

Court File Number: CV-20-00640347-00CL

**Superior Court of Justice**  
Commercial List

**FILE/DIRECTION/ORDER**

**MELVYN EISEN, TRUSTEE**

Plaintiff(s)

AND

**DIAM DANFORTH PROPERTY INC**

Defendant(s)

Case Management  Yes  No by Judge: Koehnen J.

Counsel	Telephone No:	Email/Facsimile No:
See attached counsel sheet		

Order  Direction for Registrar (**No formal order need be taken out**)

Above action transferred to the Commercial List at Toronto (**No formal order need be taken out**)

Adjourned to: \_\_\_\_\_

Time Table approved (as follows): \_\_\_\_\_

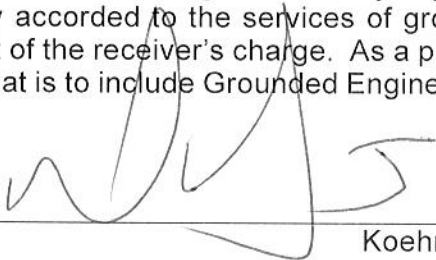
**Date Heard: May 5, 2020**

1. The respondent's first ranking mortgagee seeks a receivership order with respect to the respondent. The receivership is unopposed although a number of issues have arisen with respect to the terms of the order.
2. The first issue concerns the terms of the stay. The city of Toronto issued a work order against the respondent and its property. The property is a construction site on Danforth Avenue. It is currently excavated but material construction has not begun. The excavation is supported by shoring designed to last approximately 12 months. The shoring has been in place for 32 months. A report by Ground Engineering Inc. indicates that the current situation poses a danger to safety and to the surrounding

properties. In response to that report, the City of Toronto has issued a remediation order. The issue is whether the stay contained in a receivership order would stay the implementation of the City's order.

3. The mortgagee and the proposed receiver take issue with the Ground Engineering report. They suggest that it is ambiguous and that there are less costly alternatives available to protect the property than those required by the City's remediation order. The City is prepared to discuss the issue with the proposed Receiver to determine what the best solution it is.
4. Given the potential danger to safety and surrounding property that the current condition of the site poses, it would not be appropriate to permit the stay contained in an ordinary receivership order to affect the City's remediation order. As a result, the receivership order shall specifically specify that it has no effect on the City's order. Although I encourage further discussions between the City and the Receiver, I am not prepared, on the record before me, to restrict the City's remediation order in any way. That should be a decision for the City and its engineering experts.
5. The second issue concerns Gillam Group Ltd. It has a construction lien holdback of approximately \$135,000 in respect of a lien of approximately \$1.3 million. Gillam is concerned that the receivership costs would prime its holdback. It seeks a specific provision in the order to the effect that its construction lien has priority over the Receiver's charge. I am not prepared to make that order.
6. All parties agree that the first ranking charges are unpaid municipal taxes and the receiver's charge. The latter would cover the receiver's costs, its legal costs the cost of complying with the City's remediation order or any subsequent agreement reached with the city in respect of remediation. The City's order requires the current open pit to be backfilled up to street level. Unpaid taxes are approximately \$138,000.
7. I was given estimates of the value of the property. Even if I take a small fraction of the most conservative value of the property, that number would still far exceed the combination of any realistic receivership cost, the cost of backfilling the property and unpaid taxes. As a result, Gillam's concern about being primed by the Receiver's charge is purely academic.
8. The third issue concerns the role of Grounded Engineering and any priority associated with its fees. Grounded Engineering is the engineer of record. It has an obligation under the Building Code to continue to monitor the property. It seeks a provision in the Receivership Order that would give it priority for its outstanding accounts and for any monitoring work it carries out as engineer of record. Its total fees to date are approximately \$20,000. Its cost of ongoing monitoring is approximately \$4,000 per month. It attends the site at intervals of approximately 7 to 10 days.
9. It would not be appropriate to give Grounded Engineering priority for all of its past fees. Like any other service provider, it was up to Grounded Engineering to work out whatever commercial terms it thought appropriate with its client. If it now finds that those commercial terms were, with the benefit of hindsight, inadequate, it should be in no superior position than other service providers to the respondent.

10. The analysis changes, however, in so far as unpaid fees relate to services that Grounded Engineering is obliged to provide under the Building Code regardless of any commercial arrangements between Grounded Engineering and its client. That would involve fees that arose after April 10, 2020. On April 10, 2020 the respondent abandoned the site and ceased meeting any of its obligations. Grounded Engineering is, however, obliged to continue to provide monitoring until it is replaced by another engineer of record. Grounded engineering should receive priority for services it was obliged to perform after April 10, 2020.
11. There was some ambiguity about what formal steps are necessary to replace an engineer of record. All parties agree that it involves some form of communication with the City. But to ensure that there are no gaps in monitoring or in engineering responsibility, Grounded Engineering shall have priority for all services rendered since April 10, 2020 up until the date that the City advises the Receiver that Grounded Engineering has been replaced by another engineer of record. If the Receiver wishes to replace Grounded Engineering it is free to do so and arrange for the City to provide a confirming letter to that effect. The priority accorded to the services of grounded Engineering since April 10 will be equal to that of the receiver's charge. As a practical matter the most efficient way of dealing with that is to include Grounded Engineering's fees within the Receiver's charge.



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Koehnen J.

May 5, 2020

**COUNSEL SLIP**

**Court File Number:** CV-20-00640347-00CL    **Date:** Monday, May 4, 2020 – 10:00 a.m.  
via videoconference

**Title of Proceeding:** Melvyn Eisen, Trustee v. DIAM Danforth Property Inc.

<b>Counsel</b>	<b>Party</b>	<b>Contact</b>
R. Brendan Bissell and Joel Turgeon (student at law), Goldman Sloan Nash & Haber LLP	Counsel for the Applicant, Melvyn Eisen, Trustee	Tel: 416.597.9922 Fax: 416.597.3370 Email: <a href="mailto:bissell@gsnh.com">bissell@gsnh.com</a> <a href="mailto:turgeon@gsnh.com">turgeon@gsnh.com</a>
Eric Golden and Chad Kopach, Blaney McMurtry LLP	Counsel for the Proposed Receiver	Tel: 416.593.3927 Fax: 416.596.2049 Email: <a href="mailto:egolden@blaney.com">egolden@blaney.com</a> <a href="mailto:ckopach@blaney.com">ckopach@blaney.com</a>
Brahm Rosen, Joel Ross <b>[N.B. not counsel]</b>	The Proposed Receiver, Rosen Goldberg Inc.	Tel: 416.224.4200 Fax: 416.224.4330 Email: <a href="mailto:brosen@rosengoldberg.com">brosen@rosengoldberg.com</a> <a href="mailto:jross@rossadvisory.ca">jross@rossadvisory.ca</a>
Karen Groulx, Dentons Canada LLP	Counsel for Gillam Group Ltd.  (lien claimant)	Tel: 416.863.4697 Email: <a href="mailto:karen.groulx@dentons.com">karen.groulx@dentons.com</a>
Rodney Gill, Toronto Legal Services	Counsel for the City of Toronto	Tel: 416.392.8051 Fax: 416.397.5624 Email: <a href="mailto:rodney.gill@toronto.ca">rodney.gill@toronto.ca</a>
Clifford Blundell, Blundell Professional Corporation	Counsel for Grounded Engineering Inc.	Tel: 416.966.0111 Fax: 416.966.0112 Email: <a href="mailto:cjb@bpel.ca">cjb@bpel.ca</a>
Michael Porco <b>[N.B. not counsel]</b>	Grounded Engineering Inc.	Tel: 647.264.7911 Email: <a href="mailto:mporco@groundedeng.ca">mporco@groundedeng.ca</a>
Carmine Scalzi, Scalzi Professional Corporation	Counsel for Thrive Capital Management Limited	Tel: 416.548.7989 Email: <a href="mailto:cscalzi@scalzilaw.com">cscalzi@scalzilaw.com</a>

	(third mortgagee)	
Kevin D. Sherkin, Miller Thomson LLP	Counsel for certain Beneficiaries of the second and third mortgages	Tel: 416.597.6028 Fax: 416.595.8695 Email: <a href="mailto:ksherkin@millerthomson.com">ksherkin@millerthomson.com</a>
Chris Reed and Calvin Ho, Laishley Reed LLP	The Respondent, Diam Danforth Property Inc.	Tel: 416.981.9401 Fax: 416-981.0060 Email: <a href="mailto:creed@laishleyreed.com">creed@laishleyreed.com</a> <a href="mailto:cho@laishleyreed.com">cho@laishleyreed.com</a>