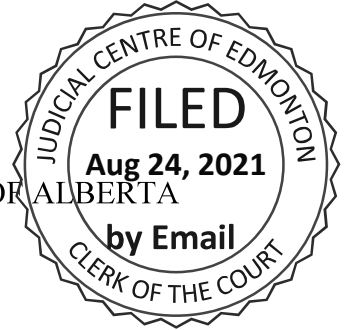


Clerk's Stamp



COURT FILE NUMBER

1303 13257

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

PLAINTIFF

CAREVEST CAPITAL INC.

DEFENDANT

830480 ALBERTA INC.

DOCUMENT

**BRIEF OF THE BOWRA GROUP INC. RE
SERVICE APPLICATION TO BE HEARD
SEPTEMBER 3, 2021 @ 10:30 A.M.**

AR ent.

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

Reynolds, Mirth, Richards & Farmer LLP
Barristers & Solicitors
3200 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3W8

Lawyer: Michael J. McCabe, Q.C.
Telephone: (780) 425-9510
Fax: (780) 429-3044
File No: 112637-001-MJM

Introduction

1. With the permission of the Court, it will hear parts of the application relating to this matter at two hearings. The first will deal solely with matters of service (the “Service Application”) scheduled to be heard on Friday September 3, 2021.
2. The second will deal with the substantive portion of the application (the “Substantive Application”). It is scheduled to be heard October 21, 2021.

Material Filed

3. In respect to the Service Application, the following has been, or will be, filed:
 - a. Application.
 - b. Receiver’s Second Report. This Report provides history of the entire receivership and goes beyond the service issue.
 - c. Supplemental to Receiver’s Second Report. This is highly relevant to the service issue.
 - d. This Brief.
 - e. Affidavit of Service.

Background

4. 830480 Alberta Ltd. (“830”) was a residential real estate developer.
5. About 10 years ago, 830 successfully developed a project called Sunset Valley Estates. As part of the development process, it required the posting of deposit to ensure compliance with architectural development requirements (the “architectural deposit”) and another deposit to ensure compliance with landscaping requirements (the “landscaping deposit”).
6. A few years later, 830 commenced another residential real estate development project in connection with a property in the Windermere area of southwest Edmonton. The name of

that project was initially Riverpointe but the name was subsequently changed to Westpointe.

7. Again, there was a requirement to post both an architectural deposit and a landscaping deposit.
8. There are many permutations as to how the deposits were posted. Sometimes they were posted by the builder. Sometimes the builder would require a deposit from the ultimate purchaser. Sometimes the builder would provide what was effectively a *master* deposit to be to be revolved among various lots acquired by the builder throughout the project. Most times, the deposits were posted by the individual purchaser.
9. In 2014, 830 was indebted to the Plaintiff, Carevest Capital Inc. (“Carevest”), in an amount in excess of \$65,000,000.
10. 830’s financial difficulties resulted in Carevest applying to this Honourable Court for the appointment of a Receiver. By Order granted January 17, 2014 Bowra Group Inc. (the “Receiver”) was appointed Receiver of all of the property assets and undertakings of 830.
11. Among the assets under the Receiver’s administration are the architectural deposits and the landscaping deposits.

The Problem

12. The deposits are held by 3 sets of law firms, in trust. In each case there is a Restrictive Covenant in place. In each case, that Restrictive Covenant has provisions whereby the purchaser of the lot can qualify for the return of the deposits. Regrettably, in some cases, the builder or homeowner, as the case may be, does not comply with the terms of the Restrictive Covenant and never qualifies for the return of the architectural deposit, the landscaping deposit, or both.
13. Unfortunately, none of the Restrictive Covenants contain a *sunset clause*, i.e. a clause that directs what is to happen with the deposits if the purchaser of the land does not qualify for the return of those deposits to that purchaser. The lack of a sunset clause is

common to each and every deposit regardless of how it was posted. On a strict reading of the Restrictive Covenants, the lawyers will be holding the unredeemed deposits, forever.

14. The deposits held are:
 - a. Reynolds Mirth - \$90,000
 - b. Kennedy Agrios - \$1,230,000
 - c. Jomha Skrobot - \$276,500
15. To deal with the Service Application, the Court needs to have a general understanding of what is to be served, and why.
16. The essence of the Substantive Application will be one for ...*the opinion, advice, or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property* pursuant to s. 43 of the *Trustee Act*.¹ Involved in that will be an analysis of some common law, the *Rules of Court* regarding interpleader, provisions of *Perpetuities Act*, the *Land Titles Act*, the *Legal Professions Act* and the *Trustee Act*. Stripped to its simplest, the Substantive Application is the request for a declaration that there is to be implied in the terms under which the deposits are held a term by which those deposits are forfeited in the event that the conditions are not met for the return of the deposit.

Service

17. Simply stated, the issue in the Service Application is how the Substantive Application is to be served upon perspective claimants of the deposits.

Who to Serve

18. As described in the Receiver's Supplemental Report, there are many permutations and combinations of events relating to the potential right to claim deposits. For example:

¹ *Trustee Act*, RSA 2000, c T-8

- a. Sometimes the right to the deposits was assigned upon the sale of a property. But sometimes it wasn't.
 - b. Sometimes the Receiver had a global security deposit from a builder for all the lots that they purchased. For the builders typically do not do the landscaping. Instead it is expected that the purchaser will do it. Sometimes they do, and sometimes they don't.
 - c. Sometimes the builder having posted one deposit, may collect its own security deposit from the customer. The Receiver has no control over any such subsequent deposit.
 - d. Many times the property has changed, and sometimes multiple times.
19. Reynolds Mirth and Kennedy Agrios have attempted to keep current records as to all of the deposits. But there can be no assurance that these records are necessarily complete.
 20. In the case of the deposits held by Jomha Skrobot, it appears that Jomha Skrobot is able to provide an address for service of the original depositor.
 21. To add to the factual confusion, here, there may also be a legal issue.
 22. As a matter of law, in Canada, it is well established that positive covenants do not run with the land and cannot be enforced against subsequent land owners. See, for example, *Durham Condominium Corp. No. 123 v. Amberwood Investment*². A positive covenant is essentially *creates an obligation to do something*.
 23. The Receiver has no intention of getting into a discussion about the validity of the Restrictive Covenants other than to suggest that, where possible, the original depositor should be served.

² *Durham Condominium Corp. No. 123 v. Amberwood Investment*, 2002 211 DLR (4th), 1 (Ont. CA).

24. While the Receiver has current information with respect to Riverpointe, it has no information respecting Sunset other than receiving a list of the original depositors from counsel involved in that project, Jomha Skrobot.
25. The Court is reminded that there are, literally, many hundreds of deposits outstanding.

What is to be Served

26. The Receiver proposes not to serve the Receiver's Second Report for the simple reason that it has very little to do with the deposit issue and to the extent that it does address that issue, it is addressed more fully in the Supplement to the Second Report.
27. The Receiver proposes to serve just the Application, a copy of the draft of which is attached as **Exhibit 1** hereto with a covering letter advising that the Supplemental Report will be made available via email or, if requested, by hardcopy, upon the request of the person served.

How it is to be Served

28. On the Riverpointe project, the Receiver has, in virtually every case, an email contact for any potential claimant.
29. Unfortunately that is not the case on the Sunset project.
30. The Receiver requests that, where possible, service be done by email and that, where not possible, it be done by ordinary, as opposed to registered, mail.

Relief Sought


31. The Receiver seeks the direction of this Honourable Court as to how, in a general way, the Substantive Application should be served. The Receiver anticipates that circumstances may arise in the course of its attempting to serve the Substantive Application which have not been contemplated. The Receiver will make its best efforts to address any such unforeseen circumstance in an effort for it to ensure that anyone who might have a claim, has service.

32. The Receiver does not seek costs of this Application against anyone.

ALL OF WHICH is respectfully submitted this 23rd day of August, 2021.

Reynolds, Mirth, Richards & Farmer LLP
Counsel for The Bowra Group Inc.

Per:



Michael J. McCabe, Q.C.

EXHIBIT 1

Clerk's Stamp:

COURT FILE NUMBER 1303 13257

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF CAREVEST CAPITAL INC.

DEFENDANTS 830480 ALBERTA INC.

DOCUMENT **APPLICATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Reynolds Mirth Richards & Farmer LLP
Barristers & Solicitors
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Telephone: (780) 425-9510
Fax: (780) 429-3044
File No: 112637-001-MJM

NOTICE TO RESPONDENT(S)

This application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: OCTOBER 20, 2021

Time: 2:00 P.M.

Where: LAW COURTS, EDMONTON, ALBERTA

Before: THE HONOURABLE MR. JUSTICE M.J. LEMA

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The Applicant, The Bowra Group Inc. (“Receiver”), in its capacity as Receiver of 830480 Alberta Inc. (“830”), applies for the following order for the advice and directions of this Honourable Court respecting the management or administration of certain trust property namely funds held in trust by the following law firms:
 - a. Reynolds Mirth Richards & Farmer LLP;
 - b. Kennedy Agrios LLP;
 - c. Johma Skrobot LLP;

all in respect of certain deposits described as architectural deposits and landscaping deposits held, in trust, by those firms in respect of sales of properties of 830, either before or during the receivership of 830.

2. More particularly, the Applicant seeks the advice and direction to the Receiver and the above mentioned three law firms that the terms upon which these deposits are held in trust shall be deemed to include a term that such deposits shall be deemed forfeited and paid to the Receiver if:
 - a. The final architectural approval and final landscape approval are not obtained within 18 months from the completion of construction of the home or;
 - b. The home has been complete for at least 1 year and the final architectural approval and final landscape approval are not obtained within 1 year from the date of the Order; or
 - c. Such further time as the Receiver and the person claiming the deposit, may agree.

3. In the alternative, the Applicant seeks to have the Receiver appointed as a judicial trustee of the deposits held by counsel.
4. Such further or other orders as this Honourable Court may grant.

Grounds for making this application:

5. The three law firms mentioned above all hold all architectural and landscaping deposits in respect of sales of lands of 830, in trust.
6. In many cases the requirements that would entitle the return of the architectural or landscaping deposits have not complied with.

7. There are no terms providing for this circumstance and, in particular, no terms in the Purchase Agreement or Restrictive Covenant for the forfeiture of these deposits upon non-performance of the obligations concerning the architectural deposit and landscaping deposit.
8. Forfeiture is inherent to the nature of a deposit and the Receiver seeks advice and directions from this Court as to the terms of the forfeiture.
9. Such further and other grounds as counsel may advise.

Material or Evidence to be relied upon:

10. The Supplemental Report to the Receiver's Second Report, to be filed with this Application, and the Appendices thereto.
11. Such further and other materials as counsel may advise.

Application Rules:

12. Rule 6.3(1), 6.54 and 6.9, 9.15, and 11.27 of the Alberta *Rules of Court*.
13. S. 25 of the Receivership Order granted January 17, 2014.
14. Such further and other Rules as counsel may advise.

Applicable Acts and regulations:

15. S. 42, 43, 46 of *Trustee Act*, RSA 2000 Chap. T-8.
16. S. 18 of the *Perpetuities Act*, RSA Chap. P-5.
17. S. 117 of the *Legal Profession Act*, RSA 2000, c L-8
18. S. 48 of the *Land Titles Act*, RSA 2000, c L-4
19. Such further and other Acts and regulations as counsel may advise.

Any irregularity complained of or objection relied on:

20. There are no irregularities complained of or objections relied on.

How is the application proposed to be heard or considered:

21. It is proposed that the application be heard virtually.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

DRAFT