*.

130 Consequently, I dismiss this argument of TSCC 1703.

(5) Conclusion on whether sections 4 and 5 of the *Limitations Act, 2002* apply

131 TSCC 1703 urges the court to rely on *Nathum v. Toronto Dominion Bank*, [1998] O.J. No. 4701 (Gen. Div.) ("*Nathum*"), for the proposition that if there is any doubt in the law as to whether sections 4 and 5 of the *Limitations Act, 2002* apply, TSCC 1703 should be permitted to amend the claim and the trial judge can address the legal issues in the context of argument at trial.

132 In *Nathum*, Sanderson J. stated "where there is doubt about the meaning or application of a limitation period, it is the plaintiff that should be given the benefit of the doubt" (*Nathum*, at para. 47). However, TSCC 1703 has not raised such a doubt with respect to the law[27], for the reasons discussed above.

133 While TSCC 1703 has raised numerous arguments that sections 4 and 5 of the *Limitations Act, 2002* do not apply, none of those arguments is founded either on a reading of the applicable legislative provisions or from the case law relied upon by TSCC 1703. Consequently, I find that TSCC 1703's fraudulent conveyance claim against HEL and the King West Defendants is governed by the two year limitation period and the discoverability principle under sections 4 and 5 of the *Limitations Act, 2002*.

(b) Whether the claim against HEL was discoverable prior to December 5, 2008

134 As discussed at paragraph 19 above, HEL does not contest for the purposes of this Motion that TSCC 1703 did not discover the existence of the Mortgages until GMA conducted a search in November 2007 (as per Smith's evidence), nor that Gardiner did not discover the Mortgages until the autumn of 2008.

135 However, TSCC 1703 attacks the granting and registration of the Mortgages as fraudulent conveyances. The first Mortgage was registered on December 23, 2005 and the second on November 24, 2006. Both Mortgages were granted and registered more than two years before TSCC 1703 proposed its initial amendments adding HEL as a defendant, which was on December 5, 2008.[28]

136 Consequently, the issue on this Motion is whether the claim was "discoverable" more than two years prior to the December 5, 2008 first version of the Proposed Claim. I examine the law and evidence on this issue below.

(1) General principles applicable when a party seeks to amend a statement of claim after the expiry of a limitation period under the *Limitations Act, 2002* on the basis of discoverability

137 I adopt the following general principles which apply when a party seeks to amend a claim after the expiry of a statutory limitation period and relies on the doctrine of discoverability to submit that the party could not have discovered the cause of action until less than two years prior to the end date of the limitation period:

(i) If there is an issue of fact or credibility on the discoverability allegation, the defendant should be added with leave to plead a limitations defence. If there is no such issue[29], the motion should be refused (*Wong*, at para. 45);

(ii) Evidence is appropriate and necessary on a pleading amendment motion or a motion to add a party (*Inco Ltd. v. McGrath*, [2005] O.J. No. 2614 (S.C.J.) at para. 23). The court must look at the evidentiary record to determine if there is a basis for the claim that a limitation period has not expired (*Wong*, at para. 46);

(iii) The common law doctrine of discoverability was codified under the *Limitations Act, 2002* (*Predie v. Ontario*, 2004 CarswellOnt 5019 (S.C.J.) at para. 22);

(iv) The discoverability doctrine sets out the "general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at para. 77; see also *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.) at 170 (as cited in *Wong*, at para. 24) and *Zapfe v. Barnes*, [2003] O.J. No. 2856 (C.A.) at para. 24);

(v) Taking no steps to make necessary inquiries will not be sufficient: "[i]gnorance of the possible liability of a particular defendant will not extend a limitation period (*Guay v. Bhd Financial Group*, [2007] O.J. No. 3405 (S.C.J. - Mast.) ("*Guay*"), at para. 7); and

(vi) The common law doctrine of special circumstances does not apply to claims under the *Limitations Act, 2002* (*Joseph v. Paramount Canada's Wonderland*, [2008] O.J. No. 2339 (C.A.) at paras. 13, 26-27, and *Meady v. Greyhound Canada Transportation Corp.*, [2008] O.J. No. 2338 (C.A.) at paras. 15-17).

138 Several of the above principles are aptly summarized by Master Dash in *Guay* (and also adopted by Glithero J. in *Hughes v. Kennedy Automation Ltd.*, [2008] O.J. No. 846 at para. 24):

> **If a plaintiff wishes to add a defendant on the basis that the limitation period has not yet expired because she did not know of and could not with due diligence have discovered the existence of such defendant, she must provide an evidentiary record such that the court may determine if there is an issue of fact or of credibility on the discoverability allegation.** If the court determines that there is such issue, the defendant should be added with leave to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the name of the tortfeasor and the essential facts that make up the cause of action against such tortfeasor, were actually known to the plaintiff or her solicitor more than two years before the motion to amend, the motion should be refused. **If the issue is**

> **due diligence rather than actual knowledge, the plaintiff must advise what steps were taken to identify the existence andname of the defendant and provide a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence more than two years before the motion to amend. If the plaintiff fails to provide a reasonable explanation on proper evidence that could on a generous reading amount to due diligence or if the evidence is clear from material provided by both the moving and responding parties that the plaintiff could have obtained the requisite information with due diligence, such that there is no issue of fact or credibility that requires a trial, the amendment will be refused.** [emphasis added] [footnotes omitted]

(2) Application of the law to the facts of the case

A. TSCC 1703's pleadings on discoverability

139 As discussed above, there was no allegation related to the issue of discovery or discoverability in the first version of TSCC 1703's proposed claim dated December 5, 2008. TSCC 1703 sought the same relief against HEL as in the current version of the Proposed Claim, but made no allegation relating to the basis for bringing the action more than two years after the Mortgages at issue were taken by HEL and registered against title.

140 Upon being advised that HEL would not consent to the motion, TSCC 1703 delivered a motion record for leave to amend its claim and included a second version of the Proposed Claim, in which TSCC 1703 pleaded that "it first discovered the [Mortgages] on or around June 10, 2008, when it became aware of the closing of the sale of condominium units by [1KW]". However, HEL filed no evidence in support of the motion. The motion was scheduled to be heard on February 19, 2009.

141 TSCC 1703 pleads in the current (third) version of the Proposed Claim that the Mortgages were discovered "on or around November 23, 2007", but makes no allegations as to the discoverability issue.

B. TSCC 1703's evidence as to discoverability

142 After receipt of HEL's factum prior to the initial return date of the motion, in which HEL submitted that evidence was required for such a motion, the motion was adjourned to May 1, 2009, so that TSCC 1703 could file evidence. As discussed at paragraph 70 above, on April 7, 2009, Smith filed evidence (in the Smith Affidavit) that the claim did not "crystallize" until after June 2008.

143 After HEL delivered a revised factum prior to the May 1, 2009 motion, in which HEL relied on the GMA and the Miller Thomson Letters (which had been submitted as an exhibit to the Mirvish examination), HEL obtained leave to file the Gardiner Affidavit, in which he disclaimed any knowledge of the existence of the Mortgages despite the GMA Letter.

144 Gardiner stated in his affidavit that the GMA Letter was his:

> usual pre-litigation approach to warn declarants to require construction deficiencies to be rectified promptly, including the usual demands to ... avoid undertaking any of the fraudulent conveyance or unjust preferences types of measures to escape liability, while confirming our intent to resolve all building deficiencies, preferably by settlement but by litigation if necessary.

Gardiner's evidence is that he drafted the GMA Letter, but it was "signed by my litigation partner, Mark Arnold".

145 Gardiner's evidence in his affidavit is also that:

> Almost inevitably, declarants are single-purpose shell companies with no assets other than the remaining unsold units which they can sell or mortgage before having to fix the construction deficiencies or reimburse the condominium corporation for the cost thereof. In this case 1KWI apparently had 35-50 unsold units, a number of which were larger-sized luxury suites in a substantially unfinished state.

146 As noted above, Gardiner disclaimed any "specific or background information" of the Mortgages, or 1KW's intent to mortgage the property at the time of the GMA Letter. With respect to his statement in the GMA Letter that "We have also learned that 1KWI plans to sell or mortgage its remaining units at TSCC 1703, as listed on Schedule "A"

attached hereto", except for his general knowledge that "all declarants typically plan to sell or mortgage their remaining units". Gardiner stated that he:

> had no knowledge whatsoever of any mortgage registered against 1KWI's remaining units ... until my partner, Mark Arnold, informed me during the autumn of 2008 that, as a result of the cross-examination of Camillo Casciato of 1KWI and the resulting analysis undertakenby our client's forensic auditor, that I first learned that [HEL] had registered a substantial mortgage against some of 1KWI's remaining units.

147 Gardiner further disclaimed any knowledge of which "specific units" remained unsold, despite the reference in the GMA Letter to a Schedule "A", and despite a specific request by letter dated August 9, 2006 from Conway for the Schedule "A".

148 Gardiner thus swears in his affidavit that his statement in the GMA Letter that TSCC 1703 instructed GMA to bring a fraudulent conveyance action was not based on any knowledge that proceeds arising from the mortgage or sale of the remaining units were paid to any related or associated company, as referred to in the GMA Letter.

149 As discussed at paragraphs 71 and 72 above, Gardiner took two positions on why TSCC 1703 could not have discovered the material facts on which to base its action:

(i) **Discovery of the Mortgages themselves could not reasonably have been expected to take place until November 2007**, "because it would be fruitless to incur the time or expense to search title to 575 units in order to ascertain which units were for sale or whether they were mortgaged because, realistically, our client had no right to register a Caution or Certificate of Pending Litigation in such a scenario. In any event, a title search would inevitably only reveal that each of the units may have been encumbered by a huge blanket construction mortgage in the range of $60,000,000 - $100,000,000 for such a building. Moreover, declarants usually have sold their unit assets by the time a condominium corporation can enforce any of its remedies and declarants typically drag out building deficiency lawsuits until their units are sold".

(ii) **Discovery of the requisite elements to discover the material facts on which to base a cause of action against HEL in fraudulent conveyance could not reasonably have been discovered until December 2008** since "there was no way we could ascertain that information [that there was a fraudulent conveyance] simply from the registration of a mortgage from 1KWI to HEL on title to 1KWI's units, even if we had become of the registrations on the day they were made. ... No basis for a fraudulent conveyance or similar claim could be ascertained until the cross-examination of Camillo Casciato, which revealed the unimaginable lack of records pertaining to the purported mortgage advance by HEL to 1KWI and until we could obtain the analysis of 1703's forensic accountant."[30]

150 I address each of these two positions below.

i. TSCC 1703's position that it would not have been reasonable for it to have learned of the Mortgages prior to November 2007

151 Gardiner's position is that it would have been "fruitless" to incur the time and expense to search 575 units to find out which units were for sale, and had GMA done so they could only expect to find a blanket construction mortgage in any event. However, Gardiner acknowledged on cross-examination that those statements were false.

152 In particular, Gardiner admitted:

(i) TSCC 1703 knew since turnover in December 2005 which units 1KW owned, and therefore was always capable of searching title on those units to discover the Mortgages;

(ii) GMA had access to enable an electronic search of title to those units to be conducted in its office; and

(iii) It would not have been "fruitless" to conduct a search of title since had TSCC 1703 (through its counsel) done so, they would have discovered the Mortgages and not merely a blanket construction mortgage.

153 The issue for discoverability is not whether TSCC 1703 could have registered a caution or a certificate of pending litigation. TSCC 1703 had already warned 1KW in the GMA Letter that if any proceeds from the mortgage or sale were paid to a related company, TSCC 1703 would bring a fraudulent conveyance action. Gardiner's admissions on cross-examination demonstrate that TSCC 1703 could have discovered the Mortgages at any time after they were registered, and that it would have been reasonable for TSCC 1703 to make such searches forthwith after the GMA Letter, since it had all of the information it needed to easily conduct the searches.

154 Further, the GMA Letter indicated that TSCC 1703 was concerned about the possibility of payment on such mortgages[31]. That concern could only have been exacerbated by the Miller Thomson letter in which Conway advised Arnold that 1KW took the position that TSCC 1703 had "no right nor legal basis for attempting to instruct our client on ... what use is made of the proceeds of sale".

155 In such circumstances, there is no genuine issue as to the discoverability of the Mortgages. TSCC 1703 ought to have conducted the search and discovered the Mortgages well prior to November 2007 when it was advised of the proposed sale of certain units, and more importantly, prior to December 5, 2006, two years before the first version of the Proposed Claim.

156 Further, the alleged inability to obtain a caution or certificate of pending litigation ought to have provided even greater impetusin the circumstances for TSCC 1703 to seek to protect its rights to collect any judgment it might receive against 1KW, when Gardiner acknowledged that "almost inevitably, declarants are single-purpose shell companies with no assets other than the remaining unsold units which they can sell or mortgage before having to fix the construction deficiencies or reimburse the condominium corporation for the cost thereof".

157 From the outset of the GMA Letter on July 28, 2006, TSCC 1703 sought to ensure that it could collect upon a judgment from any related party who obtained payment on a mortgage on the unsold units. It asked for such terms in the GMA Letter, but 1KW refused. TSCC 1703 then sought injunctive relief in its March 2007 claim, but took no steps to obtain that injunction. In November 2007, TSCC 1703 obtained temporary relief through its agreement for notice from 1KW, but was again unsuccessful in maintaining such relief when it sought a *status quo* order as a term of adjourning its Mareva injunction in August 2008.

158 Consequently, TSCC 1703 was aware from the outset of counsel's involvement of the risk of a mortgage to a third party, yet took no steps to discover the Mortgages until November 2007.

159 In light of:

(i) GMA having been authorized to send the July 28, 2006 GMA Letter,
(ii) GMA having been authorized to commence a fraudulent conveyance claim if a mortgage was granted to a related company in respect of 1KW's remaining units,
(iii) 1KW having refused the demand in the GMA Letter to hold funds in trust or otherwise provide assurances it would act as TSCC 1703 demanded;
(iv) TSCC 1703 and its lawyers knowing that it is almost inevitable that the assets of 1KW consisted only of its unsold units, and
(v) TSCC 1703 having been aware since turnover on December 6, 2005 which units 1KW owned and which units to search for a mortgage,

TSCC 1703 has not met its burden to establish a genuine issue for trial that it could not with due diligence have discovered the existence of the Mortgages prior to December 5, 2006 (two years prior to the delivery of the first version of the Proposed Claim).

ii. TSCC 1703's position that even if it had discovered the Mortgages prior to December 5, 2006, it would not have been reasonable for it to have learned of the cause of action until December 2008

160 The position taken by both Smith and Gardiner is that even if TSCC 1703 had discovered the Mortgages prior to December 5, 2006, it could not reasonably have discovered that it had a fraudulent conveyance action until both the Casciato Affidavit and cross-examination and the Martin Emails were reviewed and considered, *i.e.* not until December 2008.

161 TSCC 1703 further submits that it would have been unreasonable to bring a fraudulent conveyance claim against a "Toronto icon" such as HEL without sufficient facts on which to base the claim and that had it done so, it likely would have faced a motion for summary judgment which it could not have defended.

162 However, this position depends on TSCC 1703 establishing that there is a genuine issue that TSCC 1703 was only able to learn of material facts required to reasonably discover the fraudulent conveyance claim because of the Casciato Affidavit and cross-examination, as well as the Martin Emails. This submission is not supported by the evidence.

163 From the outset, the position of TSCC 1703 was that if 1KW entered into a mortgage with a related company, this in itself would demonstrate a presumed fraudulent intent and be the subject of a fraudulent conveyance action.

164 In the GMA Letter, TSCC 1703 stated its position directly:

> Please be advised that in the event any proceeds arising from the mortgage or sale of any of the remaining units are paid to any related or associated company or any director, officer, shareholder, employee (or their spouses), or the proceeds of any other assets of 1KWI are or are otherwise paid or conveyed to any other creditor or person, TSCC 1703 has instructed us to commence appropriate proceedings to set aside those transactions as a fraudulent conveyance and/or an unjust preference.

165 A few days later, by letter dated August 2, 2006, 1KW explicitly advised TSCC 1703 that:

> Your client has no right nor legal basis for attempting to instruct our client on how it may sell its inventory, nor what use is made of the proceeds of sale.

166 Even though TSCC 1703 knew that there was a risk 1KW could pay proceeds of any sale of remaining units to a related party pursuant to a mortgage, it chose to do nothing. Had TSCC 1703 taken the steps to discover the Mortgages, it would have learned of the facts which it now says were the basis for its fraudulent conveyance claim.

167 As set out at paragraph 51 above, in June 2008, after 1KW advised that it intended to disperse of proceeds from the sale of its units, TSCC 1703 sought a Mareva injunction and made the same representations to the court (through Smith's affidavit) that payments to HEL on the Mortgages would be a fraudulent conveyance because 1KW and HEL were related parties.

168 Smith swore in his affidavit that the issue for the court on the Mareva injunction was whether 1KW should be permitted to engage in a "manoeuver" to "keep the money out of the reach of TSCC 1703" by paying proceeds to HEL, a related company.

169 Justice Pollak considered the evidence of Smith and Casciato and held that "there is no evidence to support the allegation that [1KW] is doing anything out of the ordinary course of business by paying its mortgage" and that TSCC 1703 had not led compelling evidence that 1KW "is attempting to move assets out of the jurisdiction or out of the reach of creditors".

170 Consequently, even as of June 2008, TSCC 1703's position did notdepend on any evidence of fraudulent intent in 1KW making payment to HEL under the Mortgages, but rather a presumed fraudulent intent because assets which might otherwise have been available to pay TSCC 1703's claims were being used to pay mortgages to a related party.

171 TSCC 1703's position did not change in its pleadings. TSCC 1703 alleged in the first version of the Proposed Claim that:

(i) by "granting and registering the aforesaid mortgages, it was the intention of the defendants, 1 King West Inc. and Honest Ed's Limited, to defeat, hinder or delay the plaintiff's claims", and

(ii) the "aforesaid mortgages in the amount of $45,000,000 exceed the value of the assets of 1 King West Inc. and were registered when the defendant was insolvent or unable to pay its debts in full, or, alternatively, when that defendant knew that it was on the eve of insolvency".

Again, these allegations did not require evidence of fraudulent intent. This claim was discoverable as soon as the Mortgages could have been discovered.

172 In its second version of the Proposed Claim, TSCC 1703 again referred to the alleged discovery date of the Mortgages[32], but otherwise maintained the same allegations.

173 In its third version of the Proposed Claim in April, 2009, TSCC1703 added an allegation relating to its discovery of the Mortgages in November 2007, amended the "intention" allegation (summarized at paragraph 171(i) above) to refer to only 1KW, and further pleaded that 1KW granted the non-arms length mortgages without adequate, or alternatively, any consideration and for the purpose of defeating, or establishing a priority over, the warranty claims of the plaintiff". TSCC 1703 pleaded that "the mortgages were not granted in good faith by the defendant". TSCC 1703 also added an allegation that it and the unit purchasers were a class of "others" to whom a right of action is given by section 2 of the *Fraudulent Conveyances Act*.

174 Consequently, at all times in this litigation, TSCC 1703 maintained that it could base its claim for a fraudulent conveyance on the granting and registration of the Mortgages to HEL as a related company.

175 Now, TSCC 1703 seeks to rely upon the Casciato Affidavit and cross-examination and the Martin Emails as being necessary facts for TSCC 1703 to reasonably discover a cause of action for fraudulent conveyance.

176 Smith says generally "issues with respect to the priority of the warranty claims over non-arm's length security crystallized as an issue" after the Casciato Affidavit and Martin Email, but provides no evidence as to the particular information obtained from those sources or why the information was necessary for TSCC 1703 to recognizethat it had a cause of action in fraudulent conveyance, when it had already instructed its counsel to bring such an action more than two years earlier.

177 Gardiner states that "No basis for a fraudulent conveyance or similar claim could be ascertaineduntil the cross-examination of Camillo Casciato, which revealed the unimaginable lack of records pertaining to the purported mortgage advance by HEL to 1KWI, and until we could obtain the analysis from 1703's forensic accountant".

178 However, the information from the Martin Emails relating to the Mortgages[33] does not constitute new evidence necessary to reasonably discover a fraudulent conveyance claim. The evidence from the Martin Emails relates only to discrepancies between amounts TSCC 1703 had been advised were owed at various times. While Martin may have had "little confidence at this time on the reported total balances of funds advanced", and a "concern that funds could be paid out under the security that may not be covered under the security"[34],these concerns do not alter TSCC 1703's position from the outset of the GMA Letter that mortgages to a related party were fraudulent and granted with the intent to defeat creditors.

179 The evidence from the Casciato Affidavit refers to $45 million being owed at the time the Mortgages were registered on December 23, 2005[35], and $23,400,000 plus interest owed as at December 31, 2007, which is two years later and cannot, on its face, reflect any fraudulent intent as there could be many reasons why the debt which is the subject of the Mortgages was paid down.

180 Contrary to the submission of TSCC 1703, no genuine issue is raised for discoverability by evidence that a mortgage is for a value higher than the debt, either before any lending takes place or after the borrower pays back a portion of the amounts due under the secured loan. By way of example, the CDPQ mortgage remained for $82,460,000 until discharged, even though not all of those funds were advanced at the beginning, and CDPQ would not have been owed the full amount at all times under its mortgage.

181 Further, Martin did not file any affidavit, and as such there is no evidence from him that he discovered a fraudulent intent for the Mortgages as a result of his review, nor that such information would be necessary for such a claim. Even if I considered his affidavit from the production motion, it referred only to his attempts to seek documentation about the flow of funds, and as such did not add any further support to TSCC 1703's ability to bring a fraudulent conveyance claim.

182 Consequently, there is nothing in the Martin Emails or the Casciato Affidavit or cross-examination[36] which establishes a genuine issue that TSCC 1703 could not have reasonably discovered the fraudulent conveyance action prior to December 5, 2008. The internal accounting speaks to the magnitude of sums advanced, but in no way addresses the issue of intent upon which TSCC 1703 now seeks to rely.

183 Instead, the court is left with the same basis for a claim that was discoverable as soon as the Mortgages were registered, and was stated as such by TSCC 1703 in the GMA Letter on July 28, 2006, that (i) TSCC 1703 had learned of the Mortgages (which in fact was not true) and (ii) if payments were to be made to a related party, TSCC 1703 had instructions to bring a fraudulent conveyance action.

184 On that evidentiary basis, TSCC 1703 has not met its evidentiary onus, even at the low threshold of establishing a genuine issue as to discoverability.

185 The submission that TSCC 1703 had some reluctance to sue a "Toronto icon" on the basis of a claim it might have difficulty to prove does not stand up to scrutiny on the facts before the court. TSCC 1703 has pleaded that 1KW, a Mirvish company, was insolvent when it granted the Mortgages, a claim which casts similar aspersions of character and for which there is no evidence before the court as to why that claim is made now as opposed to July 2006.

186 Further, the submission that TSCC 1703 might lose on a summaryjudgment motion is not a basis to stop the running of a limitation period. If TSCC 1703 believed that a mortgage to a related company was fraudulent because it put assets out of reach of TSCC 1703, it could have brought its claim within the applicable limitation period and then sought the same evidence as to the adequacy of consideration through the production of relevant documents for the motion and upon cross-examination of affiants or examination of witnesses.

187 TSCC 1703's submission is that it required evidence of "intention" before recognizing that it could have a fraudulent conveyance action. This submission is directly at odds with all of its conduct in this action and is not supported on the evidence.

188 TSCC 1703 did not require such evidence before raising the issue in the GMA Letter, nor before seeking a Mareva injunction to freeze 1KW's assets. The question of litigation based on this issue was front of mind in the GMA Letter in July 2006, and there was no evidentiary record to satisfy the court that the claim could not be reasonably discoverable until December 2008. Even the plaintiff's current factum made no reference to the issue of discoverability of intent, but rather only referred to the discovery of the Mortgages (see paragraph 43 of the TSCC 1703 factum), consistent with the plaintiff's position that the granting of a mortgage to a related entity demonstrates fraudulent intent.

189 TSCC 1703 reasonably knew or ought to have known of (i) its injury (ii) the act that caused the injury, (iii) the person who committed the act, and (iv) that a proceeding was an appropriate means to remedy the wrong, in order to commence proceedings well before December 5, 2006. Consequently, "a reasonable person with the abilities and in the circumstances" of TSCC 1703 first ought to have known of the elements required to discover the claim more than two years prior to December 5, 2008, and as such "discovered" the claim under section 5(1)(b) and 5(1)(a)(i) - (iv) of the *Limitations Act, 2002*.

190 TSCC 1703 had the benefit of legal counsel aware of the potential for, and legal and factual basis for, a claim under the *Fraudulent Conveyances Act*. Further, TSCC 1703 (either through direct knowledge or through counsel):

(i) was aware of a large deficiency claim,
(ii) knew the only asset of 1KW would likely be the unsold condominium units,
(iii) indicated that it had learned of an intention to mortgage or sell those condominium units,
(iv) was aware of the available cause of action,
(v) gave instructions to lawyers in respect of that cause of action,
(vi) asked for assurances that 1KW's funds would not be transferred to a related party and received no such assurances (including no assurance that units had not been mortgaged already), and
(vii) knew there is a public registry, easily accessible, that would (if consulted) confirm whether a mortgage had been registered or if further sales had taken place; and it had the knowledge and wherewithal to ascertain if any mortgage had been registered.

191 For the above reasons, I find that TSCC 1703 has not discharged its evidentiary onus to establish a genuine issue as to discoverability with respect to its claim that the Mortgages were a fraudulent conveyance. I dismiss the Motion to add HEL as a party on this basis.

(ii) The claim against the King West Defendants on the fraudulent conveyances

192 I rely on my analysis above to conclude that the claim against the King West Defendants is also statute-barred under the *Limitations Act, 2002*.

193 There was no reference to the Mortgages in the Existing Claim. The fraudulent conveyance claim based on the Mortgages does not arise out of "facts which have been substantially pleaded in the initial statement of claim", nor is it "a different legal conclusion drawn from the same set of facts" (*Thompson*, at para. 67). Consequently, it is a new cause of action that must be considered as a new claim that must be brought within the two-year limitation period (*Frohlick*, at para. 24).

194 Further, as I discuss above, the fraudulent conveyance claim is a "claim" subject to the *Limitations Act, 2002*, and as such had to be brought within two years of the earliest of the date it was discovered or could reasonably have been discovered. Consequently, I dismiss the Motion to add a fraudulent conveyance claim against the King West Defendants.

Issue 2: Whether the breach of fiduciary duty and constructive trust claims against the King West Defendants disclose a tenable cause of action

195 The King West Defendants did not submit that the fiduciary duty or constructive trust claims were new causes of action which were statute-barred under the *Limitations Act, 2002*, an argument based on the decision in *Frohlick*, which I considered in *Thompson*. I do not need to consider whether the fiduciary duty claim is a new cause of action since I find that it is not tenable in any event. I find that the constructive trust claim is not a new claim since it arises out of "facts which have been substantially pleaded in the initial statement of claim", or can be considered "a different legal conclusion drawn from the same set of facts" (*Thompson*, at para. 67). Consequently, the constructive trust claim would not be statute-barred.

196 I address the tenability of the claims of breach of fiduciary duty and constructive trust below.

(i) Breach of fiduciary duty

197 The relationship between a condominium developer and purchaser does not, "in itself", give rise to a fiduciary relationship. It is a "normal contractual relationship" unless it can be shown that there is some special relationship that results in a fiduciary relationship. In *Simone*, Blair J. (as he then was) held (*Simone*, at para. 14):

> **The relationship between the parties was that of vendor and purchaser, and in my opinion the existence of such a relationship does not, in itself, give rise to fiduciary duties.** Nor does the fact that the vendors and purchasers happened to be friends, elevate the relationship to a fiduciary level. **The normal contractual relationship between a vendor and purchaser is not characterized by the reposing of a trust or confidence by one person in another and a consequent dependence resulting therefrom, which the authorities indicate give rise to a fiduciary duty.** It is true that the vendor acts as trustee of the title for the purchaser pending completion of the transaction. However, to the extent that there may be an obligation of the vendor "to take no steps to deal with [the] title in a manner harmful to the [purchaser's] beneficial interest", as the trial judge concluded, it is only in the sense of an obligation to be in a position to deliver title on closing, in my view. Breach of the obligation to convey the title, on tender of the purchase price at closing, is remedied by damages or, in appropriate circumstances - because of the equitable requirement to hold title - by the equitable remedy of specific performance. **There is no need to resort to the fiduciary concept.** [emphasis added]

198 Similarly, in *Cam-Valley Homes*, the Court of Appeal confirmed that there is no "overarching" fiduciary duty between condominium developers and purchasers. Finlayson J.A. held (*Cam-Valley Homes*, at para. 43):

> ... **there is no overarching fiduciary duty arising out of the relationship of a vendor and purchaser as such. The suggestion by the trial judge that a prospective purchaser is entitled to repose some element of trust in the developer that it will deal with the purchaser's reasonable expectations in the disclosure documents introduces an element of paternalism that is totally unjustified in such a relationship.** As I have indicated, the protection of the consumer rests with compliance by the developer with the disclosure provisions of the *Condominium Act*. It is inappropriate to refer to the unit holder as a fiduciary in any circumstance. **The prospective purchaser is protected by the statutory requirement of full disclosure, not the extension of fiduciary principles to the bargaining process.** After

> executing an agreement of purchase and sale, he or she is entitled to rely on the good faith of the developer to carry out the agreement honestly. [emphasis added]

199 Consequently, while the decisions in *Simone* and *Cam-Valley Homes* did not preclude a finding of fiduciary duty in the context of a condominium purchase, they set forth a general principle that such a finding would require special circumstances pleaded in the claim.

200 In the present case, there are no facts pleaded in the Proposed Claim which could establish a fiduciary duty. The only allegations related to the pleading of breach of fiduciary duty are as follows (quoted *verbatim*):

> The plaintiff pleads that as the developer, vendor of units and declarant, the defendant 1 King West Inc. was and remains in a fiduciary relationship with and has fiduciary obligations to all unit owners who purchased condominium units from that defendant and to the plaintiff condominium corporation that was subsequently registered (para. 27a of the Proposed Claim);
>
> The plaintiff further pleads that the defendant, 1 King West Inc., had and has a fiduciary duty to act in the best interest of the unit purchasers and the plaintiff was and is prohibited from putting its own interests in conflict with or preferring its own interests ahead of the interests of the said unit owners and the plaintiff (para. 27b of the Proposed Claim);
>
> The plaintiff further pleads that the defendant, 1 King West Inc., had and has a fiduciary obligation to create a fund of money from the proceeds of sale of the condominium units or provide such adequate or other security sufficient to cover the cost of subsequent warranty claims made by unit purchasers or the condominium corporation pursuant to the warranty set out in paragraph 22 herein (para. 27c of the Proposed Claim);.
>
> The plaintiff further pleads that the unit purchasers relied on, or may be deemed to have relied on, the warranty sold to them by the defendant, 1 King West Inc., as referred to in paragraph 22 herein, to pay for any warranty claims that might be brought either by unit purchasers or the plaintiff and were thereby vulnerable to any act of that defendant that might render the warranty unenforceable or result in a situation that would make it impossible for the plaintiff or unit purchasers to be compensated for claims made under the warranty (para. 27d of the Proposed Claim);
>
> The plaintiff further pleads that in registering the aforesaid mortgages on title to the remaining unsold units and then purporting to claim that the mortgages take priority over the warranty obligations of the defendant, 1 King West Inc., that defendant has breached its fiduciary obligation and duties to the plaintiff and unit purchasers with respect to the claims made herein in that the warranty sold to the unit purchasers is now effectively rendered nugatory (para. 27l of the Proposed Claim); and
>
> The plaintiff further pleads that by entering into their individual agreements of purchase and sale with the defendant, 1 King West Inc., and purchasing a two year warranty as referred to in paragraph 22 herein, a special relationship between unit purchasers, as represented in this action by the plaintiff condominium corporation, and that defendant was created. ... (para. 27m of the Proposed Claim).

201 None of the above allegations plead any facts sufficient to establish a fiduciary duty to create a reserve fund to pay for warranty claims. *Simone* and *Cam-Valley Homes* are clear that a "special relationship" cannot be established only "by entering into ... individual agreements of purchase and sale", nor by "purchasing a two year warranty" as part of those agreements of purchase and sale (as TSCC 1703 seeks to plead at paragraph 27m of the Proposed Claim). The allegations on this issue in the Proposed Claim simply assert a fiduciary obligation based on the warranty without pleading any "fiduciary" facts to support such a claim (as TSCC seeks to plead at paragraphs 27a-d of the Proposed Claim).

202 It is not sufficient to rely on the warranty, which is part of the agreement of purchase and sale, to establish a fiduciary duty when the Court of Appeal has settled the law that there is no overarching fiduciary duty between

condominium vendor and purchaser arising out of the agreement of purchase and sale (or that such a contractual arrangement does not, in itself, create a fiduciary relationship).

203 Further, there are no facts pleaded to establish a fiduciary obligation that 1KW could not provide a mortgage on the property to a related party who funded the project (as TSCC 1703 seeks to plead at paragraph 27l of the Proposed Claim). This would also be a matter of contract unless facts were pleaded to establish a basis for the alleged fiduciary obligation.

204 Consequently, I find that the proposed amendments to plead fiduciary duty do not disclose a tenable cause of action against the King West Defendants.[37]

(ii) Constructive trust

205 TSCC 1703 relies on its contractual warranty to plead that 1KW[38] had an obligation to hold sufficient monies in trust to pay the claims made on that warranty; *i.e.* a claim for a constructive trust. The pleading is set out at paragraph 27n of the Proposed Claim:

> The plaintiff further pleads that the defendant, 1 King West Inc., as vendor of the condominium units, had an obligation to hold or otherwise secure sufficient monies in trust to pay the claims made herein. In purporting to encumber, convey and then pay the proceeds from the sale of the remaining unsold condominium units to a non-arms length party, Honest Ed's Limited, the defendant is in breach of trust upon the equitable principles of constructive trust.

206 Unlike the settled law discussed above dealing with fiduciary duty in a condominium purchase, no party provided me with case law as to whether a constructive trust could arise out of the relationship between condominium developer and purchaser.

207 TSCC 1703 relies on the decision of Montgomery J. in *Leon's Furniture*, in which he held (*Leon's Furniture*, at paras. 65-66) that since "a warranty was part of what the customer purchased", the bank as holder of security could not refuse to honour the warranty and had to pay warranty claims to Leon's Furniture by way of set-off. Montgomery J. held that "the bank cannot, in equity, pocket that money and not reimburse Leon's for what it has paid out to customers" and that (*Leon's Furniture*, at para. 66):

> the banks should pay Leon's by way of set-off. To find otherwise creates unjust enrichment in the bank if they were allowed to benefit by receivables that included a component for warranty and service contracts but also allowed to decline payment of the set-off to Leon's.

208 While the decision in *Leon's Furniture* is in no way determinative of the issue of whether a constructive trust can arise to create a fund to pay for warranty claims, it suggests that equitable relief can be made available to set-off contractual obligations, a conclusion that may support a claim for a constructive trust.

209 TSCC 1703 argued that no constructive trust could be found since the warranty is part of the agreement of purchase and sale and does not stipulate for the provision of any reserve or fund. TSCC 1703 further relies on the "entire agreement" clause in the warranty that provides (as part of the clause which sets forth the warranty, in bold as in the agreement of purchase and sale):

> **it being understood and agreed that there is no other representation, warranty, guarantee, collateral agreement or condition precedent herein relating to design, workmanship or materials in respect of any aspect of the construction of the Condominium (including the Unit) under this Agreement or at law or in equity or by any statute insofar as the Vendor, its directors, officers, agents, employees, successors, assigns and affiliates are concerned, save as aforesaid.**

210 There is a tenable argument that the above entire agreement clause does not prohibit a claim in constructive trust for a fund to be created. The clause does not refer in any way to whether or how the warranty would be funded. Rather, the provision restricts any warranty, guarantee, collateral agreement or condition precedent "relating to design, workmanship or materials in respect of any aspect of the construction of the Condominium (including this Unit) under this Agreement or at law or in equity" to the rights under the contract.

211 Smith's evidence was that he expected that a fund would be set up to ensure payment of warranty obligations. Other purchasers at trial may lead similar evidence.

212 Further, a constructive trust is not limited to claims over physical property. It can extend to claims for assets wrongfully in the possession of a party. The requirements for a constructive trust are set out by McLachlin J. (as she then was) in the leading case of *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 ("*Soulos*"), and can be summarized as follows (*Soulos*, at paras. 47-51):

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands;
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
> (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.

213 It is not the role of the court on an amendment motion to determine novel issues of law. Rather, the law that governs the amendmentof pleadings requires only that the plaintiff establish a tenable case. In *Panalpina*, Master Sandler set out the test as follows:

> I wish to make it clear that a master still has jurisdiction under rule 25.11 to strike out a pleading or a part of a pleading which contains an "untenable plea" but it is essential to understand what is meant by "untenable". **An untenable plea is one that is clearly impossible of success at law, that has no legal potential whatsoever, that is clearly unviable or unachievable at law**, or, to use the words of rule 20, that raises no genuine issue of law, in which case, the plea is an "untenable plea" and is thus "frivolous or vexatious" or "an abuse of the process of the court". On the other hand, **if it can be said that the plea is legally plausible, possibly capable of success, arguably maintainable, legally credible, legally promising, viable, feasible, or conceivable, has legal potential, or is within the bounds of legal possibility, and is not excluded by law, then such plea isnot an untenable plea, and a master would not have jurisdiction to strike it out.** [emphasis added]

214 Given the law set out above, I cannot find that the proposed claim in constructive trust is a claim "clearly impossible of success at law, that has no legal potential whatsoever, that is clearly unviable or unachievable at law". It is appropriate for a court to consider the issue, whether on a Rule 21 or summary judgment motion, or at trial.

215 Consequently, I find that the constructive trust claim against 1KW is tenable.

Issue 3: Whether the proposed amendment to plead a constructive trust claim against 1KW is an abuse of process

216 Given my conclusion above that the only proposed amendment which is tenable is the addition of a constructive trust claim against 1KW, I only address whether this claim is an abuse of process.

217 1KW submits that the proposed amendment is an abuse of process, because it seeks to indirectly obtain relief against it which has already been rejected by the court, *i.e.* Pollak J. in the Mareva injunction proceedings found that payments had been made by 1KW to HEL in the ordinary course of business, and Pepall J. in the receivership proceedings held that HEL was required to and did invest money in the project.

218 However, the relief of a constructive trust does not challenge either of the above judgments. TSCC 1703 is asking the court to order that, with respect to funds in the possession of 1KW after judgment is obtained, TSCC 1703 has a priority (through a constructive trust) over the amount of the warranty claims. Such an order does not prevent 1KW from making payments in the ordinary course to HEL (the issue decided by Pollak J.), nor lead to a conclusion that HEL did not provide funding to the project (an issue decided by Pepall J.).

219 Parties are entitled to amend pleadings to seek a mechanism to ensure that they receive payment for their claims, provided the claims are tenable and do not conflict with other judgments of the court. This is a proper purpose for an amendment.

220 Further, while Smith stated in his affidavit that "TSCC 1703 does not yet have full documentary production or disclosure with respect to this mortgage", I cannot find on the evidence that the sole purpose of the proposed amendment is to obtain discovery. Rather, the amendment seeks relief to protect the interests of TSCC 1703, and even if a result of the amendment (or even one of the purposes, if Smith's evidence could be taken that far) is to obtain further production, such discovery is a necessary result of the amendment, but not its sole purpose.

221 Consequently, I find that the proposed amendment to plead constructive trust against 1KW is not an abuse of process.

Issue 4: Whether the proposed amendment to plead a constructive trust claim against 1KW would unduly delay and complicate the litigation.

222 TSCC 1703 submits that since the action was commenced more than two years ago, discoveries are all but completed, and undertakings are answered, an amendment would unduly delay and complicate the litigation.

223 However, while an amendment to plead the alleged fraudulent conveyance may have required significant additional production, examinations for discovery, and delay the litigation[39], this cannot be the case with the amendment to plead constructive trust. As set out at paragraph 27n of the Proposed Claim, the amendment seeks different legal relief based on the same facts as pleaded. It is difficult to conceive of any additional documents which would be required, and if additional discovery were necessary (an issue I do not decide), it would not be lengthy or complicated.

224 Consequently, I find that the proposed amendment to plead a constructive trust claim against 1KW would not unduly delay and complicate the litigation.

Order and costs

225 For the reasons discussed above, I dismiss the Motion to add HEL as a defendant and I dismiss the Motion to amend the claim against the King West Defendants to plead the allegations related to the fraudulent conveyance of the Mortgages and breach of fiduciary duty. I allow the proposed amendments against 1KW which plead breach of constructive trust.

226 If the parties cannot agree on costs, I will address the issue through written costs submissions of no more than three pages (plus a costs outline) to be received from HEL and the King West Defendants no later than 14 days from this order, with TSCC 1703 delivering separate responding written costs submissions of no more than three pages each (plus a costs outline) within 10 days of receipt of the submissions of HEL and the King West Defendants.

227 I thank counsel for the superb quality of their written and oral submissions, which were of great assistance to the court.

MASTER B.T. GLUSTEIN

cp/e/qlrpv/qljxr

1 Ms. Conway is counsel for 1KW, King West Developments Inc., and Projectcore Inc., whom I have referred to collectively as the King West Defendants in other reasons I have written in this litigation. Ms. Conway opposed the Motion on behalf of all of these defendants. However, since TSCC 1703 only seeks to amend the allegations against the existing defendants 1KW and King West Developments Inc. (other than an amendment to the quantum of damages against all current defendants which is not opposed), I refer to 1KW and King West Developments Inc. as the King West Defendants for the purpose of these reasons.

2 In the Existing Claim, TSCC 1703 seeks a declaration that the King West Defendants failed to comply with a ruling of the Ontario Securities Commission and damages arising therefrom, but TSCC 1703 deletes this relief in the Proposed Claim and the defendants 1KW, King West Developments Inc., and Projectcore Inc. do not oppose this proposed deletion.

3 The issue of the date a limitation period would stop running may be relevant in certain cases given that the doctrine of special circumstances no longer applies to extend limitation periods (as per my discussion at paragraph 137 below) (see *Philippine/Filipino Centre Toronto v. Datol*, [2009] O.J. No. 388 (S.C.J. - Mast.) at paras. 63-67), but it is not necessary for me to decide the issue on the facts of this

case. For the purposes of the Motion, it does not matter whether the date the limitation period would stop running is the date that the first version of the Proposed Claim was delivered to the defendants (December 5, 2008), the date the notice of motion was served (January 9, 2009), or any later date (such as the date of the hearing of the motion, an order of the court, or the amendment itself if leave were granted to amend the Existing Claim). Even if the earliest date is adopted (December 5, 2008), the claim was discoverable more than two years prior to the date. I note in any event that in the December 5, 2008 version of the Proposed Claim, TSCC 1703 made no allegation as to when the Mortgages were discovered.

4 The Mortgages were not discussed in the Existing Claim, and there was no claim for fraudulent conveyance. Since I find at paragraphs 107 to 112 below that a claim for a fraudulent conveyance is a "claim" subject to the *Limitations Act, 2002*, this is a new claim against the King West Defendants which could not be supported on the basis of the facts as pleaded in the Existing Claim and must be treated as a new claim with its own limitation period (see *Frohlick v. Pinkerton Canada Limited* (2008), 88 O.R. (3d) 401 (C.A.) ("*Frohlick*") at para. 24 and *Thompson v. Zeldin*, [2008] O.J. No. 3591 (S.C.J. - Mast.) ("*Thompson*") at paras. 62-67).

5 Justice Pepall set out background of the project and its development at paras. 1-8 of her reasons for decision dated August 24, 2007 (Court File No. 07-CL-6979 and Court File No. 07-CL-6913) concerning the receivership order sought by 1KW and Ed Mirvish Enterprises Limited, and I adopt the thorough description of the background of the project and development set out in her reasons.

6 In these reasons, all references to Mirvish's evidence are from the Rule 39.03 examination.

7 Smith's evidence is taken from his affidavit sworn April 7, 2009 (the "Smith Affidavit"). No precise date nor location where the affidavit was signed is provided on the signing page of the affidavit contained in TSCC 1703' Supplementary Motion Record, nor is it commissioned.

8 (often referred to by the parties as the "Caisse", as set out in the evidence below).

9 Hendler also acknowledged in an answer to undertaking that "he was aware of the units owned by [1KW] at least as of August 2006, when TSCC 1703 sent its unitholders notices under section 23 [of the *Condominium Act, 1998*], advising of its intention to bring litigation with respect to the alleged deficiencies which are the subject matter of this litigation".

10 (which were, in effect, one mortgage)

11 Arnold is a litigation partner at GMA and counsel to TSCC 1703 in this action.

12 GMA refers to 1KW as "1KWI" throughout its correspondence and court materials.

13 (not Mr. Richard Conway, who is counsel to HEL on this Motion).

14 TSCC 1703 also did not file a factum for the motion.

15 The parties did not complete argument on August 21, 2009, so a second hearing date was set for September 22, 2009.

16 This position is the same as that taken by Smith when he states that the fraudulent conveyance claim did not "crystallize" until this time.

17 I do not rely on these statements as evidence for this Motion, as the Casciato Affidavit was only filed in response to TSCC 1703's motion for a Mareva injunction. The issue on this Motion is whether the statements in the Casciato Affidavit raised material facts establishing a genuine issue that TSCC 1703 could not have discovered its fraudulent conveyance claim until some point after December 5, 2006 (two years prior to the date TSCC 1703 delivered its first version of the Proposed Claim).

18 This is a typographical error since the date is December 23, 2005.

19 Martin did swear an affidavit in support of an earlier motion in which TSCC 1703 sought productions. In that affidavit, Martin swore that he had been retained "to assist GMA by reviewing documentation and identifying the flow of funds to 1 King West Inc. from HEL and from EMEL, as referred to in the Casciato Affidavit". However, Gardiner does not say that he relied on anything contained in that affidavit as a basis to discover the alleged fraudulent intent of the mortgages.

20 (The King West Defendants rely on HEL's submissions with respect to these arguments.)

21 HEL does not address the legal issue of whether the limitation period would stop running upon delivery of the first version of the Proposed Claim, or at a later date such as delivery of the notice of motion, hearing, court order, or actual amendment (if granted). As I discuss at footnote 3 above, it is not necessary for me to decide that issue as the two-year limitation period expired by that date in any event.

22 (even if the December 5, 2008 date of the first version of the Proposed Claim is adopted as the end date for the running of the limitation period).

23 As I discussed at paragraph 19 above, for the purposes of this Motion HEL and the King West Defendants do no contest that TSCC 1703 did not actually discover the Mortgages until November, 2007 (as per Smith's evidence), so the analysis below is based solely on discoverability.

24 (defined in these reasons as the "*Fraudulent Conveyances Act*").

25 I also note that the court appeared to assume that even though Joanne Wills was in the same position of HEL as the alleged recipient of a fraudulent conveyance, there was still a "claim" against her under the *Limitations Act, 2002*, albeit one which was governed by section 16(1)(a).

26 (except for certain exceptions in the legislation which are not relevant to this Motion, since I find that the *Real Property Limitations Act* does not apply, as set out at paragraphs 126 to 130 below).

27 (nor a genuine issue with respect to the facts of discoverability, as I discuss below)

28 As discussed at footnote 3 above, I do not address whether the end date for the limitation period would be notice of the proposed amendment (December 5, 2008), the date of the notice of motion (January 9, 2009), the date of the hearing, the date of the court order, or the date of the amendment (if granted), since regardless of which date is applied, I find that TSCC 1703 ought to have discovered the claim more than two years prior to any of the potential end dates.

29 I note that Master Dash applied the date the motion was brought as the end date for discoverability, although it was not necessary for him to consider the issue since there was no reference to any other date that might have been relevant (*Wong*, at para. 49).

30 As noted above, this second position is consistent with Smith's evidence that issues concerning the fraudulent conveyance claim "crystallized" "with the commencement of the sale of unsold units in June 2008, the affidavit of Camillo Casciato and the statements received from the condominium corporations' [sic] accountant, Robert Martin".

31 (even if GMA had no knowledge about the existence of the Mortgages at issue).

32 In this version of the Proposed Claim, the discovery date was pleaded to be June 10, 2008.

33 (even if it is accepted that the information contained in the Martin Emails dated after December 5, 2009 was communicated to TSCC 1703 or its counsel prior to the date of the first version of the proposed claim - an issue on which TSCC 1703 filed no evidence).

34 All of these statements are from the Martin Emails.

35 The reference to December 23, 2006 at paragraph 13 of his affidavit is a typographical error.

36 While Gardiner relies on the Casciato cross-examination as a basis for TSCC 1703's submission that there is a genuine issue as to discoverability, TSCC made no argument based on any evidence from Casciato in the cross-examination.

37 I note that while the prayer for relief seeks to amend the statement of claim to plead a breach of fiduciary duty against both of the King West Defendants, the allegations relate only to the conduct of 1KW.

38 Again, while the prayer for relief seeks to amend the statement of claim to plead constructive trust against both of the King West Defendants, the allegations relate only to the conduct of 1KW. Consequently, my conclusion that the Proposed Claim discloses a tenable cause of action for a constructive trust applies only to 1KW.

39 (although I make no finding on that issue and I also make no finding as to whether any such delay or complication would be of an "undue" nature such that the amendment could be refused on this basis)

2 of 2 DOCUMENTS

Intitulé de la cause :

Lecomte c. Condominiums La Bourgade B