Court File No.: CV-19-00622054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FIRST SOURCE FINANCIAL MANAGEMENT INC.
and KINGSETT MORTGAGE CORPORATION

Applicants

- and -

IDEAL (BC) DEVELOPMENTS INC., IDEAL (BC2) DEVELOPMENTS INC., IDEAL DEVELOPMENTS INC., 2490564 ONTARIO INC., 2490568 ONTARIO INC. and SHAJIRAJ NADARAJALINGAM

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C., 1985 C, B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, C. c.43, AS AMENDED

BOOK OF AUTHORITIES OF THE RESPONDENTS

July 17, 2019

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6.	*Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (S.C.J.) [Commercial List], [2011] O.J. No. 671
7.	*Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 (S.C.J.)
8.	Houlden, Lloyd W., Morawetz, Geoffrey B., and Sarra, Janis P., "The 2019 Annotated Bankruptcy and Insolvency Act" (Toronto: Carswell 2019)
9.	*M & K Construction Ltd. v. Kingdom Covenant International*, 2015 CarswellOnt 5609
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TAB 1

TAB 2

2018 ONSC 6364
Ontario Superior Court of Justice

1806700 Ontario Inc. v. Khan

2018 CarswellOnt 18066, 2018 ONSC 6364, 298 A.C.W.S. (3d) 276

1806700 Ontario Inc. (Plaintiff) and Muhammad Aslam Khan, Saeeda Bibi, Tauqeer Aslam, Marian Dmuchowski, Leonila Fajardo, Farooq Mian, Shahzad Siddiqui, Muezzin Quershi, Faisal Hameed, Syed Abid Hussain, Abrahams LLP, Law Office of Faisal Hameed, Syed and Ellison Law Professional Corporation, MAK Law Office Professional Corporation and KM Law Professional Corporation (Defendants)

R.E. Charney J.

Heard: September 20, 2018
Judgment: October 24, 2018
Docket: CV-17-131448

Counsel: Gregory L. Chang, Joga S. Chahal, for Plaintiff
Muhammad Aslam Khan, for himself and Defendants, Saeeda Bibi, Tauqeer Aslam and MAK Law Office Professional Corporation
David Silver, for Defendants, Faisal Hameed and Law Office of Faisal Hameed

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property; Torts

Headnote

Civil practice and procedure --- Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — Miscellaneous
Action originated in real estate transaction where plaintiff was second mortgagee, second mortgage was in default, and that prompted multiple legal proceedings in Brampton, Toronto and Newmarket — Plaintiff sought to amend statement of claim to alleged that K defendants created and registered fraudulent third mortgage on property and they took steps that resulted in plaintiff incurring unnecessary litigation fees, and that H defendants assisted K defendants in attempting to hide fraud — K defendants and H defendants brought motions for orders dismissing plaintiff's action or striking statement of claim; plaintiff brought cross-motion to amend statement of claim — Motions granted; cross-motion granted — Pursuant to Rule 26.02(a) of Rules of Civil Procedure, party may amend pleadings without leave before close of pleadings if amendment did not include or necessitate addition, deletion or substitution of party to action — Defendants had not yet filed statement of defence, so pleadings had not closed — Plaintiff was free to amend statement of claim without leave of court or consent of parties — Given plaintiff's acknowledgement that original statement of claim was unsustainable, there was nothing to be gained by refusing amendment at this stage of proceeding.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles
Action originated in real estate transaction where plaintiff was second mortgagee, second mortgage was in default, and that prompted multiple legal proceedings in Brampton, Toronto and Newmarket — Plaintiff sought to amend statement of claim to alleged that K defendants created and registered fraudulent third mortgage on property and they took steps that resulted in plaintiff incurring unnecessary litigation fees, and that H defendants assisted K defendants in attempting to hide fraud — K defendants and H defendants brought motions for orders dismissing plaintiff's action or striking statement of claim; plaintiff brought cross-motion to amend statement of claim — Motions granted; cross-motion granted — With respect to H defendants, proposed fresh as amended statement of claim sought to re-litigate costs orders made in Brampton and Toronto

proceedings, none of which were appealed by plaintiff, which was impermissible collateral attack on costs orders and was abuse of process — Successful party in legal proceeding could not bring second legal proceeding against same person to claim legal costs not awarded in first proceeding — Essence of action against H defendants was based on testimony given by H in his affidavit, which was sworn in his capacity as counsel for purposes of providing evidence in Brampton power of sale proceeding, and that evidence was protected by absolute privilege and could not be basis of cause of action — Two defects, collateral attack and absolute privilege, were sufficient to establish that it was plain and obvious that claim against H defendants disclosed no reasonable cause of action and was abuse of process, and it was struck without leave to amend — Fresh as amended statement of claim against K defendants was also collateral attack on previous costs orders, and some of pleadings related to steps taken by K that were protected by absolute privilege — Claim against K defendants raised different issue as K himself had put validity of third mortgage in issue in Toronto proceeding in which K was plaintiff and plaintiff was defendant, and plaintiff was entitled to defend action by claiming that K's third mortgage was invalid because it was fraudulent — Toronto proceeding had been stayed pending final disposition of Brampton proceeding which was pending before Court of Appeal, and it was appropriate in circumstances to strike fresh as amended statement of claim against K defendants but with leave to amend.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute **commences** to run — Miscellaneous
Action originated in real estate transaction where plaintiff was second mortgagee, second mortgage was in default, and that prompted multiple legal proceedings in Brampton, Toronto and Newmarket — Plaintiff sought to amend statement of claim to alleged that K defendants created and registered fraudulent third mortgage on property and they took steps that resulted in plaintiff incurring unnecessary litigation fees, and that H defendants assisted K defendants in attempting to hide fraud — K defendants and H defendants brought motions for orders dismissing plaintiff's action or striking statement of claim; plaintiff brought cross-motion to amend statement of claim — Motions granted; cross-motion granted — In general, expiry of limitation period was defence that must be pleaded unless it was plain and obvious from review of statement of claim that no additional facts could be asserted that would change conclusion that limitation period expired — Limitation period questions were not usually appropriate for determination under Rule 21.01 of Rules of Civil Procedure — Date of discoverability of fraud would rarely coincide with date on which fraud was committed — It was question of fact when plaintiff's suspicion of fraud crystalized into discoverability — It was not plain and obvious that action was **commenced** more than two years after alleged fraud was discovered.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Miscellaneous
Action originated in real estate transaction where plaintiff was second mortgagee, second mortgage was in default, and that prompted multiple legal proceedings in Brampton, Toronto and Newmarket — Plaintiff sought to amend statement of claim to alleged that K defendants created and registered fraudulent third mortgage on property and they took steps that resulted in plaintiff incurring unnecessary litigation fees, and that H defendants assisted K defendants in attempting to hide fraud — K defendants and H defendants brought motions for orders dismissing plaintiff's action or striking statement of claim; plaintiff brought cross-motion to amend statement of claim — Motions granted; cross-motion granted — Toronto and Newmarket proceedings were improperly **commenced** in wrong locations, contrary to Rules 13.1.01(1) and (3) of Rules of Civil Procedure — Court exercised its authority under Rule 13.1.02(1) to transfer Toronto and Newmarket actions to Oshawa.

Table of Authorities

Cases considered by *R.E. Charney J.*:

Beardsley v. Ontario (2001), 2001 CarswellOnt 4137, 151 O.A.C. 324, 57 O.R. (3d) 1, 17 C.P.C. (5th) 94 (Ont. C.A.) — referred to

Khan v. 1806700 Ontario Inc. (2017), 2017 ONSC 3726, 2017 CarswellOnt 9122 (Ont. Div. Ct.) — referred to

R. v. Wilson (1983), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

Reynolds v. Smith (2007), 2007 CarswellOnt 1424, 45 C.C.L.T. (3d) 19, 2007 ONCA 166, (sub nom. *Reynolds v. Kingston Police Services Board)* 221 O.A.C. 216, (sub nom. *Reynolds v. Kingston (City) Police Services Board)* 84 O.R.

(3d) 738, (sub nom. *Reynolds v. Kingston (City) Police Services Board)* 280 D.L.R. (4th) 311 (Ont. C.A.) — considered

Riopelle v. Trucash Rewards Inc. (2014), 2014 CarswellOnt 7935, 2014 ONSC 3414 (Ont. S.C.J.) — referred to

Salasel v. Cuthbertson (2015), 2015 ONCA 115, 2015 CarswellOnt 2274, 381 D.L.R. (4th) 632, 124 O.R. (3d) 401, 329 O.A.C. 324 (Ont. C.A.) — referred to

Salewski v. Lalonde (2017), 2017 ONCA 515, 2017 CarswellOnt 9177, 415 D.L.R. (4th) 108, 137 O.R. (3d) 750, 137 O.R. (3d) 762 (Ont. C.A.) — referred to

Samuel Manu-Tech Inc. v. Redipac Recycling Corp. (1999), 1999 CarswellOnt 2764, 124 O.A.C. 125, 90 O.T.C. 140 (note), 38 C.P.C. (4th) 297 (Ont. C.A.) — considered

Taylor v. Workplace Safety & Insurance Board (2018), 2018 ONCA 108, 2018 CarswellOnt 1641 (Ont. C.A.) — referred to

1806700 Ont. Inc. v. Dmuchowski (2017), 2017 ONSC 6626, 2017 CarswellOnt 17130 (Ont. S.C.J.) — referred to

1806700 Ontario Inc. v. Dmuchowski (2017), 2017 ONSC 2817, 2017 CarswellOnt 6746 (Ont. S.C.J.) — followed

1806700 Ontario Inc. v. Dmuchowski (2018), 2018 ONCA 557, 2018 CarswellOnt 9511 (Ont. C.A.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 138 — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
s. 4 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 2.1.01 [en. O. Reg. 43/14] — considered

R. 2.1.01(6) [en. O. Reg. 43/14] — considered

R. 6 — considered

R. 6.01 — considered

R. 13.1.01 [en. O. Reg. 14/04] — considered

R. 13.1.01(1) [en. O. Reg. 14/04] — considered

R. **13.1.01(3)** [en. O. Reg. 259/14] — considered

R. 13.1.02(1) [en. O. Reg. 14/04] — considered

R. 21.01 — considered

R. 21.01(1) — pursuant to

R. 21.01(3) — pursuant to

R. 21.01(3)(d) — considered

R. 25.11 — pursuant to

R. 26.02(a) — considered

MOTIONS by defendants for orders dismissing plaintiff's action or striking statement of claim; CROSS-MOTION by plaintiff to amend statement of claim.

R.E. Charney J.:

Introduction

1 This case involves three motions.

2 The first is a motion by the defendants Muhammad Aslam Khan, Saeeda Bibi, Tauqeer Aslam, and MAK Law Office Professional Corporation (together referred to as the "Khan defendants") for an order dismissing the plaintiff's action or striking the Statement of Claim under Rules 21.01(1) and (3) and 25.11 of the *Rules of Civil Procedure*.

3 A similar motion is brought by the defendants Faisal Hameed and the Law Office of Faisal Hameed (the Hameed defendants).

4 There are nine other defendants named in this action, but they did not participate in this motion because they were noted in default (Marian Dmuchowski and Farooq Mian), have consented to the proposed Fresh as Amended Statement of Claim (Shahzad Siddiqui and Abrahams LLP), have filed for bankruptcy and served a notice of stay of proceedings (Leonila Fajardo), or the plaintiff has agreed to a dismissal of the action against them without costs (Syed Abid Hussain, Syed and Ellison Law Professional Corporation, Muezzin Quershi and KM Law Professional Corporation).

5 A cross-motion is brought by the plaintiff to amend the Statement of Claim issued on June 14, 2017 with a Fresh as Amended Statement of Claim. The plaintiff wishes to remove all allegations of negligence and breach of the Rules of Professional Conduct against certain defendants and add or clarify allegations of fraud.

6 The plaintiff's action finds its origin in a real estate transaction that occurred on August 8, 2012, and has engendered multiple legal proceedings that have developed into a procedural morass. These various legal proceedings have been filed and heard in Brampton, Toronto, and Newmarket. By my count, I am the tenth Superior Court judge to address the legal disputes that have arisen from the original transaction. In reviewing the material presented by counsel, I could not help but be reminded of the classic Star Trek episode "Let That Be Your Last Battlefield"[1], in which the last two survivors of a war-torn planet pursue each other across the universe, each committed to destroying the other long after their planet has become extinct.

Facts

7 Two of the defendants to this action, Marian Dmuchowski and Leonila Fajardo, owned a property at 67 Emeline Crescent in Markham, Ontario ("the property").

The Brampton Proceedings

8 The plaintiff, 1806700 Ontario Inc., was the second mortgagee. The second mortgage was in default, and 1806700 Ontario Inc. **commenced** a proceeding on December 24, 2012, for possession and personal judgment on the second mortgage. 1806700 Ontario Inc. was represented by a lawyer, Sandeep Singh Johal (Johal), in these proceedings. Since Rule **13.1.01(3)** of the *Rule of Civil Procedure* (O. Reg. 259/14, s. 4 — effective March 31, 2015) had not yet been enacted, the proceeding was **commenced** in Central West Region rather than in Central East where the property is located.

9 On January 21, 2013, the defendant, Muhammad Aslam Khan, as solicitor, registered a third mortgage on the property on behalf of the defendant Farooq Mian.

10 Default judgment was granted on February 13, 2013.

11 For ease of reference I adopt the following facts as set out by Ricchetti J. in *1806700 Ontario Inc. v. Dmuchowski*, 2017 ONSC 2817 (Ont. S.C.J.), at paras. 7-28, one of the cases leading up to the present proceeding:

> The second mortgagee wanted to sell the property under a Power of Sale. Any such sale would be subject to the first mortgage on the property.
>
> In order to sell the property, the plaintiff needed possession. Possession was granted by court order in July, 2013.
>
> The property was listed for sale in July 2013. The property was sold the same month.
>
> There is no issue regarding the first mortgage or the amount needed to discharge the first mortgage to permit the sale to close.
>
> The net proceeds were held in trust.
>
> As far as the second mortgagee was concerned, the only outstanding issue was the determination of the amount owing under the second mortgage and the distribution of the net proceeds of sale.
>
> Somehow and despite the sale of the property, Mr. Khan, as solicitor, registered an assignment of the third mortgage to Bibi (Mr. Khan's spouse). Then there appears to be another assignment to a company of which Mr. Khan is a director. To make a long story short, the third mortgage was eventually assigned to Mr. Khan personally. There is little doubt that the circumstances surrounding the dealings with the third mortgage raise reasonable questions about its validity and quantum but, whether those are questions which need to be decided in this proceeding becomes an issue to be decided by this court.
>
> Subsequent to the sale of the property, the third mortgagee sought to set aside the Default Judgment. On July 16, 2014, a consent order was made by Donohue J. fixing the amount owed to the second mortgagee. The consent order also called for a reference.
>
> Subsequently, the second mortgagee alleged it learned information that the third mortgage was a sham and, on this basis, sought to set aside the consent order by Donohue J. The second mortgagee sought leave to appeal Donohue J.'s order of July 16, 2014 despite the fact it was a consent order and a lengthy period of about two years had elapsed.
>
> The reference was to proceed.
>
> A Rule 30.10 motion was brought by the second mortgagee requiring Mr. Khan to produce records relating to the third mortgage. This motion was opposed by Mr. Khan. It is entirely unclear why the second mortgagee had any interest in the third mortgagee's validity or quantum owing under the alleged third mortgage. The second mortgagee was entitled to the amounts under its second mortgage. Any remaining proceeds of sale would belong to either the mortgagors or the third mortgagee. It mattered not to the second mortgagee which party received the surplus.
>
> Nevertheless, the Rule 30.10 motion was heard on June 22 and 23, 2016 by Snowie J. On July 20, 2016 Snowie J. ordered production by Mr. Khan of various documents related to the third mortgage and awarded costs on a substantial indemnity basis against Mr. Khan. The quantum of costs was reserved by Snowie J. pending written submissions.
>
> Mr. Khan appealed Snowie J.'s order of July 20, 2016.
>
> On September 26, 2016, the second mortgagee's motion to set aside Donohue J.'s order of July 16, 2014 was scheduled to be heard. It came before this court. It was apparent to this court that the real issue was a reference to determine the amount owing under the second mortgage. The multiplicity of motions, leave to appeal and appeal were disproportionate to the amounts at issue or the reasonable and just determination of the issues. The reference would determine what

amounts, if any, remained after payment of the second mortgage.

On September 26, 2016, all the parties agreed to a consent order which included:

1. setting aside Donohue J.'s order of July 16, 2014;

2. "the motion for leave to appeal J. Donohue's order is hereby abandoned w/o costs";

3. "Justice Snowie's order of July 20, 2016 shall be complied with (para 85) within two weeks of today's date";

4. "the motion for leave to appeal J. Snowie's order is hereby abandoned w/i [without] costs";

5. "the reference as to the amount outstanding indebtedness on the second mortgage to be heard by me based on the evidence before me."; and

6. "costs of the proceeding reserved to me after the conclusion of the Reference"

The reference was scheduled and took **place** on December 5, 2016. All parties were served. The reference took **place**.

This court found that $512,250.25 was properly due to the second mortgage (which included the payout to the first mortgagee). This left a total surplus of $17,300.29 from the net proceeds of sale of the property. This court's endorsement on that date went on to:

1. address how costs submissions were to be dealt with; and

2. "if after the costs have been decided, if this court needs to determine the validity of the third mortgage (and it is properly before this court) then either party may schedule an attendance before me."

Costs submissions were received in January 2017. In his submissions, Mr. Khan sought costs against Mr. Johal (the plaintiff's initial lawyer) personally.

The court declined to deal with costs by way of the written submissions . . .

Before this matter could be rescheduled for a hearing date, an issue arose in a Toronto proceeding involving some of these parties and the third mortgagee. Examinations were taking **place** in the Toronto proceeding. There was an outstanding motion in the Toronto proceeding scheduled for March 7, 2017. This court was asked to and did adjourn the costs hearing until after the motion in the Toronto proceeding had been decided. Eventually, Matheson J. decided the motion.

At a scheduling conference on March 29, 2017, this court imposed a timetable and scheduled a costs hearing on April 27, 2017.

Several things occurred before the hearing date:

1. Justice Snowie awarded costs of $14,672.58 against Mr. Khan for the Rule 30.10 motion. Justice Snowie's endorsement was released on April 21, 2017; and

2. Matheson J. awarded costs of $15,000 against Mr. Khan for the motion in the Toronto action.

12 That chronology brings us to May 8, 2017, when Ricchetti J. decided the costs of the reference that he had heard. Ricchetti J. made the following decisions:

1) Justice Snowie's costs award for the Rule 30.10 motion remains.

2) The second mortgagee [the plaintiff in the present case] is entitled to $20,000 all-inclusive partial indemnity costs for the reference proceeding, payable jointly and severally by the defendants and Mr. Khan.

3) The second mortgagee may add to its second mortgage the amount of $17,300 (the surplus of sale proceeds following payment of the second mortgage) plus any accrued interest in full satisfaction of this portion of this costs award for the proceeding and reference.

4) A substantial indemnity costs award of $4,500 all-inclusive is payable by Mr. Khan to the second mortgagee forthwith for the April 27, 2017 hearing in relation to Mr. Khan's claim for costs against Mr. Johal personally.

5) A substantial indemnity costs award of $6,000 all-inclusive is payable by Mr. Khan to Mr. Johal forthwith.

13 Significantly, Ricchetti J. concluded that it was not necessary to determine the validity of the third mortgage. The final paragraphs of his endorsement state, at paras. 74 and 75:

There is no reason in this proceeding to embark upon a determination of the validity of the third mortgagee or the entitlement to the owner (defendants) as there are no monies to distribute to either party from the net proceeds of sale.

This action was for possession and judgment against the defendants/mortgagors. All of the claims in this proceeding are now spent.

14 In reaching this conclusion Ricchetti J. emphasized (several times) the point that the validity of the third mortgage was irrelevant to the second mortgagee, since (at para. 17): "The second mortgagee was entitled to the amounts under its second mortgage. Any remaining proceeds of sale would belong to either the mortgagors or the third mortgagee. It mattered not to the second mortgagee which party received the surplus."

15 See also, paras. 50, 53 and 57-58:

[T]his court remains at a loss as to why the second mortgagee needed to embark upon the challenge of the validity of the third mortgage. The second mortgagee's only interest should have been a reference to determine the amount owing to it under the second mortgage. Any surplus, whether belonging to the mortgagor/defendants and/or the third mortgagee, was not relevant to the second mortgagee after it was paid its entitlement under its second mortgage in full. A number of steps in this proceeding were unnecessary.

. . .

I have excluded the costs by the second mortgagee to set aside the Default Judgment. Having obtained a judgment as to the amount owing under its second mortgage, why would the second mortgagee care whether there was any or the amount owing under the third mortgagee? This was a power of sale. The second mortgagee is only entitled to be paid what it is owed under its second mortgage. The balance, if any, belongs to others or should be paid into court. As a result, it is unclear why the second mortgagee would have moved to set aside the Default Judgment just because it had found information regarding the third mortgage.

. . .

This court is satisfied that, to some extent, the second mortgagee unnecessarily complicated this proceeding by questioning the validity of the third mortgage which was not and is not an issue relevant to the issues in this proceeding, namely, the second mortgagee's entitlement to have possession of the property, judgement against the defendants (mortgagors) or to permit it to sell the property.

Once the amount due to the second mortgagee was decided in this reference and paid to the second mortgagee, there is nothing else to be decided in this proceeding:

- There is no property left. The property is sold. The only issue is the distribution of the net proceeds and that has

been determined by this court;

• The respective entitlement and distribution of the proceeds of sale; and

• Given this decision on costs of the proceeding and reference, there remains no further proceeds for distribution to the third mortgagee or the owners (even if the third mortgage was valid).

16 I have set out these paragraphs in full because they are directly relevant to the legal issues raised in the motions before me.

17 Following the decision of Ricchetti J., the third mortgagee, Mr. Khan, brought a motion to set aside part of the Reference Report of Ricchetti J. He asked that the surplus monies resulting from the mortgage sale, in the amount of $17,300.29, be paid to him, that he not be required to pay costs to any other party, and that he be awarded his costs of the proceeding. Mr. Khan's motion was dismissed by Bielby J. on November 3, 2017 (*1806700 Ont. Inc. v. Dmuchowski*, 2017 ONSC 6626 (Ont. S.C.J.)).

18 Mr. Khan sought an extension of time to appeal the decision of Bielby J., and, by order of MacPherson J.A. dated April 5, 2018, was required to pay $10,000 to stand as security for costs before perfecting the appeal.

19 Mr. Khan's appeal from the order of MacPherson J.A. was dismissed by a full panel of the Court of Appeal on June 14, 2018 (*1806700 Ontario Inc. v. Dmuchowski*, 2018 ONCA 557 (Ont. C.A.)). The Court of Appeal imposed a deadline of June 25, 2018 for payment of the security for costs and the perfection of the appeal, failing which "the appeal shall be dismissed as abandoned".

20 Mr. Khan perfected the appeal of Bielby J.'s decision on June 26, 2018, and the appeal is scheduled to be heard by the Court of Appeal on December 17, 2018.

21 On September 13, 2018 Mr. Khan brought a motion to the Court of Appeal for an extension of time to file appeals of related orders, including the production order of Snowie J. dated July 20, 2016. Paciocco J.A. dismissed the motion, and fixed costs at $3,500 to each of the two respondents (1806700 Ontario Inc. and Mr. Johal).

22 In reviewing the litigation proceedings to date, Paciocco J.A. noted, at para. 6: "A grossly disproportionate amount of litigation has been undertaken."

The Toronto Proceedings

23 On September 8, 2015 a company called Swat Emeraldmine & Marketing Inc. (Swat) issued a Statement of Claim against 1806700 Ontario Inc., and various other parties involved in the case, including 18067000 Ontario Inc.'s lawyer in the Brampton proceedings, Mr. Johal. Much of that original Statement of Claim has been struck out (see below), but the action, in its present form, is for a declaration, *inter alia*, that the third mortgage was a valid mortgage and that the defendants had conducted an improvident sale of the property and acted in bad faith. The claim seeks damages in the amount of $440,000, and was **commenced** in Toronto.

24 Swat was the plaintiff in this action because the third mortgage was assigned from the original mortgagee, Farooq Mian, to Saeeda Bibi (Mr. Khan's wife) to Swat. Mr. Khan is a director of Swat. Swat then assigned the mortgage to Mr. Khan.

25 On May 18, 2016, the defendant Johal brought a motion to strike out the Statement of Claim. Matheson J. held that certain paragraphs in the claim should be struck with leave to amend. There was also a companion claim in which Mr. Kahn was the plaintiff and Mr. Johal the sole defendant, and that claim was struck in its entirety with leave to amend.

26 The moving party also sought to have the claim dismissed or stayed under Rule 21.01(3)(d) as frivolous, vexatious and

an abuse of process on the basis of the relationship between it and the Brampton action. Matheson J. concluded that given the issues with the pleadings, it was premature to decide whether the action should be stayed until after the pleadings had been amended.

27 The Statement of Claim was amended on October 31, 2016.

28 On November 16, 2016 a transmission of interest was filed and the Swat claim was continued with Mr. Khan as the plaintiff. The companion claim originally brought in Mr. Khan's name was not amended and was struck out.

29 On March 7, 2017 the matter returned to Matheson J., who held that there were still significant problems with the amended Statement of Claim and struck it out with leave to amend, but stayed that action pending the completion of the Brampton proceeding. In her oral reasons for decision Matheson J. expressed significant concern about the problems being created by the substantial overlap between the Brampton and Toronto actions. She stated at p. 13:

> [I]t is very apparent to me that as a result of these parallel proceedings that are significantly overlapping with causes of one case being introduced into the other back and forth between proceedings in two different regions, that there is a very high risk of unfairness and inconsistency between these two proceedings dealing with, at its core, the same subject matter.

30 Accordingly Matheson J. exercised her jurisdiction under Rule 21.01(3)(d) to temporarily stay the Toronto action pending the final determination or settlement of the Brampton proceedings, subject to further order of the court. Mr. Khan was given 60 days to deliver an amended Statement of Claim "if and when the stay is lifted" and if he has paid the costs order. Costs of the motion were fixed at $15,000, all inclusive.

31 Mr. Khan sought leave to appeal the March 7, 2017 decision of Matheson J., and his motion to for leave to appeal was dismissed by Nordheimer J. (as he then was) on June 5, 2017. Costs were fixed at $5,000 on a substantial indemnity scale.

32 On June 8, 2017, Mr. Khan filed with the Divisional Court office, a motion to set aside or vary Nordheimer J.'s order along with a request for an interim order staying enforcement of it. Nordheimer J. held that there is no right to appeal from an order refusing leave to appeal, and there was therefore no jurisdiction for the Divisional Court to entertain Mr. Khan's motion. The motion was therefore dismissed as being frivolous, vexatious or an abuse of process (*Khan v. 1806700 Ontario Inc.*, 2017 ONSC 3726 (Ont. Div. Ct.)). The endorsement states: "There will be no order as to costs".

33 On August 30, 2017, Mr. Khan sought an order vacating the stay imposed by Matheson J. Sanfilippo J. dismissed the motion because the record before him did not permit him to determine that the Brampton proceedings were "finally determined or settled". Indeed, the record indicated that Mr. Khan's motion to set aside Ricchetti J.'s decision had not yet been heard by the Brampton court. The motion was dismissed without costs.

34 Following Bielby J.'s November 3, 2017 decision to dismiss Mr. Khan's motion to set aside Ricchetti J.'s decision, Mr. Khan brought a second motion to vacate the stay imposed by Matheson J. On November 30, 2017 this second motion was dismissed by Spies J. because Mr. Khan intended to appeal the decision of Bielby J., and therefore the Brampton proceedings had not been finally determined. The endorsement notes that no costs were sought.

35 As noted above, Mr. Khan perfected the appeal of the Brampton proceeding and it is scheduled to be heard by the Court of Appeal on December 17, 2018. As such, the stay imposed by Matheson J. remains in effect.

The Newmarket Proceedings

36 That brings us to Newmarket.

37 On June 14, 2017, 1806700 Ontario Inc. issued a Statement of Claim in Newmarket, against Mr. Khan and various other lawyers, law firms and parties involved in the case.

38 In many respects the Newmarket claim issued by 1806700 Ontario Inc. against Khan et al. is a looking glass version of the Statement of Claim issued by Swat and Khan against 1806700 and Johal in Toronto. Both cases relate to the power of sale proceedings in Brampton. Where Swat and Khan claim that Johal was negligent and breached the Law Society's Rules of Professional Conduct, 1806700 claims that Khan was negligent and breached the Law Society's Rules of Professional Conduct. Where Swat and Khan seek a declaration that their third mortgage was valid, 1806700 alleges that the third mortgage was fraudulent.

39 Indeed, many of the claims advanced by 1806700 Ontario Inc. against Khan are identical to the claims made by Khan against Johal that were struck out by Matheson J. in her endorsement dated May 18, 2016.

40 The Newmarket claim, which obviously overlaps with the Toronto claim, was brought by 1806700 Ontario Inc. just three months after 1806700 Ontario Inc. successfully moved before Matheson J. to have Mr. Khan's Toronto claim stayed.

41 On July 9, 2017, four of the defendants to this action made a request pursuant to Rule 2.1.01(6) seeking an order dismissing the claim as frivolous, vexatious or otherwise an abuse of process. Di Luca J. issued his decision on April 16, 2018, declining to dismiss the proceedings under the limited scope of review contemplated by Rule 2.1.01(6). He did, however, express serious reservations regarding the merits of the case. These comments are instructive (at paras. 9-12):

> The Plaintiff in this case is the second mortgagee in the subject transaction. It appears that the Plaintiff, through litigation in Brampton has recouped any amounts owed under the mortgage. Nonetheless, and for reasons which were unclear to Ricchetti J. in the reference and unclear to me in these proceedings, the Plaintiff is seeking to litigate events relating to the third mortgage.
>
> . . . Even assuming that the third mortgage was fraudulent or otherwise improperly obtained, it is difficult to see how the Plaintiff would have any direct claim for damages against those involved in the third mortgage, seeing at is has been paid what it was owed under the terms of the second mortgage. Perhaps there is some claim that the conduct of the parties involved in the third mortgage made it more difficult and costly for the second mortgagee to secure its funds from the sale of the home, though that is not readily apparent from reading the statement of claim.
>
> A review of the claim also suggests that there may be a limitation issue that could well be insurmountable. This claim was **commenced** on June 14, 2017. The third party mortgage was registered on January 21, 2013. It is unclear from the pleadings when the facts upon which the claim is based were discovered, though the proceedings in relation to the third mortgage have been ongoing for a number of years.
>
> . . . It may well be that the third mortgage was fraudulently or improperly obtained. Indeed, it is also apparent from a review of Ricchetti J.'s endorsement that the conduct of Mr. Khan, the solicitor responsible for the third mortgage, raises numerous questions, many of which remain unanswered.
>
> On the whole, when I examine the face of the pleadings, I am concerned that the action is potentially frivolous and vexatious in that there may be no valid basis for a claim between the second and third mortgagees in this case. I am also concerned that this litigation is essentially a "re-packaging" of related litigation . . .

The Proposed Fresh As Amended Statement of Claim

42 Given their lack of success under Rule 2.1.01, the Khan and Hameed defendants brought the current motion to strike out the Statement of Claim under Rules 21.01(1) and (3) and 25.11.

43 Recognizing the obvious defects in its original Statement of Claim, 1806700 Ontario Inc. brought a cross-motion on June 12, 2018 for an order granting leave to amend the Statement of Claim issued on June 14, 2017, in a form of a Fresh as Amended Statement of Claim.

44 Pursuant to Rule 26.02(a), a party may amend the party's pleadings "without leave before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action". In the present case

the defendants have not yet filed Statements of Defence, so pleadings have not closed, and the plaintiff is free to amend its Statement of Claim without leave of the court or the consent of the other parties.

45 One of the risks that a defendant takes in bringing a motion to strike before pleadings are closed is that it may provide the plaintiff with a blueprint on how to redraft or amend the statement of claim to cure the defects identified in the motion to strike. If the plaintiff amends the statement of claim it may well render the motion to strike moot. Amending a statement of claim in response to a motion to strike does not, in my view, constitute an abuse of process, although there may be costs consequences if left to the eleventh hour or made on multiple occasions. Such amendments are, of course, subject to any limitation period defence that might apply.

46 That said, the plaintiff accepts that there is a "longstanding practice" requiring leave to amend a pleading in the face of a motion to strike, despite the wording of Rule 26.02(a) (*Riopelle v. Trucash Rewards Inc.*, 2014 ONSC 3414 (Ont. S.C.J.)), and has therefore brought a motion to amend. The issue of whether a motion to amend is necessary in the face of the wording of Rule 26.02(a) was not argued before me, and I will proceed on the basis that a motion to amend has been brought.

47 Given the plaintiff's acknowledgment that the original Statement of Claim is unsustainable, there is nothing to be gained by refusing the amendment at this stage of the proceedings. All of the parties are prepared to deal with the proposed Fresh as Amended Statement of Claim, and I will consider only the proposed Fresh as Amended Statement of Claim on this motion.

48 The proposed Fresh as Amended Statement of Claim alleges that Mr. Khan, together with the other Khan defendants, created and registered a fraudulent third mortgage on the property. As a result of this fraudulent third mortgage and other procedural steps taken by the Khan defendants, it is alleged that the plaintiff, 1806700 Ontario Inc., which was the second mortgagee, incurred unnecessary litigation fees and other losses in both the Brampton and the Toronto proceedings.

49 With respect to the Hameed defendants, the proposed Fresh as Amended Statement of Claim alleges (at para. 38) that "To assist Mr. Khan in his Attempt to Hide the Fraud, . . . Lawyer Hameed acted for the Property Owners", and alleges (at para. 59) that on December 5, 2014 Mr. Hameed advised Mr. Johal "that the Property Owners did not receive the funds purporting to be the Non-Existent Third Mortgage; and the facts surrounding the Non-Existent Third Mortgage were highly suspicious from the Property Owners' perspective".

50 Paragraphs 61 and 62 of the proposed Fresh as Amended Statement of Claim sets out the specific allegation of fraud with respect to Mr. Hameed:

> On December 13, 2014, in response to the Plaintiff's Motion to Set Aside the Donohue Order, Lawyer Hameed swore and served an affidavit denying having made comments to Sandeep Johal abut the Non-Existent Third Mortgage.
>
> By issuing this denial, Lawyer Hameed assisted the Attempt to Hide the Fraud, prolonged the Power of Sale Lawsuit and required the Plaintiff to expend time and money in order to respond to same.

51 The proposed Fresh as Amended Statement of Claim seeks a declaration that the third mortgage was a fraudulent mortgage, in addition to general and special damages against the remaining defendants.

Position of the Defendants

52 The defendants take the position that the proposed amendments do not correct the fundamental defects in the claim, and maintain their position that the Statement of Claim is fundamentally flawed with or without the proposed amendments.

53 I will deal first with the position of the Hameed defendants.

The Hameed Defendants

(i) Collateral attack on previous costs rulings

54 The first argument advanced by the Hameed defendants is that the proposed action constitutes a collateral attack on the costs decisions made in the Brampton reference proceeding before Ricchetti J. and the various Toronto proceedings.

55 In the Brampton reference, the plaintiff (who was the second mortgagee in the reference) sought substantial indemnity costs in the amount of $86,612.09. Ricchetti J.'s endorsement of May 8, 2017 determined (at para. 49) that substantial indemnity costs were not appropriate or reasonable. He concluded that a number of steps taken by the second mortgagee in that reference were unnecessary because it was not necessary for the second mortgagee to embark on the challenge to the validity of the third mortgage for the purposes of the reference. Ricchetti J. held (at para. 59) that the plaintiff was entitled to partial indemnity costs of $20,000, all inclusive. The plaintiff did not seek leave to appeal Ricchetti J.'s costs order.

56 In the Toronto proceedings (referred to by the parties as the "Swat action" after the name of the original plaintiff) costs orders were made by each of the judges (Matheson J., Nordheimer J., Sanfilippo J., and Spies J.) who dealt with each of the motions. The plaintiff (who was the defendant in the Toronto proceedings) did not seek leave to appeal any of those costs orders.

57 Paragraph 101 of the proposed Fresh as Amended Statement of Claim (which I note is 12 pages long) alleges that as a result of the defendants' efforts to enforce the fraudulent third mortgage:

> [T]he plaintiff was/has been required to contend with frivolous, vexatious, unreasonable and/or unnecessary litigation, in the Power of Sale Lawsuit and the SWAT Lawsuit, as well as other proceedings for which the Plaintiff has suffered losses as a result of fraud of the defendants, jointly and/or severally . . .

58 Paragraph 102 repeats these allegations of litigation costs:

> As a result of the Attempt to Hide the Fraud and general fraudulent scheme, described herein, the Plaintiff has suffered loss and damage including but not limited to:
>
> a) Litigation costs incurred, due to fraud, by the Plaintiff in the Power of Sale Lawsuit . . . of approximately $86,000.00;
>
> b) Litigation costs incurred in the SWAT Lawsuit, as a result of the fraud;

59 The defendants note that the amount claimed in para. 102(a) - $86,000 — is the precise amount of costs claimed and denied in the proceeding before Ricchetti J.

60 In *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the Supreme Court of Canada described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

61 In my view the proposed Fresh as Amended Statement of Claim seeks to relitigate the costs orders of Ricchetti J. and the various Toronto proceedings, none of which were appealed by the plaintiff in this case. This is an impermissible collateral attack on those costs orders and is clearly an abuse of process. A successful party in a legal proceeding cannot bring a second legal proceeding against the same person to claim the legal costs not awarded in the first proceeding: *Salasel v. Cuthbertson*, 2015 ONCA 115 (Ont. C.A.), at para. 22.

(ii) Absolute Privilege

62 Paragraphs 61-62 of the proposed Fresh as Amended Statement of Claim allege that Mr. Hameed communicated to Mr. Johal that the third mortgage was "highly suspicious", but in an affidavit sworn by Mr. Hameed in the Brampton proceedings, denied making these comments, and thereby assisted Mr. Khan's attempt to hide the fraud and prolonged the power of sale lawsuit.

63 The Hameed defendant takes the position that these allegations are barred by the doctrine of absolute privilege, which applies to any words spoken or written by counsel in the course of the judicial proceedings.

64 The doctrine of absolute privilege was summarized by the Ontario Court of Appeal in *Salasel*, at para. 35:

> The doctrine of absolute privilege contains several basic elements: no action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law; the privilege extends to documents properly used and regularly prepared for use in the proceedings.

65 In *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, 1999 CanLII 3776, (1999), 124 O.A.C. 125 (Ont. C.A.), at para. 20, the Court of Appeal held that the immunity afforded by absolute privilege "extends to any action, however framed, and is not limited to actions for defamation". In that case, the intentional acts upon which the plaintiff by counterclaim was relying in support of its claim for intentional interference with contractual relations were affidavits sworn by the defendants to obtain **receivership** orders. The court upheld the decision of the motion judge striking out the counterclaim on the basis that the affidavits were protected by absolute privilege.

66 In *Reynolds v. Smith*, 2007 ONCA 166 (Ont. C.A.), at para. 14, Borins J.A. explained the policy reasons for this absolute privilege:

> The rationale for witness immunity, which has become less an evidentiary rule than a rule of substantive law, is that the proper administration of justice requires full and free disclosure from witnesses unhampered by fear of retaliatory lawsuits.

67 It is clear that the essence of the action against the Hameed defendants is based on the testimony given by Mr. Hameed in his affidavit, which was sworn in his capacity as counsel for the purposes of providing evidence in the Brampton power of sale proceeding. This evidence is protected by absolute privilege and cannot be the basis of a cause of action.

Conclusion Re: Hameed Defendants

68 The two defects noted above — collateral attack on previous costs rulings and absolute privilege - are sufficient to address the Hameed defendants' motion to strike the Fresh as Amended Statement of Claim. Based on those two defects, even assuming the truth of all of the allegations in the proposed Fresh as Amended Statement of Claim, it is plain and obvious that the claim against the Hameed defendants discloses no reasonable cause of action and constitutes an abuse of process. The Fresh as Amended Statement of Claim is therefore struck as against the Hameed defendants, without leave to amend.

Limitation Period

69 The defendants also argue that the claim is barred by s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, because it was brought more than two years after the alleged fraud was discovered by the plaintiff.

70 In my view it is not plain and obvious from the pleadings that the alleged fraud was discovered by the plaintiff more than two years before it **commenced** the action. Generally speaking, the expiration of the limitation period is a defence that must be pleaded unless it is plain and obvious from a review of the statement of claim that no additional facts could be

asserted that would alter the conclusion that a limitation period has expired: *Beardsley v. Ontario* [2001 CarswellOnt 4137 (Ont. C.A.)], 2001 CanLII 8621, at para. 21; *Salewski v. Lalonde*, 2017 ONCA 515 (Ont. C.A.), at para. 43.

71 As such, limitation period questions are typically not appropriate for determination under Rule 21.01. Unless there are no material facts in dispute, a limitation period question should normally be determined after the close of pleadings (as a limitation period is a defence that must be pleaded) and by way of motion for summary judgment or trial. As the Ontario Court of Appeal noted in *Salewski*, where the facts of a case are not straightforward and have not been fully defined by the pleadings, it is unlikely that a proposed limitation defence can be properly dealt with on a motion under Rule 21.01(1). The Court stated, at para. 45:

> However, the basic limitation period established by the *Limitations Act*, 2002 is now premised on the discoverability rule. The discoverability rule raises issues of mixed fact and law: *Longo v. MacLaren Art Centre*, 2014 ONCA 526 (CanLII), 323 O.A.C. 246, at para. 38. We therefore question whether there is now any circumstance in which a limitation issue under the Act can properly be determined under rule 21.01(1)(a) unless pleadings are closed and it is clear the facts are undisputed. Absent such circumstances, we are sceptical that any proposed limitation defence under the Act will involve "a question of law raised by a pleading" as required under rule 21.01(1)(a).

72 See also: *Taylor v. Workplace Safety & Insurance Board*, 2018 ONCA 108 (Ont. C.A.), at para. 22:

> This court has held consistently that only in rare cases, if any, will we entertain a motion to dismiss an action as statute barred under the Limitations Act in the absence of a statement of defence.

73 This caveat is particularly applicable to an action for fraud, where the date of discoverability will rarely coincide with the date on which the fraud was committed. It is a question of fact when the plaintiff's suspicion of fraud crystalized into discoverability. I find that it is not "plain and obvious" from the facts alleged in the proposed Fresh as Amended Statement of Claim that the claim was **commenced** more than two years after the alleged fraud was discovered.

The Khan Defendants

74 The Fresh as Amended Statement of Claim against the Khan defendants suffers from the same defects as the claim against the Hameed defendants. It is a collateral attack on previous costs rulings, and at least some of the pleadings relate to steps taken by Mr. Khan that are protected by absolute privilege.

75 That said, the claim against the Khan defendants raises a different issue that must be dealt with in a different way.

76 Mr. Khan argues that the issue of the alleged fraudulent third mortgage has already been dealt with by Ricchetti J. in the Brampton proceeding, and Ricchetti J. decided that the second mortgagee had no interest in the validity of the third mortgage in that proceeding (see paras. 13-15, *supra*). Therefore, Mr. Khan argues, issue estoppel precludes 1806700 Ontario Inc. from challenging the validity of the third mortgage.

77 The difficulty with this argument is that Mr. Khan has himself put the validity of the third mortgage in issue. In the Toronto proceeding in which Mr. Khan is the plaintiff, Mr. Khan seeks a declaration that the third mortgage is valid and seeks damages for improvident sale by the second mortgagee, 1806700 Ontario Inc. There is no question that 1806700 Ontario Inc., as the defendant to that action, is entitled to defend that action by claiming that Mr. Khan's third mortgage is an invalid mortgage because it is a fraudulent mortgage. If the third mortgage is invalid, Mr. Khan's claim for improvident sale cannot succeed.

78 Thus, while Ricchetti J. and Di Luca J. questioned the need for 1806700 Ontario Inc. to challenge the validity of the third mortgage in the Brampton and the Newmarket proceedings, the reason for this position is clear in the Toronto proceeding.

79 But the Toronto proceeding has been stayed pending the final disposition of the Brampton proceeding, which is now

pending before the Court of Appeal.

80 Moreover, the Statement of Claim in the Toronto proceeding has been struck with leave to amend within 60 days after the stay has been lifted.

81 One thing is clear: if Mr. Khan's Toronto action for improvident sale ever proceeds, 1806700 Ontario Inc. will respond that Mr. Khan's third mortgage is a fraudulent mortgage.

82 As things stand now, however, the Toronto action remains inchoate. There would be little value to my deciding the scope of 1806700 Ontario Inc.'s right to challenge the validity of Mr. Khan's third mortgage in isolation. Once the Court of Appeal makes its decision in the Brampton case, the Superior Court may one day have to reconsider Mr. Khan's right to bring his action for improvident sale against 1806700 Ontario Inc.

83 Accordingly, given the fundamental defects in the Fresh as Amended Statement of Claim, I believe that it is appropriate to grant the same relief on this motion as Matheson J. granted in the motion to strike in the Toronto proceeding: The Fresh as Amended Statement of Claim is struck, with leave to amend.

84 In addition, I am exercising my jurisdiction under Rule 21.01(3) to temporarily stay the Newmarket action pending the final determination or settlement of the Brampton proceeding. If and when the stay is lifted, 1806700 Ontario Inc. will have 30 days from the receipt of Mr. Khan's amended Statement of Claim, or 30 days from the expiry of the 60 day period in which Mr. Khan was permitted to file an amended Statement of Claim, to deliver a Fresh as Amended Statement of Claim, Statement of Defence and/or Counterclaim consistent with these reasons. Leave to amend is not granted to assert claims that fall within paras. 54-68 above.

Rule 13.1.01(3) — Mortgage Claims — Place of Commencement

85 Rule **13.1.01(3)** came into force on March 31, 2015. Pursuant to that rule, an originating process containing a claim relating to a mortgage must be **commenced** in the county that the regional senior judge of the region in which the property is located designates for such claims. Rule 13.01(1) and (3) provide:

> 13.1.01 (1) If a statute or rule requires a proceeding to be **commenced**, brought, tried or heard in a particular county, the proceeding shall be **commenced** at a court office in that county and the county shall be named in the originating process.
>
> (3) In the case of an originating process, whether it is brought under Rule 64 (Mortgage Actions) or otherwise, that contains a claim relating to a mortgage, including a claim for payment of a mortgage debt or for possession of a mortgaged property, the proceeding shall be **commenced** in the county that the regional senior judge of a region in which the property is located, in whole or in part, designates within that region for such claims.

86 It is apparent that both the Toronto proceeding and the Newmarket proceeding contain claims "relating to a mortgage". The Toronto proceeding seeks a declaration that the third mortgage is valid, while the Newmarket proceeding seeks a declaration that the same mortgage is fraudulent. All other relief is dependant on and consequent to this initial declaration of (in)validity. Accordingly, both claims (which post-date March 31, 2015) are subject to the requirements of Rule 13.1.01(1) and (3).

87 The property in question is located in Markham, Ontario, which is within the Central East Region of the Ontario Superior Court. Pursuant to the Consolidated Practice Directions, Barrie or Oshawa have been designated as the **places** where mortgage proceedings may be **commenced** for property located anywhere in the Central East Region.

88 It is apparent that both the Toronto and the Newmarket proceedings were improperly **commenced** in those respective locations. Where a proceeding is **commenced** in a location contrary to Rule 13.1.01, Rule 13.1.02(1) authorizes the court to transfer the proceeding to the county where it should have been **commenced**.

89 Rule 13.1.02(1) provides:

> If subrule 13.1.01 (1) applies to a proceeding but a plaintiff or applicant **commences** it in another **place**, the court may, on its own initiative or on any party's motion, order that the proceeding be transferred to the county where it should have been **commenced**. (emphasis added)

90 Section 138 of the *Courts of Justice Act*, R.S.O. 1990, chap. C-43, provides: "As far as possible, multiplicity of legal proceedings shall be avoided". It is clearly contrary to s. 138 to permit these separate proceedings, dealing with the same subject matter, to continue in two separate judicial regions. In her March 7, 2017 endorsement, addressing the substantial overlap between the Brampton and Toronto actions, Matheson J. warned of the "very high risk of unfairness and inconsistency" if those two actions were permitted to proceed. Adding a third proceeding to the mix compounds this risk. This multiplicity of proceedings is an unacceptable waste of judicial resources in a case already described by Paciocco J.A. as "grossly disproportionate".

91 Since both the Toronto and the Newmarket actions were **commenced** in the wrong **place** contrary to Rules 13.1.01 (1) and (3), I am exercising my authority under Rule 13.1.02(1) to transfer both the Toronto action (CV-15-535860) and the Newmarket action (CV-17-131448) to Oshawa.

Rule 6 - Consolidation

92 Rule 6 provides:

> 6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
>
> (c) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
>
> (e) any of the proceedings be,
>
> (i) stayed until after the determination of any other of them, or
>
> (ii) asserted by way of counterclaim in any other of them.
>
> (2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for **placing** an action on the trial list.

93 It is clear that the Toronto and Newmarket actions have questions of law and fact in common. The validity of the third mortgage is the central question in both claims. It is also clear that both actions arise from the same transaction: the registration of the third mortgage and the sale of the house by the second mortgagee under the power of sale.

94 Should one or both of these cases continue after the stay is lifted, this is a case that clearly requires case management, and I will act as the case management judge for these proceedings. Any motions in relation to these proceedings should be scheduled before me.

95 At this stage we do not know the form that the pleadings will take. One thing is certain, if the parties issue two separate claims the first order of case management will be whether the two actions should be consolidated. The precise nature of the consolidation will be determined when and if the parties file amended pleadings after the stays are lifted or come to an end.

Conclusion

96 This Court Orders:

(a) The plaintiff's claim against Faisal Hameed and the Law Office of Faisal Hameed is struck out in its entirety, without leave to amend.

(b) The plaintiff's claim against Muhammad Aslam Khan, Saeeda Bibi, Tauqeer Aslam, and MAK Law Office Professional Corporation is struck out in its entirety with leave to amend subject to the terms of this order.

(c) This action is stayed until the proceedings in Brampton Court File No. CV-12-5383 are finally determined or settled, which stay is subject to further order of the court.

(d) That upon the stay being lifted or coming to an end, the plaintiff, 1806700 Ontario Inc. will have 30 days from the receipt of Mr. Khan's amended Statement of Claim in Toronto action CV-15-535860, or 30 days from the expiry of the 60 day period in which Mr. Khan was permitted to file an amended Statement of Claim, to deliver a Fresh as Amended Statement of Claim, Statement of Defence and/or Counterclaim consistent with these reasons.

(e) That Toronto action (CV-15-535860) and Newmarket action (CV-17-131448) are transferred to Oshawa.

(f) Should one or both of these cases continue after the stay is lifted, I will act as the case management judge for these proceedings. The parties should schedule a case management conference after the period for delivery of pleadings set out above has expired.

97 If the parties cannot agree on costs, the moving party defendants may serve and file costs submissions with 25 days of the release of these reasons. Each party's submissions will be no more than 3 pages plus costs outline and any offer to settle. The plaintiff may file reply submissions within 15 days thereafter. Since the plaintiff must respond to both defendants, its submissions may be 5 pages in length.

Motions granted; cross-motion granted.

Footnotes

1 Season 3, Episode 15

TAB 2

2012 ONSC 163
Ontario Superior Court of Justice [Commercial List]

Callidus Capital Corp. v. Carcap Inc.

2012 CarswellOnt 480, 2012 ONSC 163, 211 A.C.W.S. (3d) 861, 84 C.B.R. (5th) 300

Callidus Capital Corporation (Applicant / Respondent by cross-application) and Carcap Inc. and Car Equity Loans Corp. (Respondents / Applicants by cross-application)

Application under Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43

Kaptor Financial Inc. and Carcap Auto Financing (Applicants by cross-application) and Callidus Capital Corporation (Respondent by cross-application)

Mesbur J.

Heard: December 14, 2011
Judgment: January 5, 2012
Docket: CV-11-00009498-OOCL

Counsel: Harvey G. Chaiton, George Benchetrit for Applicant / Respondent by cross-application
Mel Solmon, Fred Tayar, Colby Linthwaite for Respondents and applicants by cross-application
Robb English for Toronto Dominion Bank
A. Kaufman for Proposed Receiver, BDO Canada Ltd.
Jennifer Imrie for Third Eye Capital

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

APPLICATION by secured lender for appointment of receiver; CROSS-APPLICATION by debtors for initial order under *Companies' Creditors Arrangement Act*.

***Mesbur J.*:**

Introduction:

1 I heard this application for the appointment of a receiver and the debtors' cross application for an initial order under the *Companies' Creditors Arrangement Act*[1] (CCAA) on December 14, 2011. At the end of the hearing I made the following endorsement:

> For reasons to follow, an order will go in the following terms:
>
> a) The debtors' cross application for an initial order under the CCAA is dismissed.
>
> b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.
>
> c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.

d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.

e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.

f) Even if the Receivership Order takes effect on December 20/11 at 5:00 pm nothing prohibits the Debtor from continuing its efforts to refinance.

2 Counsel tell me the debtor was unable to obtain financing to pay the applicant in full by December 20, 2011. Accordingly, the Receivership Order is now in effect, and it is necessary for me to deliver the reasons for my decision to appoint a receiver and decline to make an initial order under the *CCAA*.

3 These are those reasons.

The application and cross-application:

4 The applicant, Callidus, is the respondents' first secured lender. On this application, it sought the appointment of a Receiver under both the *Bankruptcy and Insolvency Act*[2] and section 101 of the *Courts of Justice Act*.[3] The TD Bank, who is the respondents' second secured lender, supported the receivership application. It pointed out none of the respondents' refinancing proposals included sufficient financing to retire the respondents' debt to the TD Bank. Accordingly, the TD Bank took the position that even if the respondents were able to find alternate financing sufficient to pay out Callidus, the TD Bank would bring its own application to appoint a receiver under the terms of its own security.

5 The respondents brought a cross-application for relief under the *CCAA*. Both Callidus and TD Bank opposed the cross-application.

Facts:

6 The respondent CarCap is in the business of sub-prime car lease financing. The respondent Cashland provides sub-prime equity car loans. Both companies are subsidiaries of CarCap Auto Finance Inc., which itself is a subsidiary of Kaptor Financial Inc. Kaptor Financial owns several other companies, either in whole or in part. The parties refer to these companies as the Kaptor Group. An individual named Eric Inspektor controls the entire Kaptor Group, either directly or indirectly.

7 The Kaptor Group, including the respondents, had deposit accounts with the TD Bank. Initially, they did not have any credit facilities with the TD. Both the respondents and the Kaptor Group had financing elsewhere. Before Callidus lent operating funds to the respondents, the Laurentian Bank provided an operating facility to them. In addition, the Kaptor Group used private investors to finance their businesses through separately incorporated special purpose investment vehicles. They refer to them as "silos". The silos provided funding either through secured term debentures or preference shares.

Callidus provides financing

8 On September 1, 2011 Callidus replaced the Laurentian Bank as the respondents' first secured lender. It did so pursuant to a credit facility agreement, under which it agreed to advance a demand loan of up to $15 million subject to certain margin conditions. The agreement provided that advances were to be used:

a) To pay off the existing indebtedness to the Laurentian Bank;

b) To repay certain silo investors;

c) To provide working capital; and

d) To finance existing and future vehicle lease and vehicle loan transactions.

9 Another term of the agreement required the respondents to establish "blocked" accounts at a bank. The respondents had to deposit all funds they received from all sources into these blocked accounts. The respondents established the blocked accounts at the TD Bank.

10 The Callidus credit facility had other provisions that are relevant to this application. The respondents' representations required them to disclose "all commitments of any lender (other than the Lender) for all debt for borrowed money, and all debt for borrowed money outstanding of the Borrowers or Corporate Guarantors."[4] The respondents did not disclose they owed any money to TD Bank, although at the time they did. In fact, in the schedule where the respondents were required to list their "current debt defaults", they entered "none". This was not true. I will discuss this more fully in the section "Changes to the respondents' arrangements with TD Bank", below.

11 The respondents also represented that all the information they had given Callidus was "true and correct and does not omit any fact necessary in order to make such information not misleading."[5]

12 Callidus made its advances to a disbursement account that the respondents maintained. The disbursement account was also at the TD Bank.

13 The credit facility's terms provided that it was due on demand, and was repayable in full on the earlier of September 1, 2012 or an event of default. Remedies on default include Callidus' right to appoint a receiver and to apply to the court to appoint a receiver.

14 The credit facility is fully secured by general security agreements as well as a first ranking secured interest over the properties, assets and undertakings of the respondents.

Changes to the respondents' arrangements with TD Bank.

15 The respondents and other Kaptor Group companies initially had only deposit accounts with the TD Bank. Their banking arrangements did not include any overdraft or credit facilities. In July and August of 2011 the TD noticed what it characterized as a high rate of unusual activity in the respondents' accounts as well as in those of other Kaptor Group companies.

16 What was unusual is that more than $60 million in cheques passed through various Kaptor Group accounts. On August 18, 2011 about $18 million flowed through in a single day. TD Bank viewed this as unusual since the businesses generally had annual revenue of about $24 million. That day, the TD Bank froze the Kaptor Group accounts. When they froze the accounts, they were in an overdraft position of about $7 million, contrary to their banking arrangements with the TD.

17 TD Bank then entered into an accommodation agreement with the Kaptor Group, including the respondents. The accommodation agreement, which was dated August 23, 2011, provided a secured loan of $5 million to cover the overdraft, and to provide some working capital. The loan was to be repaid in full by August 29, 2011. It was not.

Callidus advances

18 Callidus knew nothing about the Kaptor Group/respondents' overdraft with the TD Bank, the accommodation agreement or their failure to repay the TD loan. On September 1, 2011 Callidus made its first advance into the respondents' disbursement accounts. The advance totalled just over $8.4 million and was used to pay out the Laurentian Bank debt, make payments to silo investors and provide working capital of just under $1 million. Clearly, given the

respondents' situation with TD Bank at the time of the advance, the respondents were in breach of their representations to Callidus in the credit facility agreement.

The TD Bank's accommodation agreement is amended, then terminated

19 Since the TD Bank had not been repaid, it entered into an agreement to amend the original accommodation agreement. The amending agreement was dated September 7, 2011, a week after Callidus had advanced. The amending accommodation agreement provided for the Kaptor Group to acknowledge it was in overdraft at that date to the extent of $2.6 million. TD Bank agreed to advance up to $2 million (instead of the original $5 million) to cover the overdraft. TD Bank was to be repaid in full by September 12, 2011. Again, it was not.

20 On September 16, TD Bank entered into an agreement to terminate the accommodation agreement. In the termination agreement TD Bank agreed to extend the financing subject to certain paydowns, and with the requirement that the financing be paid in full by September 30. Once again, Kaptor Group failed to pay off the debt. It remains outstanding. Currently, the respondents owe the TD Bank about $1 million.

21 By this point the respondents had set up the required blocked account and disbursement accounts at TD Bank, and Callidus had advanced. By this point as well, TD Bank was no longer prepared to do business with the respondents. As part of its termination agreement with the respondents, TD Bank required them to transfer the blocked accounts and disbursement accounts within 90 days of September 16, 2011.

22 Before TD Bank made its various accommodation agreements with the respondents and Kaptor Group, there was a three week period in September where the TD Bank returned as NSF many cheques the respondents had written for payroll, investor payments and dealer and supplier payments. The NSF cheques to silo investors also put the respondents in breach of their obligations to Callidus.

Callidus learns of the debt with TD Bank

23 Callidus did not learn of any of the respondents' agreements with TD Bank, or the security they had given the Bank until three weeks after Callidus had made its first advance. It was only around that time that Eric Inspektor, who essentially controls the Kaptor Group, including the respondents, told Callidus that the respondents and other Kaptor Group companies maintained accounts with the TD Bank. He said that their arrangements with the TD Bank permitted the TD Bank to offset overdrafts in one corporate account against deposits in another, including the disbursement accounts into which Callidus deposited its advances to the respondents.

24 Mr. Inspektor explained that because of the overdraft position the Kaptor Group found itself in, the TD Bank had returned as NSF some of the cheques the respondents had written to some silo investors under Callidus' initial advance. It was one of the conditions of the advance that these investors were to be paid from the advance. Until this time, Callidus knew nothing of any debt the respondents owed to TD Bank. Callidus also did not know that one of the conditions of its initial advance had not been fulfilled - that is, paying off some specific silo investors.

25 Matters deteriorated. TD Bank dishonoured various Cashland cheques for things like payroll, dealership payments and business expenses. Dealers were complaining to the Ontario Motor Vehicle Industry Council.

The field audit

26 Under the terms of its security, Callidus was permitted to conduct a field audit of the respondents. When it did, it discovered that some government remittances were made late. It also learned that Mr. Inspector had directed funds in various Kaptor Group accounts to cover overdrafts in other accounts. This might have included diversion of funds from the respondents to cover overdrafts of other Kaptor Group companies. Over $300,000 in September lease and loan payments had been deposited into the disbursement accounts instead of into the blocked accounts. Mr. Inspektor and his

wife deposited nearly $700,000 into the disbursement accounts instead of the blocked accounts. Again, this constituted a breach of the terms of the credit facility agreement.

The Callidus demand

27 Needless to say, all of this created significant concern for Callidus. Callidus took the position that the respondents had made misrepresentations and material non-disclosure to it. It viewed the respondents' actions as constituting material breaches of the credit facility agreement. It was not prepared to continue to lend. On October 18, 2011 it demanded payment in full, pursuant to the terms of the credit facility agreement. It also served notice under section 244 of the *BIA* of its intention to enforce its security.

The Callidus forbearance agreement and events following

28 On October 25, 2011 Callidus entered into a forbearance agreement with the respondents. Callidus agreed to forbear from enforcing its rights, but only on a day-to-day basis. The agreement permitted Callidus to terminate it at any time, in its sole and absolute discretion.

29 In the Callidus forbearance agreement the respondents have acknowledged Callidus' *BIA* Notices are valid. They agree not to contest the validity of the demands for payment. They waive the 10-day notice period, and consent to the immediate enforcement of Callidus' security.

30 The forbearance agreement also required the respondents to hire a new interim executive officer to replace Mr. Inspektor, who ceased to have any managerial role, or any cheque signing authority. The respondents also agreed to hire MNP corporate Finance Inc. to find them alternate financing so they could pay out Callidus by April 30, 2012. They were not able to secure alternate financing in this way.

31 The agreement also required the respondents to submit a complete restructuring plan to Callidus by November 30, 2011. First, the plan had to be acceptable to Callidus, and second had to be completed by December 31, 2011. The respondents have been unable to comply with either of these conditions.

32 Although the parties concede the term is not enforceable, the Callidus forbearance agreement also contains a promise from the respondents not to commence any restructuring or reorganization proceedings under either the *BIA* or *CCAA*.

33 Since the forbearance agreement, Callidus says the respondents' financial position has deteriorated more. The loan balance has increased by more than $770,000 while the lease rental stream has dropped by about $225,000. By the end of November, the respondents were in an over advance position of more than $1.2 million.

34 Callidus was not prepared to continue without changes to the arrangement. On November 16, Callidus told the respondents it would continue to fund under the credit facility if and only if there was a minimum cash injection at least $500,000 into the businesses by subordinated debt or equity within two days, and the respondents would also have to fund their 30% of the cost of buying new vehicles for lease. The respondents failed to fulfil either of these conditions.

35 On November 24, Callidus terminated the forbearance agreement, and told the respondents it would apply to court to have a receiver appointed.

36 Even though it has terminated the forbearance agreement, Callidus continues to provide some funding to the respondents. It does so at its discretion, in order to protect its security.

37 The respondents have been looking for alternate financing. They have not been able to secure any.

Discussion:

38 Callidus takes the position that the respondent made material misrepresentations even before the first advance. It says had it known of the respondents' situation with TD Bank it would never have agreed to advance in the first place. Now it sees the respondents' financial position deteriorating. Its demand for payment has not been satisfied. The respondents' revenue stream is declining, meaning it cannot acquire new vehicles to lease. Callidus says this results in a reduction of its security, while the debt increases. As a result, Callidus says it is just and convenient to appoint a receiver in order to protect its security and the interests of other stakeholders.

39 For their part, the respondents accuse Callidus of taking an aggressive and unreasonable position (even though every position Callidus has taken has been supported by the specific terms of either the credit facility or the forbearance agreement.) The respondents point out that they are not actually behind in their payments. They view the interim financial officer who is now in place as being akin to a "soft receivership", and suggested that if they were able to have a *CCAA* stay in place for thirteen weeks, they would be able to restructure. They did not, however, present any restructuring plan, even in very draft form.

Receiver?

40 Callidus brought its receivership application under both section 101 of the *Courts of Justice Act*, and s.47 of the *BIA*. The test to appoint a receiver under the *CJA* requires the court to conclude it would be just and convenient to do so. The court may appoint an interim receiver under s. 47 of the *BIA* if and only if the court is persuaded a receiver is necessary to protect the debtor's estate or the interests of the creditor who sent a notice under s. 244(1) of the *BIA*.

41 The question is whether it is more in the interests of all concerned to have the receiver appointed or not.[6] In order to answer the question the court must consider all the circumstances of the case, particularly:

> a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;
>
> b) The parties' conduct; and
>
> c) The nature of the property and the rights and interests of all parties in relation to it.[7]

42 Receivers are considered an "extraordinary" remedy, much in the same way as granting an injunction is considered an extraordinary remedy. The law is clear, however, that an applicant who wishes the court to appoint a receiver need not show irreparable harm if a receiver is not appointed.[8]

43 Many security instruments will specifically contemplate appointing a receiver. The fact that the creditor has a right to appoint a receiver under its security is therefore an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve of assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets.

44 Here, of course, the credit facility agreement itself specifically contemplated appointing a receiver. Following the reasoning in *Fruere Village*, the "extraordinary" nature of the remedy is therefore less important here than it might otherwise be.

45 This leads me to consider the interests of all concerned, in order to determine whether the test under either the *Courts of Justice Act or Bankruptcy and Insolvency Act*, or both, has been met.

46 What is the likely effect on the parties of appointing a receiver? From Callidus' point of view, it will allow it to protect its security, and dispose of it in an organized and court-supervised fashion. It proposes to sell the businesses as a going concern, in order to maximize value for all stakeholders. The respondents concede that a possible restructuring

plan might be to liquidate, in which case the hope would also be a going concern sale. In this regard, I see no difference in outcome if a receiver is appointed.

47 Callidus has legitimate concerns about the businesses continuing as a going concern while the respondents attempt to restructure. The respondents have stopped purchasing vehicles for lease. They have no money to do so. As a result, the value of Callidus' security is declining.

48 The activities in the TD accounts that led to the Bank's freezing them suggest companies that were out of financial control, operating outside of the normal course of business.

49 The respondents' difficulties with the TD Bank overdraft arose in August of last year. They have been given every opportunity since then to cure their defaults, and have failed to do so.

50 Similarly, the respondents have been in default with Callidus since it demanded payment in mid October of last year, and delivered its notice of intention to enforce its security. Even though Callidus had agreed to forbear, the respondents have failed to honour the terms of the forbearance agreement.

51 Neither Callidus nor TD Bank has faith in the respondents' management. This is a factor that supports appointing a receiver.[9] While the interim executive officer Mr. Willis has brought some stability to the businesses, they cannot operate without further borrowing, and none is available. Without further borrowing, the respondents cannot purchase new inventory for lease, and thus its inventory is declining. What this means is that its lease and loan revenues are also declining, while its debt load to Callidus is increasing. All this suggests to me that appointing a receiver is necessary in order to protect Callidus' security from further erosion.

52 The respondents' past conduct also gives cause for concern if there is no receiver who can manage the businesses and arrange for an orderly sale under the court's supervision.

53 As to the nature of the property, I note that Callidus' security is declining in value. Both secured creditors' rights in it are being eroded. The court must put an end to the continued haemorrhaging of money. Given the respondents' failure to come up with even a rudimentary restructuring plan, it is time for a receiver to take control, and manage the businesses to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders.

54 At the hearing of the application and cross-application, the respondents urged me to consider only the current situation with the businesses, and look to the future, rather than to problems in the past. Even doing only this, there is no comfort to Callidus. The respondents have repeatedly sought new financing and failed - even after I made the receivership order, but held it in abeyance so they could refinance. Most importantly, nothing prevents the respondents from continuing their efforts to restructure, even though I have appointed a receiver.

CCAA?

55 The respondents took the position that granting an initial order under the CCAA is the proper way to proceed. They point to the fact that Mr. Willis (the interim executive officer) says the businesses are not out of control, are not a disaster, and are good businesses that will not deteriorate if a stay is granted and the companies are allowed to restructure. I disagree.

56 The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances, the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

57 The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable.

In *Marine Drive Properties Ltd., Re*[11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Inducon Development Corp., Re*,[12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

58 Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

59 The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

60 The absence of even a "germ of a plan" militates against granting relief under the *CCAA*.

61 Finally, in considering the question of whether to grant relief under the *CCAA*, I must also look at the position of the two major secured creditors. Neither will support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

62 Having considered all these factors, I decline to grant relief under the *CCAA*.

Conclusion:

63 It is for these reasons I made the order I did on December 14, 2011.

Application granted on certain terms; cross-application dismissed.

Footnotes

1 R.S.C. 1985 c. C-36

2 R.S.C. 1985 c. B-3 as amended

3 R.S.O. 1990, c. C-43, as amended

4 Credit facility agreement paragraph 17(k)

5 *Ibid.* paragraph 17(q)

6 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List])

7 *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) (CanLII)

8 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List])

9 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, [2011] O.J. No. 2954 (Ont. S.C.J.)

10 Section 11.01(b) of the *CCAA*

11 (B.C. S.C.)

12 (1991) (Ont. Gen. Div.)

End of Document

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bank of Montreal v. Carnival National Leasing Ltd. | 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th) 300, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79 | (Ont. S.C.J., Feb 15, 2011)

1997 CarswellOnt 988
Ontario Court of Justice, General Division

Royal Bank v. Chongsim Investments Ltd.

1997 CarswellOnt 988, [1997] O.J. No. 1391, 28 O.T.C. 102,
32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 70 A.C.W.S. (3d) 72

Royal Bank of Canada, Plaintiff v. Chongsim Investments Ltd. and ESC Recreation Development Corporation, carrying on business as WWK Partnership, Chongsim Investments (Canada) Ltd. and Wild Water Kingdom Ltd., Defendants

Epstein J.

Heard: January 30 and 31, 1997
Judgment: April 4, 1997
Docket: 96-CU-103033

Counsel: *George Vegh* and *Debora Steggles*, for plaintiff.
John D. Campbell, for defendants.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

MOTION by creditor for appointment of receiver.

***Epstein J.*:**

1 This is a motion brought by the plaintiff the Royal Bank of Canada (the "bank") for an order appointing a receiver and manager of the property of the defendants Chongsim Investments Ltd. ("Chongsim Investments") and ESC Recreation Development Corporation ("ECS") carrying on business as WWK Partnership (the "partnership") and Wild Water Kingdom Ltd. ("WWK Ltd.").

2 The partnership owns and operates a water park on premises just north of Toronto. These premises are owned by the government and are leased to WWK Ltd. as bare trustee for, and on behalf of, the partnership.

3 The bank's position is that such an order would be just and equitable in the circumstances of this case based on the allegation that the partnership failed to honour the guarantee it provided to the bank in respect of a loan given by the bank to the defendant Chongsim Investments (Canada) Ltd. ("Chongsim Canada").

4 The primary position of the defendants is that the equitable jurisdiction of this court should not be available to the bank. It is their submission that the bank orchestrated the default upon which it attempts to rely in requesting that a receiver be appointed. Secondly, the defendants argue that the partnership did not, in fact, guarantee the obligations of Chongsim Canada. Accordingly, the demand upon the partnership is invalid.

5 Shortly after the matter was argued, I advised counsel of my decision to dismiss the bank's motion. The following is a brief summary of the reasons for this decision.

6 By commitment letter of May 22, 1992, the bank granted a $1.1 million credit facility to the partnership that was secured by a debenture (the "debenture") executed by WWK Ltd. The partnership agreed to be bound by the terms of the debenture. The bank also had a general security agreement in place (the "GSA") as a result of an earlier credit facility. The GSA was granted by the partnership and was consented to by WWK Ltd. These contracts contain cross-default provisions. A default of the partnership is also a default under the security agreements. The debenture and GSA are the only potential *contractual* sources of the bank's entitlement to a receiver.

7 The Wild Water Kingdom credit facility was structured as a demand loan. However, the parties agreed that the bank would not call for payment on the loan as long as the credit facility was kept in good standing.

8 The bank has considerable security in respect of this credit facility. The commitment letter required "receipt by the bank of an appraisal ... reflecting replacement cost of not less than $11 million ..." The bank received an appraisal dated March 31, 1992, in the amount of $11.3 million. The bank has not disputed this value. I also note that the bank's security has improved through the pay down of a first mortgage from $1.7 million to approximately $900,000.

9 Chongsim Canada is a holding company with several interests. It also has a credit facility with the bank. This facility is reflected in a commitment letter dated August 18, 1992. Again, the parties agreed that the loan would not be called absent default. Chongsim Investments and ESC Recreation guaranteed this facility. I find, based on the evidence, including the wording of the loan documentation, that the obligations of Chongsim Canada were also guaranteed by the partnership.

10 I now turn to the events leading up to the default upon which the bank relies in its efforts to put in a receiver.

11 The monthly payments of the Chongsim Canada credit facility were made from the operating account on the 26th day of each month by automatic transfer. If there were insufficient funds in the operating account to cover the interest payment, the bank would transfer the necessary amount to cover the deficiency from the loan account. If the loan account were fully drawn, the bank would allow the operating account to go into overdraft and would then notify Chongsim Canada's office. Chongsim Canada would then make a deposit to bring the operating account into a positive balance. Prior to May 29, 1995, the bank at no time returned any of Chongsim Canada's cheques on the basis of insufficient funds. Similarly, at no time prior to that date did the bank treat these temporary overdrafts as defaults under the Chongsim Canada credit facility.

12 It was therefore not unusual when on January 26, 1995, Chongsim Canada's interest payment of $7,378.64 created an overdraft. Contrary to the manner in which the bank had historically dealt with such a situation, the then new manager of the account, Mr. Smith, caused the interest payment to be reversed. Further contrary to established practice, the bank did not contact Chongsim Canada about the non-payment of interest.

13 On February 27, 1995, the bank returned to established practice. The automatic withdrawal was made to pay interest. An overdraft was thereby created. The bank still had not tried to contact its customer about the default that had taken place in January as a result of the bank's unprecedented reversal of the interest payment.

14 Again, in March and in April, the bank reversed the interest payments without contacting Chongsim Canada. During this time and into May 1995, Mr. Smith further intervened by causing various amounts to be deducted from the operating account and to be credited to interest on the loan facility. He also, for the first time, returned a Chongsim Canada cheque as "NSF." Again, Mr. Smith did not specifically notify anyone at Chongsim Canada of the nonpayment of interest, of the other transfers or of his decision to refuse to honour one of his customer's cheques.

15 Then, on June 5, 1995, Mr. Smith sent a letter to Chongsim Canada indicating interest arrears of $12,222.04. Dr. Chong, the principal of these various companies, expressed surprise and asked for particulars as to how these arrears could have accumulated.

16 Instead of providing any type of meaningful response, the bank, by letter dated June 22, 1995, demanded payment in full of the Chongsim Canada credit facility from Chongsim Canada, Chongsim Investments and ESC Recreation. Shortly thereafter, Chongsim Canada offered to pay any interest arrears even though the bank still had not clarified the accounting behind the amount claimed to be due. The bank refused to accept any payment, taking the position that the default could not be cured.

17 Technically, Chongsim Canada defaulted on its loan by failing to maintain its obligation to pay interest. However, is this default, having regard to all of the circumstances, one that warrants the exercise of the court's discretion to put a receiver in charge of the affairs of the operation?

18 The jurisdiction to order a receiver is found in section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section provides that a receiver may be appointed where it appears to be just and convenient. The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.

19 As far as the impact of the order sought, there can be no doubt but that the effect of installing a receiver to manage the affairs of the defendants would have a serious and potentially permanent adverse affect on their operations. The bank has indicated that it intends to attempt to sell the water park. A sale under these circumstances frequently results in a lower price and always results in substantial receivership fees (estimated by the bank at $400,000). In the meantime, the receivership may well damage the park's apparently good relations with its landlord, employees, suppliers and customers.

20 This damage to the defendants in the form of added expense and reduction of value must be compared to the position of the bank if the receivership is not granted. The first mortgage is current. In fact, the principal amount outstanding has been reduced from $1.7 million in 1992 to $900,000 today. There is no evidence of any problems with creditors. The bank has more than adequate security for the $2 million it is owed.

21 If a receiver is ordered, then the park will be sold, the bank will be paid, and the litigation in which the bank's right to call the loan is in dispute will be rendered academic. There will be a loss to the defendants not only of some of their investment but also of their right to defend the bank's action. If the order is not granted, an acceptable *status quo* can be maintained in which the investment and interests of all parties are protected.

22 In the face of these observations, it would certainly not be "just" to put in a receiver.

23 Nor would it be equitable having regard to the conduct of the parties. The worst that can be said of the conduct of the representatives of Chongsim Canada is that they failed to notice the irregularities that appeared in the monthly bank statements that would have alerted them to the fact that the bank had deviated from established practice and interest payments were therefore not being made. Secondly, perhaps Dr. Chong can be faulted for not pressing the bank aggressively enough for particulars of the arrears in response to a clear demand for payment.

24 However, the conduct of Chongsim Canada must again be compared with that of the bank. The bank has a recognized obligation to treat its customers fairly, meaning in an honest, straightforward fashion. While the evidence is not sufficient for me to make a finding that the bank was dishonest in its dealings with the defendants, there is certainly ample evidence suggesting that Mr. Smith was being less than straightforward in his handling of the Chongsim Canada account. By reversing the loan payments for January and March 1995, Mr. Smith effectively caused a default. He did this knowing that it was reasonable for his customer to assume that the bank would not change its practice in relation to the account at least without some direct notification. In fact, the evidence shows that Mr. Smith actually met with Dr. Chong during the critical period when the defaults were being created and said nothing to him about this serious state of affairs.

25 Then there was the precipitous nature of the demand. If the bank intended formally to demand, it had an obligation in the circumstances of this case to provide specific details of the default, what was required for correction and establish a reasonable timetable for such correction. This it did not do.

26 The bank relies almost exclusively on the evidence of Mr. Smith in support of the order sought. I find certain aspects of Mr. Smith's evidence troublesome. For example, the record shows regular communication between Mr. Smith and his superior, Mr. Brown, about the Chongsim Canada situation throughout December 1994 and January 1995. Then, curiously, on January 29, 1995 (the same day as Mr. Smith first reverses an interest payment) all communication of this nature stops until after Mr. Brown decided to call the loan. Further, Mr. Smith claims to have been unaware of the default that he created until he requested a computer summary of the Chongsim Canada account on May 31, 1995. Mr. Smith gave this evidence in the face of other evidence that he regularly reviewed weekly computer printouts throughout this time period that showed, among other things, interest arrears. I also note that Mr. Smith, in an effort to explain his deviation from the bank's practice of allowing the Chongsim Canada operating line to go into overdraft, testified that he had authority to permit an overdraft only "up to $5,000." However, in November 1994, he permitted a $9,338 overdraft in the Chongsim Canada account.

27 The conclusion is inescapable that the bank was determined to force Dr. Chong to agree to restructure his credit facilities with the bank to the bank's advantage. Given the agreement that the bank would not call the loan unless Dr. Chong was in default, the bank only had one option — to do whatever was necessary to create a default. The bank was successful — technically, but against this background it would neither be just nor equitable to grant the interlocutory relief requested by the bank and put in a receiver.

28 Parties to a contract have an obligation to deal with each other in good faith toward the fulfilment of the agreement. The agreement between the bank and Chongsim Canada had been modified by established practice. To the bank's knowledge, Chongsim Canada relied on this modification. In this case, the bank had a legal obligation to support the defendants as long as they were honouring their obligations to the bank. On the facts, I find that rather than trying to fulfill its obligations to its customers, the bank was deliberately trying to sabotage the relationship.

29 The motion is dismissed. If the parties are unable to agree as to costs they may make submissions in writing by facsimile. The defendant's submissions should be sent to the plaintiff's solicitors and my office by April 18, 1997, and the plaintiff's submissions should be sent to me and the defendant's solicitors by April 28, 1997.

Motion dismissed.

End of Document

TAB 4

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its

disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

TAB 5

2011 ONSC 4616
Ontario Superior Court of Justice [Commercial List]

Canadian Tire Corp. v. Healy

2011 CarswellOnt 7430, 2011 ONSC 4616, [2011] O.J. No. 3498, 206 A.C.W.S. (3d) 66, 81 C.B.R. (5th) 142

Canadian Tire Corporation, Limited (Applicant) and Mark Healy and Mark V. Healy Sales & Distribution Inc. (Respondents)

Newbould J.

Heard: July 28, 2011
Judgment: July 29, 2011
Docket: CV-119250-00CL

Counsel: William J. Burden, John N. Birch for Applicant
William C. McDowell, Trent Morris for Respondents
Daniel Murdoch for Franchise Trust and CIBC
Kenneth Rosenberg for Ernst & Young Inc.

Subject: Corporate and Commercial; Contracts; Insolvency

APPLICATION by franchisor for appointment of receiver.

***Newbould J.*:**

1 In this application, Canadian Tire Corporation, Limited ("Canadian Tire") seeks the appointment of Ernst & Young Inc. as a fully-empowered receiver of Mark V. Healy Sales & Distribution Inc. ("Healy Inc.") for the purpose of taking control of its business and assets and operating the Canadian Tire store in Mississauga, Ontario operated by Healy Inc. Franchise Trust and CIBC, creditors of Healy Inc., support the application.

2 The application was heard on July 38, 2011, and at the conclusion of the hearing I ordered the appointment of Ernst & Young Inc. as receiver of Healy Inc. for reasons to follow. These are my reasons.

3 Healy Inc. is an Associate Dealer of Canadian Tire and operates Canadian Tire Store 152 located in Mississauga, Ontario. The relationship between Healy Inc. and Canada is the subject of a Dealer Contract, initially signed by Mr. Healy and then assigned to Healy Inc.

4 Canadian Tire acts as the primary supplier of inventory to dealers. It also leases store sites to dealers. Canadian Tire's relationship with dealers is governed by a Dealer Contract which each dealer executes in favour of Canadian Tire.

5 Mark Healy has been a Canadian Tire dealer since October 4, 1992. He executed various Dealer Contracts, each of which was assigned to Healy Inc., the corporation that operates Store 152. In or around, July 1995, Mr. Healy commenced operating the Canadian Tire store in Alliston, Ontario where he remained until July 13, 2000. In July 2000, Mr. Healy then became the dealer at Store 429 in Oakville, Ontario. He remained at Store 429 until August 2, 2006. On August 10, 2006, Mr. Healy became the dealer at Store 152 in Mississauga and he remains the dealer of Store 152 today, although Canadian Tire delivered a notice on June 1, 2011 terminating the Dealer Contract. Healy Inc. has delivered a notice of arbitration to have the termination declared invalid.

6 In December 2007, Healy Inc. commenced an arbitral proceeding in accordance with the Dealer Contract. The arbitral proceeding related only to alleged damages suffered by Healy Inc. in relation to Store 429, the Oakville store

that Healy Inc. operated from 2000 to 2006. No claim was made in respect of Healy Inc.'s current Store 152. The trial of that proceeding before the arbitrator, Graeme Mew, began on May 26, 2010 and ran for 42 days to December 17, 2010. Healy Inc. claimed damages of $40 million. The arbitrator released his award on March 23, 2011 in which he dismissed all of the claims except one claim in which he held Canadian Tire liable for $250,000 for breach of a duty of good faith. Mr. Healy and Healy Inc. have appealed the award, which is to be heard on September 15 and 16, 2011. Mr. McDowell says that if entirely successful, Healy Inc. could realistically be entitled to an award of between $3 and $5 million.

7 On October 22, 2010, during the course of the arbitration, the arbitrator appointed Ernst & Young Inc. as receiver of Healy Inc., with the power to, inter alia,

> (i) attend at the store premises;
>
> (ii) review receipts, disbursements, revenue and expenses;
>
> (iii) exercise control over certain financial transactions such as manual sales and returns and inventory adjustments;
>
> (iv) complete a store inventory count; and
>
> (v) otherwise monitor the business.

8 In his reasons appointing E&Y as a monitoring receiver, the arbitrator noted that "CTC's proposal is for a soft receivership to review, assess, monitor and preserve the assets of the store pending the outcome of the arbitral trial".

9 Canadian Tire now says that since the appointment of E&Y as a monitoring receiver on October 22, 2010, there has been a significant change in circumstances which now require a receiver with full powers to take control of the business and assets of Healy Inc. and to operate the store.

10 In order to run his business, Healy Inc., like other dealers, obtains credit from the following three main lenders, all of which are secured creditors, and each of which provides credit to Healy Inc. for different purposes:

> (i) Franchise Trust, guaranteed by Canadian Tire;
>
> (ii) CIBC as the operating lender, guaranteed by Canadian Tire; and
>
> (iii) Canadian Tire.

11 Canadian Tire holds security from Healy Inc., including a general security agreement, which gives it the right to demand payment upon a default.

12 Because of the losses suffered at Store 152, Healy Inc. has, since 2006, had a bulge facility in place with CIBC over and above the CIBC operating credit line. That bulge facility is currently $3.9 million. Canadian Tire has guaranteed this bulge facility.

13 Healy Inc. generates more than $23 million in annual retail sales. It has had substantial losses over the past 10 years, both at Healy Inc.'s previous store in Oakville and at its current Store 152. Overall, from the time that Healy Inc. assumed Store 429 until August 31, 2006, shortly after moving to Store 152, it experienced total net losses of $1,702,198. Since the time that Healy Inc. took over its current Store 152, operational losses have been $3,363,775. This sustained history of losses has caused Healy Inc. to accumulate an ever-increasing dealer equity deficit (i.e., negative retained earnings).

14 On April 20, 2011, Canadian Tire demanded payment by May 2, 2011 of $1,692,218.68 for outstanding flex payments owed by Healy Inc. for inventory purchases which were in default. Payment has not been made. That outstanding amount for overdue inventory payments owed to Canadian Tire is now $2.3 million.

15 The letter also demanded that $741,442 be re-injected into Healy Inc by May 2, 2011. These amounts represented a cumulative overdraw by Mr. Healy from the business as of the end of fiscal 2010 over and above the amounts permitted under the Dealer Contract. That money has not been injected into Healy Inc.

16 As of May 30, 2011, Canadian Tire's direct exposure to Healy Inc. was over $12.9 million, consisting of the following items:

> (a) Canadian Tire's guarantee of the current CIBC $3.9 million bulge excess credit facility, which is not supported by inventory, fixed assets, or any other security;
>
> (b) Healy's defaulted debt (as of July 12) to Canadian Tire for inventory, rent, and other flex charges in the amount of $3,228,629; and
>
> (c) Canadian Tire's exposure of $5,831,331 in respect of the Franchise Trust Loan, which Canadian Tire is required to purchase from the Franchise Trust if such loan becomes a Defaulted Loan.

17 The GSA held by Canadian Tire entitles it upon the occurrence of a demand that has not been cured to appoint a receiver or to apply to a court for the appointment of a receiver. Although more than three months have passed since demand was made, Healy Inc. has not cured the defaults and has committed four further payment defaults. From May 31, 2011 to July 12, 2011, Healy Inc. defaulted on four flex payments totalling $612,769.92 when its bank dishonoured payment because of insufficient funds.

18 The appointment of a receiver under section 101 of the *Courts of Justice Act* or section 243 of the *BLA* is a matter of discretion. This is not a case such as *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) or *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.)in which an applicant for an interim receiving order had no security to enforce and was effectively seeking execution before any right to any payment was established. I discussed this in *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J.) and distinguished such a situation from *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]). In that case Blair J., as he then was, stated:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

19 Healy Inc.'s primary argument is that if it is successful on the appeal from the arbitrator's award, it stands to collect somewhere between $3 and $5 million. It is said that this would be sufficient to pay off what had been demanded and Mr. Healy would be in a better position to build up the business and improve its balance sheet. Mr. McDowell put it that the prospect of the appeal being successful was not remote.

20 It is not for me to determine whether the appeal will succeed. It is to be noted, however, that the arbitration agreement provides for an appeal on a question of law only. There are two bows to the quiver of Healy Inc. The first is an allegation that a finding that Canadian Tire was not liable for negligent misrepresentation was made on an incorrect test, and an allegation that the amount of damages that the arbitrator said he would have awarded had he found liability for misrepresentation, being $1.6 million, was based on a misapprehension of the evidence.

21 Normally, when a demand for payment has not been made, some reasonable time for payment is permitted before a receiver will be appointed by a court, and hopes of future financing falling into place will not be sufficient beyond what that reasonable time is. I dealt with this in *Bank of Montreal v. Carnival National Leasing Ltd.*, *supra*:

> 13. On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Div. Ct.) per Farley J.:
>
> > 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

22 If difficulties in obtaining replacement financing do not permit an open ended time for repayment beyond days, not weeks, I fail to see how the hopes of winning an arbitration appeal can put a debtor on any stronger basis. The amounts demanded have been outstanding for 3 months.

23 As things now stand, Healy Inc. has been unable to pay inventory, defaulting on payments when its bank dishonoured cheques because of insufficient funds. On his cross-examination, Mr. Healy said that if the bank would not let him draw on his credit line, he would not be ordering any more inventory but would operate his business until he ran out of inventory. This is not a satisfactory situation. In spite of the $2.3 million owed to Canadian Tire for inventory which is in default, there is a further $1.5 that will become due for inventory based on May 30, 2011 figures.

24 Canadian Tire contends that if Healy Inc. is unable to pay for inventory when due, Canadian Tire will face the untenable choice between continuing to ship inventory to the store without any reasonable likelihood of payment and insisting on C.O.D. terms for inventory. In the first case, Canadian Tire would be significantly increasing its financial exposure. In the second case, Healy Inc. would likely stop ordering inventory, stock would be depleted, customer needs for products would go unfulfilled, and the Canadian Tire brand and reputation would suffer. I accept the concern of Canadian Tire as valid.

25 For a number of reasons, I do not view Mr. Healy as a strong candidate for equitable consideration.

26 Pursuant to an agreement dated February 8, 2010 between Mr. Healy, Healy Inc. and Canadian Tire, it was agreed that Canadian Tire would pre-approve and co-sign all cheques or other bank disbursement of any kind. The purpose of such control was to ensure that Healy Inc.'s funds were used only for proper business purposes relating to the store and to prevent further unauthorized transactions, including dealer over-draws. In April 2010, Mr. Healy breached the February 8 agreement by transferring $82,425.83 from the Healy Inc. business account to the personal credit card accounts of Mr. Healy and his family members. He circumvented the February 8 agreement by making such payments through internet banking, rather than issuing a cheque which Canadian Tire would have to review and sign. This was raised in the arbitration and Mr. Healy replaced the funds. Mr. Healy also undertook transactions involving his family trust during fiscal 2010 when he made payments from Store 152 in the amount of $178,215 allegedly on account of his children's educational expenses.

27 It appears that in 2011 Mr. Healy again breached the February 8 agreement when he took $60,000 of money collected from daily sales for Store 152 on April 21 and 23, 2011 and used them to pay for legal fees, which required the approval of Canadian Tire. This came to light when Store 152 provided Canadian Tire with daily sales reports and bank deposit receipts. The missing $60,000 appeared in Healy Inc.'s bank account on April 27, 2011 after Canadian Tire's counsel wrote to Healy's counsel to seek a full explanation about the $60,000 cash diversion.

28 It appears that Mr. Healy has breached the Dealer Contract by the intentional overstatement of invested equity through a temporary injection of funds. In his award, the arbitrator made the following findings of fact:

(a) "Healy repeatedly breached his contractual obligations under Policy 26.";

(b) "Pursuant to Policy 26, the intentional overstatement of invested equity by a dealer through temporary injection is considered to be a non-curable event of default under section 20.1 of the Dealer Contract. Healy not only breached this obligation on several occasions, but also took excessive draws out of his business, when the business could ill afford for him to do so. As submitted by CTC, during his career as a dealer, Mr. Healy has been consistently overdrawn throughout the year";

(c) In 2009, Healy obtained loans totalling $554,990 so that he could re-inject into the business the amount of his overdraws prior to year end, and then draw out the same money after year end to re-pay to loans.

29 Actions such as these leave little confidence that Mr. Healy can be trusted to run the business properly. It is quite apparent that the relationship between Canadian Tire and Mr. Healy has broken down. The instances outlined in Mr. Lamanna's affidavit of Mr. Healy's behaviour during and after the arbitration are of obvious concern.

30 One reason that the business is losing money may be a lack of planning. In the first report of the receiver appointed by the arbitrator, the receiver reported that it asked Mr. Healy to provide copies of any and all cash flow statements with which to determine Healy Inc.'s ability to pay existing and accruing debts over the coming months. Mr. Healy advised the receiver that Healy Inc. does not prepare cash flow projections.

31 Mr. Healy has resisted attempts by Canadian Tire to assist him with store operations and to work out a viable plan to deal with the ongoing losses and substantial outstanding debts. In August 2009, Canadian Tire offered to put Mr. Healy into a Performance Support Initiative Program which is designed to help dealers improve their financial performance, and financial and operations experts were sent to the store to help. Mr. Healy ordered them out of the store and said he did not want help. On April 4, 2011, following the arbitral award, Canadian Tire encouraged Mr. Healy to provide two senior executives with a plan to resolve his financial situation on an urgent basis. Mr. Healy's response was that he would meet with one of them at a bar in Port Credit at 6 p.m. In spite of further requests that he meet with the executives to discuss plans to resolve his financial situation, Mr. Healy has refused to meet with them.

32 Canadian Tire has prepared a series of realistic and optimistic projections to determine whether Healy Inc. will be able to pay off its indebtedness over a matter of years. No matter which scenario Canadian Tire chose, the conclusion reached was that Healy would still have substantial negative equity even at the end of fiscal 2015. The negative equity ranges from $9.4 million to $3.3 million, the latter being the most optimistic with the store ranking in the top quartile of Canadian Tire dealers (it is in the bottom quartile at present). All of these projections assume that Healy Inc. will not expend any amount on legal fees, which appears unlikely as Mr. Healy and Healy Inc. have started at least four new arbitration proceedings apart from the appeal of the award of arbitrator Mew.

33 In all of the circumstances, I ordered that Ernst & Young Inc. be appointed receiver of Healy Inc. with the usual powers of a receiver, including the power to operate the business, but not at the moment to sell all or parts of it outside of the ordinary course of business. If the appeal from the arbitrator is successful, it will be open to Healy Inc. to apply to vary or rescind the order.

Application granted.

TAB 6

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J. No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

Bank of Montreal (Applicant) and Carnival National Leasing Limited and Carnival Automobiles Limited (Respondents)

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Subject: Corporate and Commercial; Insolvency

APPLICATION by creditor for appointment of private receiver of debtor.

***Newbould J.*:**

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That

review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide

an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC

stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to

judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
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> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

> 28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
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> . . .
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> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was

sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

End of Document

TAB 7

2010 ONSC 4008
Ontario Superior Court of Justice

Anderson v. Hunking

2010 CarswellOnt 5191, 2010 ONSC 4008, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

Garth Anderson, et al. (Plaintiffs / Moving Parties and Bryan Hunking, et al. (Defendants / Respondents)

G.R. Strathy J.

Heard: June 17, 2010
Judgment: July 16, 2010
Docket: CV-10-8597-00CL

Proceedings: additional reasons at *Anderson v. Hunking* (2010), 2010 ONSC 4920, 2010 CarswellOnt 6724 (Ont. S.C.J.)

Counsel: Lincoln Caylor, Jonathan Bell for Plaintiffs / Moving Parties
Heath Whitely, Gwendolyn L. Adrian for Hunking, et al., Defendants / Respondents
David Preger for Romspen Mortgage Investment Fund
A. Kauffman for Ernst and Young Inc., proposed receiver
No one for Chowdhry, et al.

Subject: Corporate and Commercial; Civil Practice and Procedure

APPLICATION by plaintiffs to appoint receiver.

D.G. Redman Prov. J.:

1 This is a motion by the plaintiffs for an order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 41.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, appointing a receiver over the assets and business of a commercial retirement project owned or controlled by the defendant Bryan Hunking ("Hunking") and referred to as the "Retirement Residence".

2 The 79 individual plaintiffs claim that they are victims of a fraudulent investment scheme orchestrated by Hunking, in concert with the defendants Rajesh Chowdhry ("Chowdhry"), Inderpal Bajaj ("Bajaj") and Ajinderpal Singh ("Singh") (collectively, including Hunking, the "Partners"). They claim that, contrary to assurances made to them that their money would be put in low risk/high return investments, some $5 million, or more than half of their investments, ended up in the Retirement Residence.

3 At the hearing of the motion, the plaintiffs asked that the receiver be given power to sell the Retirement Residence, which they say is either insolvent or at risk of imminent insolvency.

4 I will begin by describing the circumstances that give rise to this motion. I will then set out the court's jurisdiction to appoint a receiver and the principles that govern the exercise of that jurisdiction. I will then apply those principles to the facts of this case.

Background

5 The plaintiff, Dr. Robert Gibb ("Gibb"), who has sworn an affidavit in support of the motion, claims that, at some time in 2000, he and the other plaintiffs (who appear to be unrelated individual investors) began attending investment seminars conducted by the Partners. These seminars, although ostensibly for educational purposes, served as a platform to promote the Partners' investment vehicle, which has been referred to as the "Netbusmodel Group". [1] Gibb alleges that the Partners represented that 80% of investors' money contributed to Netbusmodel would be placed in "secure" investments, which would yield returns of 18-30% per annum and the balance would be placed in more speculative, high tech start-up companies. Some of the investors were induced to participate in a charitable donation plan, referred to as "Help for Humanity - Canada" on the basis that their "investment" would be fully tax deductible but that they would eventually receive a return of two-thirds of their investment.

6 This is an individual action in which 79 investors are joined as plaintiffs. It is not advanced as a class action. Gibb is the only plaintiff who has sworn an affidavit in support of this motion. Singularly lacking from his evidence, and presumably from the records of the other plaintiffs is any documentary evidence of the allegedly fraudulent misrepresentations made by the Partners. While different investors were allegedly induced to participate in different investments within the Netbusmodel Group, and to make their investments in different ways, it is acknowledged that none of the plaintiffs were told that their money would be used to finance the Retirement Residence.

7 In approximately October, 2001, the Partners purchased a corporation called Emmanuel Village Homes (Kitchener) Inc. ("EV Homes") for a price of one dollar. In return, they took over that corporation's outstanding liabilities of about $2.4 million. The assets of EV Homes consisted of 42 town homes, all of which were subject to life leases, and a tract of land.

8 In December of 2001, the Partners began to construct the Retirement Residence on the tract of land owned by EV Homes. The money to finance the construction came from a company called Commonwealth Capital Corporation ("Commonwealth"), which was also owned by the Partners.

9 As construction of the Retirement Residence progressed, the Partners acquired additional funding by way of a $7.5 million first mortgage from Romspen Investment Corporation ("Romspen") and they severed the lands on which the Retirement Residence was being built from the balance of the lands containing the town homes. They created Emmanuel Village Residence Inc. ("EV Residence"), which took title to the lands on which the Retirement Residence was being built. EV Homes retained the town homes lands and held an unsecured debt from EV Residence, representing the money put into the Retirement Residence by EV Homes.

10 Plaintiffs' counsel claim to have established that in excess of $5 million of the $8.63 million invested by the plaintiffs found its way into the Retirement Residence. Some of that ($1.4 million) came from Help for Humanity - Canada, and some came from Commonwealth (approximately $3.7 million). The funds provided by Commonwealth are alleged to have been provided by six sources:

(a) Alcorp ($520,000);

(b) VM Press ($45,000);

(c) S & P Trading ($180,000);

(d) Harsajan Singh ($2.086 million);

(e) Birchwood ($530,000);

(f) Baby Alcorp ($370,224).

11 In March, 2003, through a series of transactions, three of the Partners, Chowdhry, Bajaj and Singh, transferred their interests in EV Homes, EV Residence and Commonwealth to a holding company owned by Hunking. In the result, Hunking now owns the Retirement Residence. The validity of these transactions is challenged in litigation between Hunking and the other three Partners. [2]

12 The plaintiffs claim that at least $3.166 million of their investments in the Netbusmodel Group was fraudulently transferred to Commonwealth and was used to construct the Retirement Residence.

13 A fundamental factual issue raised by this motion is whether Hunking, who now owns the Retirement Residence, participated in the alleged diversion of the plaintiffs' investments to the Retirement Residence.

14 The plaintiffs have provided no direct evidence on this critical question. Gibb has no direct evidence on the issue and much of his affidavit is either argumentative or the statement of information that has been provided to him as a result of investigations carried out by his counsel. The plaintiffs also rely on evidence of the Partners other than Hunking, but this evidence is disputed by Hunking and the plaintiffs concede that some of that evidence is unreliable. The other Partners are in litigation with Hunking and may well have their own reasons to embarrass him financially. While plaintiffs' counsel appear to have done an admirable job of forensic investigation, the evidence falls short of establishing that Hunking was a knowing participant in the diversion of the plaintiffs' funds into the Retirement Residence.

Jurisdiction to appoint a receiver

15 Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:

> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
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> (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (Ont. H.C.);
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> (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090 (Ont. S.C.J.), 2008 CanLII 66137, referring to *Royal Bank v. Chongsim Investments Ltd.*, 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Ont. Gen. Div.);
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> (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), 1996 CanLII 8258;
>
> (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.);
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> > (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
> >
> > (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude -evidence

of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.*(2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton*, 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (Ont. S.C.J.).

16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, above, at para. 6:

> [T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

Analysis

17 In this section, I will apply the test for the appointment of an interlocutory receiver, having regard to the principles expressed above.

(a) Preliminary assessment of the merits of the case

18 The plaintiffs' case is based on (i) fraud; (ii) conspiracy; and (iii) unjust enrichment. The plaintiffs also claim the remedy of constructive trust over the Retirement Residence which they say was constructed using their funds.

19 The plaintiffs say that they have established a strong *prima facie* case of fraudulent misrepresentation. They claim that their investment, which was made based on the representation that it would be "secure", was in fact "funneled" into the Retirement Residence".

20 A fundamental problem with the fraudulent misrepresentation aspect of this case is that Gibb, (who is the only affiant on behalf of the plaintiffs) gives only general evidence as to what the Partners told him would be done with his money. Although he claims that 80% of his money was to be put in "secure" investments and the balance in "risky start-up high tech companies", there is no evidence that there were specific limits on the use that could be made of his funds. There were certainly no limits reduced to writing that have been put in evidence and there are no limits identified by Gibb. His evidence, and the other evidence adduced by the plaintiffs, is really to the effect that, "[n]o one ever told the investors their money would ever go into the Retirement Residence".

21 Moreover, there is no evidence of specific representations that were made to any one of the other 78 investor plaintiffs, other than the foregoing general representations.

22 A second problem is that the plaintiffs' case in fraud and conspiracy against Hunking will fall to be determined on questions of credibility as between Hunking and the other Partners.

23 Hunking's evidence is that he understood that the construction of the Retirement Residence was being funded by Commonwealth through loans advanced by the other Partners, and their families, as well as by private loan agreements with other lenders. Hunking swears that he did not participate in a fraud, that the representations made to investors concerning their investments in Netbusmodel reflected his understanding of the facts, and that he was not aware of any wrongdoings in relation to the plaintiffs' investments.

24 For the purposes of this motion, it is not disputed that the plaintiffs invested over $8 million in the Netbusmodel Group and that much of that money has not been returned to them. Nor is it disputed that some of this money found its way through Commonwealth and into EV Homes and EV Residence. What is altogether unclear is what happened in the "messy middle" to use the expression of counsel for the plaintiffs. The plaintiffs have not established anything more than that Hunking *might* have been responsible for the misappropriation of investors' funds and the use of those funds for the Retirement Residence.

25 While the plaintiffs' counsel points to a number of circumstances that cast doubt on Hunking's explanation that the money was provided by the other Partners, there are - equally -circumstances that suggest that the other Partners controlled the flow of funds from Netbusgroup through Commonwealth and to EV Homes and/or EV Residence. On the evidence before me, I cannot say that a strong case of fraud (or, for that matter, a *prima facie* case of fraud) has been made out against Hunking. For the same reason, I cannot say that there is strong evidence that Hunking was a party to a conspiracy to defraud the plaintiffs.

26 The plaintiffs' alternative claim is in unjust enrichment. The well-settled elements of this cause of action are: (a) enrichment of the defendant; (b) corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.); *Richardson Estate v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.) at para. 36. While there is a basis for concluding that there has been a deprivation of the plaintiffs because they have lost their investments, it does not follow that there has been an enrichment of the defendant because the advance of funds by Commonwealth is reflected by a liability of EV Residence to Commonwealth. As well, there is a juristic reason for the "enrichment" - namely, the funds were advanced as a loan.

(b) Irreparable Harm

27 The plaintiffs rely on the following observation of Sopinka and Cory JJ. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, above, at para. 59:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. CrainInc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

28 The plaintiffs say that the liabilities of the "EV Group" are increasing daily and that, because of Hunking's actions, there is a strong likelihood that by the time of trial the amount of equity in the EV Group, and in the Retirement Residence in particular, will be insufficient to satisfy the plaintiffs' claim. They say that there is no evidence that Hunking has any asset other than the Retirement Residence to satisfy their claims.

29 The plaintiffs rely on unaudited financial statements of EV Residence for the year ended February 28, 2009, which show assets of approximately $11.75 million (with lands and buildings reflected at book value) as against liabilities of over $18 million and a negative cash flow. The notes to the financial statements indicate that:

> The company has incurred significant losses from operations, has a working capital deficiency and a deficit of $6,640,465 as at February 28, 2009. The continuation of the company as a going concern is dependent on its ability to generate sufficient cash to meet its obligations as they come due and achieving a profitable level of operations.

30 In spite of this, it was acknowledged by counsel for Romspen, which does not oppose the appointment of a receiver provided it does not have to fund the cost, that his client's mortgage and the realty taxes are current and in good standing.

31 Hunking has tendered the affidavit of Theresa Landry, Executive Director of the Retirement Residence, to the effect that the facility has, since late 2005, maintained occupancy levels at approximately 96% and has a number of long-term employees. Contrary to the plaintiffs' assertions, through Gibb, that Hunking is living an "extravagant" and "luxurious lifestyle" from the profits of the Retirement Residence. Ms. Landry deposes that from approximately 2004 to February 2009, Hunking and his wife received no salary from the Retirement residence and were only reimbursed for their expenses in the amount of about $24,000. Commencing in February, 2009, Hunking was paid a salary of about $95,000 per annum before taxes and his wife (who has worked at the Retirement Residence on a full-time basis since 2008) was paid about $60,000 per annum before taxes.

32 There is no evidence to support the plaintiffs' inflammatory allegations (which appear to be fueled by hearsay information supplied by the other Partners who are in litigation with Hunking) that Hunking is using the Retirement Residence as his personal bank account to deplete funds "stolen" from them. Nor is there any current, independent, reliable evidence to show that the Retirement Residence is being operated as anything other than a going concern or that it is a wasting asset or being dissipated in any way.

33 The Retirement Residence is subject to a substantial mortgage in favour of Romspen, an apparent arms-length commercial lender, which presumably has a keen interest in ensuring that the asset is not dissipated. It is also subject to two certificates of pending litigation, obtained by the plaintiffs, which will effectively prevent the sale or further encumbrance of the Retirement Residence.

34 The plaintiffs' submission on irreparable harm overlooks the fact that, apart from Hunking, his wife and his companies, there are other defendants, including the other three Partners, who may well be either wholly or partly liable to the plaintiffs and there is no independent evidence to show that these parties lack the means to satisfy a judgment. I conclude that it would be pure speculation to say that the plaintiffs will suffer irreparable harm if a receiver is not appointed.

(c) Balance of convenience

35 I have noted above that the appointment of a receiver is intrusive and that the effect on the parties must be considered in the exercise of the court's discretion. In this case, the plaintiffs are neither judgment creditors nor secured parties. They simply have a potential claim against Hunking. The plaintiffs seek, at a minimum, the appointment of a receiver to take possession of and manage the Retirement Residence and, at the more extreme end, to sell it. It is quite obvious that the appointment of a receiver could have drastic consequences in terms of the business itself, and the confidence of staff, suppliers and residents in the viability of the business. It would take out of the hands of Hunking an enterprise in which he appears to have invested some seven years of work and could well see the enterprise sold from under him. I note, in that regard, that the plaintiffs have not given any undertaking as to damages, should it be determined that this relief ought not properly to have been granted. I also note that there has been no guarantee by the plaintiffs that Hunking and his wife would remain employed by the receiver.

36 In a nutshell, the appointment of a receiver would likely have disastrous consequences for Hunking, someone who may, at the end of the day, be found innocent of wrongdoing.

37 Balanced against this is the existing security that the defendants have by way of a certificate of pending litigation against the Retirement Residence as well as the potential for recovery against the other defendants, and Hunking, in the

event that they prove liability and damages at trial. There is no evidence of dissipation of the Retirement Residence and it appears to be operating as a going concern. While there is a risk that the plaintiffs will not be able to enforce a judgment against Hunking, should they obtain one, I am not satisfied that the appointment of a receiver will attenuate that risk.

Conclusion

38 For these reasons, the plaintiffs' motion for the appointment of a receiver is dismissed, with costs. If costs are not agreed upon, written submissions may be made to me care of Judges' Administration.

39 Counsel for the defendants indicated that he is prepared to cooperate with counsel for the plaintiffs to finalize a schedule in order to bring this matter on to trial within a reasonable time. If the parties are unable to agree on a timetable an appointment can be made through my assistant in order to set a timetable.

40 I encourage counsel to discuss the removal of one of the two certificates of pending litigation and the temporary lifting of the certificate to enable the Retirement Residence to refinance the Romspen mortgage, which is at 11%, a rate which is a burden on the defendant. I will remain seized of the matter should a motion be necessary.

Application dismissed.

Footnotes

1 The "Netbusmodel Group" consisted of three companies, which have been referred to as "Netbusmodel", "Alcorp" and "Baby Alcorp".

2 Superior Court of Justice File 04-CV-271509CM3.

End of Document

TAB 8

CARSWELL

THE 2019 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

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MAIN TABLE OF CONTENTS

[CURRENCY OF INFORMATION: The statutes and regulations in this annotated book are current to Canada Gazette: Vol. 153:4 (February 20, 2019).]

In the course of considering whether the mortgagee was entitled to a three-month interest payment, the Court of Appeal for Ontario reaffirmed the principle that for the purposes of realization on security, a privately appointed receiver acts as agent of the secured creditor: *58 Cardill Inc. v. Rathcliffe Holdings Limited*, 2018 CarswellOnt 12561, 62 C.B.R. (6th) 173, 2018 ONCA 672 (Ont. C.A.).

L§3 — Appointment of Receiver and Manager

See L§2 for new provisions on appointing a national receiver.

The *BIA* applies to receivers of the estates of insolvent persons or bankrupts whether appointed with or without court order: s. 243(2).

A receiver is a person who has been appointed to take, or has taken, possession or control, pursuant to a security agreement or a court order, of all or substantially all of the inventory, accounts receivable or other property of the debtor: s. 243(2). A court-appointed receiver derives its powers and authority wholly from the order of the court appointing it: *Royal Trust Co. v. Montex Apparel Industries Ltd.* (1972), 17 C.B.R. (N.S.) 45 (Ont. C.A.).

A privately appointed receiver and manager is not acting in a fiduciary capacity: it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A court-appointed receiver and manager, on the other hand, is an officer of the court and acts in a fiduciary capacity with respect to all interested parties: *Ostrander v. Niagara Helicopters Ltd.* (1973), 19 C.B.R. (N.S.) 5 (Ont. S.C.); *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.* (2004), 2004 CarswellBC 52, 1 C.B.R. (5th) 1 (B.C. S.C.).

Factors to consider in the determination of whether it is appropriate to appoint a receiver include: (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed; (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place; (c) the nature of the property; (d) the apprehended or actual waste of the debtor's assets; (e) the preservation and protection of the property pending judicial resolution; (f) the balance of convenience to the parties; (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others; (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly; (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently; (k) the effect of the order on the parties; (l) the conduct of the parties; (m) the length of time that a receiver may be in place; (n) the cost to the parties; (o) the likelihood of maximizing return to the parties; and (p) the goal of facilitating the duties of the receiver. The court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument-appoint a receiver. Here, it was just and convenient to grant a receivership order. The receiver would be authorized to engage only in such sales as would occur in the ordinary course of business, and the order appointing the receiver did not authorize the receiver to have conduct of the sale of the business, although the creditor could renew the application for sale in the event of a material change of circumstances: *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 2010 CarswellBC 855, 67 C.B.R. (5th) 97 (B.C. S.C. [In Chambers]). See also *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 58 D.L.R. (4th) 447, 98 A.R. 250 (Q.B.); *Pirbhai Estate v. Pirbhai* (1988), 70 C.B.R. (N.S.) 175 (B.C. S.C.); *Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]); *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 2014 NSSC 128 (N.S. S.C.).

Where a defendant debtor moved to set aside an *ex parte* order appointing an interim receiver on the basis of an error in principle and the plaintiff creditor moved to appoint a receiver over the debtor, the Ontario Superior Court of Justice dismissed the debtor's motion and appointed a receiver. The court held that the question of appearance of lack of impartiality must be approached from the perspective of a reasonable and intelligent person who is objective and in possession of the relevant facts. Here, the evidence was that the receivers in Canada and the U.K. were members of the same franchise, but there was no overlapping ownership and no profit sharing between them, they were not the same entity, and there was no evidence of actual lack of impartiality: *Westernbank Puerto Rico v. Inyx Canada Inc.* (2007), 2007 CarswellOnt 5470, 36 C.B.R. (5th) 133 (Ont. S.C.J.).

The Ontario Superior Court of Justice reviewed the basis for the appointment of a receiver under s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (*CJA*). Newbould J. held that on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time would generally be of short duration, not more than a few days and not encompassing anything approaching 30 days, referencing *Kaycar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 1989 CarswellOnt 191, 70 O.R. (2d) 225, 77 C.B.R. (N.S.) 1 (Ont. C.A.); and *Toronto Dominion Bank v. Pritchard* (1997), 1997 CarswellOnt 4277, 154 D.L.R. (4th) 141 (Ont. Div. Ct.); leave to appeal refused (1998), 1998 CarswellOnt 641 (Ont. C.A.). Under the loan agreements, the credits were on demand and over 70 days had passed since demand for payment was made. Under s. 243 of the *BIA* and s. 101 of the *CJA*, a court may appoint a receiver if it is "just and convenient to do so", having regard to all the circumstances and, in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so is the question of whether or not an appointment by the court is necessary to enable the receiver-manager to carry out its work and duties more efficiently. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed. Here, it was preferable to have a court-appointed receiver rather than privately appointed receiver: *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 2011 CarswellOnt 896, 74 C.B.R. (5th) 300 (Ont. S.C.J.).

The Alberta Court of Queen's Bench granted a motion by investors to appoint a receiver, based on a securities commission decision that the principals of the debtor companies were responsible for false or misleading statements in offering materials and had engaged in conduct that amounted to fraud on the shareholders. There was a real risk of irreparable harm in the wasting of the debtor companies' assets. The receiver would be able to preserve assets and investigate the whereabouts of any other assets. There was no evidence of harm to the debtor companies by placement of the receiver: *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88 (Alta. Q.B.); affirmed (2010), 2010 CarswellAlta 1049, 69 C.B.R. (5th) 42 (Alta. C.A.).

Section 129 of the Ontario *Securities Act* permits the Ontario Securities Commission (OSC) to apply to the court for an order appointing a receiver. Such an order may be made where the court is satisfied that the appointment is in the best interest of the company's creditors or the security holders or if it is appropriate for the due administration of Ontario securities law. The criteria should take into consideration all the circumstances and whether in the context of the circumstances it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders, the court citing *Ontario (Securities Commission) v. Factorcorp Inc.* (2007), 2007 CarswellOnt 7515 (Ont. S.C.J.),

TAB 9

2015 ONSC 2241
Ontario Superior Court of Justice

M & K Construction Ltd. v. Kingdom Covenant International

2015 CarswellOnt 5609, 2015 ONSC 2241, 252 A.C.W.S. (3d) 642

M & K Construction Limited, Marvyn Jay Turk, Debra Fern Turk, Josie Nespolo, Lucio Nespolo, Fidenzio Salvatori, Maria Salvatori, Ebgrow Investments Corporation, the Bank of Nov A Scotia Trust Company as Trustee for the Benefit of SDRSP No. 494-03763-14 and SDRST No. 491-02246-19, Angela Tocci, Donato Tocci, Glencliff Construction Limited, Lillian Noble, Lisa Noble, Barry Noble, Ralcap Investments Corporation, Morry Rotman, Kay Rotman, Harry Rotstein, 1351710 Ontario Inc., Mafc Management Inc., Rita Zeppieri, Propelling Investments Limited, Larry Conte, Peter Sillery, Marina Sillery, Charles Rotstein, Lorraine Rotstein, Ryan Turk, Alix Turk, Ashley Turk and 457351 Ontario Inc., Applicants and Kingdom Covenant International, Respondent

T. McEwen J.

Heard: April 2, 2015
Judgment: April 20, 2015
Docket: CV-14-10846-00CL

Counsel: David Preger, Michael Brzezinski, for Applicants
Mark Veneziano, Andrew Parley, for Respondent

Subject: Corporate and Commercial; Insolvency

APPLICATION by creditors for appointment of receiver.

***T. McEwen J.*:**

1 The applicants bring this application for an order appointing M.N.P. Ltd. (the receiver) as receiver and manager over all of the assets, property and undertakings of the respondent pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and s. 1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. For the reasons below I dismiss the application.

2 I do not intend to recite the disputed and undisputed facts of this matter in detail. Briefly, the applicants are members of a mortgage group that have loaned a large amount of money to the respondent. The respondent is a not for profit corporation which owns lands at Rakley Crescent in Toronto. The property generally consists of two parcels of vacant land comprising approximately 19 acres of frontage at Rakley Crescent and Eglington Avenue West. The respondent also operates a church and school.

3 Initially, as is outlined in the motion materials, a loan was made in the amount of $7,500,000.00 from the Group A investors and a second loan was made in the amount of $1,500,000.00 by the Group B investors. The respondent has stopped paying on the loans which now have an outstanding balance of approximately $11,500,000.00.

4 In September 2014, the respondent commenced an action against a number of defendants, including most of the applicants. In that action the respondent alleges a number of inappropriate dealings including a conspiracy, seeks a number of declarations and restitution. Admittedly, the action does not involve a claim for conspiracy concerning the

Group A investors but other relief sought, including the declaratory relief, involves both the Group A and Group B investors.

5 Notwithstanding the existence that action, which is in the early stages, the applicants move for the appointment of the receiver submitting, amongst other things, as follows:

- The totality of the respondent's allegations in the action have little merit.
- The respondent's claims for set off in the action could be dealt with within the receivership.
- The amounts claimed by the respondent pale in comparison to the amount of the loan.
- The respondent has no intention of repaying the loan.
- It is unlikely that the respondent can refinance its obligation to the applicants.
- The applicants are subrogated to the prior mortgages which were discharged with the loan proceeds.

6 In all of the circumstances, however, I agree with the respondents that it is not just and convenient to appoint the receiver at this time for the following reasons:

- The respondent has raised a number of triable issues in the action that involve the totality of the loan and in particular a conspiracy with respect to the Group B investors.
- Appointing a receiver would effectively end the action as the property would be sold and the respondent, which also operates a church and school, would be negatively affected in a significant way.
- Based on the testimony provided by the parties at their cross-examinations the property does not constitute a diminishing asset and the value of the property greatly exceeds the outstanding indebtedness to the applicants. The applicants have adduced no other evidence that is to suggest the contrary.
- The appointment of the receiver would introduce expense, not of an insignificant nature, into the process.
- There does not seem to be urgency to have the land sold at this point in time and the asset will be available at the end of the day once the litigation is resolved.
- There are no other creditors.

7 In my view, the foregoing makes this case distinguishable from the decision of Blair J. (as he then was) in *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]), which is heavily relied upon by the applicants in this application. This case is more analogous to the case law relied on by the respondent in *Royal Bank v. Chongsim Investments Ltd.*, 1997 CarswellOnt 988 (Ont. Gen. Div.), *Canadian Imperial Bank of Commerce v. Jack*, 1990 CarswellOnt 3055 (Ont. H.C.) and *Canadian Imperial Bank of Commerce v. John Taylor's Truck Sales Ltd.*, [2003] O.J. No. 1377 (Ont. S.C.J.). In all of these cases the courts declined to appoint receivers in similar circumstances.

8 As opposed to appointing the receiver, much would be gained by moving the underlying action to the trial stage as quickly as possible. There was some discussion with the parties at the conclusion of the motion, that if I were to dismiss the motion, as to whether I would be prepared to seize myself of the action and case manage it to the trial stage. I am prepared to do so and I would ask that the parties contact me to arrange a 9:30 appointment in this regard.

9 The respondent was successful at the motion and is entitled to its partial indemnity costs. I have reviewed the costs outline and am satisfied that the amount sought of $35,025.01 is reasonable and shall be paid by the applicants.

Application dismissed.

End of Document

TAB 10

2003 CarswellOnt 1419
Ontario Superior Court of Justice

Canadian Imperial Bank of Commerce v. John Taylor's Truck Sales Ltd.

2003 CarswellOnt 1419, [2003] O.J. No. 1377, 122 A.C.W.S. (3d) 12

CANADIAN IMPERIAL BANK OF COMMERCE (Applicant) and John TAYLOR'S TRUCK SALES LIMITED (Respondent)

Ground J.

Heard: April 9, 2003
Judgment: April 9, 2003
Docket: 03-CL-004936

Counsel: L. Corne for Applicant
Martin Greenglass for Respondent

Subject: Corporate and Commercial

Ground J.:

ENDORSEMENT

1 I have some concern about the court's jurisdiction to deal with this matter on an application where the only relief sought in the application is the appointment of a Receiver. Moreover, I am not satisfied that this is a matter where it is unlikely that there will be any material facts in dispute. Mr. Greenglass, as I understand it, may take the position that there was a misrepresentation to Mr. Kestenberg as to the bank's position with respect to the value of the building accruing to the benefit of John Taylor's Truck Sales Limited ("JTTS") and that accordingly, the guarantee and the mortgage pursuant to which the appointment of a Receiver is sought, are unenforceable.

2 In any event, in the circumstances of this case, I am not satisfied that it is just and convenient that a Receiver be appointed. The bank's security is clearly not a wasting asset and whether it be security for $437,000 or $737,000 it is not in jeopardy. The only evidence before the court is that the property has been independently appraised at $2,000,000. There is no urgency to having a Receiver appointed to manage or control any assets or business. To the extent that there is any business or income stream which may impact on the position of the bank or JTTS, it is already being managed by a Receiver, Schwartz Levitsky, pursuant to the Order of Farley J.dated March 28, 2003. In addition, a Receiver is inevitably expensive and it would appear that there is no function to be performed by a Receiver other than the sale of the property which is resisted by JTTS and which may have an adverse impact on JTTS's entitlement to redeem the property.

3 It seems to me that there has been a singular lack of cooperation, communication and common sense between the parties as mandated by the Commercial List Practice Direction and an undue intransigence on the part of both counsel.

4 JTTS appear to wish to re-mortgage the property which would clearly result in sufficient proceeds to pay off the CIBC mortgage. It would appear to me that the parties should cooperate to effect this result. The $300,000 in dispute could be paid into the court or held in a solicitor's trust account until the issue of the amount secured by the mortgage is resolved.

5 In the meantime, I would suggest that a joint direction be given by the parties to Schwartz Levitsky to pay the taxes on the property and to pay the rent payable to the bank without prejudice to the right of JTTS to take any position it wishes to take as to the application of such rental payments by the bank.

6 The application is dismissed.

7 The application having been dismissed, it seems to me that JTTS is entitled to some award of costs. The amounts suggested by Mr. Greenglass I don't think is out of line, but in view of the fact that it seems to me this whole thing could have been avoided by a little less adversarial position and a little more cooperation, I will award costs to JTTS in the amount of $1,500, all in, payable within 30 days.

End of Document

FIRST SOURCE FINANCIAL MANAGEMENT INC. et al.
Applicants

- and -

IDEAL (BC) DEVELOPMENTS INC., et al.
Respondents

Court File No.: CV-19-00622054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RESPONDENTS

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Court File No.: CV-19-00622054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FIRST SOURCE FINANCIAL MANAGEMENT INC.
and KINGSETT MORTGAGE CORPORATION

Applicants

- and -

IDEAL (BC) DEVELOPMENTS INC., IDEAL (BC2) DEVELOPMENTS INC., IDEAL DEVELOPMENTS INC., 2490564 ONTARIO INC., 2490568 ONTARIO INC. and SHAJIRAJ NADARAJALINGAM

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C., 1985 C, B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, C. c.43, AS AMENDED

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July 17, 2019

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FIRST SOURCE FINANCIAL MANAGEMENT INC. et al.
Applicants

- and -

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