Court File No.: CV-25-00736577-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

MIZUE FUKIAGE, AKIKO KOBAYASHI, YOSHIKI FUKIAGE, KOBAYASHI KYOHODO CO., LTD. AND TORU FUKIAGE

Applicants

- and -

CLEARVIEW GARDEN ESTATES INC., TALBOT CROSSING INC., NIAGARA ESTATES OF CHIPPAWA II INC., LONDON VALLEY INC., LONDON VALLEY II INC., LONDON VALLEY III INC., LONDON VALLEY IV INC., LONDON VALLEY V INC., FORT ERIE HILLS INC., 2533430 ONTARIO INC., CGE CAPITAL MANAGEMENT INC., TGP-TALBOT CROSSING INC., NEC II CAPITAL MANAGEMENT INC., LV CAPITAL MANAGEMENT INC., LV II CAPITAL MANAGEMENT INC., LV III CAPITAL MANAGEMENT INC., LV IV CAPITAL MANAGEMENT INC., LV V CAPITAL MANAGEMENT INC. AND FORT ERIE HILLS CAPITAL MANAGEMENT INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED AND RULES 14.05(2) AND (3) OF THE *RULES OF CIVIL PROCEDURE*, R.R.O. 1990, REG. 194, AS AMENDED

FACTUM OF THE APPLICANTS
(Returnable March 6, 2025)

March 4, 2025

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TO: THE SERVICE LIST

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PART I: OVERVIEW

1. The Applicants seek an order (the "**Receivership Order**") appointing a receiver over the Respondents' Property and declaring that certain of the Respondents hold the applicable Real Property in trust for the benefit of the Co-Owners thereof (as defined below).

2. The Respondents, other than 2533430 Ontario Inc., were purportedly formed to hold title to, as nominees and bare trustees, or operate, as applicable, various land banking projects in Ontario involving the Real Property (collectively, the "**Land Banking Projects**"). The Applicants and numerous other investors whose investments financed the acquisition of the Land Banking Projects (collectively, the "**Co-Owners**"), are the beneficial owners of the Real Property.

3. The Applicants and certain other members of the Kobayashi family (collectively with the Applicants, the "**Kobayashi Group**"), invested or were caused to invest in excess of $21 million in the Land Banking Projects. As a result, the Kobayashi Group acquired or was caused to acquire fractional undivided beneficial interests in each of the Land Banking Projects ranging between approximately 3%-72% pursuant to agreements of sale and purchase (the "**Sale Agreements**").

4. Each of the Sale Agreements was accompanied by a co-owners agreement (collectively, the "**Co-Owners Agreements**"). The Co-Owners Agreements govern the ownership of the undivided beneficial interests in the applicable Land Banking Project, any sale, financing and/or development of such Land Banking Project, the obligations of the applicable Operator Respondent, and the distribution of any net proceeds or income derived from such Land Banking Project.

5. Notwithstanding the terms of the Co-Owners Agreements and the rights and interests of the Co-Owners, the Respondents and their present and former principals have, by neglect and potentially, by design, allowed the Land Banking Projects to be lost to creditor enforcement efforts, inappropriately transferred, encumbered and/or sold.

6. What remains of the Land Banking Projects is, in part, ensnared in an application commenced under section 248 of the *Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended (the "**OBCA**") by, *inter alios*, the Respondents' former indirect parent company, Trans Global Partners Limited ("**TGP**"), and its principal, Randy Hoffner ("**Mr. Hoffner**" and collectively with the other applicants, the "**Hamilton Applicants**"), against, *inter alios*, the Respondents' current indirect parent company, First Global Financial Corp. ("**First Global**"), and its principal, Elena Salvatore ("**Ms. Salvatore**" and collectively with the other respondents, the "**Hamilton Respondents**"), alleging, among other things, oppression and the perpetration of a fraudulent scheme (the "**Hamilton Proceedings**").

7. The Respondents' and their present and former principals' conduct, the breaches of the Co-Ownership Agreements, the Applicants' substantial ownership interests in the Real Property, the deadlock created by, and material omissions in, the Hamilton Proceedings, and the number of Land Banking Projects, creditors and Co-Owners involved, demand that the Respondents and the Property be subject to the appointment of a receiver on an urgent basis. Accordingly, the Applicants seek the proposed Receivership Order, among other things:

(a) declaring that the Nominee Respondents hold the applicable Real Property in trust for and on behalf of the applicable Co-Owners to the extent of each Co-Owner's respective interest;

(b) appointing KSV Restructuring Inc. as receiver and manager (in such capacity, the "**Receiver**") of all of the Property, including the Real Property and the Segregated Funds (as defined in the Receivership Order); and

(a) granting the Receiver’s Charge and the Receiver’s Borrowings Charge (each as defined in the Receivership Order) over the Property.

8. The appointment of the proposed Receiver is not only just and convenient but, necessary to protect the Property and the rights and interests of the Applicants and the other Co-Owners.

PART II: FACTS

9. The facts underlying this application are more fully set out in the affidavits of Akiko Kobayashi sworn February 27, 2025 (the "**Kobayashi Affidavit**") and Lorraine Klemens sworn February 27, 2025.[1] All capitalized terms used but not defined herein have the meanings ascribed to them in the Kobayashi Affidavit, and all monetary amounts are in Canadian currency.

A. The Applicants

10. The Applicants consist of Kobayashi Kyohodo Co., Ltd. (a/k/a Kobayashi Kyohodo K.K./K.K. Kobayashi kyoho dou/K.K. Kobayashi Kyouhou Doh/ K.K Kobayashi kyohodou), a privately held corporation incorporated under the laws of Japan, and four members of the Kobayashi family.[2]

B. The Respondents

11. The Respondents are privately held special purpose companies incorporated pursuant to the OBCA.[3] Except for 2533430 Ontario Inc., the Respondents were purportedly formed to hold title to, as nominees and bare trustees, or operate, as applicable, the Land Banking Projects.[4]

12. Ms. Salvatore is a director and officer of Niagara Estates of Chippawa II Inc. while Behzad Pilehver ("**Mr. Pilehver**") is a director and officer of Talbot Crossing Inc., London Valley Inc., London Valley II Inc., London Valley IV Inc., London Valley V Inc. and Fort Erie Hills Inc.[5] Mr.

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1 Affidavit of Akiko Kobayashi sworn February 27, 2025 [Kobayashi Affidavit], Applicants' Application Record dated February 28, 2025 at Tab 2 [Application Record]. Affidavit of Lorraine Klemens sworn February 28, 2025 [Klemens Affidavit], Application Record at Tab 3 [Application Record].
2 *Ibid* at para 16, Application Record at Tab 2.
3 *Ibid* at para 4, Application Record at Tab 2.
4 *Ibid* at para 5, Application Record at Tab 2.
5 *Ibid* at para 21, Application Record at Tab 2.

Hoffner was previously the director and officer of each of the Nominee Respondents and remains the director and officer of Clearview Garden Estates Inc. and London Valley III Inc.[6]

13. Mr. Hoffner is a director and officer of each of the Operator Respondents, except for LV Capital Management Inc. (of which Timothy Shields ("**Mr. Shields**") is the sole director and officer).[7]

C. The TSI/TGP Group

14. Until recently, the Respondents, other than 2533430 Ontario Inc., were indirect subsidiaries of TGP. TGP is a corporation existing under the special administrative region of Hong Kong, of which Mr. Hoffner is a director.[8]

15. On or about June 4, 2024, the Respondents, other than 2533430 Ontario Inc., were indirectly acquired by First Global.[9] Ms. Salvatore is a director and officer of First Global.[10]

D. The Real Property and the Land Banking Projects

16. The Nominee Respondents and 2533430 Ontario Inc. are the registered owners of the Real Property.[11] The Real Property and the Land Banking Projects, certain of which are no longer owned by the Respondents, consist of the following:

(a) a property located at 5980 Colonel Talbot Road, London, Ontario (the "**TCX Project**"), which is owned by Talbot Crossing Inc.;

(b) a property located at 5318 Colonel Talbot Road, London, Ontario (the "**LV Project**"), which is owned by London Valley Inc.;

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[6] *Ibid*, Application Record at Tab 2.
[7] *Ibid* at para 24, Application Record at Tab 2.
[8] *Ibid* at para 4, Application Record at Tab 2.
[9] *Ibid* at para 9(e), Application Record at Tab 2.
[10] *Ibid* at para 26, Application Record at Tab 2.
[11] *Ibid* at para 5, Application Record at Tab 2.

(c) a property located at 6172 Colonel Talbot Road, London, Ontario (the "**LV II Project**"), which is owned by London Valley II Inc.;

(d) a property located immediately adjacent to the LV III Project (as defined below) in London, Ontario, which is owned by 2533430 Ontario Inc.;

(e) a property located at 6211 Colonel Talbot Road, London, Ontario (the "**LV IV Project**"), which, until recently, was owned by London Valley IV Inc.;

(f) a property located at Wonderland Road. S, London, Ontario (the "**LV V Project**"), which is owned by London Valley V Inc.;

(g) a property located at 6237 27/28 Side Road Nottawasaga, Clearview, Ontario (the "**CGE Project**"), which was previously owned by Clearview Garden Estates Inc.;

(h) a property located at 5559 Sodom Road, Niagara Falls, Ontario (the "**NEC Project**"), which was previously owned by Niagara Estates of Chippawa II Inc.;

(i) a property located at 6188 Colonel Talbot Road, London, Ontario (the "**LV III Project**"), which was previously owned by 2533430 Ontario Inc.; and

(j) a property located at 87 Crooks Street & 0 Thompson Road ES, Fort Erie, Ontario (the "**FEH Project**"), which was previously owned by Fort Erie Hills Inc.[12]

17. Between 2012 and 2016, the Kobayashi Group invested or were caused to invest in excess of $21 million in the Land Banking Projects, approximately $14 million of which was invested by the Applicants, or caused to be invested on, or purportedly on, their behalf.[13] As a result of its substantial investments, the Kobayashi Group acquired or were caused to acquire fractional

[12] *Ibid*, Application Record at Tab 2.
[13] *Ibid* at para 6, Application Record at Tab 2.

undivided beneficial interests in each of the Land Banking Projects ranging between approximately 3%-72% pursuant to the Sale Agreements.[14]

18. Each of the Sale Agreements was accompanied by a Co-Owners Agreement.[15] The Co-Owners Agreements govern the ownership of the beneficial interests in the applicable Real Property, any sale, financing and/or development of such Real Property, the obligations and powers of the applicable Operator Respondent, and the distribution of any proceeds or income derived from such Real Property.[16]

19. Notably, the Co-Owners Agreements:

(a) provide for the delivery of a declaration of trust or certificate of interest to each applicable Co-Owner, wherein the applicable Nominee Respondent declared or acknowledged, as applicable, that it holds title to the applicable Land Banking Project as nominee and bare trustee for and on behalf of such Co-Owner to the extent of such Co-Owner's interest; and

(b) prohibit, absent a written resolution from the Co-Owners holding, in aggregate, not less than 51% of the interests in relevant Land Banking Project, the applicable Operator Respondent from exercising certain powers, including approving the sale or exchange of all or any part of the applicable Land Banking Project.[17]

E. Concerning Events Necessitating These Proceedings

20. Notwithstanding the terms of the Co-Owners Agreements and the rights and interests of the Co-Owners, the Respondents and their present and former principals have, by neglect and potentially, by design, allowed the Real Property to be lost to creditor enforcement efforts,

[14] *Ibid*, Application Record at Tab 2.
[15] *Ibid* at para 7, Application Record at Tab 2.
[16] *Ibid*, Application Record at Tab 2.
[17] *Ibid* at paras 83-84, 87, Application Record at Tab 2.

inappropriately transferred, encumbered and/or sold.[18] The Respondents' and their present and former principals' conduct in this regard is summarized below.

1. The Sale and Loss of the CGE Project Without Notice or a Distribution

21. On October 8, 2021, the CGE Project was transferred to CBJ – Clearview Garden Estates Inc., a corporation incorporated under the OBCA of which Christopher Agagnier and Jeffrey Burrell ("**Mr. Burrell**") are directors, for a reported purchase price of $15 million.[19] Approximately $13 million of the purchase price for the CGE Project was paid by way of a subordinated vendor take-back mortgage (the "**Clearview VTB Charge**").[20] A $6 million priority mortgage/charge was also registered on title to the CGE Project on the date of the transfer in favour of 1180554 Ontario Limited ("**118**").[21]

22. On January 26, 2024, 118 obtained an order from this Court appointing TDB Restructuring Limited (f/k/a RSM Canada Limited) ("**TDB Restructuring**") as receiver and manager of all of the assets, undertakings and properties of CBJ – Clearview Garden Estates Inc., CBJ Bridle Park II Inc. and CBJ Developments Inc. (the "**CBJ – CGE Receivership Proceedings**"). On April 12, 2024, Clearview Garden Estates Inc. transferred the Clearview VTB Charge to First Global for $2.00. The CGE Project was subsequently sold to 118 pursuant to a credit bid.[22]

23. The Applicants were not provided with adequate advance notice of the sale of the CGE Project to CBJ – Clearview Garden Estates Inc., the Clearview VTB Charge or the CBJ – CGE

[18] *Ibid* at para 8, Application Record at Tab 2.
[19] *Ibid* at para 9(a), Application Record at Tab 2.
[20] *Ibid*, Application Record at Tab 2.
[21] *Ibid*, Application Record at Tab 2.
[22] *Ibid*, Application Record at Tab 2.

Receivership Proceedings.[23] Moreover, the Applicants did not receive any proceeds of the purchase price for the CGE Project or from the transfer of the Clearview VTB Charge.[24]

2. The Sale and Loss of the FEH Project Without Notice or a Distribution

24. On November 1, 2021, the FEH Project was sold to CBJ – Fort Erie Hills Inc., a corporation incorporated pursuant to the OBCA of which Ms. Salvatore and Vincent Salvatore ("**Mr. Salvatore**") are currently the directors and officers and Mr. Burrell was previously a director, for a reported purchase price of $15.95 million.[25] Approximately $13.1 million of the purchase price for the FEH Project was paid by way of a subordinated vendor take-back mortgage (the "**FEH VTB Charge**"). Mortgages/charges in favour of Mr. Burrell and Salvatore Romeo ("**Mr. Romeo**") in the amounts of $1,053,000 and $620,000, respectively, were also registered against the FEH Project on the date of the transfer.[26]

25. The FEH VTB Charge and mortgages/charges in favour of Messrs. Burrell and Romeo were postponed to a mortgage/charge in favour of 2703738 Ontario Limited ("**270**") in the amount of $2.5 million.[27] It was subsequently discharged when a mortgage/charge in the amount of $8 million in favour of Hillmount Capital Mortgage Holdings Inc. ("**Hillmount**") was registered against the FEH Project.[28] On October 29, 2024, 1001045239 Ontario Inc. (the "**Salvatore Numbered Co.**"), a corporation incorporated pursuant to the OBCA just four days prior thereto, of which Mr. Salvatore is the sole director, registered a mortgage/charge in the amount of $49 million against the FEH Project.[29]

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[23] *Ibid* at paras 104-105, Application Record at Tab 2.
[24] *Ibid*, Application Record at Tab 2.
[25] *Ibid* at para 9(b), Application Record at Tab 2.
[26] *Ibid*, Application Record at Tab 2.
[27] *Ibid*, Application Record at Tab 2.
[28] *Ibid*, Application Record at Tab 2.
[29] *Ibid*, Application Record at Tab 2.

26. On December 19, 2024, Hillmount obtained an order from this Court appointing TDB Restructuring as receiver and manager of all of the assets, undertakings and properties of CBJ – Fort Erie Hills Inc. (the "**CBJ – FEH Receivership Proceedings**").[30]

27. The Applicants were not provided with adequate advance notice of the sale of the FEH Project to CBJ – Fort Erie Hills Inc., the FEH VTB Charge, the CBJ – FEH Receivership Proceedings, or the mortgages/charges registered in favour of Messrs. Burrell and Romeo, 270, Hillmount or the Salvatore Numbered Co.[31] Further, the Applicants did not receive any proceeds of the purchase price for the FEH Project or from the FEH VTB Charge.[32]

3. The Titan Shield Acquisition and the Respondents' Change of Control

28. On or about June 4, 2024, First Global acquired all of the shares in the capital of Titan Shield Inc., a corporation incorporated under the OBCA of which Messrs. Shields and Pilehver are directors, pursuant to a share purchase agreement (the "**Titan Shield SPA**") among, *inter alios*, TGP Canada Management Inc., a corporation incorporated under the OBCA of which Mr. Pilehver is currently, and Mr. Hoffner was previously, a director, as vendor, First Global, as purchaser, Titan Shield Inc. and TGP.[33] Pursuant to the Titan Shield Acquisition, First Global was to become the indirect owner of each of the Respondents.[34]

29. Following the Titan Shield Acquisition, the Applicants were provided with written notice from TSI Global Co., Ltd., an affiliate of TGP, that the "TGP Group was to be absorbed into First [Financial] Group" and "the co-owners' interests in land and real estate are segregated and protected indivisibly, regardless of the management of the TGP Group".[35]

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[30] *Ibid*, Application Record at Tab 2.
[31] *Ibid* at paras 113, 121, Application Record at Tab 2.
[32] *Ibid*, Application Record at Tab 2.
[33] *Ibid* at para 9(e), Application Record at Tab 2.
[34] *Ibid*, Application Record at Tab 2.
[35] *Ibid* at para 11, Application Record at Tab 2.

4. Attempts to sell the TCX Project, the LV II Project and the LV V Project

30. On July 30, 2024, Talbot Crossing Inc., London Valley II Inc., and London Valley V Inc., in each case, as vendor, entered into three separate agreements of purchase and sale (collectively, the "**Outstanding APSs**") for the purchase of the TCX Project, the LV II Project and the LV V Project, respectively.[36] According to the Respondents' and TGP's records, the Kobayashi Group owns approximately 61%, 42% and 59% of the beneficial interests in the TCX Project, the LV II Project and the LV V Project, respectively.[37] Nonetheless, the Applicants were not provided with notice of the Outstanding APSs or an opportunity to approve the proposed sale transactions (the "**Proposed Transactions**"), contrary to the applicable Co-Owners Agreements.

5. The Hamilton Proceedings and Allegations of a Fraudulent Scheme

31. On October 18, 2024, the Hamilton Applicants filed a Notice of Application with the Ontario Superior Court of Justice pursuant to section 248 of the OBCA against the Hamilton Respondents, for an order, among other things:

(a) awarding damages payable to the Hamilton Applicants in the amount of $12,444,121.92;

(b) approving the Outstanding APSs and compelling the disgorgement of the net proceeds of the Proposed Transactions to the Hamilton Applicants; and

(c) compelling the Hamilton Respondents to disclose the particulars of all sales of properties owned by First Global or companies that it came to control, directly or indirectly, pursuant to the Titan Shield Acquisition.[38]

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[36] *Ibid* at para 9(g), Application Record at Tab 2.
[37] *Ibid*, Application Record at Tab 2.
[38] *Ibid* at para 9(h), Application Record at Tab 2.

32. The Hamilton Proceedings were commenced by the Hamilton Applicants following several alleged defaults under three promissory notes issued in connection with the Titan Sheild SPA and three other related share purchase agreements (collectively with the Titan Shield SPA, the "**Share Purchase Agreements**").[39] Notwithstanding their alleged defaults, the Hamilton Applicants have asserted that the Hamilton Respondents took action to monetize, dissipate and/or encumber the assets acquired pursuant to the Share Purchase Agreements while failing to satisfy their assumed obligations in furtherance of a fraudulent scheme, including by:

(a) commencing a "fire sale of certain real properties" by entering into the Outstanding APSs, and listing the NEC Project, the LV Project, the LV IV Project and the FEH Project on MLS for sale (and subsequently removing such listings);

(b) failing to comply with their assumed obligations, including by permitting Niagara Estates of Chippawa II Inc. to remain in default under a mortgage/charge registered by 2229815 Ontario Ltd. ("**222**") on April 19, 2023 in the amount of $5.25 million against the NEC Project despite having received a notice of sale – ultimately resulting in the 222's foreclosure on the NEC Project; and

(c) encumbering "real properties owned by the Subsidiary Companies" to prohibit the Hamilton Applicants from enforcing their security in certain pledged shares.[40]

33. After the commencement of the Hamilton Proceedings, the Salvatore Numbered Co. registered a blanket mortgage/charge in the amount of $110 million against the TCX Project and the LV V Project and a $49 million mortgage/charge against the FEH Project.[41] Such

[39] *Ibid* at para 126, Application Record at Tab 2.
[40] *Ibid* at para 131, Application Record at Tab 2.
[41] *Ibid* at para 133, Application Record at Tab 2.

mortgages/charges are grossly disproportionate to the assessed value of the TCX Project, LV V Project and FEH Project.[42]

34. On October 31, 2024, the Ontario Superior Court of Justice granted an order in the Hamilton Proceedings (the "**First Global Injunction**"), among other things, temporarily restraining the Hamilton Respondents from, directly or indirectly, selling, dissipating, transferring, assigning, encumbering or dealing with their assets or the assets of any companies which they came to control pursuant to the Titan Shield Acquisition and approving the Outstanding APSs.[43]

35. The Hamilton Applicants did not oppose the Outstanding APSs' approval, provided the proceeds arising therefrom were disgorged to them.[44] In so doing, the Hamilton Applicants remarkably made no reference to the fact that the TCX Project, the LV II Project and the LV V Project were acquired using monies from, and are held in trust for, the applicable Co-Owners, the obligation to seek the applicable Co-Owners' approval of the Proposed Transactions, or the Co-Owners' interests in the proceeds of the Proposed Transactions.[45]

6. The Sale of the LV IV Project in Breach of the First Global Injunction

36. Despite the granting of the First Global Injunction, and in breach thereof, Mr. Pilehvar caused London Valley IV Inc. to sell the LV IV Project to Titan Lands Inc. (the "**LV IV Transaction**") for $2 million (the "**LV IV Proceeds**") on February 5, 2025, without notice to, or the consent of, the Kobayashi Group, which owned approximately 72% of the undivided beneficial interest therein.[46] Mr. Pilehvar also sought to cause the sale of the LV Project to a purchaser on or

[42] *Ibid*, Application Record at Tab 2.
[43] *Ibid* at para 9(j), Application Record at Tab 2.
[44] *Ibid* at para 134, Application Record at Tab 2.
[45] *Ibid*, Application Record at Tab 2.
[46] *Ibid* at para 14(a), Application Record at Tab 2.

about February 19, 2025, which sale was not consummated due to the prospective purchaser's counsel's discovery of the First Global Injunction and the within application.[47]

37. The LV IV Proceeds were wired to an account bearing account number 1140-5017446 in the name of the Parminder Hundal Law Professional Corporation with Toronto Dominion Bank ("**TD Bank**").[48] A portion of the LV IV Proceeds were used to discharge a collateral mortgage registered by Olympia Trust Company against the LV IV Project to secure a mortgage loan principally registered against a property located at 601 Maplehurst Ave, Oakville, Ontario, of which Mr. Hoffner is the registered owner.[49] Such property is currently listed for sale.[50]

38. Further information concerning the dissipation of the proceeds of the sale of the LV IV Project is in the possession and/or control of TD Bank.[51]

PART III: ISSUES

39. The issues to be considered on this application are whether:

(a) the Applicants have standing to bring the within application;

(b) it is just or convenient to appoint the proposed Receiver; and

(c) the terms of the proposed Receivership Order are appropriate in the circumstances.

PART IV: LAW AND ANALYSIS

A. The Applicants Have Standing to Bring the Within Application

40. Read together, Rule 14.05(3) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the

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[47] *Ibid* at para 14(b), Application Record at Tab 2.
[48] *Ibid* at para 138, Application Record at Tab 2.
[49] *Ibid* at para 9(d), Application Record at Tab 2.
[50] *Ibid*, Application Record at Tab 2.
[51] *Ibid* at paras 138-139, Application Record at Tab 2.

"**CJA**"), authorize Courts to make a declaration of an interest in land and appoint a receiver where it is "just or convenient to do so" on an application.[52]

41. Importantly, applicants may avail themselves of section 101 of the CJA without establishing that they are creditors of the respondents or assigning such respondents into bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").[53] Rather, applicants need only establish a "sufficient interest" or that they are "major stakeholders" to have recourse to section 101 of the CJA.[54]

42. Having invested or having been caused to invest approximately $14 million in the Respondents, and acquired beneficial interests in the Real Property, the Applicants are major stakeholders of the Respondents with a sufficient interest in the Property.[55] The Applicants therefore have standing to bring the within application.

B. The Proposed Receiver's Appointment is Just and Convenient

43. The appointment of a receiver is generally an extraordinary equitable remedy for which, under section 101 of the CJA, there are no preconditions.[56] In determining whether it is just or convenient to appoint a receiver under section 101 of the CJA, Courts must have regard to "all of

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[52] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 14.05(3), Schedule B [Rules of Civil Procedure]; *Jansari v Jansari*, 2020 ONSC 2473 at paras 36-37; *Courts of Justice Act*, R.S.O. 1990, c. C. 43 s 101(1), Schedule B [CJA]; *Star America DPGI Acquisition Company, Inc. v Demand Power Group Inc.* (November 22, 2023), Toronto, CV-23-00709164-00CL (Endorsement) (ONSC) at para 10 [*Demand Power*]; *Government of Yukon v Victoria Gold Corp.* (August 14, 2024), Toronto, CV-24-00725681-00CL (Endorsement) (ONSC) at para 17 [*Victoria Gold*]; *In the Matter of the Receivership of Nautilus Fitness Canada, Inc.* (November 15, 2024), Toronto, CV-24-00729624-00CL (Endorsement) (ONSC) at para 11; *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock*, 2022 ONSC 6186 at para 21 [*Hypoint*]. See also, *WestLB AG v Rosseau Resort Developments Inc.*, 2009 CanLII 55120 (ONSC) at para 37 [*WestLB*].

[53] *Demand Power, ibid* at para 11; *Hands-On Capital Investments Inc. v DMCC Holdings Inc.*, 2023 ONSC 2417 at para 75 [*Hands-On*].

[54] *Demand Power, ibid* at para 11; *Hypoint, ibid* at para 21; *King (Township) v Rolex Equipment Co.*, [1992] 90 DLR (4th) 442 at paras 17, 22; *Hands-On* at paras 58-63.

[55] Kobayashi Affidavit at para 33, Application Record at Tab 2.

[56] *Macquarie Equipment Finance Limited v Validus Power Corp et al*, 2023 ONSC 4772 at para 6 [*Validus*]; *Hypoint*, at para 24; *Hands-On, ibid* at para 65; *Demand Power* at para 14.

the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto".[57]

44. Where, as is the case here, the a receiver's appointment is sought on a *final* basis, Courts need not be satisfied that the moving party will suffer irreparable harm, that such appointment is urgently required or that other available remedies are defective.[58] Rather, Courts must assess "whether, in all the circumstances, the appointment of a receiver is just or convenient".[59]

45. When evaluating whether, in all the circumstances, the appointment of a receiver is just or convenient, Courts have considered numerous factors. These include, among others: (i) the risk to the moving party, taking into consideration the size of the debtors' equity in the assets and the need for protection or safeguarding of such assets; (ii) the nature of the property; (iii) the apprehended or actual waste of the debtors' assets; (iv) the preservation and protection of the property; (v) the balance of convenience to the parties; (vi) the loss of confidence in the debtors' management; (vii) the fact that the moving party has a contractual right to the receiver's appointment; (viii) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtors; (ix) the principle that the appointment of a receiver should be granted cautiously; (x) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently; (xi) the effect of the order upon the parties; (xii) the conduct of the parties; (xiii) the length of time the receiver may be in place; (xiv) the cost

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[57] *Hypoint*, *ibid* at para 23; *Validus*, *ibid* at para 5; *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No. 5088 at para 10 [*Freure*]; *Bank of Montreal v Carnival National Leasing Ltd*, 2011 ONSC 1007 at para 24 [*Carnival*]; *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866 at para 26 [*Elleway*]; *Canadian Western Bank v 2563773 Ontario Inc*, 2023 ONSC 4766 at para 6 [*Western Bank*].

[58] *Carnival* at paras 24, 28; *Freure* at para 10; *Foremost Financial Corporation et al v Alai Developments Inc et al* (July 23, 2023), Toronto, CV-23-00702528-00CL (Endorsement) (ONSC) at paras 28, 30-31; *Validus*, *ibid* at para 10; *Western Bank*, *ibid* at para 11; *Hypoint*, *ibid* at para 26.

[59] *Validus*, *ibid* at para 9; *KEB Hana Bank as Trustee et al. v Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881 at para 39 [*KEB*].

to the parties; (xv) the likelihood of maximizing return to the parties; and (xvi) the goal of facilitating the duties of the receiver.[60]

46. Having regard to the foregoing considerations, the Applicants submit that it is just and convenient for the proposed Receiver to be appointed in the circumstances given that, among other things:

(a) the Property and the interests of the Applicants and other Co-Owners are at substantial risk. This risk is neither immaterial nor speculative. The Respondents and their present and former principals have, by neglect and potentially, by design, allowed the Real Property to be lost to creditor enforcement efforts, inappropriately transferred, encumbered and/or sold. The Respondents and their present and former principals, as applicable, have repeatedly done so without adequate advance notice to the Applicants, the requisite approval of the Co-Owners, or making distributions to the Applicants. The most recent of such conduct – the sale of the LV IV Project directed by one of the Respondents' purported directors, Mr. Pilehver – has resulted in the loss of the LV IV Project, without notice to, or the consent of, the Kobayashi Group, which owned approximately 72% of the undivided beneficial interest therein, and the dissipation of the proceeds thereof;

(b) the nature of the Property militates in favour of the Receiver's appointment. The Property comprises the Real Property, generally being vacant lands beneficially owned by the Co-Owners, the income derived therefrom and certain other funds related thereto, including monies intended to be used to defray the costs of the Real Property and the proceeds of sale of the Land Banking Projects. It does not consist

[60] *Elleway* at para 28; *Western Bank*, *ibid* at para 9; *Validus*, *ibid* at para 8.

of real or personal property required to conduct an operating business or property in which the Respondents have an equity interest;

(c) in the circumstances, the Applicants have unsurprisingly lost all confidence in the Respondents' management to comply with their obligations under the Co-Owners Agreements or remedy the breaches thereunder, manage and operate the Property in good faith and with a view to the best interests of the Co-Owners, advance any value accretive planning or development activities and solicit interest in potential value maximizing sale transactions for the Co-Owners' consideration and approval. The Applicants have likewise lost all faith in the Respondents' ability to protect the Property and safeguard or otherwise act in the best interests of the Applicants and all other Co-Owners therein;

(d) the Respondents and their current principals plainly cannot remain in control of the Property and the *status quo*, including the deadlock created by the Hamilton Proceedings, cannot be permitted to continue. Given the Respondents' and their current principals' remarkable conduct and blatant efforts to encumber and dissipate the Real Property, and the Respondents' woeful failure to protect the Co-Owners' interests therein, the appointment of a Court-officer having fiduciary duties to the Respondents' stakeholders, is urgently required for the protection of the Property and the rights and interests of the Respondents' creditors and the Co-Owners. The proposed Receiver's appointment will prevent any further irreversible prejudice to such creditors and Co-Owners;

(e) if the Receiver is appointed on the terms of the proposed Receivership Order, these proceedings will provide the stability, structure and supervision required to identify, collect, preserve, protect and maximize the value of the Property. Further,

they will allow for the identification and tracing of any and all Segregated Funds, the determination of the Respondents' creditors' and the Co-Owners' rights and interests in the Property, and the orderly, efficient and transparent sale of the Property, with a view to maximizing recoveries for, and distributing funds to, the Respondents' stakeholders in accordance with their respective priorities and entitlements;

(f) the proposed Receiver will have access to information and value-maximizing remedies not currently available to the Applicants or any of the Respondents' stakeholders, including, information pertaining to the use and dissipation of the Segregated Funds and the acquisition and sale of the Land Banking Projects, the power to impugn and void certain transactions, and the power to sell, subject to this Court's approval, the Real Property free and clear of claims and encumbrances;

(g) the proposed Receiver will be able to equitably deal with the interests of all of the Respondents' creditors and other stakeholders, including with respect to the distribution of funds realized from any Court-authorized sale of the Real Property;

(h) given the conduct of the Respondents and their present and former principals, the nature of the Property, the nature of the Applicants' rights and interests therein, as beneficial owners, and in the case of 2533430 Ontario Inc., the sole shareholders, and the prejudice already occasioned upon the Applicants, the balance of convenience favours the Applicants; and

(i) despite having been provided ample notice of the within application, none of the Respondents (nor any other party) have expressed any opposition to the proposed Receiver's appointment.[61]

C. The Terms of the Proposed Receivership Order are Appropriate

47. Pursuant to subsection 101(2) of the CJA, an order appointing a receiver may include "such terms as are considered just."[62] Here, the proposed Receivership Order is substantially similar to the terms of the Ontario Superior Court of Justice (Commercial List)'s model receivership order (the "**Model Order**"),[63] consistent with prior orders of this Court,[64] and appropriate in the circumstances. Certain terms of the proposed Receivership Order are discussed immediately below.

1. The Super-Priority Charges are Necessary and Appropriate

48. As contemplated by the Model Order, the proposed Receivership Order grants the Receiver's Charge and the Receiver's Borrowings Charge over the Property.

49. Subsections 101(2) of the CJA and 31(1) and 243(2)(b)(ii) of the BIA vest this Court with jurisdiction to grant a super-priority charge securing the fees and disbursement of a Court-appointed receiver, and to authorize such receiver to borrow monies and grant a super-priority

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[61] Kobayashi Affidavit at paras 141-143, Application Record at Tab 2. See generally, Affidavit of Service of Joshua Foster sworn March 4, 2025.

[62] CJA, *ibid* s 101(2); *WestLB* at para 37.

[63] Blackline to CLUC Model Receivership Order, Application Record at Tab 5.

[64] *Star America DPGI Acquisition Company, Inc. v Demand Power Group Inc.* (November 22, 2023), Toronto, CV-23-00709164-00CL (Order Appointing Receiver) (ONSC); *Government of Yukon v Victoria Gold Corp.* (August 14, 2024), Toronto, CV-24-00725681-00CL (Order Appointing Receiver) (ONSC); *Nuance Pharma Ltd. v Antibe Therapeutics Inc.* (April 22, 2024), Toronto, CV-24-00719237-00CL (Order Appointing Receiver) (ONSC); *In the Matter of the Receivership of Nautilus Fitness Canada, Inc.* (November 15, 2024), Toronto, CV-24-00729624-00CL (Order Appointing Receiver) (ONSC); *In the Matter of the Receivership of the Lion's Share Group Inc.* (April 3, 2024), Toronto, CV-24-00717669-00CL (Order Appointing Receiver) (ONSC); *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc et al* (May 2, 2023), Toronto, CV-23-00698576-00CL (Order Appointing Receiver) (ONSC); *Ontario Securities Commission v Bridging Finance Inc. et al.* (April 30, 2021), Toronto, CV-21-00661458-00CL (Order Appointment of Receiver) (ONSC).

charge securing its borrowings.[65] Priority charges such as the Receiver's Charge and the Receiver's Borrowings Charge, provide the certainty necessary to ensure the integrity, fairness and predictability of receivership proceedings and achieve their objectives of preserving and maximizing value for the benefit of a debtor's stakeholders.[66]

50. The Applicants submit that the proposed Receiver's Charge and the Receiver's Borrowings Charge are appropriate in the circumstances and commensurate with the status and magnitude of the Land Banking Projects and the complexity of these proceedings.

2. The Stay of Proceedings is Necessary and Appropriate

51. Consistent with the Model Order, the proposed Receivership Order grants a stay of proceedings. Such stay of proceedings prohibits, absent the consent of the proposed Receiver or leave of this Court, the commencement or the continuation of any proceeding or enforcement process against or in respect of any of the Respondents or the Property, including for certainty, the Hamilton Proceedings. Additionally, it stays and suspends the exercise of all rights and remedies against the Respondents, the Receiver, or affecting the Property.

52. Courts routinely grant stays of proceedings in favour of debtors and their property in the context of receiverships pursuant to section 106 of the CJA and their general and inherent jurisdiction.[67] As observed in *Business Development Bank of Canada v 1673747 Ontario Inc.*, "the appointment of a receiver and simultaneous imposition of a stay of proceedings is designed to

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[65] CJA, s 101(2); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 s 31(1), s 243(2)(b)(ii); *KEB* at paras 53-54; *Victoria Gold* at para 31.

[66] *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750 at paras 21-23; *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 at paras 16-23.

[67] CJA, s 106; *Business Development Bank of Canada v 1673747 Ontario Inc*, 2013 ONSC 286 at para 16 [*1673747*].

establish a temporary oasis […] in which the receiver has an opportunity to consider, reorganize and deal with the affairs of the debtor […] for the benefit of creditors and the debtor".[68]

53. Here, the stay of proceedings contemplated under the proposed Receivership Order will facilitate these proceedings and ensure that the proposed Receiver is not forced to divert time and resources to proceedings, including the Hamilton Proceedings, commenced or continued against the Respondents or the Property. The Applicants submit that the stay of proceedings contemplated under the proposed Receivership Order is therefore appropriate in the circumstances.

3. The Norwich Order is Both Necessary and Appropriate

54. The proposed Receivership Order contains a Norwich order, directing TD Bank to disclose and produce to the Applicants and the Receiver, among other things, copies of bank account statements and other documents in its or its subsidiaries' possession relating to the transfer of the LV IV Proceeds. The basis for such relief is well established and satisfied in the circumstances.[69]

55. Courts consider the following factors on an application for a Norwich order:

(a) whether the moving party has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;

(b) whether the motion has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;

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[68] *1673747, ibid* at paras 17-18. See also, *KEB* at paras 62, 64.

[69] This Court has jurisdiction to issue an order requiring the disclosure of information, either under Rule 14.05(3)(g) as ancillary relief or under 14.05(3)(h) for other matters where the facts are not in dispute. Rules of Civil Procedure, Rule 14.05(3)(f), (g), Schedule B; CJA, s 96(1); *GEA Group AG v Ventra Group Co*, 2009 ONCA 619, at para 71 [*Ventra*]; *Myers v Wellesley Hospital*, [1986] OJ No 995 *(HCJ)* at para 4.

(c) whether the third party is the only practicable source of the information available;

(d) whether the third party can be indemnified for costs to which the third party may be exposed because of disclosure; and

(e) whether the interests of justice favour the obtaining of disclosure.[70]

56. Each of these factors supports the Applicants' request for the Norwich order.

(a) A Valid, *Bona Fide* and Reasonable Claim

57. In *Isofoton S.A. v. Toronto Dominion Bank.*, the Court clarified that an application for Norwich relief will be reasonable if it is not frivolous or vexatious, and held that the requirement of raising a *bona fide* claim does not extend to proving a *prima facie* case.[71] In this case, the Applicants meet the threshold of a strong *prima facie* claim, or minimally, a *bona fide* claim, including to their proportionate share of the LV IV Proceeds (which ought to have been disbursed to the Co-Owners).

(b) TD Bank is Innocently Involved

58. Courts have held that financial institutions that are the "caretakers" of the impugned funds are a classic example of a third party innocently mixed up in the wrongdoing.[72] Financial frauds ordinarily, and by necessity, involve the use of financial institutions to launder money, impede tracing efforts, or receive secret payments. Accordingly, the connection of an innocent bank through which transactions are processed is sufficient to satisfy the second requirement of the test

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[70] *Isofoton SA v Toronto Dominion Bank*, 2007 CanLII 14626 (Sup Ct) at para 40 [*Isofoton*], *Ventra* at paras 49-51; *Alberta Treasury Branches v Leahy*, 2000 ABQB 575, aff'd 2002 ABCA 101, leave to appeal to SCC ref'd, [2002] SCCA No 235, at para 106 [*Leahy*].
[71] *Isofoton* at paras 42-48.
[72] *Leahy* at para 156.

for obtaining Norwich relief.[73]

59. While the account from which financial information is sought is a law firm trust account, operating in this context, the law firm is akin to a bank as the relevant transactions were processed through its trust accounts. Payments in and out of a law firm's trust account are not privileged,[74] and the Applicants are only requesting the disclosure of non-privileged information pertaining to the flow of the proceeds from the LV IV Transaction.

(c) TD Bank is the Only Practicable Source of the Information

60. Without the requested information, the Applicants' and the Receiver's efforts to trace and further investigate the LV IV Transaction will be impeded, as will their efforts to recover the misappropriated funds.[75] Given the conduct described above, there is a real risk that the recipient(s) of the proceeds may destroy the requested information, or further dissipate and hide assets.

61. If other sources of information exist but it "would not be an efficacious method of obtaining the information and documents, justice is not served by requiring those sources be tapped prior to coming to the court for assistance".[76] In light of the circumstances in which the LV IV Project was sold (in a deliberate breach of the First Global Injunction), it cannot be considered practicable to request information revealing details of the LV IV Transaction from the implicated persons (who have, in any event, refused to respond to inquiries about the whereabouts of the proceeds of same).[77]

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[73] *Isofoton* at paras 50-51.
[74] *Bank of Montreal v Cochrane,* [2010] A.W.L.D. 3823 (ABQB) at paras 10-12, Tab 1 C.
[75] Kobayashi Affidavit, *supra* note 1 at para 139, Application Record at Tab 2.
[76] *Leahy* at para 157.
[77] Kobayashi Affidavit, *supra* note 1 at para 139, Application Record at Tab 2.

(d) The Applicants Have Agreed to Indemnify TD Bank

62. The proposed Receivership Order provides that the Applicants will indemnify TD Bank for its reasonable costs associated with compliance with the Norwich order.[78]

(e) The Interests of Justice Favour Disclosure

63. To determine whether the interests of justice favour disclosure, the Court must balance the benefit of disclosing the information against the prejudice to the alleged wrongdoer(s) in releasing it. Norwich relief is necessary when the applicant seeks to obtain the identity of a wrongdoer, evaluate whether a cause of action exists, trace assets, or preserve evidence or property.[79]

64. Norwich applications involving banking records entail a balancing exercise between the public interest of account holders that their records will remain confidential and the public interest in the administration of justice.[80] The public interest in administration of justice is significant – fraudsters cannot expect to hide behind the interest in confidentiality to avoid civil claims concerning their improper and fraudulent actions.[81]

65. The Applicants and the Receiver, have a strong interest in pursuing an investigation to determine where the LV IV Proceeds have been disbursed. Without the disclosure sought, the Receiver may be unable to determine the identity of the wrongdoers, trace the misappropriated funds and determine their location (and any properties purchased) to preserve the LV IV Proceeds. The balance thus weighs in favour of granting the relief sought.

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[78] *Ibid* at para 140, Application Record at Tab 2.
[79] *Ventra* at para 91.
[80] *Leahy* at para 161.
[81] *Bankers Trust Co v Shapira*, [1980] 3 All E.R. 353 (CA), 358, Tab 2C; *Isofoton* at paras 57-61.

4. The Noticing Relief is Both Necessary and Appropriate

66. The proposed Receivership Order directs the Vendors and each of the Respondents to provide the Receiver with, among other things, the names, addresses and email addresses of the Co-Owners in these proceedings to the extent such information is in their possession or control. Such relief is a common feature in insolvency proceedings, involving one or more large stakeholder constituencies – the contact information for which is known only to the applicable debtors or other parties – such as lenders or employees.[82]

67. Here, the Applicants submit that it is appropriate to provide the proposed Receiver with the contact information of the Co-Owners. Such information is not public or otherwise readily available and is necessary to enable the Receiver to apprise the Co-Owners of these proceedings and steps to be taken by the Receiver herein.

PART V: RELIEF REQUESTED

68. The Applicants submit that it is just and convenient to appoint the Receiver over the Property and respectfully request that this Court grant the proposed Receivership Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF MARCH 2025

Bennett Jones LLP

BENNETT JONES LLP

[82] See for instance, *In the Matter of a Plan of Compromise or Arrangement of Balboa Inc. et al.* (January 23, 2024), Toronto, CV-24-00713245-00CL (Initial Order) (ONSC) at paras 18-19; *In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail, Inc. et al.* (March 10, 2023), Toronto, CV-23-00695619-00CL (Amended and Restated Initial Order) (ONSC) at paras 33-34; *In the Matter of a Plan of Compromise or Arrangement of Target Canada Co. et al.* (January 15, 2015), Toronto, CV-15-10832-00CL (Amended and Restated Initial Order) (ONSC) at para 33-34.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *Alberta Treasury Branches v Leahy*, 2000 ABQB 575
2. *Bank of Montreal v Carnival National Leasing Ltd*, 2011 ONSC 1007
3. *Bank of Montreal v Cochrane,* [2010] A.W.L.D. 3823 (ABQB)
4. *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No. 5088
5. *Bankers Trust Co v Shapira*, [1980] 3 All E.R. 353 (CA)
6. *Business Development Bank of Canada v 1673747 Ontario Inc*, 2013 ONSC 286
7. *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock*, 2022 ONSC 6186
8. *Canadian Western Bank v 2563773 Ontario Inc,* 2023 ONSC 4766
9. *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750
10. *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109
11. *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866
12. *Foremost Financial Corporation et al v Alai Developments Inc et al* (July 23, 2023), Toronto, CV-23-00702528-00CL
13. *GEA Group AG v Ventra Group Co*, 2009 ONCA 619
14. *Government of Yukon v Victoria Gold Corp.* (August 14, 2024), Toronto, CV-24-00725681-00CL (Endorsement) (ONSC)
15. *Government of Yukon v Victoria Gold Corp.* (August 14, 2024), Toronto, CV-24-00725681-00CL (Order Appointing Receiver) (ONSC)
16. *Hands-On Capital Investments Inc. v DMCC Holdings Inc.*, 2023 ONSC 2417
17. *In the Matter of a Plan of Compromise or Arrangement of Balboa Inc. et al.* (January 23, 2024), Toronto, CV-24-00713245-00CL (Initial Order) (ONSC)
18. *In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail, Inc. et al.* (March 10, 2023), Toronto, CV-23-00695619-00CL (Amended and Restated Initial Order) (ONSC)
19. *In the Matter of a Plan of Compromise or Arrangement of Target Canada Co. et al.* (January 15, 2015), Toronto, CV-15-10832-00CL (Amended and Restated Initial Order) (ONSC)

20. *In the Matter of the Receivership of Nautilus Fitness Canada, Inc.* (November 15, 2024), Toronto, CV-24-00729624-00CL (Order Appointing Receiver) (ONSC)

21. *In the Matter of the Receivership of Nautilus Fitness Canada, Inc.* (November 15, 2024), Toronto, CV-24-00729624-00CL (Endorsement) (ONSC)

22. *In the Matter of the Receivership of the Lion's Share Group Inc.* (April 3, 2024), Toronto, CV-24-00717669-00CL (Order Appointing Receiver) (ONSC)

23. *Isofoton SA v Toronto Dominion Bank*, 2007 CanLII 14626 (Sup Ct)

24. *Jansari v Jansari,* 2020 ONSC 2473

25. *KEB Hana Bank as Trustee et al. v Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881

26. *King (Township) v Rolex Equipment Co.*, [1992] 90 DLR (4th) 442

27. *KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes (Minu Towns) Inc et al* (May 2, 2023), Toronto, CV-23-00698576-00CL (Order Appointing Receiver) (ONSC)

28. *Macquarie Equipment Finance Limited v Validus Power Corp et al*, 2023 ONSC 4772

29. *Myers v Wellesley Hospital*, [1986] OJ No 995 *(HCJ)*

30. *Nuance Pharma Ltd. v Antibe Therapeutics Inc.* (April 22, 2024), Toronto, CV-24-00719237-00CL (Order Appointing Receiver) (ONSC)

31. *Ontario Securities Commission v Bridging Finance Inc. et al.* (April 30, 2021), Toronto, CV-21-00661458-00CL (Order Appointment of Receiver) (ONSC)

32. *Star America DPGI Acquisition Company, Inc. v Demand Power Group Inc.* (November 22, 2023), Toronto, CV-23-00709164-00CL (Endorsement) (ONSC)

33. *Star America DPGI Acquisition Company, Inc. v Demand Power Group Inc.* (November 22, 2023), Toronto, CV-23-00709164-00CL (Order Appointing Receiver) (ONSC)

34. *WestLB AG v Rosseau Resort Developments Inc.*, 2009 CanLII 55120 (ONSC)

I certify that I am satisfied as to the authenticity of every authority.

Dated: March 4, 2025

Joshua Foster

JOSHUA FOSTER

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Section 243

Court may appoint receiver

(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> > (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
> >
> > (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read

without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

Section 96

Rules of law and equity
96 (1) Courts shall administer concurrently all rules of equity and the common law.

Rules of equity to prevail
(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

Jurisdiction for equitable relief
(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

Section 101

Injunctions and receivers

(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

Section 106

Stay of proceedings

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

Rule 14.05

Applications — By Notice of Application or Application for Certificate
14.05 (1) The originating process for the commencement of an application is, as applicable,

(a) a notice of application (Form 2.2B, 14E, 14E.1, 68A or 73A); or

(b) an application for a certificate of appointment of estate trustee (Form 74A or 74J), small estate certificate (Form 74.1A) or amended small estate certificate (Form 74.1E).

Information for Court Use
(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 2.2B, 14E, 14E.1, 68A or 73A unless the notice of application is filed electronically through the Civil Submissions Online Portal under rule 4.05.2.

Application under Statute
(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes.

Application under Rules
(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial.

SCHEDULE C – ABBREVIATED AUTHORITIES

TAB 1C

2010 CarswellAlta 889
Alberta Court of Queen's Bench

Bank of Montreal v. Cochrane

2010 CarswellAlta 889, [2010] A.W.L.D. 3823

Bank of Montreal, Plaintiff and Kenneth Robert Cochrane, Michael David Cochrane, Mortgage Line Corp., 1282851 Alberta Ltd., 1168216 Alberta Ltd., Scottie George Bartlett aka Scott Bartlett aka James Bartlett, Carrie Lynn Vande Graaf aka Carrie Van De Graaf aka Carrie Vande Graff, 1180555 Alberta Ltd., Curbside Homes Ltd., A&G Drilling Ltd., James George & Associates Ltd., Rocksolidinvestorsgroup Ltd., Vass International Holdings Inc., Amber Katherine Bybel, Michael Eric Bybel, Marilyn Lewis, Andrew Colvin, Brent Lee Wagner, Rebecca Louise Stiles, Derrick Wiebe, Dan Chornoboy aka Daryn Charnoboy aka Dan Chornoboy aka Darren Chornoboy aka Dan Chornaboy, Michael Habib aka Mike Habib, Thomas Jason Evans aka Jason Evans, Nicola Clare Evans aka Nichola Clare Evans, Momentum Developments Ltd., David Scott Pepper, Pep Homes Ltd., William Dean Hood aka Dean Hood, Denise Lemay, Michael J. Bondar, Michael J. Bondar Professional Corporation, Janice L. J. L. Jong, Theodore Schwartzberg, Manjit S. Walia, David Steed, Zimmerman & Company, Patrick John Borody, Country Realty Inc. Operating as Homelife Country Realty, Jody Jay Wenger, Alberta 2500 Group Corp. Operating as Sutton Group - Altawest, Reuben Samuel Noblet, Century 21 The Professionals Ltd., Emmeline Chrystel Noblet, Impact Real Estate Group Ltd. Operating as Residential One Real Estate, Brendan Grant Banbury, Foothills Real Estate Appraisals Ltd., Eric James Rocker aka Jim Rocker, Rocker Appraisal Services Ltd., Brian Richard Mann, Atkinson & Associates, Charnjit Singh aka Charanjit Singh, Preetinder Tah, Rajbir Virk, 1168995 Alberta Inc., G5 Ventures Inc., Rahu Ketu Inc., Ultimate Roofing Ltd., Pacific Homes Ltd., Gurdarshan Singh Toor, Chadi El-Hawi aka Chadi Elhawi, Rony El-Chmoury aka Rony Elchmoury aka Rony El-Shmoury aka Rony Elshmoury aka Rony Shmoury, Mohamad Amin Harb aka Mohammad Harb aka Mohamed Harb aka Mohammed Harb aka Moe Harb aka Mohamad Amine Harb aka Mohamed Amine Harb, Wassim Hattoum aka Wasim Hattoum aka Wassim Hatoum aka Wasim Hatoum aka Wassim Clemment aka Wasim Clement aka Wissam Clement aka Wissam Clemment aka Wissam Chaammat aka Wissam Chammat, ABC Painting Ltd., Canadian Grande Investments Ltd., Jana Painting Inc., Saef Painting Ltd., 1183992 Alberta Ltd., 1216869 Alberta Ltd., 1293677 Alberta Ltd., 1335569 Alberta Ltd., 1203837 Alberta Ltd., Anton's Pizza Inc., 1318274 Alberta Ltd., Mohamed Imam Mohamed, Rabia Hamwi aka Rabina Hamwi, Elias Al-Rachid aka Elias A. Rachid, Ebrahim El-Hawi aka Ebrahim Elhawi aka Ibrahim El-Hawi aka Ebrahim Hawi, Rima Chamali aka Rima Chamaly aka Rima El-Hawi aka Rima Elhawi, Houssam El-Hawi aka Houssam Elhawi aka Houssam Hawi aka Hassam Hawi aka Hossam Hawi aka Hassam El-Hawi aka Hassam El-Horchi aka Hassam El-Haoui aka Hassam Hawi aka Hassan Hawi, Fawzi El-Shmoury aka Fawzi Elshmoury aka Fawzi Shmoury, Fatima Ibrahim Chmouri aka Fatima Ibrahim Chmoury, Mustefa Abdella Abdrahman aka Mustafa Abdella Abdrahman, Bilal Abdul Shmoury aka Bilal Abdul Chmoury aka Bill Shmoury, Amine Mustefa Harb, Fatima Said Chmouri aka Fatima Said Chmoury, Amro Abdual Shmoury aka Amro Shmoury aka Abdual Shmoury, Maher El-Shmoury aka Maher Elshmoury, Noel Hattoum aka Noel Hatoum, Adnan Zain aka Adnan Zain-Alarab aka Alan Zain aka Alan Zain-Alarab, Am&ay Excavating Ltd., Karam Ali Badrudin aka Karim Ali Badrudin, Latife Ahmad Bakri, Tarek Mohamad Chemali, Ihab Demian, Mohamad Hachem aka Mohammad Hachem aka Mohammad Hachen aka Mohammed Hachen, Gurdev Sran aka Dave Sran, California Properties Inc., Grande Investments Inc., Shadia El-Hawi aka Shadia El-Haoui, Mariym Fadheel aka Marium Fadheel aka Mariyum Fadheel, Harmeet Manchanda, Kaldah Kerjan, K - 2 - Renovations & Construction Ltd., Karvin Sayavong, Pat Nanthavon aka Khamphet Nanthavongdouangsy aka Khamphet Nanthavongsouangsy, Ibrahim El-Chammouri, Youssef Hussin Haymour, Omar Merhi, Sobhi Salem aka Salem Sobhi, Ali Hammoudi, William Gates, Trevor Cockrell, Robert John Edward Allen, Hanson Associates, Harris Nathan Hanson, Harris N. Hanson Professional Corporation Carrying On Business as Hanson & Associates and Also Carrying On Business as Hanson Associates, Rodney Wynn Mackenzie, Balraj Chhoker, Navjot Gill, Zarmeen Zubair, Nada Hammoud aka Nada Khalil, Brian David Hassett, Joy Percival, Kenneth Dale Blatz, Alex Karmis, Jackie Gilluley aka Jacqueline Gilluley, Dylan Elash, Samantha Brammer, Mike Veroba, Derek Mackay, Remigio T. Belmonte aka Remie T. Belmonte aka Remi T. Belmonte aka Remie T. Belmonte Jr., Kim Belmonte, Chande Mwangi, 1222062 Alberta Inc., Saifullah Khan aka Jay

Heard: February 19, 2010
Judgment: February 19, 2010
Docket: Calgary 0801-07347

Counsel: M. Mohamed, M.D. Mysak, for Plaintiff
R.W. Calvert, Q.C., B. Rentiers — Independent Counsel

***C.A. Kent J.*:**

1

THE COURT: All right. This is my decision with respect to one of the applications in the Bank of Montreal matter.

2 This is a follow-up application to a Norwich order which I granted in May 2009. The allegation upon which I granted the original order involved a mortgage skimming fraud scheme that involved many defendants. The original order was against 69 of the apparently principal actors in the fraudulent scheme. In November 2009, after the original tranche of documents was examined, I issued a further order permitting name searches at Land Titles and motor vehicle registries and also extending the Norwich order to include some real estate purchases.

3 It is the bank's evidence that about $139.6 million is involved in the fraud. To date there have been significant difficulties in tracing funds, even with the benefit of the documents produced by the banks and others under my previous orders. The bank now applies to extend my order further to obtain documents from certain law firms.

4 In looking at the nature of the Norwich Pharmacol order granted to date and as requested, I have been and continue to be satisfied that under the authority of *Alberta Treasury Branches v. Leahy* this is an appropriate case to grant the order to trace and preserve assets and evidence. I continue to be satisfied from the evidence before me that the bank has met the factors that Mr. Justice Mason outlined in *Leahy*.

5 Dealing specifically with this application, it should first be noted that several of the law firms against which the bank applies for Norwich relief are also defendants in the case. The allegation against these law firms is in negligence. The documents sought by the bank do not relate to the real estate transactions where negligence is alleged against the law firms. Rather the documents sought relate to moneys paid into the law firms on unrelated transactions, which the bank has discovered as a result of the review of documents which is produced by banks and real estate agents and others pursuant to my previous orders.

6 In regard to the documents sought, the bank is not alleging wrongdoing on the part of the law firms but rather, using the words of *Leahy*, these firms are probably innocently mixed up in the wrongdoing. Based on the evidence before me I can conclude that the law firms are mixed up in the wrongdoing.

7 The bank argues that the order against the law firms is necessary because there is no other reasonable way to trace these funds. They have attempted to do so through Land Titles and through real estate brokerages. However, the trail stops at the law firms and it is for that reason that they seek this order. Based upon the evidence provided to me, I agree that the only practical way to trace the funds identified is through the lawyers.

8 The next issue to deal with is whether the documents which are sought are privileged. The specific documents which they seek are completed land transfer forms, certificates of title, executed real estate purchase contracts, executed bills of sales or sale and purchase agreements, statements of adjustments, cancelled cheques, bank drafts, electronic and wire transfer documents and cheque requisition slips, whether such funds have been co-mingled with other funds or not and copies of trust ledgers evidencing payments in and out.

9 Several of the documents would be documents in the hands of more than just the lawyer. That would include things like real estate purchase contracts and other evidence of the completion of the purchase or sale. Those documents obviously would not be privileged.

10 The more difficult issue that I must be careful of is the request for trust ledger documents and related instruments. Counsel cited several cases which satisfy me that with the exception of accounts rendered by the law firm to the clients which may contain privileged information, payments in and out of a solicitor's trust account do not constitute communications from the client and thereby do not attract a privileged claim.

11 For example, in *Bank of Montreal v. Lysyk* [2003 CarswellAlta 296 (Alta. Q.B.)], Madam Justice Veit noted that while communications between the client and her lawyer relating to the acquisition of the house are privileged

> ... acts and facts such as the tender of the purchase price and the executed transfer of land are not privileged. Here the law firm's ledger documents showing the receipt of bank drafts and the payments of monies from Ms. Lysyk's account, together with the name of the recipients of funds from that account and copies of documents relating to completed transactions - such as the transfers of land - are not privileged and must be provided to the Bank of Montreal.

12 Accordingly, I am satisfied that the documents requested on their face are not privileged. As well, out of an abundance of caution, there will be a provision in the order permitting the lawyers whose records are sought to appear before me to make argument that in fact the documents in their case are privileged.

13 Ancillary to this order the bank seeks an order whereby the lawyers involved are prohibited from communicating the disclosure of the Norwich order to their clients. The bank argues that the people whose funds have been transferred into the law firms are the fraudsters. If they are told about the Norwich Pharmacol orders which continue to be under seal, they will attempt to hide assets.

14 The bank cites the commentary to the Professional Code of Conduct, which says that before a lawyer discloses confidential information he must afford the client the opportunity to either make disclosure personally or persuade the lawyer that the apparent need for disclosure is based on incorrect information. The bank does cite some cases where courts are directed that the client be given notice of a Norwich order with the ability to instruct. However, there are no reasons given for requiring that disclosure.

15 I note that in *Gainers Inc. v. Pocklington*, [1995] A.J. No. 438 (Alta. C.A.), the court was dealing with an allegation that a law firm was unable to continue to act because of conflict. During argument the Professional Code of Conduct was cited. At paragraph 11 of the decision Mr. Justice Coté said the following:

> The codes of professional conduct governing lawyers do not govern the court, which must follow the law governing fiduciaries and confidences, not rules of professional ethics. But that theoretical distinction weakens in practice, for the rationales for the law and the ethics are similar, as are the problems. So professional ethics codes are suggestive, even persuasive in court.

16 With that in mind, while I acknowledge the obligations of lawyers under the Code of Professional Conduct, I am persuaded that advising the clients of the order in this case could risk the disappearance of assets. As well, since there is an ability on the part of the lawyers to attend before me before releasing the documents, they can argue based on evidence provided to me that disclosure is appropriate.

17 For the same reasons I am satisfied that the order will — should go out under an anonymous Style of Cause so that the lawyers are not informed of all the people involved and also subject to the protection, which I will — and instruction that I will give to the independent counsel will not know that they in fact are parties to this action.

18 So those are my reasons. I have a copy of an order that counsel passed up as an example. It was the one with respect to which law firm? Aujla Law Group. My memory from the application, and maybe someone can remind me, is that I didn't suggest any changes to this order already, did I? Was there one?

> MR. MOHAMED: You did, and that was dealing with the — recognizing in the order the fact that in spite of what the code of conduct says that the lawyers were instructed not to advise anyone, including their clients, just the recommendation.

THE COURT: Oh, yes. We acknowledge the —

MR. MOHAMED: It was in your reasons.

THE COURT: Right. Exactly. Okay.

Now, the other thing that I wanted to say and the reason that I wanted independent counsel here — and I gather that's you, Mr. Calvert, for today?

MR. CALVERT: It is today. Mr. Bancroft is the primary, but Mr. Bancroft is off in Vietnam with his son, who is getting married.

THE COURT: Oh, okay.

MR. CALVERT: He will be gone for two weeks and in the meantime it is me, and Mr. Rentiers is assisting as well.

THE COURT: Okay, great. The lawyers are going to — you're going to be the one introducing the orders into the law firms; right?

MR. CALVERT: Correct.

THE COURT: And they won't know they're defendants in the lawsuit. I can't put in this order what I want you to do because that will then of course alert them that they are defendants. I want you to be sure. So you're going to have to inform yourself about the allegations of negligence for each of those law firms, and I want you to do a review of the documents when they provide them and make sure that those documents don't relate to the allegations of negligence. And if there is any question and if you can't be satisfied from Mr. Mohamed, Mr. Mysak that they are unrelated, then you will have to come back to me.

MR. CALVERT: I understand.

THE COURT: So, as I say, we can't put that in the order or they'll know about it.

MR. CALVERT: Correct.

THE COURT: And I think that's the only instruction that I would have for you, unless there's something else.

MR. CALVERT: No. And we have established a protocol in the past how this is to be done in service, showing the propriety and keeping these documents whole and ensuring that they are kept in a secure place with logged-in access, that sort of thing. So we have established the protocol and understand that none of the parties upon whom orders are going to be served are to be advised of any of the identity of the parties.

THE COURT: Yes.

MR. CALVERT: That they will simply be given my friend's contact information to appear on the back of the order. I assume we will also provide them with a business card.

THE COURT: Right.

MR. CALVERT: And nobody will be contacted with respect to the matter.

THE COURT: Okay. And then we've identified March 4th and 5th as the potential dates when they can come back or you can or anyone could come back to deal with issues that arise out of this order.

MR. CALVERT: Yes. I was made aware of that.

THE COURT: Okay.

MR. MOHAMED: Did you confirm those, My Lady?

THE COURT: Yes, those work.

MR. MOHAMED: Okay, thank you.

THE COURT: Now, I will warn you that I am not in town next week. I am on email contact with my assistant. I could, subject to when you want to do it, be available by phone for any phone applications. I will speak to the chief as well. He, I think, was the first person who contacted you about this —

MR. MOHAMED: Yes, that's right.

THE COURT: So he knows about it, but I don't know what can't wait until the next week.

MR. MOHAMED: If we are contacted by any of these law firms, I will advise them that you have made available March 4 and 5 for them to attend and counsel can attend and speak to it then.

THE COURT: Okay.

MR. MOHAMED: All of us presumably will then attend before you, including the independent solicitor, I assume.

THE COURT: Correct.

MR. CALVERT: I did notice in the draft, I see a copy of a draft order, provision with respect to 24 hours, within 24 hours.

THE COURT: Yes. It says shall provide to the independent solicitor within three days of service all these things; and then if they attempt to challenge it they must within 48 hours provide written notice to Mr. Mohamed and then attend before me on a date to be arranged.

MR. CALVERT: So that was the 4th and 5th.

THE COURT: So that's how it works.

MR. CALVERT: Okay. Maybe I had an earlier version. I was concerned that if you were unavailable and they wanted to challenge sooner than the 4th and 5th.

THE COURT: Yes.

MR. CALVERT: But in that situation the documents simply get preserved until the matter is settled.

MR. MYSAK: So what I've done, based on the scheduling, is change that date to be arranged too on March 4th and 5th, 2010 at a time to be arranged.

THE COURT: Exactly, yes.

MR. CALVERT: I also pointed out to my friends this morning, just checking to get the managing partners from various law firms involved or the addresses for those who are smaller firms, and one of the individuals appears not to be in Alberta anymore but is in Saskatchewan.

THE COURT: Who is that?

MR. CALVERT: A gentleman by the name of Michael Derbowka. And there may be an issue with respect to enforcing the order in Saskatchewan.

THE COURT: I suspect any lawyer will probably want a Saskatchewan judge to bless this.

MR. MOHAMED: Well, My Lady, there might be a little complication with that as well, as it turns out. Maybe I'll let Mr. Mysak speak to that, but what I would propose as a solution is we will not execute the order upon that individual and what we can do is on March 4 and 5, since those days are set aside, should we need interrogatories, which we've already obtained in relation to brokerages, we will come before you to speak to that.

THE COURT: Okay.

MR. MYSAK: Yes. The short issue is this: Is that in relation to the interrogatory application on the brokers, we've had some contact with two different firms in Saskatoon who are acting for these brokers. One of those firms is the Cuelenaere Kendall Katzman & Richards firm, which I gather from Mr. Calvert's research is where Mr. Derbowka now is, and that firm has seen the order.

THE COURT: With the full Style of Cause?

MR. MYSAK: With the full Style of Cause.

THE COURT: Is Mr. — whatever his name is. I'm sorry, I missed his name.

MR. CALVERT: Derbowka.

THE COURT: Is he a defendant?

MR. MYSAK: I believe he is a defendant.

THE COURT: Oh. Well, there you go.

MR. MYSAK: He's not the one we've been dealing with. We've been dealing with Mr. Kendall, but obviously we'll have to contact Mr. Kendall today and figure out what he's told his — I don't know what he told his partner, but what he's told the members of his firm.

THE COURT: Okay. All right. Okay. So do you have the orders?

MR. MOHAMED: What we would propose to do is make the changes and have it back to you within, say, within the hour.

THE COURT: Yes.

MR. MOHAMED: If that would be convenient.

THE COURT: If you're going to have a student or someone come over, I'm sitting in chambers, just have him come to chambers. As long as they're all sorted out then I can just sign them.

MR. MOHAMED: Are you sitting on this floor? Right in this hall?

THE COURT: Right here. And if you come a little — oh, I have a 9:30 and then I start chambers, so if they just come to chambers.

MR. MOHAMED: We'll have someone here by 10:30 with the order.

THE COURT: Okay.

MR. MOHAMED: They obviously won't be able to speak to the Style of Cause or the details.

THE COURT: That's right. I'll have to remember —

MR. MOHAMED: They'll just advise you that they're here on my behalf, if that's convenient.

THE COURT: Okay. Anything arising from what happens Wednesday, Mr. Mysak?

MR. MYSAK: Nothing yet. I can advise we've provided a copy of the order to both Equifax and TransUnion, had some conversations with them. I've made the call to the individual that the clerk located.

THE COURT: FC Data?

MR. MYSAK: Well, not FC Data —

THE COURT: That person is no longer employed by the government.

MR. MYSAK: So the clerk was able to give me the new person's contact number. I left her a message yesterday. I haven't heard back from her, but in the discussion I had with TransUnion's inhouse counsel this morning, certainly the information is certainly going to FC Data. So I'll continue to work and get ahold of this person.

THE COURT: Yes. And we've sort of run it to the ground here and it was — let me put it this way: It was the — and this is a province-wide problem. They didn't — whoever was putting — inputting data didn't understand that it was not to be sent out if there was a sealing order. They thought everything did. So I guess there's things in the works now to make sure that it doesn't happen again, which doesn't help you. You have to unwind it for yours, but in a way it will help in the future.

19 Okay. So if you need — I guess — and I'm — the chief is just back. He's been down in southern Alberta for most of the week. I'm going to speak to him about the problem because if you need more orders next week again to try and unwind things, the best person to contact would be him because I'll explain what happened and so on. Okay.

20 (Proceedings concluded at 9:20 a.m.)

21 PROCEEDINGS CONCLUDED

Application granted.

TAB 2C

Bankers Trust Co v Shapira and others

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, WALLER AND DUNN LJJ
4th JUNE 1980

Equity – Tracing property – Plaintiff seeking to trace money paid under mistake of fact induced by fraud – Power to make interlocutory order for disclosure of bankers' books and correspondence between bank and customer to show amount standing in defendant's account – Defendants outside jurisdiction – Plaintiff unable to effect service on defendants but effecting service on bank – Bank not implicated in fraud – Whether interlocutory order for disclosure should be made against bank.

In September 1979 S and F presented for payment to a bank in New York two cheques totalling $1m which purported to be drawn on a Saudi Arabian bank. The New York bank honoured the cheques and credited $708,203 to accounts kept by S and F at a discount bank in London. Six months later the Saudi Arabian bank alleged that the cheques were forgeries and took up the matter with the New York bank. The New York bank recredited the Saudi Arabian bank with the $1m. On 20th May 1980 the New York bank commenced an action in England against S and F (as first and second defendants) and against the London discount bank (as third defendant) seeking, inter alia, to trace the money they had paid to the discount bank. S and F had gone outside the jurisdiction in circumstances which prevented the New York bank from effecting service on them, but service was effected on the discount bank. On 23rd May the New York bank obtained a Mareva injunction restraining the discount bank from disposing of any money S and F had paid into that bank, but the judge refused to grant the New York bank's further interlocutory application for an order for discovery against the discount bank requiring it to disclose the sums standing in any accounts of S and F with it and to disclose all the correspondence between it and S and F relating to their accounts and all banking documents, eg cheques drawn on the accounts, debit vouchers and internal memoranda, relating to the accounts. The judge's ground for refusing that application was that such an order for discovery should not be made so long as the true defendants to the action, S and F, had not been served. The New York bank appealed against the refusal.

Held – The court was entitled, for the purpose of giving effect to a defrauded plaintiff's equitable right to trace his money, to order a bank to disclose the state of, and the documents and correspondence relating to, the account of a customer who was prima facie guilty of fraud even though the bank had not incurred any personal liability for the fraud, for unless there was the fullest possible disclosure the fund could not be traced. To justify such an order, however, the evidence of fraud against the customer had to be very strong, but, where it was, the customer was disentitled from relying on the confidential relationship between him and his bank to prevent the discovery. Moreover, such an order for discovery would only be made on terms that the plaintiff gave an undertaking in damages to the bank, paid the bank's expenses of making the discovery and used the documents disclosed solely for the purpose of tracing the money. On that basis, the court would aid the New York bank's claim to trace the money paid to the discount bank by making an order for discovery in the terms sought against that bank. The fact that the true defendants, S and F, had not been served and that a considerable period of time had elapsed since the fraud had been committed did not, in the circumstance, deprive the court of its power to make the order. The appeal would accordingly be allowed (see p 357 *e f* and *h* to p 358 *h* and p 359 *a b*, post).

Dictum of Lord Denning MR in *Initial Services Ltd v Putterill* [1967] 3 All ER at 148, of Lord Reid in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER at 948 and *A v C* [1980] 2 All ER 347 applied.

Notes

For the production in evidence of bankers' books, see 3 Halsbury's Laws (4th Edn) paras 124–126.

For the tracing of property generally, see 16 ibid, para 1460.

Cases referred to in judgments

A v C [1980] 2 All ER 347.

Banque Belge Pour L'Étranger v Hambrouck [1921] 1 KB 321, 90 LJKB 322, 26 Com Cas 72, CA, 3 Digest (Reissue) 638, 4005.

Initial Services Ltd v Putterill [1967] 3 All ER 145, [1968] 1 QB 396, [1967] 3 WLR 1032, CA, 28 (2) Digest (Reissue) 1087, 907.

London and Counties Securities Ltd v Caplan (26th May 1978, unreported).

Mediterranea Reffineria Siciliana Petroli SpA v Mabanaft GmbH [1978] Court of Appeal Transcript 816.

Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, [1974] RPC 101, HL, 18 Digest (Reissue) 8, 23.

Upmann v Elkan (1871) 7 Ch App 130, 41 LJ Ch 246, 25 LT 813, 36 JP 295, LC; *affg* (1871) LR 12 Eq 140, 28 (2) Digest (Reissue) 1157, 1589.

Cases also cited

EMI Ltd v Pandit [1975] 1 All ER 418, [1975] 1 WLR 302.

Third Chandris Shipping Corpn v Unimarine SA [1979] 2 All ER 972, [1979] QB 645, CA.

Tournier v National Provincial and Union Bank of England [1924] 1 KB 461, [1923] All ER 550, CA.

Interlocutory appeal

In an action commenced by writ dated 20th May 1980 the plaintiffs, Bankers Trust Co, sought (1) against the first and second defendants, Walter Shapira and Max Frei, $US1m as money had and received by them to the plaintiffs' use, or paid to them under a mistake of fact, damages for deceit and/or conspiracy to defraud and a Mareva injunction, (2) against the third defendant, Discount Bank (Overseas) Ltd, $US708,203 as money had and received by it to the plaintiffs' use and, inter alia, the inquiries and accounts necessary to trace the proceeds of that sum and disclosure of all the bank documents and correspondence relating to the first and second defendants' accounts with the third defendant, and (3) against all three defendants, inter alia, disclosure forthwith of the sums or balances at present standing in any account of the first and second defendants with the third defendant. On the same date the plaintiffs applied by summons for the following interlocutory relief: (1) against the first and second defendants, a Mareva injunction restraining them from removing from the jurisdiction or otherwise disposing of or dealing with any of their assets within the jurisdiction including any credit balance in any account in their names with the third defendant; (2) against all three defendants, an order that each of them disclose to the plaintiffs forthwith the sums at present standing in any account in the names of the first and second defendants with the third defendant; and (3) as against the third defendant, an order that it disclose to the plaintiffs forthwith and permit them to take copies of (i) all correspondence passing between the third defendant and the first and second defendants relating to any account with the third defendant in the first or second defendants' names from 15th July 1979 onwards, (ii) all cheques drawn on any account with the third defendant in the names of the first and second defendants from 15th July 1979 onwards, (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account with the third defendant in the first or second defendants' name from 15th July 1979 onwards; (4) an injunction restraining the third defendant from making any payment or transfer out of any account in the name of the first or second defendant at its branch at 63 Hatton Garden, London EC1 or otherwise dealing with such accounts save for payment to the plaintiffs of any sum found due to them. By a judgment given on 23rd May 1980

Mustill J granted the plaintiffs an injunction against the third defendant restraining it from making any payment or transfer out of any account in the name of the first or second defendants at its branch at 63 Hatton Garden or otherwise dealing with such accounts until trial or further order, but made no order under para (2) and (3) of the summons on the ground that an order for discovery against the third defendant ought not to be made at that stage of the proceedings when the first and second defendants who were the true defendants to the action had not been served and were not before the court. The plaintiffs appealed from so much of the judge's order as made no order on paras (2) and (3) of their summons. The facts are set out in the judgment of Lord Denning MR.

Michael Crystal for the plaintiffs.
Nicholas Elliot for the third defendant.
The first and second defendants were not represented.

LORD DENNING MR. This is a new case. It illustrates something that happens from time to time, frauds made on banks. It appears that on 20th September 1979 two men (Walter Shapira and Max Frei) went into a bank in New York, the Bankers Trust Co. They went into the Middle East section. They presented two apparent cheques, each for $500,000, for payment. The cheques purported to be drawn by the National Commercial Bank in Saudi Arabia on the Bankers Trust Co of 16 Wall Street, New York. One of them was for $500,000 to be paid to Mr Shapira. The other was also for $500,000 to be paid to Mr Shapira.

Bankers Trust honoured the cheques. They let these men have $1m. They acted on the instructions of the two men. I will not go into detail, but I will mention two particular matters. $600,000 was credited to Mr Shapira's account at a London bank in Hatton Garden, the Discount Bank (Overseas) Ltd. They asked that another sum of $108,203 should be credited to Mr Frei's account at a bank in the Cayman Islands. But, as he had no such account there, that sum was also transferred to the Discount Bank in Hatton Garden. So, on the face of it, $708,203 was sent over to the Discount Bank in Hatton Garden. That was in September 1979.

In some way those cheques got over to the Mecca branch of the Saudi Arabian bank. They apparently honoured them at the time. But six months later, on 10th April 1980, the head office of the National Commercial Bank in Saudi Arabia found that those two cheques were forgeries. They immediately took the matter up with Bankers Trust. I will read part of the letter they wrote:

> 'On looking into these drafts you will find that signatures do not conform in any way to the signatures number 140 and 141 of our officers in our Mecca Branch, that the validating numbers in red do not compare in any way to our validity machine which has the name of our bank on it, that the draft forms are on poor quality paper while our drafts are printed on safety paper with our logo water mark. We therefore consider these drafts are clearly forged and you should have exercised care in encashing them.'

When Bankers Trust received that letter, they felt that they were not free from blame themselves. It appears that they did recredit the Saudi Arabian Bank with the money. So Bankers Trust have lost $1m.

They then looked round to see if they could find these rogues. (I call them 'rogues' although it has not been proved yet; but the prima facie evidence against them is strong.) On 20th May 1980 Bankers Trust brought an action. The first defendant was Mr Walter Shapira; the second defendant was Mr Max Frei; and the third defendant was Discount Bank (Overseas) Ltd, with which the moneys were deposited. They did not serve the documents on either Mr Shapira or Mr Frei. We are told, on the evidence, that they investigated the matter. Mr Shapira is now in gaol in Switzerland as a result of a fraud investigation by the Swiss police. Mr Frei is presently believed to be in

Liechtenstein. So they have not served those two. But they have served Discount Bank. The action they have brought is quite clearly to trace and follow these funds which Bankers Trust have been fraudulently deprived of. It operates in common law and in equity as a right to follow and trace the moneys. So they brought this action on 20th May 1980.

Bankers Trust obtained a Mareva injunction in the usual form to stop Discount Bank from disposing of any of the moneys which they had at that time, which Shapira and Frei had paid into Discount Bank. That is common form nowadays in the Commercial Court when it is desired to prevent money being abstracted from the true creditor.

But this case brings out a new point which we have not had before: because Bankers Trust want more information from Discount Bank. They want information as to these accounts. They want to know how much money is now in the accounts. Money has been taken out in the last six months. They want to know what has happened to the money in the accounts. It may have been paid over to third persons; and they may want to follow the money into the hands of those third persons. So they have asked for discovery of the documents relating to the moneys which Discount Bank had, and what has happened to them.

As the question of the form of order has come into question in some of the cases, I would like to read the actual form of order which is sought in this regard by Bankers Trust:

> 'FOR AN ORDER
>
> '(1) Against the first, second and third defendants that each of them do disclose to the plaintiffs forthwith the sums or balances at present standing in any account in either of the names of the first or second defendants at the third defendants.
>
> '(2) Against the third defendants [ie Discount Bank (Overseas) Ltd] that they do disclose to the plaintiffs forthwith and permit the plaintiffs to take copies of the following documents:—(i) all correspondence passing between the third defendants and the first and second defendants relating to any account at the third defendants in the names of either the first and/or second defendants from 20th September 1979 onwards. (ii) all cheques drawn on any account at the third defendants in the names of either the first and/or second defendants from 20th September 1979 onwards. (iii) all debit vouchers, transfer applications and orders and internal memoranda relating to any account at the third defendants in the names of either the first and/or second defendants from 20th September 1979 onwards.'

That is what they applied for in addition to the ordinary Mareva injunction.

The matter came before Mustill J. He refused to make any such order, his reason being that he thought it should not be made whilst the first and second defendants (Mr Shapira and Mr Frei) had not been served.

Counsel has come here today on behalf of Bankers Trust, and asks us to reverse that decision. He has brought to our attention, very usefully, three recent cases (two of them unreported) in which a similar point has arisen. The first one was on 26th May 1978 before Templeman J, *London and Counties Securities Ltd v Caplan*. The plaintiff company had been defrauded by Mr Caplan in the sum of £5m. Mr Caplan was said to have embezzled them. It was desired to obtain information as to the whereabouts of the moneys and what had been done with them. The plaintiffs wanted to trace the moneys to see where they had gone. Templeman J, having considered the matter very carefully, made an order under which the bank was to disclose all the documents and accounts showing where the money had gone.

Then there was a case before this court on 1st December 1978, *Mediterranea Reffineria Siciliana Petroli SpA v Mabanaft GmbH* [1978] Court of Appeal Transcript 816. It was not a fraud on a bank. Nor a fraud at all. Owing to a mistake in a commercial transaction, moneys payable to the plaintiffs were paid to other people. It was desired to trace them. A Mareva injunction was granted and also an order for discovery of documents to discover where the money had gone. Templeman LJ said:

'It is a strong order, but the plaintiffs' case is that there is a trust fund of $3,500,000. This has disappeared; and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in charge of it. A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain.'

The last of the three cases was *A v C* [1980] 2 All ER 347 before Robert Goff J on 18th March 1980. That was a case again of a fraud on a bank. A very large sum of money was involved. It seems to be a case very similar to the present case, but in which the fraudulent rogues (as they may well turn out to be) had been served. It is on that ground distinguishable from the present case. The rogues were served together with the bank. Robert Goff J, after considering the two cases which I have mentioned, said (at 351):

'There is no doubt that this jurisdiction is in a process of development, and that it is still in the course of throwing up problems which have yet to be solved.'

He granted a Mareva injunction; but in addition he made an order for discovery of documents. He did so in order to enable the plaintiffs to trace what had happened to the moneys.

Mustill J had *A v C* before him. He thought it was distinguishable on the ground that in that case the 'rogues' had been served. He refused to order discovery in this case; but he gave leave to appeal in order that the questions of principle could be discussed.

We have had the matter fully argued before us. I would like to express our gratitude to counsel for Bankers Trust for all the submissions he has made in support of the order. Equally to counsel for Discount Bank, who has taken a very proper attitude. He said that the bank are neutral in this matter; but they felt it right to put forward to the court various considerations, such as the confidential relationship between the bank and its customers.

Having heard all that has been said, it seems to me that Mustill J was too hesitant in this matter. In order to enable justice to be done, in order to enable these funds to be traced, it is a very important part of the court's armoury to be able to order discovery. The powers in this regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133. The customs authorities were perfectly innocent; but they had to disclose the names of infringers of patents whose goods had passed through their hands. Lord Reid said ([1973] 2 All ER 943 at 948, [1974] AC 133 at 175):

'They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.'

Lord Reid was referring to the views expressed by Lord Romilly MR and Lord Hatherly LC in *Upmann v Elkan* (1871) LR 12 Eq 140 at 145, 7 Ch App 130 at 133.

So here Discount Bank incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men; and they come under a duty to assist Bankers Trust by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is 'full information'.

This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money, as for instance when the customer has got the money by fraud, or other wrongdoing, and paid it into his account

at the bank. The plaintiff, who has been defrauded, has a right in equity to follow the money. He is entitled, in Atkin LJ's words, to lift the latch of the bankers' door: see *Banque Belge Pour L'Étranger v Hambrouck* [1921] 1 KB 321 at 335. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd v Putterill* [1967] 3 All ER 145 at 148, [1968] 1 QB 396 at 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents, for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Reffineria Siciliana Petroli SpA v Mabanaft GmbH* [1978] Court of Appeal Transcript 816. So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery; and the documents, once seen, must be used solely for the purpose of following and tracing the money, and not for any other purpose. With these safeguards, I think the new jurisdiction, already exercised in the three cases I have referred to, should be affirmed by this court.

Applying this principle, I think the court should go to the aid of Bankers Trust Co. It should help them follow the money which is clearly theirs, to follow it to the hands in which it is, and to find out what has become of it since it was put into Discount Bank (Overseas) Ltd.

If the courts were to wait until the first and second defendants were served goodness knows how many weeks might elapse. Meanwhile, if some of it has got into the hands of third persons, they may dispose of it elsewhere. It seems to me that the fact that the first and second defendants have not been served does not deprive the court of its power to make such an order. These two men have gone out of the jurisdiction in circumstances in which it is clear that the court should do all it can to help the innocent people to find out where their money has gone.

In those circumstances, while expressing our indebtedness to both counsel, I would allow the appeal and make the order as asked in the notice of appeal.

WALLER LJ. I agree. I only add a word or two about three points which were made by counsel on behalf of Discount Bank (Overseas) Ltd taking, so far as he could, a neutral attitude in this matter. He, first of all, emphasised that where the other two parties had not been served, it was very strong action on the part of the court to order the bank to break their duty of confidentiality. It was going further, he said, than an Anton Piller order because, when an Anton Piller order is made, there remains the opportunity of disobeying it or appealing against it.

Clearly it is undesirable that an order such as this should be lightly made. But the answer to this part of counsel's submission, in my judgment, is that here there is very strong evidence indeed of fraud on the part of the other two defendants, the first and second defendants. They presented two forged cheques, each for $500,000, and as a result a total of $1m was transferred to accounts in their names or from which they would benefit.

Secondly, counsel for Discount Bank submitted that, having regard to the amount of time which had gone by, there was no case for making this order now; it could wait until the normal time for discovery; and indeed Mustill J in his decision adverted to that. But again, in my opinion, where you have a fraud of this nature, although it may be late, and although much or perhaps all of the money may be now gone, the sooner that steps are taken to try and trace where it is the better. If steps are going to be taken, it is important that they should be taken at the earliest possible moment.

Thirdly, counsel for Discount Bank expressed concern at the wideness of the order which it was sought to make, one which required the bank to permit the plaintiffs to take copies of all correspondence, for example, all debit vouchers, transfer applications and orders, and internal memoranda. He submitted that the breadth of that order went far beyond the disclosure which would have to be made under the Bankers' Books

Evidence Act 1879. Again, in my opinion, an order of that breadth is completely justified in a case of this sort because, unless there is the fullest possible information, the difficulties of tracing the funds will be well nigh impossible.

On the other side of the coin in relation to that, there must be an implied undertaking on the part of the plaintiffs that the information which they obtain will only be used for the purposes of this action and of course will not be disclosed otherwise.

DUNN LJ. I agree for the reasons given by Lord Denning MR and Waller LJ that this appeal should be allowed.

Appeal allowed. Order in terms sought by the plaintiffs.

Solicitors: *Linklaters & Paines* (for the plaintiffs); *Dawson & Co* (for the third defendant).

Sumra Green Barrister.

Rothmans of Pall Mall (Overseas) Ltd and others v Saudi Arabian Airlines Corporation

QUEEN'S BENCH DIVISION
MUSTILL J
29th OCTOBER, 7th NOVEMBER, 17th DECEMBER 1979

COURT OF APPEAL, CIVIL DIVISION
ROSKILL AND ORMROD LJJ
13th, 14th MARCH 1980

Carriage by air – Carriage of goods – International carriage – Jurisdiction – Place where carrier ordinarily resident – Ordinarily resident – Goods carried by Saudi Arabian airline with principal place of business outside England but branch office in England – Goods lost – Claim by owners for damages – Writ served at branch office on ground that airline ordinarily resident in England – Whether airline 'ordinarily resident' in England – Whether court should set aside writ and service – Carriage by Air Act 1961, Sch 1, art 28(1).

The first plaintiffs agreed to sell a consignment of goods to the second plaintiffs in Saudi Arabia and arranged in Holland for the defendants, an airline corporation incorporated in Saudi Arabia, to carry the goods from Amsterdam to Jeddah, the carriage being subject to the Warsaw Convention as amended at The Hague in 1955 and as set out in Sch 1 to the Carriage by Air Act 1961. Some of the goods were lost and some damaged on the journey to Jeddah. The plaintiffs issued a writ in England against the defendants claiming damages and served it on the defendants at their branch office in London. In so doing, they relied on art 28(1)[a] of the convention which enabled a plaintiff to bring an action for damages against a carrier, in the place, inter alia, where the carrier was 'ordinarily resident'. The defendants, whose principal place of business was outside England, applied to have the writ and service set aside on the ground that the English courts had, in the circumstances, no jurisdiction over the suit by virtue of art 28(1). The plaintiffs contended that, as the defendants had an office in London, they were, within the meaning of art 28(1), 'ordinarily resident' within the jurisdiction because the word 'resident' was to be interpreted in the same way as it was in English cases concerning service on foreign corporations under RSC Ord 65, r 3, ie a defendant company was resident within the jurisdiction if it had a place of business there.

a Article 28(1) is set out at p. 361 g, post

IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED AND RULES 14.05(2) AND (3) OF THE *RULES OF CIVIL PROCEDURE*, R.R.O. 1990, REG. 194, AS AMENDED

MIZUE FUKIAGE, AKIKO KOBAYASHI, YOSHIKI FUKIAGE, KOBAYASHI KYOHODO CO., LTD. AND TORU FUKIAGE	and	**CLEARVIEW GARDEN ESTATES INC., TALBOT CROSSING INC., NIAGARA ESTATES OF CHIPPAWA II INC., LONDON VALLEY INC., LONDON VALLEY II INC., LONDON VALLEY III INC., LONDON VALLEY IV INC., LONDON VALLEY V INC., FORT ERIE HILLS INC., 2533430 ONTARIO INC., CGE CAPITAL MANAGEMENT INC., TGP-TALBOT CROSSING INC., NEC II CAPITAL MANAGEMENT INC., LV CAPITAL MANAGEMENT INC., LV II CAPITAL MANAGEMENT INC., LV III CAPITAL MANAGEMENT INC., LV IV CAPITAL MANAGEMENT INC., LV V CAPITAL MANAGEMENT INC. AND FORT ERIE HILLS CAPITAL MANAGEMENT INC.**
Applicants		Respondents

Court File No.: _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

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