Court File No. CV-18-00608356-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

B E T W E E N:

BUDUCHNIST CREDIT UNION LIMITED

Applicant

and

2321197 ONTARIO INC., CARLO DEMARIA, SANDRA DEMARIA, 2321198 ONTARIO INC., SASI MACH LIMITED, VICAR HOMES LTD., and TRADE FINANCE CAPITAL CORP.

Respondents

**BOOK OF AUTHORITIES OF THE RESPONDENTS, 2321197 ONTARIO INC., CARLO DEMARIA, 2321198 ONTARIO INC. AND VICAR HOMES LTD.**
**(Receivership Application, returnable January 16, 2019)**

January 14, 2019

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# TAB 1

2016 ONSC 4472
Ontario Superior Court of Justice

Gold Candle Ltd. v. GSR Mining Corp.

2016 CarswellOnt 10865, 2016 ONSC 4472, 268 A.C.W.S. (3d) 787

# Gold Candle Ltd. (Applicant) and GSR Mining Corporation and AJ Perron Gold Corp. (Respondents)

Hainey J.

Heard: July 6, 2016
Judgment: July 7, 2016
Docket: CV-16-00011351-00CL

Counsel: Gregory R. Azeff, for Applicant
Aubrey Kauffman, Dylan Chochla, for Respondent, GSR Mining Corporation
Stewart D. Thom, for Proposed Receiver, A. Farber & Partners

***Hainey J.*:**

1 This is an application for the appointment of A. Farber & Partners Inc. ("Farber") as the receiver over the respondents' property which consists of the surface rights to the Kerr-Addison Mine near Virginiatown, Ontario (the "Mine").

2 The application is brought pursuant to s. 101 of the *Courts of Justice Act* which gives the court power to appoint a receiver where it appears to a judge of the court to be just or convenient to do so.

3 In *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]), at paras. 52-53, Newbould J. stated as follows:

> There are no pre-conditions for the exercise of a court's discretion to appoint a receiver. Each case depends upon its own facts.

4 The applicant, Gold Candle Ltd. ("Gold Candle") has acquired the mining rights to the Mine and wishes to obtain the surface rights so that it can recommence operations at the Mine that has been inactive since 1996.

5 According to the applicant, title to the surface rights to the Mine is unascertainable because of a complicated history of corporate ownership and significant encumbrances on title.

6 Gold Candle, therefore, seeks the court's assistance to "clean up" the title and determine the parties' rights as they relate to the Mine.

7 The receiver's mandate, if appointed, will be to conduct a court-supervised sale of the Mine.

8 The respondents oppose the appointment of a receiver on the grounds that they allege that Gold Candle is frustrating good faith negotiations that had been ongoing between the parties for the acquisition of the surface rights. The respondents maintain that the applicant does not have "clean hands" and should not be granted the equitable relief sought.

9 I recognize that the appointment of an equitable receiver is an intrusive remedy that should be granted sparingly. In deciding whether a receiver should be appointed I must consider the circumstances of the case and balance the rights of the parties.

10 In this case the Mine has not operated for 20 years. At its peak, more than 500,000 ounces of gold were extracted from the Mine each year. The Mine employed approximately 2,500 people and was the major employer in the area.

11 The Mine's closure severely affected the local economy. I accept the evidence that there are hazards and other environmental problems associated with the inactive Mine that have not been addressed for many years. These problems present a risk to the public. If the appointment of a receiver results in a sale of the Mine and its operation is recommenced, these problems will be remediated.

12 In balancing the interests of the parties I have considered the following factors:

(a) There is currently a health and safety problem with the Mine;

(b) The non-operation of the Mine has severely affected the local economy. Many people in the area are unemployed because of the closure of the Mine;

(c) There are millions of dollars in municipal taxes owing by the Mine;

(d) There are many trade creditors of the Mine who currently have no recourse due to the closure of the Mine;

(e) The respondents have not actively operated the Mine for 20 years; and

(f) There is no prospect for any economic development with respect to the Mine under the current circumstance.

13 I am of the view that the following benefits could be achieved by the appointment of a receiver with a mandate to conduct a court-supervised sale of the Mine:

(a) The operation of the Mine could be recommenced;

(b) The property could be remediated;

(c) The operation of the Mine would result in increased direct and indirect employment which would have a significant beneficial impact on the local economy;

(d) The municipal taxes could be paid; and

(e) The Mine's creditors may obtain at least partial payment of their debts.

14 Balancing all of these factors and the possible benefits from a court-supervised sale of the Mine leads me to conclude that it would be just and convenient to appoint a receiver for the purpose of conducting a court-supervised sale.

15 The application is, therefore, granted. Farber shall be appointed receiver of the Mine pursuant to s. 101 of the *Courts of Justice Act* for the purpose of conducting a court-supervised sale of the Mine.

16 I request that counsel agree upon the terms of a draft order. If they cannot agree, they may attend before me at a 9:30 a.m. appointment to settle the terms of the order.

17 I urge counsel to settle the issue of the costs of the application. If they cannot, they may file written submissions on costs of no longer than three double-spaced pages with costs outlines attached.

18 I commend counsel for the efficient and professional manner in which they conducted this hearing.

*Application granted.*

# TAB 2

2008 CarswellOnt 7601
Ontario Superior Court of Justice

1468121 Ontario Ltd. v. 663789 Ontario Ltd.

2008 CarswellOnt 7601, [2008] O.J. No. 5090, 173 A.C.W.S. (3d) 442

# 1468121 ONTARIO LIMITED (Plaintiff) and 663789 ONTARIO LTD., RODERICK W. JOHANSEN and CARREL + PARTNERS LLP (Defendants)

J.F. McCartney J.

Heard: November 17, 2008
Judgment: November 28, 2008
Docket: Thunder Bay CV-08-0287

Counsel: Chantal M. Brochu for Plaintiff
Roderick W. Johansen for Defendant, 663789 Ontario Ltd.

***J.F. McCartney J.*:**

1 This is a motion by the Defendant, 663789 Ontario Ltd. (*Cherry Express*), for summary judgment against, and for the appointment of a receiver of the "assets, undertakings and properties of" the Plaintiff, 1468121 Ontario Limited (*Poni Express*).

2 The basic facts that are not in dispute are as follows:

(1) On October 1, 2003, Poni Express and Cherry Express entered into an Asset Purchase Agreement whereby Poni would purchase the trucking business operated by Cherry.

(2) There were six central critical documents relevant to this motion that went along with the transaction as follows:

I. The Initial Asset Purchase Agreement dated October 1, 2003;

II. A Commercial Lease of the property where the business was carried on dated September 29, 2003;

III. An inventory loan backed by a promissory note date October 1, 2003 and due October 1, 2008;

IV. An operating loan backed by an Agreement and a promissory note dated November 30, 2004, due November 1, 2009;

V. A General Security Agreement dated October 1, 2003; and

VI. A Final Asset Purchase Agreement dated June 2005.

(3) The Final Asset Purchase Agreement of June 2005 replaced the original agreement of October 2003. It set a purchase price of $300,000. It set a closing date of September 30, 2008, subject to the Purchaser's right to unilaterally move the closing date to the last day of any month prior to September 30, 2008. The Purchaser was to receive half of the rent paid under the lease as a credit. The Vendor assumed the risk to the buildings prior to

closing, and would hold insurance proceeds in trust for the parties. If substantial damage occurred prior to closing, the Purchaser could elect to take the insurance proceeds and complete the transaction, or back out of the transaction at its option.

(4) On January 14, 2008, a fire caused serious damage to the buildings on the premises and the contents.

(5) Poni advised Cherry that it was electing to take the insurance proceeds and complete the transaction but Cherry took the position it would not close unless the insurance proceeds were first used to pay off the inventory/operating loans.

(6) Poni also proposed changing the closing date to March 31, 2008 and then, since insurance proceeds were delayed, to June 20, 2008.

(7) Poni claims it forwarded all documents necessary to close the transaction to Cherry's solicitor on January 19, 2008, but received no response, and so the transaction did not close.

(8) On July 4, 2008, Poni commenced an action for specific performance and other relief, and Cherry counterclaimed for the amount of the inventory loan due October 1, 2008.

**The Summary Judgment Issue**

3 Rule 20 of the *Rules of Civil Procedure* states that summary judgment shall issue if the court is satisfied that there is no genuine issue for trial. The well known case of *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.) sets out how this rule is to be applied in the following passage at para. 32:

> In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.

4 Counsel for Cherry takes the position that with respect to the promissory note backing the inventory loan there is no genuine issue for trial and summary judgment should be granted. Counsel for Poni takes the position that the inventory loan is just a part of the overall mix of issues in this matter which must be decided before it is resolved.

5 I agree with this latter position. It would be unreasonable to piece off a single issue for judgment, leaving such other issues requiring resolution as:

(a) Poni's claim for specific performance;

(b) Poni's claim for damages;

(c) Cherry's counterclaim for damages;

(d) whether Poni was entitled to change the closing date on the asset purchase to June 20, 2008, and demand that the transaction be closed;

(e) whether Cherry was entitled to refuse to close on the basis that it required more security; and,

(f) whether Cherry was entitled to refuse to close on the basis that the insurance monies would not be directed to the outstanding loans.

6 Clearly, these and all other issues in the action, since they are all a part of the same transaction should be determined at

the same time at trial. The motion for summary judgment is therefore dismissed.

**The Interim Receiver Issue**

7 The Defendant Cherry argues that it is entitled to have a receiver appointed because:

(a) the inventory loan has matured and has not been repaid by Poni Express;

(b) the parties contractually agreed that the Defendant corporation has a right to appoint a private receiver in the event of default by Poni Express;

(c) the Defendant corporation attempted to appoint a private receiver but access was denied by Poni Express;

(d) there is a significant amount owing to the Defendant corporation; and

(e) there is evidence that Poni Express is attempting to dispose of assets against which the Defendant corporation has a registered security interest.

8 The Plaintiff, Poni, argues that a receiver should not be appointed because:

(a) there is no evidence of wrongdoing;

(b) Poni is up to date on its payments on both the inventory loan and the operating loan;

(c) the reason why the balloon payment on the inventory loan is overdue is because of Cherry's refusal to close the transaction;

(d) no assets have been transferred from Poni's ownership to defeat Cherry's security;

(e) a lien on a 1988 Peterbilt truck resulted from a disputed repair, and has subsequently been discharged;

(f) no equipment has been removed from the property, although some furniture is being used on another of Poni's locations;

(g) the original loans are now less than half of their original amounts; and

(h) in Poni's opinion a receivership order would put them out of business.

9 Section 101 of the *Courts of Justice Act* states that a receiver should be appointed where it is just and convenient to do so. Some of the cases where the courts have explained the just and convenient test are the following:

(1) Since the appointment of a receiver is very intrusive, it should only be used sparingly with due consideration for the effect on the parties as well as a consideration of conduct of the parties. (See: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.));

(2) Since an appointment of a receiver is tantamount to execution before judgment, it should not be granted unless there is strong evidence that the creditor will not recover. (See: *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.));

(3) When the security interest permits the appointment of a receiver — and the circumstances of default justify the appointment — the extraordinary nature of the remedy is less essential to the consideration of the court. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]));

(4) Where there is default which is not caused by the moving party where a loan had matured and there was no other

> means to protect the party's interest then a receivership order should issue. (See *Royal Bank v. 605298 Ontario Inc.*, 1998 CarswellOnt 4436 (Ont. Gen. Div. [Commercial List])).

10 The factual situation presented here makes it very difficult to determine whether it would be just or convenient to appoint a receiver. However, the onus of proof is on the moving party. Taking into account that Poni has made its loan payments faithfully (cutting the balance to less than half) and where the reason for the default (under the inventory loan) is not clear, and there being no clear evidence of any wrongdoing on Poni's part, the motion for the appointment of an interim receiver is denied.

**Costs**

11 Regarding costs I see no reason in this case to involve the cost sanction under Rule 20.06 — so costs shall be fixed on a partial indemnity basis to the responding party in the amount of $4,000.

# TAB 3

2009 CarswellOnt 1128
Ontario Superior Court of Justice

1468121 Ontario Ltd. v. 663789 Ontario Ltd.

2009 CarswellOnt 1128, [2009] O.J. No. 876, 175 A.C.W.S. (3d) 98

# 1468121 Ontario Limited (Plaintiff) and 663789 Ontario Ltd., Roderick W. Johansen and Carrel and Partners LLP (Defendants)

G.P. Smith J.

Heard: February 5, 2009
Judgment: March 2, 2009
Docket: Thunder Bay CV-08-0287

Proceedings: refusing leave to appeal *1468121 Ontario Ltd. v. 663789 Ontario Ltd.* (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.)

Counsel: Chantal Brochu for Plaintiff / Responding Party
Robin Clinker for Defendants / Moving Party

***G.P. Smith J.*:**

**Overview**

1 This is a motion for leave to appeal the decision of McCartney J. dismissing the Defendant Corporation's motion for summary judgment.

**Factual Background**

2 On or about October 2003, Cherry Express Inc., a corporation related to the corporate Defendant, 663789 Ontario Ltd., agreed to sell its trucking business to the Plaintiff corporation, 1468121 Ontario Limited, commonly referred to as Poni Express. Several agreements were entered into between the parties as part of this transaction.

3 The asset purchase agreement provided that the Plaintiff would lease the lands and premises upon which the Defendant's business was situated plus various chattels for the sum of $3,000.00 per month with an option to purchase the property for $300,000.00.

4 A credit against the purchase price was agreed to equal to 50 per cent of the lease payments made by the Plaintiff under the lease.

5 The asset purchase agreement also provided that the Plaintiff would purchase the inventory and good will of the Defendant at a purchase price of $300,000.00 payable at the rate of $3,000.00 per month with the balance due in full on October 1, 2008, (the "*Inventory Loan*"). The Plaintiff executed a promissory note in relation to the inventory loan in the amount of $275,000.00.

6 The parties also signed a General Security Agreement in favour of Cherry Express as security for the payment of all

existing and future indebtedness.

7 Poni Express began to operate the business but needed an injection of funds to continue to do so Cherry Express advanced the sum of $380,000.00 (the "*Operating Loan*") secured by a second promissory note in the amount of $323,453.98 payable at the rate of $5,000.00 per month with the balance due in full on November 15, 2009.

8 In June 2005 the parties executed a formal Option to Purchase (the "*Option Agreement*") with respect to the property mirroring the terms of the Asset Purchase Agreement. A closing date for the deal was set for September 30, 2008.

9 On January 14, 2008, a fire occurred on the property and the Plaintiff elected to take the insurance proceeds from the fire and close the sale and, without the agreement or concurrence of the Defendant, advanced the closing date from September 30, 2008 to June 20, 2008.

10 On October 1, 2008 the outstanding balance of $168,693.30 of the inventory loan became due and payable.

11 When the sale did not close the Plaintiff brought an action for specific performance against the Defendant. The Defendant counterclaimed for the balance owing on the inventory and operating loans.

12 On November 17, 2008, as a result of receiving information that the Plaintiff was insolvent and disposing of assets from the trucking business, the Defendant brought a motion for, *inter alia*, summary judgment for the balance owing of $168,693.30 on the inventory loan and for the appointment of a receiver pursuant to the terms of the General Security Agreement.

13 On November 28, 2009, McCartney J. dismissed the Defendant's motion. The Defendant now seeks leave to appeal this decision to the Divisional Court.

**The Test for Leave to Appeal**

14 Rule 62.02(4)(b) provides:

> Leave to appeal shall not be granted unless,
>
> . . . . .
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

15 The test set out in the rule is conjunctive requiring an applicant to demonstrate good reason to doubt the correctness of the decision and that the matters are of such importance that leave to appeal should be granted.

16 There are four discreet issues before the court:

1. is there reason to doubt the correctness of Justice McCartney's decision to dismiss the motion for summary judgment?

2. does the appeal in relation to the decision to dismiss the summary judgment motion raise issues of general importance?

3. is there reason to doubt the correctness of the decision to dismiss the motion for the appointment of an interim receiver?

4. does the appeal in relation to the decision to dismiss the appointment of an interim receiver raise issues of general importance?

17 My reasons will begin by addressing the second prong of the test for leave to appeal with respect to issues 2 and 4.

**The Decision to Dismiss the Motion for Summary Judgment — The Issue of General Importance**

18 Rule 20.04(2)(a) provides that a court will grant summary judgment if it is satisfied that there is no genuine issue for trial with the onus on the moving party to meet this test.[1]

19 The Plaintiff, Poni Express, acknowledged the terms of the inventory loan, the amount owing, that the balance was due in full on October 1, 2008 and had not been paid yet defended the motion on the basis that the inventory loan was part of a larger transaction, that the failure of the Defendant, Cherry Express, to complete the transaction prevented it from meeting its financial obligations that both claims were inextricably linked and should be heard together.

20 McCartney J. agreed with the position of Poni Express and dismissed the motion finding that Cherry Express had not established that there was no genuine issue for trial.

21 The argument presented by Cherry Express is that the importance of the matter justifying leave to appeal concerns the principle that parties will be able to avoid summary judgment by "mudding the waters and attempting to tie all outstanding issues together even though the resolution of these issues will not change the result"[2] which will increase the trial time and costs of the litigation and thwart the purpose of summary judgment procedure.

22 The words "general importance" contained in Rule 62.04(2) refer to matters of general or public importance or to issues relevant to the development of law and/or the administration of justice.[3]

23 Matters that are not precedent setting and which involve a contractual dispute specific to the parties in the litigation are not of sufficient importance such that leave to appeal should be granted.[4]

24 The issues in dispute in the case at bar are no doubt of importance to the parties but do not concern matters of broader importance in that they are fact specific. The decision to dismiss the motion for summary judgment is not precedent setting lacking sufficient importance to justify leave to appeal to the Divisional Court.

25 I do not agree that the decision of McCartney J. will set a precedent encouraging others to avoid summary judgment on a loan or security agreement by raising collateral issues.

**The Decision to Dismiss the Motion to Appoint an Interim Receiver — The Issue of General Importance**

26 In his decision to dismiss the motion to appoint an interim receiver McCartney J. held that it was not just and convenient to make an appointment in part, because Poni Express had paid its loans faithfully, had cut the balance of the debt in half, that the reason for the default was unclear and because there was no evidence of wrongdoing.

27 Section 101 of the *Courts of Justice Act* states that a receiver may be appointed where it is just and convenient to do so.[5]

28 In deciding whether to appoint a receiver the following general principles are relevant:

- The decision is discretionary
- The appointment of a receiver is an equitable remedy and, as such, the conduct of the parties may be relevant and where there is no evidence of wrongdoing or unfairness
- The appointment of a receiver is intrusive and should only be granted sparingly
- The decision to appoint a receiver may necessitate a court taking a broader view including an examination of the effect an appointment would have on the parties.[6]

29 Cherry Express argues that there is an important commercial aspect to the issue in that a court's failure to appoint a receiver when agreed to by the parties in a General Security Agreement or other form of contract will send a negative message to the lending community and lessen confidence in the ability to collect on loans in the event of insolvency.

30 I do not agree with this argument and reiterate my comments that this is a fact specific case with no general or public importance such to warrant leave to appeal to the Divisional Court.

**The Correctness of the Decision**

31 In view of the conjunctive nature of Rule 62.04(2)(b) and my decision on the issue of the "importance" of the issues, I will briefly discuss the issue of the "correctness" of the dismissal of the motion for summary judgment and for the appointment of an interim receiver.

32 It is well established that it is not necessary when deciding the issue of whether to grant leave to appeal for a judge to find that the decision is wrong or even probably wrong.

33 This aspect of the test will be satisfied if a judge is satisfied that the correctness of the decision is open to very serious debate.[7]

**The Correctness of the Decision Not to Grant Summary Judgment**

34 With regard to the motion for summary judgment, McCartney J. was cognizant of the proper legal test of whether the applicant had demonstrated that there was no genuine issue for trial.

35 The position of Cherry Express is that, although the inventory loan was part of the overall transaction, the motion for summary judgment should have been granted because it was a separate loan to Poni Express and the issues raised by Poni Express provided no defence especially since there had been an admission that there had been a default on the loan.

36 Cherry Express submits that the dismissal of the motion for summary judgment is wrong or at least open to serious doubt because, contrary to the decision of McCartney J., the collateral issues raised by Poni Express had no legal connection to its obligations under the inventory loan and the right of Cherry Express to collect the balance owing on default.

37 In his decision, McCartney J. reviewed all of the evidence including the submissions of counsel and concluded that the issues raised by Poni Express were inextricably linked to the issue of the default on the inventory loan making it unreasonable to piece off the litigation and thereby creating a genuine issue for trial.

38 While I may have come to a different conclusion, I cannot say that the applicant has established that there is good reason to doubt the correctness of the decision or that it is open to very serious debate.

**The Correctness of the Decision not to Appoint a Receiver**

39 With respect to the correctness of the decision dismissing the motion to appoint an interim receiver, the relief sought is an equitable remedy and the conduct of the parties is relevant.

40 McCartney J. reviewed the conduct of the parties in detail and exercised his discretion finding that it would not be just and convenient to appoint a receiver.

41 This issue was canvassed in *Royal Bank v. Chongsim Investments Ltd.*[8] where, in declining to appoint a receiver under the terms of a debenture and general security agreement, the court took into account the conduct of the parties reasoning that it would not be just or equitable under the circumstances to do so.

42 Considerable deference is owed to the findings of fact and the exercise of the discretion of a motion court judge.[9]

43 In the case at bar, I am not in a position to disagree with the learned motion judge's findings of fact or with the exercise of his discretion nor to conclude that there is good reason to doubt the correctness of the decision or that it is open to serious debate.

**Disposition**

44 The motion for leave to appeal the decision of McCartney J. to the Divisional Court is dismissed.

45 The Respondent shall file written submissions on the issue of costs within 14 days. The Applicant shall have 14 days thereafter to respond. No further material may be filed without leave to the court.

*Application dismissed.*

Footnotes

1 *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (Ont. C.A.).

2 Factum of the Applicant, para. 39.

3 *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Ont. Div. Ct.); *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)*, [2005] O.J. No. 4847 (Ont. Div. Ct.).

4 *Astellas Pharma Canada Inc. v. WellSpring Pharmaceutical Canada Corp.*, [2008] O.J. No. 4278 (Ont. S.C.J.).

5 *Courts of Justice Act*, R.S.O. 1990, c.C.43, s. 101.

6 *Royal Bank v. Chongsim Investments Ltd.*, 1997 CarswellOnt 988 (Ont. Gen. Div.); *Fisher Investments Ltd. v. Nusbaum*, 1988 CarswellOnt 180 (Ont. H.C.).

7 *King Line Investments Inc. v. 973976 Ontario Ltd.*, 2008 CarswellOnt 3904 (Ont. Div. Ct.); *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.).

8 *Royal Bank v. Chongsim Investments Ltd., supra.*

9 *Housen v. Nikolaisen*, [2002] S.C.J. No. 31 (S.C.C.).

# TAB 4

1990 CarswellOnt 3055
Ontario Supreme Court [High Court of Justice]

Canadian Imperial Bank of Commerce v. Jack

1990 CarswellOnt 3055, [1990] C.L.D. 538, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416

# Canadian Imperial Bank of Commerce, Plaintiff and Garnet Glen Jack, and Robert G. Jack, Defendants

Killeen L.J.S.C.

Judgment: March 23, 1990
Docket: London 39399/89

Counsel: None given

***Killeen L.J.S.C.*:**

1 The parties to this proceeding have already been before me seeking other relief. On an application brought by the Jacks last fall, I ordered that their request for an accounting under s.63(1) of the *Personal Property Security Act*, R.S.O. 1980, c.375 be stayed and that any claims that they wished to assert against the Canadian Imperial Bank of Commerce be asserted, by counterclaim, in the Bank's action on its security instruments. The Jacks, I am advised, have now done so.

2 The Bank now brings a motion in its action for the appointment of a receiver-manager and, in response, the Jacks seek an injunction which would effectively restrain the Bank from that course.

**The Background Facts**

3 The defendants, Garnet Glen Jack and Robert G. Jack, have had a long-standing business relationship with the plaintiff Bank, going back at least 25 years. The Jacks are farmers in Chatham, Ontario, and own about 825 acres of farmland.

4 Until 1986, when this lawsuit started to bubble, the Jacks financed their large farming business through the Bank using a variety of banking methods such as an overdraft or current account, an operating line of credit and special loans. It would seem that prior to the early 1980's the Bank's practice was to secure amounts advanced to the current account by promissory notes and so-called s.178 security under the *Bank Act*, R.S.C. 1985, c.B-1.

5 In the early 1980's, it is clear that the Bank became concerned about its loans to the Jacks and sought to improve its securities. For example, in 1986, the Jacks agreed to execute a land mortgage in the sum of $700,000. on 325 of the total of 825 acres of farmlands owned by the Jacks. This mortgage did *not* represent new debt but was, rather, largely a consolidation or conversion of existing debt.

6 There is uncontradicted evidence that, in 1987, representatives of the Bank sought further and broader land security from the Jacks and this effort led the Jacks to demand a full accounting of what was truly owing from them to the Bank. By early 1988, the battlelines were drawn and the Bank, on April 27, 1988, made formal demand on the Jacks for payment of the sum of about 1.3 million dollars. Then, in late May, 1988, the Bank served a "Notice of Disposition" pursuant to the *Personal Property Security Act*, along with a Notice of Sale under the land mortgage.

7 In response to these steps by the Bank, the Jacks deposited $150,000.00 into the current account on May 31, and, later, on June 8, deposited a further $196,964.00. These funds, totalling $346,964.00, came from the sale of farm crops planted in the spring of 1987 on the Jacks' farm. No further funds have been forthcoming from the Jacks since these mid-1988 payments and the Bank's position is that, as of February 23, 1990, the indebtedness stands at $1,298,619.97. In the interim, the Jacks sold their 1988 crops in December, 1989, without accounting for them and the 1989 crops now rest in storage.

8 The nub of the Bank's argument is that the Jacks are guilty of breach of trust or conversion in respect of the sale proceeds for the 1988 crop and that their security interests are seriously jeopardized by the Jacks' conduct. The Bank relies heavily on two instruments in support of its sought-for order: first, a "General Assignment of Accounts" instrument, dated March 21, 1984, which, in material part, says:

> ...5. All moneys collected or received by the undersigned in respect of the assigned premises shall be received as trustee for the Bank and shall be forthwith paid over to the Bank.

and second, a s.178 instrument, described as an "Overdraft Lending Agreement", dated October 29, 1987, which contains, in part, the following language:

> ...For good and valuable consideration, the undersigned hereby assigns to Canadian Imperial Bank of Commerce...all property of the kinds hereinafter described of which the undersigned is now or may hereafter become the owner, to wit:
>
> All the crops growing or produced upon the farm hereinafter mentioned...
>
> All the horses and other equines, cattle... and the natural increase thereof....

9 On the other hand, the Jacks, in defence of the Bank's motion and in support of their own cross-motion, lay out a complex set of evidentially-supported propositions and positions which may be summarized in the following way.

10 First, the Jacks point to the mid-1988 payments totalling $346,964.00 which would, on the then face of things, have reduced the Bank's claim to a *maximum* of about $960,000.00. Second, they point to the serious issues they have raised evidentially about the correct balance of the Bank's overall loan claim under its prior advances. The Jacks' materials challenge (1) $180,000.00 of alleged prior advances as being totally unsupported by promissory notes or otherwise; (2) another $266,000.00 where promissory notes show only one signature; (3) another $70,000.00 where the notes contain no specified interest rate. Also, and probably more importantly, the Jacks claim that they have been grossly overcharged on interest through the period from about 1976 down to the end of 1982 or so. In this period, they claim that the Bank illegally charged interest at floating rates rather than at fixed rates as allegedly provided for in the relevant promissory notes. There is affidavit evidence before me tending to show that the overcharge arising from the interest issue, as of June, 1988, could run from a low of about $300,000.00 to a high of $990,000.00. This range-estimate, when coupled with the admitted payments at that time, totalling $346,964.00, means that there is even the possibility at trial of a judge finding that no money was owing to the Bank by the end of June, 1988.

11 The Jacks make one further point about their position: during earlier interim steps in this lawsuit the Jacks gave a special undertaking, as a condition of an adjournment, that they would not dispose of any of their assets other than in the ordinary course of farming nor further encumber any of their assets. I am advised that that undertaking was fully complied with to its end date, Oct.5-6, 1989, but counsel for the Jacks has indicated that his clients would agree to its extension to the trial date subject, of course, to the outcome of this motion and cross-motion. While the Jacks' lands covered by the Bank's mortgage are only worth about 1.2 million dollars against the alleged indebtedness of 1.3 millions, as of February 23, 1990, the parties agreed before me that the total farmlands, comprising 825 acres, were worth about 2.6 millions and that there was ample equity in the total farmlands to cover the Bank claim, if the Bank were successful at trial.

**The Law**

12 The plaintiff Bank's motion is grounded in s.144(1) of the *Courts of Justice Act, 1984* S.O. 1984, c.11, reading as follows:

> **114.**-(1) In the Supreme Court, the District Court or the Unified Family Court, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

It is but stating the obvious to say that the appointment of an interim receiver-manager is extraordinary relief which, as it were, prejudges the conduct of a litigant and, accordingly, should only be granted cautiously and sparingly where there is a showing of serious potential prejudice or jeopardy to the creditor's right to recover on its claim and security interests: see *Fisher Investments Ltd. v Nusbaum* (1988), 31 C.P.C. (2d) 158 (Ont.H.C.).

13 Here, my outline of but some of the major factual and legal issues between the parties shows that the defendant Jacks have raised strong triable issues as to the entitlement of the Bank to *any* of the moneys claimed. It is true that the Bank has put before me apparent answers to each of the defendants' positions but, nevertheless, this case bristles with serious issues which call for a trial.

14 Because of the strong and broad frontal attack on all aspects of the Bank's claim, as demonstrated in the materials before me, and the fact that the Bank's land mortgage is but $100,000.00 short in value of the Bank's gross claim, I remain thoroughly unconvinced that the Bank should obtain its order. I am reinforced in that view by reason of the defendant's compliance up to this date with their undertaking not to dispose of or encumber their complete farm holdings and their offer to extend that undertaking to trial.

15 As I have implied in what I have said already, the defendants have shown that there are strongly serious issues to be tried between the parties and, to me, the balance of convenience strongly points to the grant of an interlocutory injunction, as a corollary of my rejection of the Bank's motion, to restrain the Bank from attempting to realize upon the defendants' pledged assets pending trial: see *American Cyanamid Co. v Ethicon Ltd.*, [1975] A.C. 396 (H. of L.) and *Yule Inc. v Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 (Ont.Div.Ct). This injunctive order is conditioned upon the extension of the undertaking of the defendants, as given by their counsel, to the completion of the trial.

16 In accordance with discussions with counsel at the end of the hearing, I order that the trial of this action be expedited and that the case be transferred to Chatham for trial at the September sittings. Because of the extensive cross-examinations already conducted in this case, counsel have indicated that the discoveries, as required, could be completed by the end of June and that affidavits of documents could be exchanged at an early date. I order, accordingly, that (1) affidavits of documents be delivered by not later than April 30 next; (2) the discoveries be completed by June 30 next; (3) the plaintiff Bank will, immediately after the completion of the discoveries, serve and file a trial record with notices of readiness dispensed with; (4) after delivery of the trial record, the case will immediately go on the trial list in Chatham for the September sittings.

17 I may be spoken to on the question of costs in the next two weeks. If counsel wish, the costs' question can be dealt with by teleconference at a time to be arranged with the trial coordinator.

# TAB 5

2015 ONCA 368
Ontario Court of Appeal

Akagi v. Synergy Group (2000) Inc.

2015 CarswellOnt 7407, 2015 ONCA 368, 125 O.R. (3d) 401, 254 A.C.W.S. (3d) 186, 25 C.B.R. (6th) 260, 334 O.A.C. 279, 74 C.P.C. (7th) 45

# Trent Akagi, Applicant (Respondent) and Synergy Group (2000) Inc. (aka Synergy Group Inc., Synergy Group 2000 Inc., The Synergy Group 2000 Inc., The Synergy Group, Inc., (2000), The Synergy Group Incorporated, The Synergy Group 2000 Incorporated) and Integrated Business Concepts Inc., Respondents (Appellants)

Janet Simmons, R.A. Blair, R.G. Juriansz JJ.A.

Heard: December 12, 2014
Judgment: May 22, 2015
Docket: CA C57582, C59494, C59496, C59497, C59498, C59499, C59500, C59508, C59509, C59510, C59511

Counsel: J. Lisus, J. Renihan for Appellants, Student Housing Canada and R.V. Inc.
J. Spotswood and W. McDowell for Appellants, Integrated Business Concepts Inc. and Vincent Villanti
D. Magisano, S. Puddister for Appellant, Ravendra Chaudhary
M. Katzman for Appellants, Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.
J. Leon, R. Promislow for Respondent, J.P. Graci & Associates (the court appointed receiver)
T. Corsianos for Respondent, Trent Akagi

***R.A. Blair J.A.*:**

**Overview**

1 The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

2 Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately $137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an *ex parte* order appointing a receiver over all assets, undertakings and property of Synergy and an additional company, Integrated Business Concepts Inc. ("IBC").

3 The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency (the "CRA"). The representatives' affidavits outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as 3800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 — some four months before Mr. Agaki brought the *ex parte* application.

4 Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action, and only two were actually judgment debtors.

5 On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

6 All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Accordingly, the appeal does not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

7 Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the Receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi — although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

8 For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

**Factual Background**

***The Tax Loss Allocation Scheme***

9 Mr. Akagi invested more than $100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's "Tax Reduction Strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

10 Mr. Akagi made an initial investment of $20,000 in November 2006. He received documentary confirmation: that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as Transfer Agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into...small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

11 In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of $164,500, of which his proportionate share was $104,000. Mr. Akagi deducted that amount and received a tax credit of $27,262.10.

12 Having received that benefit, Mr. Akagi invested a further $90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association ("IBCA") enclosing a cheque in the amount of $248.78, purportedly representing his share of IBCA's profits for the 2007 year.

13 The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his $90,000 investment was not returned.

14 In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006 and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions." In May 2009, Mr. Agaki received a Notice of Re-Assessment for the 2006 taxation year, completely disallowing his claimed business losses of $104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid $54,842.58.

***The Underlying Proceedings: The Akagi Action***

15 In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it — Shane Smith, David Prentice, Sandra Delahaye, and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

16 In the action, Mr. Akagi claimed $116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus $25,000 in punitive damages. He dismissed Mr. Agaki's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

17 Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi $15,000 in costs thrown away, plus $7,000 for his costs on appeal; and (ii) the defendants were to pay $60,000 to the credit of the action pending the outcome of the proceedings.

18 The defendants complied with these conditions.

19 Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice.[1] On May 14, 2012, McEwen J. granted summary judgment in the amount of $90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on those claims. By agreement of the parties, the $60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the $90,000 judgment.

20 The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the $60,000 be paid out to him in partial satisfaction of his $90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the Registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

21 Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 — on the basis of the fraud and conspiracy to defraud claims in the Akagi action — awarded Mr. Akagi $116,575.98 in compensatory damages, $30,000 in punitive damages, and $17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

22 I note here that the $90,000 sum awarded by McEwen J. is a component of the $116,575.98 compensatory damages awarded by Chiappeta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately $182,000, consisting of: (i) $116,575.98 in compensatory damages; (ii) $30,000 in punitive damages; and (iii) $36,000 in costs. From this must be subtracted the $60,000 already paid, leaving a balance of approximately $122,000.

23 It is this claim that spawned the sprawling receivership outlined below.

***The Initial Ex Parte Receivership Application***

24 No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 — less than two months after the judgment was granted — Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as Receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

25 In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and as a judgment creditor of Synergy, Smith and Prentice (the "Debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages.

26 In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an Information to Obtain Production Order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

27 The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

> In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.
>
> The net result of the Alleged Offenders' activities is that:
>
> > a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Allege Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.
> >
> > b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and
> >
> > c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006.
>
> As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders ... acting personally or through corporations or entities which they controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

28 The Suga Information to Obtain, referred to above, described a similar tax scheme, although in much greater detail.

29 As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga

material or that he believed in the truth of their contents. Nor did he or the Receiver — then or at any time during the subsequent *ex parte* applications discussed below — disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

30 On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed." The Order was made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I shall refer to this Order as the "Initial Order".

31 Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis added). However, the Initial Order makes no mention of the Synergy Alternative Tax Investment Program, much less of the power to investigate any such program. That said, the Receiver appears to have treated the Initial Order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

32 What follows is a brief description of how the receivership evolved.

***The Subsequent Ex Parte Expansions of the Receiver's Powers***

*June 24, 2013*

33 Just ten days after the Initial Order, the Receiver applied *ex parte* for expanded powers. It sought authorization to direct financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the Initial Order), but also by or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

34 The Receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the Initial Order was the Receiver's First Report. In another brief endorsement, the application judge granted the order sought.

35 As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme...described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

*June 28, 2013*

36 Still, the Receiver was not content.

37 Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional Receiver's Report. The Receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the Debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement the application judge stated that "[h]aving heard from counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed."

*August 2, 2013*

38 On August 2, 2013 the Receiver obtained what can only be described as a breathtakingly broad extension of the Initial Order. Recall that the only judgment debtors of Mr. Akagi were — and are — Synergy, Smith and Prentice. The only respondents on the initial application — and the only entities made subject to the Initial Order — were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

39 Here is what happened leading up to August 2.

40 On July 30, 2013, the Receiver e-mailed the application judge with a copy of its Second Report, dated that same date. On July 31, counsel for the Receiver appeared before the application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the Receiver e-mailed the application judge again, attaching a draft order that would become the August 2 Order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order." There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the Receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

41 Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the Receiver's Second Report.

42 The Second Report summarized the results of the Receiver's investigations after serving the June 24 and June 28 "Disclosure Orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The Receiver's conclusion was "that the alleged offenders have set up a complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

43 What makes the reach of the August 2 Order breathtakingly broad is the following:

- It extended the Receiver's powers to include and apply to: a list of 43 additional individuals and entities identified in Schedule "A" to the Order; any affiliates of those individuals or entities (as defined in the *Ontario Business Corporations Act* ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC.

- The Schedule "A" list was inaccurately defined as comprising "Additional Debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.

- The Order contained sweeping injunctive provisions — operating on a worldwide scale — enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way, and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".

- The Order authorized the Receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "Additional Debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief.[2] The Court's attention was not drawn to s. 103 of the *Courts of Justice Act*, which requires the commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.

- Not only did the Order freeze the accounts of the Debtors and the "Additional Debtors", it granted the Receiver a $500,000 borrowing charge against the frozen funds to fund the Receiver's activities.

44 All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately $122,000, against the three judgment Debtors — Synergy, Smith and Prentice. As noted above, Smith and Prentice were not even subject to the Initial Order, nor were they examined in aid of

execution until July 26, 2013, more than a month *after* the Initial Order was made. Nor was there any evidence before the application judge on the initial application — or thereafter for that matter — indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the Debtors or "Additional Debtors" is insolvent.

45 I shall refer to the *ex parte* Orders of June 24, June 28 and August 2, 2013, as the "Subsequent Orders".

***The September 16, 2013 "Come-back Hearing"***

46 Sometime after the August 2 Order was granted, the various appellants were notified of the Initial and Subsequent Orders. On August 14, 2013, they applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this Order as the "Come-Back Hearing Order".

47 At the come-back hearing, the Receiver filed its Third, Fourth and Fifth Reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

48 The application judge dismissed the complaint that the Receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality."

49 Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim receivers) set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at paras. 47-48. He concluded:

> The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums ($10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

50 Thirdly, the application judge rejected the argument that the Initial and Subsequent Orders constituted execution before judgment, analogous to a *Mareva* injunction. In his view, the relief sought was simply a "freezing subject to further order in support of an ongoing investigation."

51 Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

> Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

**Final or Interlocutory Order**

52 Counsel for Mr. Akagi advanced two arguments that he submits undermine this Court's jurisdiction to hear the current appeal.

53 First, he argued that the orders under attack are interlocutory and therefore this Court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

54 The Initial Order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

55 Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the Subsequent Orders is unclear because the Receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

56 In any event, they are subsumed in the September 16, 2013 Come-Back Hearing Order, which is a final order. It finally disposes of the receivership issues between the parties to the Initial Order and between the Receiver and the numerous non-parties caught by the Subsequent Orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to this Court: see e.g., *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]).

57 Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the Initial and Subsequent Orders is inappropriate because the *Rules of Civil Procedure* provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

58 For these reasons, an appeal lies to this Court from the Come-Back Hearing Order.

**Discussion and Analysis**

59 It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant. Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

60 I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding, and (ii) to comment briefly on the relatively new notion of an "investigative receiver" — so named for the powers the receiver is granted — as it begins to stride across the commercial law landscape.

***The Framework of This Proceeding***

61 The Initial Order and Subsequent Orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act.* Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

62 This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect investors in certain circumstances). As noted earlier, it is not a class proceeding or other form of representative action.

63 This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in

order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so related entities and individuals. And to do so not to protect his own interests, but those of some 3800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

64 This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the Receiver be appointed. Ground 10 in the notice of application states:

> It is in the interests of justice that a Receiver be appointed over Synergy and IBC:
>
> (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
>
> (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.
>
> (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.
>
> (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

***"Investigative" or "Investigatory" Receiverships***

65 The idea of appointing a receiver or monitor with investigative powers — and sometimes, with only those powers — has emerged in recent years. This Court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

66 Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view — when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions — including even, in proper circumstances, the affairs of and transactions concerning related non-parties — will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.); *Pandya v. Simpson* [2005 CarswellOnt 10517 (Ont. S.C.J. [Commercial List])] (17 November 2005), Toronto, 05-CL-6159; *Century Services Inc. v. New World Engineering Corp.* [2007 CarswellOnt 9945 (Ont. S.C.J.)] (28 July 2006), Toronto, 06-CL-6558; *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.); *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]); *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.); *236523 Ontario Inc. v. Nowack*, 2013 ONSC 7479 (Ont. S.C.J. [Commercial List]) (relief denied); *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.).

67 It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears...just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the tension between these two considerations that defines the parameters of receivership orders in aid of execution.

68 A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

*Stroh v. Millers Cove Resources Inc.*

69 The first is *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.). Because it involved an oppression remedy claim, the appointment of an inspector under the *OBCA* was an available option.[3] Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

70 It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to re-attend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

71 In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding.

*Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corporation*

72 A decade later, Ground J. made a similar order in *Pandya v. Simpson* (17 November 2005), Toronto, 05-CL-6159, as did Morawetz J. in *Century Services Inc. v. New World Engineering Corp.* (28 July 2006), Toronto, 06-CL-6558. Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

73 As Morawetz J. reasoned in *Century Services*, the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken." No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants."

74 In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff*. That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

*Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living*

75 It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian, American, British and other common law jurisprudence, his decisions in *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.), and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.), are the first to have recognized such a receiver as, in effect, a specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

76 *Loblaw Brands* — a decision upon which the application judge relied — is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about $4.2 million in supplier rebate payments from Loblaw to his own company (IBL).

77 Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*[4] order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than $44,000 and Thornton's less than $6,000. On the other hand, the accounts revealed outgoing transfers of over $900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

78 Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

79 In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

80 First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL ($4.2 million) and the value of Thornton and IBL's known assets (approximately $50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately $122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

81 Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the Receiver with overreaching powers to interfere with the rights of others. The *Loblaw* Receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the Receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere nearly as wide-spread or tangentially associated with the parties to the proceeding as is the case here.

82 Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned — if not entirely concerned — with protecting the interests of the 3800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to protect Mr. Akagi's interests at all; they relate to the interests of those 3800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

83 Nor does Brown J.'s decision in *General Electric* — a bankruptcy proceeding — provide a basis for justifying the orders here.

84 *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The Receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the BIA.

85 In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of insolvency, there had been a series of intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

86 The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the BIA, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

87 Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that:

> Those factors point[ed] to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729185's interest in any of the [funds] — whether they were in trust for others or whether the company enjoyed a beneficial interest in them — and, (c) to figure out the true state of the affairs regarding those to whom the [funds] were paid.

88 With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

89 Again, then, *General Electric* is a case where the investigative powers granted to the Receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

90 Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.

- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric*, at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.), at para. 75.

- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see e.g., *Loblaw Brands*, at para. 17; *Century Services*.

- Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

91 An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate: (i) that there is a serious issue to be tried;[5] (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership order is purely interlocutory and ancillary to the pursuit of other relief claimed — where it is, in effect, execution before judgment.

92 Although the application judge applied the test at the time of the Comeback Hearing — concluding that it had been met here — I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The Initial Order, Subsequent Orders, and Come-Back Hearing Order must be set aside in any event, in my view, for the reasons that follow.

***The Investigative Receivership in This Case***

93 In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The Receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural

safeguards were at least obscured in the dust of the chase.

*The Procedural Issues*

94 Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised.[6] It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List — carefully designed to permit the parties to get to the merits of a dispute and resolve them in "real time" without trampling their procedural rights — not been permitted to become overly casual, as they did, the galloping nature of the receivership may well have been reined in.

95 *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *CanaSea PetroGas Group Holdings Ltd., Re*, 2014 ONSC 6116 (Ont. S.C.J.), at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application."

96 At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

97 Beyond the Receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the Receiver's failure to disclose, during the *ex parte* steps in the proceeding, that the CRA had discontinued its investigation — on the particulars of which the applicant relied — in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 Order that the termination of the CRA investigation was first brought to the Court's attention, and even then, it was raised indirectly: in its Third Report, dated August 15, 2013, the Receiver confirmed that the CRA had referred its investigation to the RCMP.

98 There was some indication in the materials filed when the Initial Order was sought, however, that the RCMP was also investigating the matter. Based on this — despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation — the application judge "was satisfied there was no lack of full disclosure."

99 The application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure.

*The Substantive Issues*

**The "Roving Receivership"**

100 The fundamental flaw underlying the Initial and Subsequent Orders is the faulty premise that the Receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry — the civil equivalent of a criminal investigation or public inquiry — for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both: (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending

the termination of the receivership.

101 Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately $122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.), at para 6.

102 Put simply, the reach of the Subsequent Orders granting the Receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000. To the extent the Initial Order was granted for the same roving purpose — as the Receiver submits it was — that Order must also be vacated.

103 That the receivership was intended from the beginning to be — and certainly became — an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3800 non-party investors is apparent from both the position taken by the Receiver and the application judge's following comment from his September 16 reasons:

> This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaw Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

104 As explained above, *Loblaw Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

*The Initial Order of June 14, 2013*

105 Even if the Initial Order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

106 It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets — and, in this case, not only the debtors' assets but the assets of others as well — was needed to protect his ability to recover on the debt.

107 However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the Receiver. Nor was there any evidence that Synergy or the other defendants had insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

108 The Initial Order must be set aside on this basis as well.

**The Certificates of Pending Litigation**

109 The final Subsequent Order, granted *ex parte* on August 2, 2013, authorized the Receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also against the property of the 43 "Additional Debtors" sought to be added to the receivership, only two of which were

debtors to the underlying Akagi action.

110 There are at least two problems with this aspect of the Order.

111 First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2), these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 78 D.L.R. (4th) 129, 2 O.R. (3d) 696 (Ont. C.A.), at p. 714; *Erdman, Re*, 2012 ONSC 3268 (Ont. S.C.J.), at para. 65. Nor was it asserted before this Court that Mr. Akagi, or anyone else, intended to commence such an action.

112 Secondly, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities — such as the "freezing" orders otherwise attacked in these proceedings — a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

113 For these reasons, the August 12 Order authorizing the issuance of certificates of pending litigation must be set aside.

**Disposition**

114 For the foregoing reasons, I would set aside the Initial Order dated June 24, 2013, the Subsequent Orders dated June 24, 2013, June 28, 2013 and August 2, 2013, and the Come-Back Hearing Order dated September 16, 2013.

115 If the parties cannot agree on costs, they may make brief written submissions, not to exceed 8 pages in length, within 30 days of the release of these reasons.

***Janet Simmons J.A.*:**
I agree

***R.G. Juriansz J.A.*:**
I agree

*Appeal allowed.*

Footnotes

[1] The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.

[2] The Receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.

[3] Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229-230; the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Baker v. Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38 (Ont. H.C.), at p. 39. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.*, [2007] O.J. No. 993 (Ont. S.C.J. [Commercial List]), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies

of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.

[4] That is, an order providing for discovery of a non-party prior to trial.

[5] It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.

[6] I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

# TAB 6

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

***Ground J.*:**

**E N D O R S E M E N T**

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.

# TAB 7

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.

***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.*

# TAB 8

2012 ONSC 2070
Ontario Superior Court of Justice (Divisional Court)

Royal Bank v. Boussoulas

2012 CarswellOnt 5385, 2012 ONSC 2070, [2012] O.J. No. 2335, 215 A.C.W.S. (3d) 634

# Royal Bank of Canada, Plaintiff/Appellant and Theodore Boussoulas, Chris Boussoulas, Peter Boussoulas, 4191153 Canada Inc. o/a Royal Edge, Edgebanding Solutions Inc., and Royal Edge Incorporated, Defendants/Respondents

J. Kent J., P. Perell J., S. Pepall J.

Heard: March 28, 2012
Judgment: April 26, 2012
Docket: Toronto 438/10

Proceedings: affirming *Royal Bank v. Boussoulas* (2010), 2010 ONSC 4650, 2010 CarswellOnt 6332 (Ont. S.C.J.)

Counsel: J. Thomas Curry, Emily Graham, for Plaintiff / Appellant
Peter Greene, Michael Binetti, for Defendants / Respondents

***P. Perell J.*:**

**Introduction**

1 In this case, Justice Stinson determined that all of the constituent elements for granting a *Mareva* injunction had been established, but he exercised the Court's equitable discretion, and he dismissed the Royal Bank of Canada's ("RBC") motion seeking an injunction. He also dissolved an interim *Mareva* injunction that had been granted on consent.

2 On this appeal, the Appellant RBC makes four main arguments that the judgment below was in error and that a *Mareva* injunction should be granted and a receiver appointed by this appellate court. I will label the Bank's arguments: (1) the natural justice argument; (2) the substantive argument; (3) the strong substantive argument; and (4) the permanence of the consent injunction argument.

3 The Bank's natural justice argument is that the motions judge erred in holding that the Bank's conduct disentitled it to relief because the equitable doctrine (of unclean hands) had not been pleaded and the Bank was denied notice and the opportunity to respond.

4 The substantive argument, which is a case specific argument, is that in the case at bar, having found mat the constituent elements for a *Mareva* injunction had been established, the motions judge erred in the exercise of his discretion by relying on the doctrine of unclean hands as the basis for refusing an injunction.

5 The strong substantive argument, which is a categorical argument, is that when the constituent elements for a *Mareva* injunction are established, the Court may *never* refuse the injunction and any concerns about the conduct of the plaintiff or counsel should be dealt with as a matter of costs.

6 The permanence of the consent injunction argument is that the motions judge erred in dissolving the *Mareva* injunction

that Justice Cumming granted on consent on September 9, 2009.

7 The Respondents, the Defendants, Theodore Boussoulas, Chris Boussoulas, Peter Boussoulas, 4191153 Canada Inc. (”Royal EDge-1”), Edgebanding Solutions Inc. (”Edgebanding”) and Royal Edge Incorporated deny the merits of any of these arguments, and they submit that the motions judge made no error in dismissing the motion to continue the injunction originally granted on consent.

8 Both the RBC and the Defendants submit that this is a very significant appeal. RBC submits that there will be a significant change in the law if the judgment below is affirmed. The Defendants submit that there will be a significant change in the law if the order below is reversed.

9 For the reasons that follow, it is my opinion that both the RBC and the Defendants are incorrect about the significance of the order below. There will be no change in the law whatever arising from the outcome of this appeal. As I will explain, the motions judge did not develop or change the law but took the opportunity of the Bank’s motion to emphasize existing law

10 In any event, as I will explain, there was no breach of natural justice and the motions judge made no error in applying the substantive law and in dissolving the injunction granted by Justice Cumming. Accordingly, for the following reasons, the appeal should be dismissed.

**Factual and Procedural Background**

11 Starting in 2005, RBC loaned $4 million to Royal Edge-1, which made parts for furniture. The loan was secured by a general security agreement and the guarantees of Peter (father) and Theodore (son) Boussoulas. The loan went into default, and the Bank appointed a receiver.

12 RBC alleges that it discovered that Royal Edge-1’s equipment was being used by Edgebanding, which was being operated by Theodore’s 21-year old brother, Chris Boussoulas, to produce furniture parts.

13 Edgebanding became insolvent, and RBC next discovered that Royal EDge-1’s equipment was being used by Royal Edge Incorporated and 2200504 Ontario (collectively, “Royal Edge-2”) to manufacture furniture parts. Royal Edge-2 was being operated by Joanne Bradbury, a former employee of Royal-Edge-1. The Bank later discovered that Theodore and Chris had granted a $1 million mortgage against the Boussoulas family home to their mother Theresa for no apparent consideration.

14 On August 31, 2009, the Bank sued Peter, Theodore, and Chris Boussoulas, Royal Edge-1, Edgebanding, and Royal Edge Incorporated, and sought an interim and interlocutory *Mareva* injunction. Included among the grounds for the motion was the allegation that there was a strong *prima facie* case that the Defendants defrauded RBC of $3.8 million and that the Defendants obtained half of the amount borrowed on the basis of a fraudulent equipment appraisal.

15 This injunction was granted by Justice Cumming on consent on September 9, 2009. The order was a partial *Mareva* injunction and imposed reporting requirements on the Defendants. It will be important to the discussion below to note that the sixth term of the order was an adjournment to allow cross-examinations. Paragraph 6 of the order stated:

> 6. THIS COURT ORDERS that this motion be adjourned to a date to be set at a 9:30 am. appointment following the delivery of all affidavits and such cross examinations as may be required.

16 Between September 9, 2009 and July 6, 2010, there were numerous 9:30 am. scheduling appointments and the date for the return of the motion kept changing. Meanwhile, the parties delivered affidavits, and there were examinations, cross-examinations, and interlocutory motions and directions, all as the run up to a motion to continue Justice Cumming’s order scheduled for July 6, 2009 on the Commercial List.

17 On July 6, 2010, with a 17-volume “Compendium of Evidence” and other documents filling three banker’s boxes, it was readily apparent that one day was insufficient time for the motion.

18 For reasons that will become clearer later, it is very important to note the nature of the voluminous material delivered in the run up to the argument of the motion about the appointment of a receiver and for a *Mareva* injunction and how these court documents dealt with the matter of fraud.

19 In this regard, there was the Bank's original and amended Statements of Claim. These pleadings were gorged with allegations of fraud. There was the Bank's original and amended notice of motion that asserted that a *Mareva* injunction was warranted on the ground that, among other things, "there is a strong *prima facie* case that the defendants defrauded RBC of more than $3.8 million" and that "the Boussoulas obtained over half the total amount borrowed on the basis of a fraudulent equipment appraisal." There was the Bank's original factum, supplemental factum, and amended factum, of which, the first two factums, but not the last factum, made extensive reference to allegations of fraud.

20 For their part, the Defendants' materials included a factum and a supplementary factum delivered by different lawyers of record. These factums included a vigorous defence to the allegations of fraudulent conduct and the counterarguments that the RBC was making false allegations of fraud and the RBC and its counsel were improperly attacking the personal defendants' reputation and making unsubstantiated allegations of fraudulent behaviour.

21 Justice Stinson met counsel in chambers and explained to them that more time was needed. Counsel acknowledged that the time booked was insufficient and that the quantity of materials could be pared down. Justice Stinson rescheduled the motion, and it was argued for three days, on July, 21, 22, and 23, 2010.

22 On the return of the motion, RBC sought, among other things, the joinder of Joanne Bradbury, 2200504 Ontario Inc., and Theresa Boussoulas as party defendants, the amendment of its Statement of Claim, the appointment of a receiver, and a *Mareva* injunction. On consent, the joinder was allowed and leave was granted to deliver the amended Statement of Claim, which included numerous new allegations of fraud.

23 For reasons that will become clearer later, it is very important to note the nature of the parties' arguments at the hearing of the motion for a *Mareva* injunction.

24 For its argument on the return of the motion, RBC s amended factum did not mention fraud, and the Bank's argument-in-chief made no mention of any evidence of fraud. The position of the Bank during argument was that it was entitled to a *Mareva* injunction independent of its pleaded allegations of fraud.

25 The Defendants did not file an amended factum. Their responding argument was to deny any fraud and to deny any basis for a *Mareva* injunction. In their documents filed for the motion, the Defendants also argued that the Court should refuse any injunction because the Bank had made unsupported allegations of fraud and also allegations of fraud that were shown to be unsupportable.

26 During the argument of the motion, in its reply submissions, the Bank's counsel stated that RBC was not withdrawing the fraud allegations and it still intended to rely on them, but, given the other evidence available, the Bank did not consider it needed to rely on fraud as a basis for obtaining the *Mareva* interlocutory. During the reply argument, the Bank indicated that it was prepared to substantiate its allegations of fraud, but this was not allowed because the Defendants objected that the Bank should not be allowed to split its argument-in-chief. The motions judge agreed with the Defendants in this regard.

**The Judgment Below**

27 Justice Stinson reserved judgment, and he released his reasons on August 25, 2010 [*Royal Bank v. Boussoulas*, 2010 CarswellOnt 6332 (Ont. S.C.J.)].

28 In his reasons for judgment, referring to *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), and with exceptions for Ms. Bradbury and 2200504 Ontario Inc" Justice Stinson concluded that the Bank had satisfied the three constituent elements for a *Mareva* injunction. First, without relying on the Bank's allegations of fraud, there was a strong *prima facie* case that the Defendants were liable to the Bank. Second, there was a real risk that the Defendants were dissipating assets outside of the ordinary course of business making the possibility of future tracing of the assets remote, if not impossible in fact or in law. Third, the balance of convenience favoured granting the injunction over refusing to grant the

injunction.

29 Thus, by paragraph 20 of his 37 paragraph judgment, Justice Stinson had decided that the constituent elements for a *Mareva* injunction had been established. The balance of his reasons addressed the question of whether the Bank's actions disentitled it to an injunction. For present purposes, the most important paragraphs of this discussion are paragraphs 21-22 and 31-35, which stated:

> 21. The next question to address is whether the actions of the plaintiff have, as the defendants argue, disentitled it to the relief sought. A Mareva injunction is a discretionary, equitable remedy, as is an order appointing a receiver, which is granted only where it is "just and equitable". This means that, in deciding whether or not to grant the relief sought, the court is entitled to weigh in the balance the conduct of the party seeking it, and to decline the relief where that conduct is wanting. As noted by I.C.F. Spry in the *Principles of Equitable Remedies*, London: Sweet & Maxwell, 2010, at 414:
>
> > an applicant who culpably misleads the court in making his application may be refused equitable relief on this ground.
>
> 22. In my view, the plaintiff's conduct in these proceedings has been such as to disentitle it to an equitable remedy such as a Mareva injunction or the appointment of a receiver. At its heart, the problem stems from the plaintiff overstating its case and making unsupportable allegations in its notices of motion, factums and affidavits. This is unacceptable in any court at any stage of a proceeding. It is especially problematic in a high volume court such as the Commercial List, where highly complex matters often come before the court for resolution on short notice, accompanied by thick affidavits, recounting complicated fact situations and supported by detailed and complex documentation.
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> . . . . .
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> 31. In the present case, I find that RBC's materials fail to meet acceptable standards in numerous material respects.
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> 32. RBC's original notice of motion and amended notice of motion both allege as grounds for the relief sought that there is a strong *prima facie* case that the defendants defrauded RBC of $3,829,025 and that "Boussoulases [and Bradbury] obtained over half the total amount borrowed on the basis of a fraudulent equipment appraisal." The initial, 3-volume affidavit filed before Cumming J. contained similar allegations. The word "fraud" (or variations of it) was used no less than 4 times in only the third paragraph of the affidavit: the affidavit concludes in its penultimate paragraph that "RBC has been the target of a fraudulent scheme to defraud it of the assets under its security." The RBC factum filed before Cumming J. recited the word "fraud" (or variations of it) no less than 4 times in only the second paragraph, including the assertion that the defendants "orchestrated a fraudulent scheme ... to fraudulently borrow over $4 million from RBC between 2005 and 2008 ...."
>
> 33. Despite these multiple, serious and repeated allegations of fraud in its initial salvos in this litigation (when it initially sought and obtained Mareva relief) in RBC's amended factum and its submissions in chief before me, the word "fraud" was not mentioned at all. In their submissions in response, the defendants argued (as they had submitted in their factums) that RBC had alleged, but failed to even argue, let alone prove fraud and should be denied equitable relief. In reply, RBC asserted that it stood by its allegations of fraud, and attempted to argue them despite having said nothing about them in its argument in chief. Understandably, the defendants objected that it was not open to RBC to advance in reply an argument that it could have, but refrained from advancing in chief. I agreed with the defendants' objection. RBC explained that it believed the remaining grounds relied upon were sufficient to warrant the relief sought.
>
> 34. While I agree (for the reasons articulated above) with the last proposition, it remains the case that RBC alleged yet failed to prove a case in fraud. Moreover, in several material respects, RBC misstated or overstated its case and the evidence. These include the following:.....
>
> 35. As I have indicated previously, in my view, the conduct of RBC in these proceedings has been such as to disentitle it to equitable relief. Misstatements and overstatements of evidence such as those mentioned above impair and impede the court in the performance of its function, and are to be strongly discouraged. It is no answer for a party to say: "this motion was brought on notice - the defendant had every opportunity to respond with his side of the story." Whether a motion is or is not brought on notice does not affect a party's duty to be fair, accurate and candid with the court, in its notice of motion, affidavits and factum. At the same time as advocating his or her client's cause, counsel has a duty to assist the court in arriving at a just and proper result.

30 For present purposes, it is also important to note what Justice Stinson said in his costs endorsement, which he released on October 18, 2010 [2010 CarswellOnt 7982 (Ont. S.C.J.)], after receiving writing submissions. In paras. 4 and 5 of the costs endorsement, he stated:

> 4. In the ruling I made dismissing the RBC motion, however, I concluded that the activities of the Boussoulas Group would have entitled RBC to a *Mareva* injunction, but for the fashion in which the litigation was conducted by RBC. Among other things, I found a history of conduct by the Boussoulases and their companies that is inconsistent with "the ordinary course of business." The evidence revealed transfers of assets from company to company, repeated moves from premises to premises, assignment to and collection of accounts receivable by a sibling's company (despite a pledge of those receivables to the bank), and refusals to disclose assets or receipts. In the circumstances, it is understandable that RBC pursued the remedies that it did. Additionally, although RBC did not consider it necessary to advance fraud arguments before me, RBC was no doubt motivated by its belief that there was fraudulent conduct of some sort practiced by the Boussoulas Group. It may well yet emerge that RBC is on the right side of the dispute.
>
> 5. In view of this conduct by the Boussoulas Group, and the fact that such conduct caused RBC to pursue the motion as it did, I have reached the conclusion that, as between it and RBC, the costs of the motion should be reserved to the trial judge, and I so order.

**Discussion**

31 The discussion of the Bank's four main arguments may be organized by first setting out the source of the Court's jurisdiction to grant a *Mareva* injunction and then addressing three regrettable circumstances associated with the motion and the judge's reasons.

32 The decisions of Justice Cumming and the decision of the motions judge were made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O.1990, c. C.45, which is a statutory codification of the Court's equitable jurisdiction to appoint receivers and grant injunctions. Section 101 states:

> 101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just and convenient to do so.

33 The first regrettable circumstance is that RBC made its decision to deliver an amended factum and decided not to rely on fraud in support of its request for a *Mareva* injunction after, counsel had acknowledged that the quantity of materials could be pared and the motions judge ordered that amended facta and compendia be filed.

34 This circumstance is regrettable because it might leave the impression that with the Bank paring down its material, it would be unfair later for the motions judge to agree with the Defendants' argument that the *Mareva* injunction should be refused because of the Bank's conduct of advancing unsubstantiated allegations of fraud and some not provable allegations of fraud.

35 This impression would be false. After relying on allegations of fraud for the purposes of obtaining the interim interlocutory injunction and continuing to rely on allegations of fraud during the run up to the argument of the motion and until the delivery of the amended factum, the RBC made its own unfettered tactical decision not to rely on the allegations of fraud for the purposes of the *Mareva* injunction while at the same time not abandoning those allegations.

36 There is nothing unfair in holding RBC to the consequences of that decision, particularly when the Defendants made it clear in their material and in response to the motion that they were defending the allegations of fraud being made against them and that they would argue that the injunction should be refused if the Bank was found to have advanced unsupported or disproved allegations of fraud.

37 It is notable that the Defendants did not file an amended factum on the argument of the *Mareva* injunction and the motions judge's reasons in para. 33 reveal that in their submissions and in their factum, the Defendants argued that if RBC alleged but failed to prove fraud, it should be denied equitable relief. The Defendants never agreed that the Bank should be freed of the consequences of its tactical decisions.

38 If in the eleventh hour, the Bank made a tactical decision not to rely on its allegations of fraud, in order to curry the favour of the Court - which I do not think RBC did - then it was an unsolicited decision.

39 The RBC made its tactical decision because it apparently thought that there would be advantages and no adverse consequences. The Defendants, however, did not agree that there should no adverse consequences, and as I will explain below, the motions judge made no error in visiting on the Bank the consequences of its tactical decision.

40 The second regrettable circumstance brings me to what I have labelled the natural justice argument. The second regrettable circumstance is that for the reply argument, as noted above, RBC sought to respond to the Defendants' argument by now substantiating the fraud and the Defendants rightly objected that RBC was splitting its argument-in-chief. The motions judge agreed, and he did not permit RBC to respond by now relying on its allegations of fraud.

41 This circumstance might give the impression that RBC was not given notice of an issue and not given the opportunity to defend itself. Once again, this impression would be false. In advance of the argument of the motion, RBC knew that the Defendants would take the position that even if the constituent elements for a *Mareva* injunction were established, equity's relief should be denied because of unsubstantiated allegations of fraud and because there were allegations of fraud that patently could not be substantiated.

42 As set out above, the motions judge noted in para. 34 of his reasons that RBC misstated or overstated its case and the evidence. I now set out the details of para. 34 that I excerpted from the quote above. In full, para. 34 states:

> 34. While I agree (for the reasons articulated above) with the last proposition, it remains the case that RBC alleged yet failed to prove a case in fraud. Moreover, in several material respects, RBC misstated or over-stated its case and the evidence. These include the following:
>
> > (a) The assertion that the defendants fraudulently borrowed over $4 million from RBC between 2005 and 2008 is wrong. There is no evidence that the defendants embarked on a fraudulent scheme in 2005. The supposed fraudulent conduct (if it qualifies as such) did not commence until 2008, once most of the money had been advanced.
> >
> > (b) The allegation that the defendants obtained over half of the total amount borrowed (Le. $1.9 million out of $3.8 million) on the basis of a fraudulent equipment appraisal, is untrue. The appraisal in question was obtained by RBC in January 2008. Thereafter, RBC advanced net new funds of only $489,000, nothing close to the $1.9 million alleged. There is a material misstatement. There is no evidence of any participation by Chris, Theo or Joanne in the so-called "fraudulent appraisal scheme" yet RBC persists in that allegation, too.
> >
> > (c) There is no direct evidence of a fraudulent appraisal. In fact, contrary to the assertion in its initial factum and 3 volume affidavit that 419 submitted a fraudulently prepared equipment appraisal report, in truth RBC dealt directly with the appraiser to request the report. The affiant who swore the principal affidavit purported to state the facts underlying this key allegation; in truth, he lacked personal knowledge of what transpired, but failed to qualify his "evidence" accordingly. A supplementary affidavit filed on the day the motion was argued, contained some correcting information but gave no further evidence to sustain the allegation of fraud. The sole basis for the allegation remains the difference between the two appraised values, with no evidence that the defendants bore any responsibility for the discrepancy. This is far from a prima facie case of fraud; it is no evidence of fraud on the part of the defendants. It is an allegation of fraud that should never have been made, without proper evidence to sustain it. The statement in the RBC factum before Cumming J. was unsupportable and misleading in relation to a highly material and damaging allegation.
> >
> > (d) RBC's practice of overstating its case was not confined to the evidence (or lack of it) before Cumming J. For example, in an affidavit sworn May 27, 2010, RBC witness Tony Depascal swore that, as he and another RBC

employee were asking questions of Joanne, it became obvious that she was determined not to provide the information they required. In truth, Depascal never met Joanne. Another RBC affiant, Colin Cochrane, swore that significant funds of 419 had been diverted to 220. On cross-examination, he admitted he had no evidence of this. He further swore that the receiver had been refused access to the books and records of 419. This was a misleading overstatement, given the access and assistance provided by Joanne to the receiver. On several other occasions under cross-examination Cochrane was forced to concede that he had no personal knowledge or evidence to support beliefs or conclusions in his affidavits that he stated as facts. His affidavit included numerous occasions in which he went beyond stating facts within his personal knowledge, without properly qualifying them as hearsay evidence or surmises on his part. This is not properly admissible evidence.

(e) In addition, RBC's affidavits included a number of irrelevant and inadmissible allegations as against the defendants, including reference to a pending criminal prosecution against Peter. That is evidence of no moment in this proceeding, and ought not to have been included in an RBC affidavit.

43 In the context of what took place during reply argument, the three points to be emphasized are that: (1) the Defendants had given RBC notice that they were going to assert that the injunction should be denied because RBC had made unsubstantiated allegations of fraud; (2) there were allegations of fraud that patently could not be substantiated; and (3) RBC had the opportunity to be heard on whether the injunction should be denied on equitable grounds. With respect to the third point, RBC had been given notice that the court's equitable discretion was in play, and apart from splitting its case, it remained open to RBC to justify its tactical decision not to rely on the fraud allegations and to explain that there should be no adverse consequences from that decision.

44 Further, and in any event, the discretionary factors associated with equitable relief are always in play and this issue does not have to be pleaded. In other words, it would not have come as a surprise and it should not have come as a surprise that a Court with an equitable discretion will exercise its discretion in accordance with the historic principles of equity, which the motions judge set out in his reasons. The discretionary elements of equity's jurisdiction are inherent in equity's jurisdiction. Indeed, equity's *in personam* jurisdiction is its legal persona.

45 Thus, it is not necessary to discuss the case law relied on by the Bank for this appeal that is authority for the proposition that a case should not be decided by the injection of a novel theory via the reasons for judgment. See: *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511 (Ont. C.A.); *Garfin v. Mirkopoulos*, 2009 ONCA 421 (Ont. C.A.); *Grass (Litigation Guardian of) v. Women's College Hospital* (2005), 75 O.R. (3d) 85 (Ont. C.A.); and *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.).This case law is simply not applicable to the problem before the Court, which involves the exercise of an equitable discretion, the principles of which were applicable as an inherent aspect of the Bank's own request for equitable relief. Thus, I disagree with RBC's natural justice argument.

46 This brings me to the third regrettable circumstance, which I must deal with before addressing the Bank's two substantive arguments. The third regrettable circumstance is the possible impression that RBC or its counsel intentionally sought to deceive the Court by its allegations that the Defendants had committed fraud.

47 This impression, once again, would be false. As set out above, in his costs endorsement, the motions judge stated, this time with emphasis added: "although RBC did not consider it necessary to advance fraud arguments before me, *RBC was no doubt motivated by its belief that there was fraudulent conduct of some sort practiced by the Boussoulas Group. It may well vet emerge that RBC is on the right side of the dispute*." This comment indicates that the motions judge appreciated that fraud was a live issue and that although not proven on the motion, the Bank's overall belief that it had been the victim of fraud might ultimately be substantiated. However, as noted above, for the purposes of the *Mareva* injunction, the Bank had overstated its case.

48 I can understand why RBC and its counsel would be distressed by suggestions of misconduct, but it is clear that the motions judge in the educative and editorial portions of his judgment was speaking at large and referring to "spreading practices" that were of concern to the administration of justice. He spoke of counsel's ethical duty not to mislead the Court, especially in the context of a high volume court like the Commercial List in Toronto, but all the comments of the motions judge should not be taken as being specifically directed at RBC or its counsel.

49 The RBC made a late in the day tactical decision not to rely on the allegations of fraud for the purposes of the *Mareva* injunction but at the same time did not abandon those allegations. In my opinion, in the circumstances of this case, without the concurrence of the Defendants, this tactical decision had consequences. Metaphorically speaking, if a litigant drops the gauntlet and insults another's integrity, then the litigant must complete the duel or genuinely withdraw the insult and apologize.

50 For about a year, the Defendants had been defending themselves from allegations of dishonesty and without abandoning those allegations, the Bank took the position that those allegations did not matter for the purposes of its request for equitable relief. This was simply not fair, and the unfairness has nothing to do with the administrative concerns of the Commercial List in Toronto. This tactical decision tainted the Bank's request for *in personam* relief. In my opinion, the motions judge was correct in concluding that RBC had unclean hands and should be denied an equitable remedy as a result of its conduct.

51 I discussed the doctrine of unclean hands in *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (Ont. S.C.J.) at paras. 51-53, where I stated:

> An injunction is an equitable remedy and it is subject to the principles that govern the grant of equitable decrees and orders. One of those principles is the maxim that "one who comes to equity with clean hands."
>
> As commentators and judges have noted, the metaphor that a claimant for equitable relief must have clean hands must be put into context. Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court. In *Argyll v. Argyll*, [1967] Ch. 302, Ungoed-Thomas, J. described the principle nicely at pp. 331-2, when he said: "A person coming to Equity for relief... must come with clean hands; but the cleanliness required is to be judged in relation to the relief sought."
>
> In *City of Toronto v. Polai* (1969), 8 D.L.R. 689 (Ont. C.A.), in describing the clean hands principle Schroeder, J.A. stated at pp. 699-70:
>
> > The misconduct charged against the plaintiff as ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v. Lenthal* (1669), 1 Chan. Cas. 154, 22 E.R. 739: "... that the iniquity must be done to the defendant himself."

52 In the case at bar, in my opinion, the motions judge was correct and made no error in principle in relying on the unclean hands doctrine associated with equitable relief. The Bank's tactical decision was an iniquity done to the Defendants. This opinion disposes of the Bank's substantive argument.

53 This opinion, also disposes of the Bank's strong substantive argument, which categorical argument, unsupported by any authority, is that when the constituent elements for a *Mareva* injunction are established, the Court may *never* refuse the injunction and any concerns about the conduct of the plaintiff or counsel should be dealt with as a matter of costs.

54 The motions judge might well have granted the *Mareva* injunction and exercised his discretion by denying costs or awarding costs against RBC, but the proposition that having decided that the constituent elements for a *Mareva* injunction had been established, the Court has no discretion to deny the injunction on equitable grounds, is just wrong.

55 An injunction is not a common law remedy like damages, which is a non-discretionary remedy; an injunction is an equitable remedy and it is discretionary and can be refused on equitable grounds, including the clean hands doctrine. Contrary to the Bank's strong substantive argument, the discretion of the motions judge was not circumscribed to making only a costs award.

56 Finally, this brings me to the Bank's permanence of the consent injunction argument, which is that the motions judge

erred in dissolving the *Mareva* injunction that Justice Cumming granted on consent on September 9, 2009.

57 In my opinion, the motions judge made no error in dissolving the *Mareva* injunction granted by Justice Cumming. It is clear that the parties were consenting only to an interim interlocutory order pending the outcome of the motion that was being adjourned and that was repeatedly being rescheduled. The Bank's amended notice of motion sought a continuation of the September injunction, which would not have been necessary if the order was permanent. Although, it would have been clearer if the interim order had expressly indicated the duration of its operation, it is clear enough that it was an interim order and, therefore, it was quite appropriate for the motions judge to dissolve it when he refused to continue and expand it as requested by the Bank.

**Conclusion**

58 For the above reasons, I dismiss the Bank's appeal with costs of $6,000, all inclusive, for the motion for leave to appeal and $10,000, all inclusive, for the appeal. At the hearing of the appeal, counsel agreed on the quantum of costs.

*Appeal dismissed.*

# TAB 9

1986 CarswellBC 370
Supreme Court of Canada

Bank of Montreal v. Wilder

1986 CarswellBC 370, 1986 CarswellBC 763, [1986] 2 S.C.R. 551, [1986] S.C.J. No. 67, [1987] 1 W.W.R. 289, 2 A.C.W.S. (3d) 391, 32 D.L.R. (4th) 9, 37 B.L.R. 290, 70 N.R. 341, 8 B.C.L.R. (2d) 282, J.E. 87-22

# BANK OF MONTREAL v. WILDER et al; BANK OF MONTREAL v. WILDER and WILDER

McIntyre, Chouinard, Wilson, Le Dain and La Forest JJ.

Heard: November 5, 1985
Judgment: November 27, 1986
Docket: No. 18010

Counsel: *D. Roberts, Q.C.*, for appellant.
*G. Nicholson*, for respondents.

**The judgment of the court was delivered by *Wilson J.*:**

1 This appeal involves the law of guarantee and suretyship. The essential question to be answered is in what circumstances a guarantor or other surety will be discharged absolutely or partially from liability on his guarantee because of improper conduct on the part of the creditor. The question arises out of three related actions brought by the ap pellant upon seven personal guarantees given to it by the respondents. The actions were tried together and the Court of Appeal for British Columbia dealt with them as a single appeal. I propose to do the same.

**1. The facts**

2 The respondents ("the Wilders") are all members of the Wilder family, which was headed by Earl Wilder Sr. and his wife, Minnie. By 1971 the Wilders were active in ranching, park maintenance, ski hill development and other businesses in British Columbia. The family enterprises were operated through companies controlled by the Wilders. This appeal concerns only one of those companies, E.A. Wilder Enterprises Ltd. ("the company").

3 Late in 1971 Mr. and Mrs. Wilder took stock of the loans which they had from their banker, the Canadian Imperial Bank of Commerce. These had started out as fixed interest loans but had been converted by the bank into fluctuating interest loans and were now all at different interest rates. The total amount owing was approximately $225,000. The Wilders decided that the time had come to move their banking business elsewhere. They were particularly interested in obtaining a fixed interest rate. They approached the Industrial Development Bank in Cranbrook and reached a tentative agreement with it for a $200,000 loan repayable in instalments over 20 years at a fixed interest rate of 8 3/4 per cent. However, on the way home from Cranbrook they decided to check with the Bank of Montreal in Kimberley to see if they could do better. They were interviewed by the bank manager, Mr. Jeffrey, and a lot of evidence was adduced at trial concerning alleged misrepresentations made by him as to the interest rate on the loan of $330,000 which was negotiated at that meeting. The issues relating to alleged misrepresentation were dealt with in the courts below, and since no appeal has been taken to this court from the disposition made in the Court of Appeal, this court need not deal with them.

4 On 16th February 1972 Mr. and Mrs. Wilder gave their joint guarantee to the bank for the $330,000 loan made to the

company. On 28th April 1972 the company executed a demand debenture in the same principal amount. This debenture created a floating charge on the assets and undertaking of the company and a fixed charge on its real property. By May 1972 the debenture was registered in British Columbia.

5 The bank and the company apparently enjoyed an amicable relationship during the following two years. By the end of 1974 the company had become quite heavily involved in road construction. This resulted in an increase in its operating capital requirements. In particular, the company had bid successfully on two road-building projects for the Alberta government, the Priddis and High Prairie projects in Northern Alberta. With the need for increased operating capital, the company began to exceed its authorized credit limits. The credit limits were adjusted by the bank with periodic increases. Nevertheless, the credit draws exceeded the credit limits during most of 1975.

6 By the beginning of 1975 the bank had a new manager in Kimberley, a Mr. Smith. Mr. Smith was anxious to improve the bank's security against company borrowings. On 26th March 1975 he wrote to the company and enclosed standard form guarantees to be executed by the Wilders. The letter also noted that there was a need to "reach accord on future loan limits". The requested guarantees were given to the bank by various members of the Wilder family. I set out the particulars of all the outstanding guarantees below.

| Guarantor | Relationship | Limit | Date |
|---|---|---|---|
| 1. M.P. Wilder) M.P. Wilder) | Father) Mother) | $330,000 | 16th February 1972 |
| 2. E.A. Wilder | Father | 105,000 | 2nd April 1974 |
| 3. E.E. Wilder | Son | 300,000 | 2nd April 1975 |
| 4. Dara Wilder | Daughter | 300,000 | 9th June 1975 |
| 5. Tara Wilder | Daughter | 300,000 | 19th June 1975 |
| 6. Cecilia Melrose | Daughter | 300,000 | 19th June 1975 |
| 7. E.A. Wilder | Father | 250,000 | 14th August 1975 |

7 Company drawings on its loan account continued to exceed credit limits to some degree and in early June 1975 the bank dishonoured two of the company cheques. This upset the Wilders and Mrs. Wilder asked for a meeting with bank representatives in Vancouver. The meeting was held on 23rd June 1975 and Mrs. Wilder's son, Earl Wilder Jr., attended the meeting with her. Present on behalf of the bank were Mr. Smith, the branch manager, Mr. Munzel, the credit manager, and Mr. Campbell, the assistant credit manager. Mr. Campbell was responsible for the company's account. The trial judge found as a fact that Mrs. Wilder represented both the company and the individual members of the family at the meeting as their "authorized agent". This proved to be a very significant finding.

8 There was conflicting evidence at trial as to whether or not an agreement was reached at the meeting. The trial judge evidently preferred the evidence of Mrs. Wilder and her son because he found that an agreement was entered into ("the June agreement") in the terms alleged by the Wilders. He found that the bank had agreed to continue to finance the company at least until it had completed the Alberta road projects. It was to extend the necessary line of credit to complete these projects estimated at a maximum of $1,100,000. In return, the Wilders were to inject $250,000 into the company account from related family companies. Individual family members were to provide further guarantees of the company loans and the company was to provide the bank with a new debenture for $550,000.

9 The $250,000 was paid into the company by the Wilders as agreed and on 14th August 1975 Mr. Wilder gave the bank his guarantee for $250,000. Unfolding events overtook the giving of the guarantees by the other family members. The new debenture was never presented to the company for execution for the same reason.

10 As noted by Lambert J.A., almost immediately after the Wilders' injection of fresh capital into the company, the bank again began to dishonour company cheques, including payroll cheques for the Alberta road projects. Beginning in August 1975 the bank honoured no more cheques. The trial judge found that this was a breach of the June agreement and the Court of Appeal agreed.

11 Some time in the early part of August 1975, Mrs. Wilder had discovered what seemed to be an error in the audited financial statements of the company. The error resulted in an inaccurate picture of the company's financial position. It improved it by some $250,000. Before notifying the bank of the error, Mrs. Wilder asked the company's chartered accountants to verify whether it was in fact an error or not. It is not clear on the evidence exactly when the bank learned of the error since there is a conflict in the testimony of the parties. Mr. Smith testified that in a telephone conversation with Mrs. Wilder on or about 15th August 1975 she told him of the error. Mrs. Wilder denied speaking with Mr. Smith until 22nd August 1975, when she says she told him about it. In any event, the bank appears to have learned of the error through the auditors, possibly in a telephone call on 21st August 1975 to the Kimberley branch, but certainly on 22nd August 1975 when the auditors withdrew the financial statements. The bank demanded payment of its loan before noon on 22nd August 1975.

12 By way of further explanation for the bank's sudden calling of the loan Mr. Smith testified as to other things Mrs. Wilder had said to him in the telephone conversation he alleged took place on or about 15th August 1975. In addition to the alleged advice as to the error in the company's financial statements, Mr. Smith testified that Mrs. Wilder told him that no further bank documents would be executed by the company. He also claimed that Mrs. Wilder told him that the company might even shut down. Mrs. Wilder, as earlier mentioned, denied that any such conversation ever took place. Mr. Smith also alleged that Mrs. Wilder had told him that the company was depositing its money elsewhere. In cross-examination Mr. Smith admitted that it could well have been Earl Wilder Jr. who told him this. Earl Wilder Jr. testified that at no time did any of the company principals contemplate shutting the company down for any period. The trial judge made no specific findings of fact on this conflicting testimony because in the view he took of the case the reasons for the precipitous demand were irrelevant. It was, in any event, a clear breach of the June agreement.

13 Mr. Smith also testified that by early August 1975 the bank was anxious to get the new debenture in place. While he acknowledged that the bank wanted to shore up its security, he denied that it was planning to call the loan as soon as it accomplished this.

14 By August 1975 the bank had a new assistant credit manager in its Vancouver office, a Mr. McPhee. Mr. McPhee had not been present at the meeting when the June agreement was entered into. On 12th August 1975 Mr. McPhee prepared an internal memorandum that made several recommendations concerning the company account. One was that the company be given two weeks to seek financing elsewhere. There is no evidence that the company was ever given this opportunity. Another was the appointment of a receiver-manager to "look after our interests" and yet another the placing of a chattel mortgage on company equipment "to delay call of loan".

15 On 22nd August 1975 the bank demanded payment of its loan by letter served on the company by the bank's Alberta solicitors. This demand was made under the debenture given by the company in 1972. The amount claimed due including accrued interest was $860,920.30. The demand was made in Calgary at 11:40 a.m. for payment to be made in Kimberley by noon of the same day. Not surprisingly, it was not possible for the company to meet such a precipitous demand and later the same day the receiver-manager took possession under the debenture.

16 The receiver-manager refused to complete the road-building projects when Earl Wilder Jr. asked him to do so on 22nd August 1975 and they were completed at a loss under the auspices of the company's bonding company. On 2nd December 1975 the company was declared bankrupt.

17 In an action by the bank against the company on the debenture, the trustee in bankruptcy eventually consented to judgment for the bank in January 1978. The company's counterclaim for damages for wrongful appointment of the receiver was dismissed by consent in April 1979. There is no evidence as to whether or not the Wilders ever consented to this dismissal. The receiver-manager was ordered discharged in April 1979. The bank sued several of the Wilders on their personal guarantees and it is that litigation which gives rise to the issues before us.

**2. The courts below**

18 Munroe J. found that the bank breached the June agreement by failing to provide the company with the financing it had undertaken to provide, by dishonouring the company's cheques, by calling the company loans and by causing a receiver-manager to be appointed under the debenture [reported at 19 B.C.L.R. 77]. As a result the company was unable to

complete the road-building projects and the bonding company was called upon to do so. This could result in the Wilders being sued by the bonding company on an indemnity agreement they had signed with the bonding company. The trial judge also found that, apart from its breach of the June agreement, the bank also violated the terms of the debenture by failing to give the company a reasonable time to comply with its demand.

19 Nevertheless, the trial judge did not accept the Wilders' submission that they were entitled to a discharge of their obligations under all their personal guarantees. He released Mr. and Mrs. Wilder from liability on guarantee 1 because of misrepresentations by the bank as to the interest rate on the loan guaranteed. He released Mr. Wilder from liability on guarantee 7 because it had been given "pursuant to an agreement made on June 23, 1975 and later breached by the plaintiff". But he found that the Wilders "had no meritorious defence" to the bank's claim on guarantees 2, 5 and 6. he did not elaborate on why this was so. He did, however, grant the Wilders the right to set off $74,000 against their liability under these guarantees for damages caused by the bank's breach of the June agreement and its unreasonable demand under the debenture. The bank's claim on guarantee 3 was stayed by the personal bankruptcy of E.E. Wilder before trial and the bank's action on guarantee 4 was discontinued.

20 The bank appealed the trial judgment on guarantees 1 and 7 to the British Columbia Court of Appeal and the Wilders cross-appealed the disposition on guarantees 2, 5 and 6 [reported at 47 B.C.L.R. 9, 149 D.L.R. (3d) 193]. Each judge of the Court of Appeal gave separate reasons for judgment. Lambert J.A., with whom Anderson J.A. concurred, held that the bank was not entitled to succeeded on any of the guarantees. It could not succeed on guarantees 2, 5, 6 and 7 because of its breach of the June agreement. Seaton J.A., dissenting, distinguished between the guarantees which preceded the June agreement and its breach and guarantee 7, which post-dated the agreement and was given on the faith of it. He saw no reason why the bank should not succeed on the earlier guarantees. Lambert J.A. agreed with the trial judge that guarantee 1 was unenforceable because of the bank's misrepresentation. Anderson J.A. disagreed that there had been any misrepresentation but found guarantee 1 unenforceable for the same reason that guarantees 2, 5 and 6 were unenforceable, i.e., breach of the June agreement. Seaton J.A. also found no misrepresentation but found guarantee 1 enforceable for the same reason that in his mind guarantees 2, 5 and 6 were enforceable.

21 The bank, pursuant to leave granted on 16th February 1984, appealed to this court the judgment of the Court of Appeal discharging the Wilders from liability on guarantees 1, 2, 5 and 6.

**3. The issues**

22 There are three issues before us, namely:

23 (1) Are the Wilders entitled to be discharged from their liability under guarantees 1, 2, 5 and 6 because of the bank's breach of the June agreement?

24 (2) If not, are the Wilders entitled to set off against their liability under the guarantees the damages suffered by the company as a result of the bank's breach?

25 (3) If they did have a right of set-off, are the Wilders precluded from asserting it because the company's counterclaim against the bank for damages for the wrongful appointment of the receiver was dismissed on consent? In other words, is the set-off claim res judicata?

26 Because of the conclusion I have reached on the first issue, it is not necessary to deal with the second and third issues.

**4. The guarantees**

27 All of the guarantees executed by the Wilders were in the bank's standard form. In them the guarantors guaranteed:

> ... payment to said Bank of all present and future debts and liabilities direct or indirect or otherwise, now or at any time and from time to time hereafter due or owing to said Bank from or by the Customer ...

The guarantees were expressed to be "continuing" guarantees subject to the guarantor's right to terminate further liability on 90 days' written notice to the bank. They contained the following clause which is relevant to the issue before us:

> IT IS FURTHER AGREED that said Bank, without exonerating in whole or in part the undersigned, or any of them (if more than one), may grant time, renewals, extensions, indulgences, releases and discharges to, may take securities from and give the same and any or all existing securities up to, may abstain from taking securities from, or from perfecting securities of, may accept compositions from, *and may otherwise deal with the Customer and all other persons (including the undersigned, or any one of them, and any other guarantor) and securities, as said Bank may see fit* ... [emphasis added]

**5. Discharge of the guarantors**

28 Counsel for the bank submits that a distinction must be made between a guarantee of a specific contract and a general guarantee of present and future debts or liabilities. Only, he submits, where a specific contract has been guaranteed will breach of that contract by the creditor entitle the guarantor to an absolute discharge. Guarantees 2, 5 and 6 were general guarantees of the company's continuing obligations to the bank. The bank could therefore stop financing the company at any time without affecting the enforceability of the guarantees. Counsel did, however, concede that the Wilders are entitled to a partial discharge from their guarantees because of the bank's breach of the June agreement on the basis that the breach impaired the value of security held by the bank. He submits that the figure of $20,000 arrived at by Seaton J.A. was the appropriate measure of this relief from their liability.

29 It is trite law that any material variation of the terms of the contract between the creditor and the principal debtor to the prejudice of the guarantor without the guarantor's consent will discharge the guarantor. Seaton J.A. in his dissenting reasons says that is not this case. The variation, if it is properly so called, was made in this case with the consent and active participation of the guarantors and in fact constituted a binding agreement, so the trial judge found, to which the creditor, the principal debtor and the guarantors were all parties. Herein lies the point of divergence between the view of the majority and the view of the minority on the Court of Appeal. Lambert J.A. approached the case on the basis that if a variation of the principal contract without the guarantor's consent discharges the guarantor, so also should a breach of a variation made with the guarantor's consent. In other words, Lambert J.A. would apply the law of guarantee and suretyship to that situation. Seaton J.A., on the other hand, saw no reason to stretch the law of guarantee and suretyship to cover a case involving a straight breach of contract. The following excerpt from his reasons sets out Seaton J.A.'s position [pp. 17-18 B.C.L.R.]:

> The case law provides that guarantors will be discharged if a creditor unilaterally varies a term of the principal contract guaranteed. These cases may be rationalized on the basis that a guarantor is entitled to some relief where his risk is materially altered and where there are no remedies available to him in contract. In these circumstances, the guarantor is on his own and must look to equity because the principal debtor has suffered no loss upon which the guarantor could rely in counterclaim or set-off. I see no merit in extending the reasoning in these cases to the situation of a breach of contract by a creditor where adequate contractual remedies lie. If a guarantor's interests can be protected in contract, there is no reason to extend the application of equitable principles.

30 Lambert J.A. states the principle on which he relies as follows [at p. 48]:

> The principle on which I rely in reaching my conclusion on this point may be stated in this way. Where the creditor, by his own conduct: (a) causes the default of the principal debtor; (b) materially increases the risk to the guarantor; and (c) impairs the security that is available to the guarantor on payment of his guarantee obligation to the creditor, then the guarantor is discharged.

Lambert J.A. then went on to add that it was not necessary in this case to decide to what extent any one or any two of these three factors would have been sufficient to discharge the guarantees because in this case they were all present.

31 As already mentioned, Seaton J.A. was troubled by the fact that the guarantees in issue other than guarantee 7 were all given prior to the June agreement and its breach by the bank. The trial judge found that there was no valid defence to guarantees 2, 5 and 6, presumably for this reason. Seaton J.A. pointed out that the guarantees were in standard form and

guaranteed all present and future debts and liabilities and permitted the bank to deal with the company as it saw fit. The company borrowed and the bank advanced on the strength of the guarantees and any loss suffered by the guarantor as a result of a breach by the creditor of the principal contract could be adequately compensated by rights of set-off and the right to be discharged pro tanto if securities were impaired.

32 Lambert J.A. appreciated the problem arising from the timing of the earlier guarantees. He resolved it by finding that the June agreement was a "modification agreement" to the original "umbrella loan agreement" pursuant to which financing arrangements between the parties were worked out. He states [p. 46]:

> In my opinion there was eventually an overall agreement between the bank and the company. The agreement covered the terms of the banking arrangements of the company, and the security to be given by the company to the bank. That overall umbrella agreement is of the type usually called "the loan agreement". The agreement made on 23rd June 1975 was a "modification agreement" to the umbrella loan agreement.

And later he says [p. 46]:

> The umbrella agreement coupled with the security documents and any subsidiary agreements must all be gathered together and considered together and interpreted and applied as a unified contract consisting of a total package of inter-related rights and obligations.

Seaton J.A. accepts the concept of an "umbrella agreement" pursuant to which the company became a customer of the bank. He does not, however, subscribe to the view that the earlier guarantees attached to the June agreement.

33 It is apparent that the approach of Seaton J.A. would result in a partial discharge only; the approach of Lambert J.A. in a total discharge. The bank does not deny that the Wilders are entitled to a partial discharge. It disputes only the amount. It is necessary therefore to determine whether the position taken by Lambert J.A. has any basis in the existing jurisprudence.

34 The first case relied on by Lambert J.A. is *Watts v. Shuttleworth* (1860), 5 H. & N. 235, 157 E.R. 1171. In that case the contractor had agreed with Watts to complete the fittings for a warehouse. Watts agreed to insure the fittings against fire. Shuttleworth agreed to guarantee the performance of the contractor's work. When the fittings were partly completed they were destroyed by fire. Watts had not insured and Pollock C.B. concluded that Shuttleworth was discharged from his guarantee by this failure on the part of Watts. Quoting from his reasons at p. 1176:

> The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged: Story's Equity Jurisprudence, sect. 325. The same principle is enunciated and exemplified by the Master of the Rolls in *Pearl v. Deacon* (24 Beav. 186, 191), where he cited with approbation the opinion of Lord Eldon in *Craythorne v. Swinburne* (14 Vesey, 164, 169), that the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be a quasi contract; but that the right of the surety arises out of the equitable relation of the parties.

The decision of Pollock C.B. was upheld on appeal ((1861), 7 H. & N. 353, 158 E.R. 510 (Ex. Ch.)), Williams J. stating at pp. 510-11:

> In this case the Court, at the close of the argument, was unanimous in thinking that the defendant, as surety, was discharged by the plaintiff's omission to insure. But some doubts were felt whether the discharge ought to be regarded as total, or only to the extent of the damage which could be shewn to have been sustained by the surety in respect of that omission. In support of the latter view, it was contended, on behalf of the plaintiff, that the present case is analogous to that of a creditor who has lost or given up to his debtor a security which he has in his hands, where the surety is held to be thereby discharged, because of the rule that a surety is entitled to the benefit of all the securities which the creditor has against the principal; not however in toto, but only to the extent of the security so lost or given up.
>
> But on consideration we are all of opinion that, in the present instance, the discharge of the surety, being effected by reason of his position having been deteriorated in respect of having been made responsible for an uninsured principal, in lieu of an insured one, the case is analogous to those where a surety has been held discharged by time having been given

to the debtor ...

35 In commenting on the judgment of Williams J. in *Watts v. Shuttleworth*, Lambert J.A. expresses the view that the reasons in that case did not turn on any proposition that the contract to insure became incorporated as a term of the guarantee. However, it would appear that the case deals with the guarantee of a specific contract which was breached. In the case of a specific contract it is to be assumed that the guarantor gave his guarantee in contemplation of an ascertainable and clearly identified risk inherent in the contract. The guarantor in such a case is discharged because he is powerless to protect against variation of the principal contract by the parties to that contract. Once he has given his guarantee on the basis of that particular risk, equity protects him against any variation of it to which he was not a party.

36 Lambert J.A. relied also upon *Bank of India v. Trans Continental Commodity Merchants Ltd.*, [1982] 1 Lloyd's Rep. 506 (Q.B. (Com. Ct.)). The guarantor of the bank's customer in that case argued amongst other things that he was not liable to the bank because of irregular dealings between it and the customer on certain foreign exchange contracts. Bingham J. held that there had been no negligence by the bank and no irregular or prejudicial dealings by it towards the guarantor. He cited the familiar principle that variation of the principal contract without the consent of the guarantor will discharge the guarantor. He rejected the submission that the guarantor should also be discharged where the creditor acts in a manner prejudicial to the interests of the guarantor. At p. 515 of the report Bingham J. states:

> Leaving aside what may be the special case of fidelity guarantees, I consider the true principle to be that while a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation *or causes or connives at the default by the principal debtor in respect of which the guarantee is given* or varies the terms of the contract between him and the principal debtor in a way which could prejudice the interests of the surety, other conduct on the part of the creditor, not having these features, even if irregular, and even if prejudicial to the interests of the surety in a general sense, does not discharge the surety. [emphasis added]

Lambert J.A. relies on this passage for the proposition that a surety will be discharged when the creditor causes the debtor's default. He points out that the discharge occurs not because the obligation that was broken was made a part of the guarantee contract, but because the creditor's breach of his contract with the principal debtor increased the risk to the guarantor. For this proposition he relies also on the decision of Felton J. in *Seaboard Loan Corp. v. McCall*, 61 Ga. App. 752, 7 S.E. 2d 318 at 319 (1940):

> ... the failure of the corporation to procure the insurance [on the debtor's life] increased the risk of the sureties and they were relieved, not because the corporation breached an agreement with them, but because it breached an agreement with the maker whereby their risk was increased ...

Lambert J.A. concludes from these authorities [at p. 52]:

> In my opinion, the present case, where the creditor intentionally adopted a course of action that was in breach of its contract with the principal debtor, with the result that the risk to the guarantor was materially increased, and the guarantor's security was materially impaired, is a case where the guarantee is completely discharged and not a case where the liability of the guarantor should be reduced only by the extent to which the security was impaired.

He points out that in *Rose v. Aftenberger*, [1970] 1 O.R. 547, 9 D.L.R. (3d) 42 (C.A.), Laskin J.A. (as he then was) distinguished the two kinds of cases as follows at p. 49:

> In my view, the encompassing principle to be applied is that a surety is discharged if either the principal contract to which he gave his guarantee is varied without his consent in a matter (as the Supreme Court of Canada said in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165 at p. 172, [1936] 2 D.L.R. 481 at p. 486), not plainly unsubstantial or necessarily beneficial to the guarantor; or, if the terms of the contract of guarantee between the creditor and the surety are breached by the creditor. Where, as here, there is simply a wrongful dealing with the security taken by the creditor, and it is not shown that the taking (and hence the keeping as well) of the security was a condition of the giving of the guarantee, then the surety cannot be relieved beyond the value of the security lost to him.

Lambert J.A. states [at p. 52]:

> This is not a case where the contract between the creditor and the principal debtor was varied without the consent of the guarantor; it is a case where the principal contract was broken unilaterally by the creditor in a way which materially affected both the obligations and the rights of the guarantor. I regard this as a stronger case even than the case of a variation of the principal contract. So I think the breach operates as a complete discharge in this case.

37 It seems to me that the authorities relied on by Lambert J.A. support his approach provided, and this is the crucial proviso, the pre-existing guarantees given by the Wilders somehow "attached" to the June agreement. As has been noted earlier, the guarantees themselves do not refer to any particular agreement. They are general guarantees covering liabilities incurred by the company in its dealings with the bank in the ordinary course of its relationship with the bank. Nor were the guarantees originally given on the faith of any particular agreement. Counsel for the Wilders submits, however, that the pre-existing guarantees did "attach" to the June agreement. He finds some support for this in Rowlatt, Principal and Surety, 4th ed. (1982), at p. 88, where the learned author suggests that general guarantees of future liabilities "attach" to liabilities incurred through any subsequent agreements made between the creditor and debtor. The learned author states:

> However, where a guarantee is given in general terms to cover the liabilities which are to result from a future course of dealing generically specified in the guarantee, the creditor can vary the course of dealing under which successive liabilities arise, so long as the course of dealing continues to be of the character coming within the scope of the guarantee, and no change is made in the terms of any liability after it is actually incurred and the guarantee is attached to it.

38 In my view the June agreement was an agreement for the financing of the company's business within the contemplation of the overall loan agreement which was guaranteed by the Wilders. By itself, of course, it was not prejudicial to the guarantors; indeed, quite the contrary. However, if the pre-existing guarantees attached to it, and I believe that they did, then the key question becomes whether the subsequent breach of it by the bank materially changed the risk assumed by the guarantors to the guarantors' detriment. I think there can be no doubt that it did. I agree with Lambert J.A. that the bank's breach caused the company's default. It materially impaired the value of the security it held for the company's indebtedness by preventing the company from continuing as a viable commercial operation. As a consequence the guarantors' equitable rights of subrogation and indemnity were seriously interfered with, if not effectively destroyed. As far as its effect on the liability of the guarantor is concerned, there seems to be no justification for distinguishing between a variation of a principal contract without consent and a breach of a principal contract varied with consent. The case of *Watts v. Shuttleworth*, supra, would appear to be authority for that proposition.

**6. Conclusions**

39 There was in this case an umbrella loan agreement, general in nature, under which the bank agreed to finance the company's business. This general agreement was the one guaranteed by the Wilders' earlier guarantees. The initial loan agreement became very specific, however, when all the interested parties entered into the June agreement. The bank under the umbrella agreement could have decided to make the business decision to stop financing the company at any time prior to the June agreement. After that agreement this option was closed to it. It agreed with the company and with the guarantors that it would continue to finance the company at least until it had completed the Alberta road projects. It failed to do so despite the fact that the Wilders kept their part of the bargain. The bank's breach not only increased the guarantors' risk in a way which was "not plainly unsubstantial" and impaired their security; it put the principal debtor out of business and into bankruptcy. Such conduct on the part of the bank cannot, in my opinion, be viewed as within the purview of the clause in the guarantee contracts permitting the bank to deal with the company and the guarantors as it "may see fit". I agree with Lambert J.A. that such a clause must be construed as extending to lawful dealings only.

40 I would dismiss the appeal with costs and order the appellant to release to the respondents its claim to the life insurance proceeds hypothecated to it as security for the respondents' guarantees.

*Appeal dismissed.*

BUDUCHNIST CREDIT UNION LIMITED
Applicant

-and-

2321197 ONTARIO INC. et al.
Respondents

Court File No. CV-18-00608356-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

# BOOK OF AUTHORITIES
**(Receivership Application, returnable January 16, 2019)**


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