Court File No. CV-10-883-00CL

SUPERIOR COURT OF JUSTICE

B E T W E E N: ONTARIO SECURITIES COMMISSION

Applicant

- AND -

PETER SBARAGLIA, MANDY SBARAGLIA, CO CAPITAL GROWTH INC. and 91 DAYS HYGIENE SERVICES INC.

Respondents

BEFORE THE HONOURABLE MR. JUSTICE MORAWETZ, held at the courthouse, 330 University Avenue, on December 23, 2010, commencing at 10:00 a.m.

REASONS FOR JUDGMENT

A P P E A R A N C E S:

PAMELA FOY	FOR THE APPLICANT
M.P. GOTTLIEB	FOR RSM RICHTER INC., RECEIVER AND ROBERT MANDER
MILTON DAVIS	FOR THE RESPONDENTS
KELLI PRESTON	FOR THE RESPONDENTS
PAUL ERIC VEEL	FOR CREDITOR, THE RESPONDENT CO CAPITAL GROWTH INC.

December 23, 2010
Mr. Justice Morawetz,

REASONS FOR JUDGMENT

The Ontario Securities Commission ("OSC") brings this application for an order appointing RSM Richter Inc. as receiver of the assets, undertakings and property of Dr. Peter Sbaraglia, Ms. Mandy Sbaraglia, CO Capital Growth Inc. and 91 Days Hygiene Services Inc.

This matter has a long history. In July 2008, staff of the OSC obtained an order from the Commission pursuant to s. 11(1) of the Securities Act to investigate and inquire into the business and affairs of Dr. Sbaraglia, Mr. Robert Mander, CO and Pero Assets Inc. with respect to trading in securities and potential breaches of Ontario securities law.

Based on the information that OSC staff received, it appeared that CO was obtaining funds from investors and investing those funds in securities.

The primary concern of the Commission was the use of investor funds by CO and Mr. Mander and Dr. Sbaraglia and whether funds and assets were available so as to ensure that the investors would be repaid.

During its investigation, the staff learned that a significant amount of funds obtained from investors had been transferred to Mr. Mander and his companies.

Mr. Mander operated and owned EMB Asset Group Inc. Through EMB, Mr. Mander operated a fraudulent Ponzi scheme involving in excess of $40 million of investors' funds. In certain instances, investors, such as CO Capital, invested money with

Mr. Mander or EMB which had been loaned to them from third-party investors.

CO was run by D. Sbaraglia and Mr. Mander. The record also establishes that Ms. Sbaraglia was integrally involved in the business of CO.

Throughout the period under review, CO was used by Dr. and Ms. Sbaraglia as an investment vehicle to solicit third-party investors to invest with Mr. Mander through CO.

Neither Dr. or Ms. Sbaraglia were registered with the OSC. CO raised approximately $21.2 million from investors, who Dr. Sbaraglia described as both friends and family. There were approximately 25 to 30 CO investors.

It has been determined that a significant portion of investor funds were not invested at all. Rather, the funds were used by Mr. Mander, and by CO to repay other investors.

The OSC takes the position that the Sbaraglias, through their role in CO and their close involvement with Mr. Mander, participated in the Ponzi scheme in a manner which they knew or ought reasonably to have known, perpetrated a fraud on investors contrary to s. 126(1)(e) of the Securities Act.

This is disputed by the Sbaraglias who take the position that they were victims of the fraud and not perpetrators of the fraud as they did not know about the fraud until the summer of 2009.

CO was incorporated on January 5, 2006. The first investor

agreement is dated January 9, 2006 and CO continued to enter into loan agreements with investors until August 2009.

The OSC takes the position that CO's purported business model provided that CO would solicit investors to loan money; funds would then be loaned to CO for a fixed term, generally 1 to 3 years at a fixed high rate of interest ranging from 20% to 30%. CO would issue a loan agreement to each investor; funds from CO were transferred to Mr. Mander personally or through EMB or other Mander controlled companies for investment purposes and the profits generated from these investments above the fixed interest rate promised to investors were to be split equally between CO and Mr. Mander.

The record established that CO's actual business varied from the above model in a number of ways. First, CO did not transfer all of the funds of CO investors to Mr. Mander as approximately $6 - 7 million was not transferred directly to Mr. Mander or EMB. These funds were used in a number of ways by Dr. Sbaraglia, acting on behalf of CO, by making payments to CO investors with newly received funds from other CO investors, or in making investments in securities either directly in trading accounts in the names of other companies, which resulted in significant losses.

Further, it became clear that the funds that Mr. Mander did receive from CO were not invested, but were used to pay the returns to other investors that he was dealing with independently from CO.

RSM Richter as receiver of the EMB Asset Group, Mr. Mander and related entities obtained an order on July 14, 2010 in

Reasons, Morawetz, J.,

the receivership proceedings of EMB, which authorized the receiver to conduct investigations into the business and affairs of Dr. Sbaraglia and Ms. Sbaraglia and the CO group.

According to the receiver's reports, $15.4 million of the $21.2 million raised by CO from its investors was transferred to Mr. Mander/EMB.

The balance of what CO raised, estimated to be between $6 and 7 million can be accounted for as follows. $2.1 million was received personally by Dr. and Ms. Sbaraglia at the direction of Mr. Mander, purportedly for profits earned by them from the actions of Mr. Mander.

Approximately $2.4 million was lost through trading accounts. Approximately $985,000 in general expenses of CO were paid from the CO bank accounts. Approximately $585,000 was used by CO to purchase open ventures securities, which securities have very little value today. Approximately $213,000 in rent payments in respect of a property located at 239 Church Street, Oakville, Ontario were made by CO to 91 Days Hygiene, a company wholly owned by Ms. Sbaraglia. Approximately $383,000 in charges were incurred on a corporate visa in the name of CO, a significant number of which were not for the benefit of CO investors, but rather, were for the personal benefit of the Sbaraglias, including significant payments for restaurants, renovations of 239 Church Street and numerous other personal expenses.

Dr. Sbaraglia, on behalf of CO, opened bank accounts over which he had signing authority. The accounts were used to pool investor funds. At no time were the funds segregated in

any manner.

Dr. Sbaraglia acknowledged that throughout the review period CO used funds raised from one investor to pay amounts owing to other investors. This issue was specifically referenced in cross-examination, the transcript of which reads, commencing at Question 954 as follows:

> Q. And Ms. Burton was an investor?
> A. Yes.
> Q. And this payment of $63,250 was paid to her in connection with her investment?
> A. Yes.
> Q. And that payment was made just using other investors' funds also? Correct?
> A. Yes.
> Q. And I can keep going through this book, but what we will see is throughout this entire piece payments are being made by CO Capital directly from funds paid into CO Capital from other investors?
> A. Right.
> Q. And you are aware of that?
> A. Yes.
> Q. And you were aware that this was going on throughout the piece?
> A. Yes.

The payments to investors from the CO bank accounts were made with cheques signed by Dr. Sbaraglia. Ms. Sbaraglia undertook the bank statement and loan reconciliations for the payments.

Reasons, Morawetz, J.,

In July 20098, as part of its investigation, OSC staff conducted examinations of Mr. Mander and Dr. Sbaraglia. They were represented by the same legal counsel, who attended with each of them at their respective examinations.

Dr. Sbaraglia had retained legal counsel in or around June 2009 and it is apparent that Dr. Sbaraglia knew that the OSC's primary concern was whether investors' funds were at risk and whether CO could properly account for the funds. Dr. Sbaraglia understood that the OSC staff would be seeking verification from CO that the assets as between CO and Mr. Mander and EMB were in excess of what was owed to CO investors.

Dr. Sbaraglia specifically acknowledged that he was under oath and he swore to tell the truth at this OSC examination.

During the examination, OSC staff were advised by counsel to Dr. Sbaraglia of the following: CO investors consisted of only friends and family and that each of the investors had approached Dr. Sbaraglia about investing; CO had relied on legal advice obtained from another law firm with respect to CO's compliance with Ontario securities law in raising funds from third parties; CO investor funds were not at risk; the amount owing by CO to the CO investors was approximately $8.5 million, but the bulk of the value of CO investors' funds were invested in real estate assets purchased by Mr. Mander and Dr. Sbaraglia; Dr. Sbaraglia and Mr. Mander had a verbal arrangement whereby all assets held by the Sbaraglias were used by Mr. Mander for the benefit of CO investors and that the assets held by Dr. Sbaraglia and Mr. Mander were valued at approximately $12 million, and therefore well in excess of

all amounts owing to CO investors.

At no time during the examination did Dr. Sbaraglia correct his legal counsel. Further, it is clear that Dr. Sbaraglia was aware that his legal counsel was speaking on his behalf during the examination.

OSC takes the position that the statements made by Dr. Sbaraglia were materially misleading and that among other things, Dr. Sbaraglia did not advise that CO had raised almost $1 million in 2006 prior to obtaining any legal advice as to whether CO was in compliance with Ontario securities law. Dr. Sbaraglia did not disclose a $6 million obligation to CO to Pero pursuant to a loan agreement dated March 1, 2009. Dr. Sbaraglia does take the position that the obligation is not one of CO and that it was transferred to Mr. Mander. Documentation was produced that evidences a transfer to EMB/Mander, but there is no documented release from Pero in favour of CO or Dr. Sbaraglia. Further, Dr. Sbaraglia now claims that he feels only morally obligated to CO investors. Dr. and Ms. Sbaraglia wish to use the proceeds from the sale of their assets to pay certain of the CO investors in priority to others based on their assessment of the relative needs of the CO investors. It is also apparent that all the assets of the Sbaraglias and Mr. Mander and CO were not, in fact, available to satisfy the amounts owing to CO investors as Mander had loans outstanding with many additional investors, other than the CO investors, all of which has been documented in the Mander receivership.

On August 7, 2009, following the examination, Dr. Sbaraglia's counsel provided OSC staff with a loan agreement between EMB

and CO and an undertaking to the OSC in respect of loans made by CO investors to the real assets, which are being held for the benefit of those investors.

The undertaking provided that: (a) CO would not enter into any further loan agreements with third-party investors; (b) CO would cause outstanding loans to CO investors to be paid as they became due; (c) CO had used the loans from CO investors to acquire the assets listed in the schedule to the undertaking.

OSC takes the position that the undertaking constitutes an obligation and commitment in favour of OSC.

OSC also takes the position that immediately after entering into the undertaking, CO breached the terms of the undertaking by entering into a new loan agreement on August 21, 2009 in the amount of approximately $54,000. Dr. Sbaraglia takes the position that this was not a new loan agreement, but a rollover of an existing agreement.

OSC also takes the position that Dr. Sbaraglia failed to identify material obligations in its schedule of outstanding loans. The undertaking failed to list nine loan agreements for a total of approximately $9.4 million, which includes the Pero investment of $6 million. Even taking into account the position put forth by Dr. Sbaraglia that the $6 million Pero investment was an obligation transferred to Mr. Mander, there remains $3.4 million in loans which were not listed.

Counsel for Dr. Sbaraglia and Ms. Sbaraglia and the CO Group paints a very different picture of events. Counsel suggests

that the proper narrative should be that a well-intentioned family was caught in the middle of a Ponzi scheme, that they were led into error by a career fraudster and ill-advising lawyers. Counsel portrays his clients as victims of Mr. Mander, a predator fraudster. Counsel puts forth that his clients are guilty of no wrong-doing and that no investor had sued or made any claim against them. In fact, all investors without exception, support them. Mr. Davis does acknowledge that Mr. Obradovich is one investor who raises the spectre of a claim against Dr. Sbaraglia through Pero, on the basis that notwithstanding the transfer of the obligation to Mr. Mander there is still no obligation from CO.

Counsel for the Sbaraglias takes the position that his clients are not to blame, but rather, others were involved. These include the lawyers who acted for both the Sbaraglias and also Mr. Mander. Mr. Davis also contends that these lawyers breached their fiduciary duty, hid information from the Sbaraglias in their representation before the OSC and despite a grave conflict of interest, counsel advised the Sbaraglias and misinformed the OSC.

Mr. Davis also puts forth that Dr. Sbaraglia and Ms. Sbaraglia have been and remain committed to helping repair the damage to repay those who invested with them and to co-operate with the OSC. The Sbaraglias are also suing their lawyers to pay for the repairs.

The Sbaraglias also take the position that the OSC has been deficient in its investigation insofar as it had in its possession evidence of Mr. Mander's fraud for the better part of the year before examining Dr. Sbaraglia. Further, it

takes the position that the receivership is not necessary for a number of reasons including: (a) the creditors - who are also victims of Mr. Mander - oppose the receivership; (b) the receivership would strip the Sbaraglias of their assets without any action or proceeding having been commenced, in effect denying them due process; (c) the receivership would be destructive, and it would diminish the Sbaraglias' efforts to make the creditors whole; (d) it would punish the Sbaraglias for Mr. Mander's wrong-doing and would ignore their innocence; and (e) it would ignore the Sbaraglias' diligence in trying to avoid this current predicament as it would reduce the prospects of recovery in the litigation against the lawyers. In all respects the Sbaraglias remain transparent and wish to co-operate with the OSC.

The Sbaraglias also take the position that the receivership will benefit no one and will be costly and consequently the OSC's application, they take the position, should be dismissed, and they should be relieved of their undertaking and allowed to continue with their work.

From their standpoint, the matter began to unravel in the spring of 2009 when CO Capital stopped making money for new investments. As noted previously, the OSC served Dr. Sbaraglia and Ms. Sbaraglia with a summons under the Securities Act and they were required to attend examinations. The Sbaraglias had no reasons, they say, to have known about Mr. Mander's fraud at that point. There was also no reason to think that they were caught in a fraudulent scheme, as Mr. Mander had paid all investors to that date.

Dr. Sbaraglia acknowledges that his OSC examination and the

participation of his counsel at this examination resulted in statements that may not have been accurate. Certain aspects were not true. He now says that he knew that some of the statements being made by his counsel were not true at the time, but he did not correct these statements. He now states that he was surprised by the disclosure. He also felt that he was under duress at the time. He acknowledges that he knew the information was inaccurate, but he did not speak up. Dr. Sbaraglia is of the view that he has paid dearly for his legal counsel's transgressions and having already been victimized by the fraud, he now find himself victimized by his own lawyer. He has sued that lawyer.

Dr. Sbaraglia also referenced the undertaking to the OSC. It is described in his counsel's factum as being an ill-advised undertaking. It is also referenced that the undertaking was a misrepresentation in certain respects. The undertaking states that the property had been bought with CO Capital's money; this was false. It was also false insofar as certain properties had been bought before CO Capital's incorporation.

Dr. Sbaraglia takes the position his legal counsel had prepared the statutory declaration which he had signed and swore that assets that he owned or controlled would be held in trust as security for the repayment of loans. He also took the position that it was his legal counsel who provided assurances to him which misled him into signing the undertaking. Dr. Sbaraglia also takes the position that he should be relieved of the undertaking as it was not freely given or independently given and that it was not accurate.

It is apparent that the Sbaraglias have also acknowledged that they have suffered financial and personal devastation at Mr. Mander's hands and that they are now working to repay investors fully, but they are struggling to meet their expenses. Their insolvency has been acknowledged.

Dr. Sbaraglia also takes the position that the OSC and the receiver are trying to access their personal assets, i.e., the proceeds or potential proceeds from the sale of their home or corporate assets, i.e. the proceeds through the sale of 239 Church Street to repay investors, most of whom are unrelated to the Sbaraglias.

The Sbaraglias also take the position that both the OSC and the receiver ignored the fact that the three properties in question were bought before the Sbaraglias met Mr. Mander and that there is no basis in law for stripping them of their personal assets.

The Sbaraglias also place certain responsibility on the OSC. The OSC was investigating Mr. Mander as early as 2008 and by August 2008 the OSC obtained bank records showing millions of dollars flowing to EMB, yet the Sbaraglias contend the OSC stood back and did nothing.

They do not accept the receiver's report as being accurate. They also stress that the receiver has not reviewed monies paid by CO Capital to its investors and, as a result, the accounting and subsequent allegations against Dr. Sbaraglia and Ms. Sbaraglia have been skewed.

Counsel for the Sbaraglias does acknowledge that mistakes

were made and that misrepresentations were made. However, he submits that there is nothing to be gained from a receivership; there are no hidden assets, the investigations have been complete and the most viable assets that the Sbaraglias have, mainly litigation against former counsel, can only be optimized in the absence of a receivership.

He also stressed that s number of CO Capital investors are in dire straits, that they are losing homes or businesses and that his clients are trying to arrange for these investors to receive some monies now so as to avoid disaster. Further, counsel contends that the Sbaraglias themselves are in dire need and that while they seek to re-establish themselves professionally they need money for basic living expenses.

The two positions are diametrically opposed. The position put forward by the OSC is supported by the receiver and by counsel to Mr. Obradovich who claims he is a creditor for some $6 million. The position of Dr. Sbaraglia is supported by all of the remaining creditors, most of whom are family and friends.

Turning now to an analysis of the law. Section 129 of the Securities Act permits the commission to apply to the court for an order appointing a receiver for all the property, assets and undertakings of a person or company. Such an order can be made where the court is satisfied that such an appointment is in the best interest of the company's creditors or the security holders or if it is appropriate for the due administration of Ontario securities law.

A threshold question was raised by counsel on behalf of

certain creditors of CO Capital, contending that the court has no jurisdiction to appoint a receiver under s. 120 of the Act because constitutional principles impose a limitation on the power of the court to appoint a receiver under a provincial statute in situations where the entity over whose assets the receiver is sought to be appointed is insolvent

This position is based on the Constitution Act 1867, which gives exclusive jurisdiction over bankruptcy and insolvency to the federal parliament. On this basis, counsel contends that the Supreme Court has repeatedly held that a provincial statute which purports to impact creditors' priorities or to otherwise substantially regulate the affairs of an insolvent person or company vis-à-vis its debtors is unconstitutional.

Counsel goes on to submit that in the present case, there is no challenge to the validity of s. 129 itself. It is not a necessary condition for the appointment of a receiver under s. 129 that the person or company over whose assets the receiver is being appointed be insolvent. Section 129, therefore, does not in pith and substance relate to bankruptcy and insolvency.

The constitutional challenge was raised on behalf of creditors of CO Capital and not by counsel on behalf of Dr. Sbaraglia and Ms. Sbaraglia of CO Capital, who declined to take a position.

No notice of a constitutional question was served on the Attorney General of Canada and the Attorney General of Ontario as provided for in s. 109 of the Courts of Justice Act. Counsel for the creditors who put forth this argument

relies on his statement that there is no direct challenge to the validity of s. 129 itself.

Counsel to the receiver submits that this submission is belied by the statements contained at paragraph 25 of the factum of counsel for the CO Capital creditors, which takes direct aim on the constitutional validity or constitutional applicability of the Act in this context, and further, that the notice provision in s. 109 of the Courts of Justice is mandatory. In the absence of such notice, s. 109(2) of the Courts of Justice Act provides that the Act, Regulation and Bylaw, a rule of common law shall not be adjudged to be invalid or inapplicable.

In my view, the position put forth by the creditors of CO Capital calls into question the constitutional validity of the Securities Act in this context. No case law was put forward to support this position. This seems unusual because, as was pointed out to counsel in argument, if this position is correct with respect to the Securities Act, it would also call into question the thousands and thousands of receivership orders granted over the years under s. 101 of the Courts of Justice Act. Counsel was unable to reference any case law under which such a challenge had been successfully made to receiverships granted under the Courts of Justice Act.

I am satisfied that if counsel wished to raise this issue, the same should have been done after providing the required Notice of Constitutional Question.

A number of disputes have been raised by the Sbaraglias with

respect to the factual background. However, putting their position at its highest, there are still a number of facts that are most troubling:

1. Neither Dr. Sbaraglia or Ms. Sbaraglia were registered with the Commission. CO raised approximately $21.2 million from CO investors.

2. CO did not transfer all the funds of CO investors to Mr. Mander and EMB. Approximately one-third of the funds raised, namely $6 - 7 million, were not transferred. These funds were used in part to make investments with newly received funds form other CO investors. This activity took place over a number of months. It cannot be characterized as a mistake.

3. $ 213,000 in payments were made in respect to property located at 239 Church Street. These payments were made by CO to 91 Days Hygiene Services Inc.

4. $383,000 in charges were incurred on a corporate visa in the name of CO with a significant number of payments being made not for the benefit of CO investors, but rather, for the personal benefit of the Sbaraglias.

5. It is also clear that the OSC was misled in its investigation. The Sbaraglias did not advise the OSC that they raised almost $ 1 million prior to receiving any legal advice as

> to whether they were in compliance with securities law. They did not disclose the $6 million obligation to Pero, regardless of whether the matter had been transferred to Mander. They did not fully disclose their remaining creditors.
>
> 6. With respect to the undertaking, it seems to me clear that the Sbaraglias knew counsel's strategy was to convince the OSC that there were sufficient assets to repay all CO investors and accordingly proceedings should not be taken against them. Through-out the investigation, the Sbaraglias sat by and let legal counsel make representations to the OSC that they knew were false. In this respect, the Sbaraglias did have options. They could have taken steps to ensure that the truth came out. They chose to remain silent.

The Sbaraglias take the position that the receivership will achieve nothing. They insist that the litigation can only be maximized under their direction. They insist that they are the ones who should be able to direct the payment of funds to creditors in dire straits.

Counsel to the Sbaraglias and also to the CO creditors submit that if there are any issues that require a resolution they can be brought forth to the court. In this respect, I take it from their submissions that there is a tacit acknowledgement that there are several loose ends in this matter that will require further direction.

The criteria for determining what is in the best interests of creditors, security holders or subscribers for the purposes of the appointment of a receiver pursuant to securities legislation is broader than the solvency test. The criteria should take into consideration all the circumstances and whether in the context of the circumstances it is in the best interests of creditors that a receiver be appointed. The criteria should also take into account the interest of all stakeholders (OSC v. Factorcorp 2007 OJ 4496; OSC v. Sextant 2009 OJ 3063.

Further, where there is a history of mismanagement, no evidence of a tangible alternative resolution, evidence that investors' interests will not be served by maintaining the status quo and evidence that the company is not in a better position than a receiver to protect investors' interests, it is appropriate to appoint a receiver.

Further, where there is evidence of regulatory breaches and evidence that the value and integrity of the assets purchased with investor funds has been compromised, it is in the investors' best interests that a receiver be appointed such that the investors are provided with an independent and verifiable review and analysis. Investors deserve treatment they can rely on (see Factorcorp., Sextant, and OSC v. ASL Direct).

The second part of the test, the alternate test, is that securities legislation has as its primary goal, the protection of the investing public and the protection of the integrity of the capital markets. Section 1.1 of the Act provides that the purposes of the Act are to provide

protection to investors from unfair or improper or fraudulent practices and to foster fair and efficient capital markets and confidence in the capital markets.

It seems to me that an assessment of whether the appointment of a receiver is appropriate for the due administration of Ontario Securities law must therefore take into consideration the purposes of the Act to be undertaken with a view to determining whether such an appointment is consistent with the goals of protecting investors and protecting the integrity of the capital markets.

In this respect, it is noteworthy that, pursuant to s. 122 of the Act, it is an offence to mislead staff of the Commission during the course of an examination taken as part of an investigation.

The failure to advise staff of complete information about the flow of investor funds in the operation and business of the entity in question amounts to a contravention of s. 122 of the Act. The offence of misleading staff can occur by making affirmative statements and can equally occur by omission (Norshield Asset Management Canada Limited 2010, 33 OSCB 7171).

In addition, s. 126 of the Act prohibits conduct which perpetrates a fraud on investors. The use of investor funds to repay other investors and for personal benefit constitutes securities fraud pursuant to s. 126.1(b) of the Act.

Having considered the uncontradicted facts noted above, it is clear to me that this is a situation that cries out for the

appointment of a receiver. I am satisfied that by using investor funds to repay other investors, by using investor funds for personal use, by being untruthful to the OSC, by not fully disclosing creditors of CO to the OSC, it cannot be in the best interests of creditors of CO Capital that the continued administration of creditors' affairs be administered by the Sbaraglias. This is a situation that requires an independent court officer to oversee.

I am making this finding notwithstanding the level of support provided by the family and friends who are creditors of the Sbaraglias. It could very well be that there are other creditors, most notably Mr. Obradovich. It is essential, in my view, that a claims process be established which can be verified as being accurate. I am not satisfied that this can be accomplished without an independent court officer overseeing the process.

In making this determination I cannot overlook that CO, Dr. Sbaraglia and Ms. Sbaraglia retained and had access to funds in excess of $6 million. I also cannot overlook that they improperly used some of these funds for personal use or for related corporate use. I also cannot overlook that some of the new money was used to pay interest payments to old investors. To use the words of counsel of the receiver, "This is the hallmark of a Ponzi scheme where you keep the dollars rolling."

I have no doubt that Mr. Mander contributed significantly to the problems that the Sbaraglias currently face. I also have to take into account that there may be issues with respect to deficiencies in the legal advice that can be

pursued in due course. With respect to the litigation against former counsel, I have not been persuaded that the Sbaraglias are the best party to direct such litigation. Rather, it seems to me that the insertion of an independent court officer is essential to ensure the best outcome for creditors.

The Sbaraglias have also blamed the OSC for not taking more prompt action. It could very well be that the OSC could have acted more promptly. However, the timing of the OSC's involvement does not excuse or explain the activities of the Sbaraglias that led to the determination being made today.

The Sbaraglias also take the position that breaches of securities legislation have not been clearly proven. I do note that under s. 129 there is a broad discretion that the courts can make such an order which does not require evidence of a breach. Having said that, there are certain very serious concerns that have been raised by the OSC with respect to possible breaches of the statute.

With respect to the second part of the test which provides a receiver can be appointed if it is appropriate for the due administration of Ontario securities law, I am satisfied that this is the type of case that calls for such an appointment. The factors that have led to my decision to appoint a receiver as being in the best interests of the company's creditors and the potential Sbaraglia creditors is also applicable for the appointment under the second part of the test. This was a Ponzi scheme. Although Mr. Mander may have been the head of the Ponzi scheme, it is clearly apparent that by using investors' money to repay other investors,

steps were taken by the Sbaraglias that were improper. The use of investors' money to pay personal and related company expenses is also improper. It also cannot be overlooked that the Sbaraglias misled the OSC in the course of its investigation. This type of activity cannot and should not be overlooked and I am satisfied that the appointment of the receiver is also justified under the second part of the test.

As Mr. Gottlieb summed up in his reply, the remedy of the appointment of a receiver goes beyond certain principles, it also takes into account the importance of a neutral court officer to oversee the claims process, the evaluation process and to provide appropriate recommendations as to the administration of the estate.

A considerable amount of investigation has already been done. Most assets have been identified. However, issues remain outstanding with respect to the identification of proper creditors, maximizing asset realization through litigation and the necessity to demonstrate that transparency exists in all respects in the resolution of all outstanding matters.

For the foregoing reasons, the application of the OSC is granted. I would be grateful if counsel could prepare an appropriate order for my review.

CERTIFIED

HELEN P. SINCLAIR
OFFICIAL COURT REPORTER
SUPERIOR COURT OF JUSTICE