

**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

**FACTUM 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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PART I - INTRODUCTION

1. In this Application, a mortgagee, Buduchnist Credit Union Limited (“**BCU**”), seeks to appoint a receiver over two residential properties owned by the respondents Carlo and Sandra DeMaria.

2. BCU is not entitled to this relief. The appointment of a receiver is an equitable remedy, which is only available to parties who come to the court with clean hands, and BCU has not done so.

3. BCU’s application materials portray this proceeding as a simple issue of collecting on mortgage security, but that is not the whole story.

4. Over the last three and a half years, BCU has unilaterally inflated the amount allegedly owed under the one of the three mortgages on which it claims against Mr. DeMaria. BCU did so by adding unauthorized debits to a line of credit held by the respondent Vicar Homes Ltd. (“**Vicar**”), without authorization and in breach of agreements between BCU, Vicar, and Mr. DeMaria. These unauthorized charges amount to a total of almost \$1,200,000.

5. Furthermore, the BCU account manager with responsibility for Mr. DeMaria’s accounts has admitted to falsely registering a mortgage on a house owned by Mr. DeMaria’s mother without consent. She also admitted to having falsely witnessed documents alleged to have been signed by Mr. DeMaria. This course of conduct undermines the credibility of BCU and calls into serious question the validity of its claims against Mr. DeMaria.

6. Since 2015, Mr. DeMaria has been subject to a *Mareva* order, issued in a pending proceeding before the Superior Court of Justice in Brampton. This order has prevented him from

dealing with his property, including that held by BCU. Mr. DeMaria is in the process of bringing a motion in that proceeding to vary the *Mareva* order. If successful, he will be able to refinance his properties and discharge the amounts he owes in connection with the BCU mortgages.

7. Given BCU's wrongful conduct in connection with mortgages registered over the properties of Mr. DeMaria and his family members, the lack of urgency for the appointment of a receiver over personal residences, and the relative harm that the appointment of a receiver to sell Mr. DeMaria's personal home and cottage would cause, it would be inequitable to grant it a receivership over either the Woodland or 5th Line properties. As a result, the Application should be dismissed, or, in the alternative, stayed pending the outcome of Mr. DeMaria's motion to lift or vary the *Mareva* order.

PART II - SUMMARY OF FACTS

THE LOANS

8. This application concerns three mortgages: the 5th Line Mortgage, the First Woodland Mortgage, and the Second Woodland Mortgage.

9. The 5th Line Mortgage is a mortgage made by MCAP Mortgage Corp. ("**MCAP**") to Mr. and Mrs. DeMaria in connection with their purchase of the property known municipally as 6216 5th Line, Egbert, Ontario ("**5th Line**") in April 2006. 5th Line is Mr. and Mrs. DeMaria's cottage. The amount of the 5th Line Mortgage is \$317,241.¹ The charge was registered on April 28, 2006, and assigned to BCU by MCAP on or around May 12, 2009.² As of the date of this Application, the remaining principal amount of the 5th Line Mortgage is \$179,730.64.

¹ Supplemental Application Record, Tab 2B.

² *Id.*, Tab 2C.

10. The First Woodland Mortgage is a mortgage made by BCU to Mr. and Mrs. DeMaria in connection with their purchase of the property known municipally as 211 Woodland Acres Crescent, Vaughan, Ontario (“**Woodland**”) in August 2010. Woodland is Mr. and Mrs. DeMaria’s personal residence. The amount of the First Woodland Mortgage is \$1,490,000.³ The charge was registered on August 16, 2010. As of the date of this Application, the remaining principal amount of the First Woodland Mortgage is \$995,199.35.

11. The Second Woodland Mortgage was a collateral mortgage granted to BCU by Mr. and Mrs. DeMaria on November 30, 2012. The amount of the Second Woodland Mortgage is \$3,000,000 and it was registered on December 5, 2012.⁴

12. The original purpose of the Second Woodland Mortgage was to secure a line of credit loan issued to Mr. and Mrs. DeMaria by BCU with a maximum amount of \$3,000,000 (the “**Woodland Line of Credit**”).

13. The Woodland Line of Credit was intended to serve as additional security for extraordinary obligations incurred by Mr. DeMaria’s business, a cheque-cashing company called The Cash House.⁵

14. None of the mortgages contain a provision allowing BCU to appoint a receiver over the underlying properties in the event of a default.

³ Application Record, Tab 2V.

⁴ *Id.*, Tab 2X.

⁵ *Id.*, Tabs 2W and 2AA. The legal name of The Cash House is 1160376 Ontario Ltd.

SALE OF THE CASH HOUSE

15. Mr. DeMaria sold the Cash House business on March 27, 2015. As a result, the security provided by the Second Woodland Mortgage had to be “moved” to an account that would still be controlled by Mr. DeMaria in the future. BCU transferred this security to an account held by Vicar, bearing the account number 61537.⁶

16. Mr. DeMaria had not drawn on the Woodland Line of Credit before the transfer, and no funds were secured by the Second Woodland Mortgage. Documents prepared by BCU at the time noted that the line of credit had had “no issues, [and] positive balances” throughout its lifetime.⁷

17. At the time Mr. DeMaria sold the business, The Cash House owed \$1,000,000 to BCU under a line of credit facility held in an account named “Cash House Armoured Transport Service” and bearing the account number 63457.⁸ Mr. DeMaria wished to convey the Cash House business to the purchaser free of this debt, so he arranged with BCU to transfer the line of credit to the Vicar account.⁹

18. In order to do so, Mr. DeMaria caused Vicar to enter into an agreement with BCU for a new \$1,000,000 line of credit loan on April 1, 2015 (the “**Vicar Line of Credit**”),¹⁰ the proceeds of which were used to close down the Cash House line of credit.¹¹ In line with its purpose, the

⁶ Application Record, Tab 2AA.

⁷ *Ibid.*

⁸ Transcript of the cross-examination of Oksana Prociuk, p. 75, qq. 357-60.

⁹ *Id.*, pp. 77-79, qq. 370-74.

¹⁰ Application Record, Tab 2Y.

¹¹ Transcript of the cross-examination of Oksana Prociuk, pp. 75-76, q. 361.

Vicar Line of Credit agreement provided that the maximum amount to be advanced and the maximum amount that could be outstanding under the agreement at any time was \$1,000,000.¹²

19. The Vicar Line of Credit was secured by the Second Woodland Mortgage and guaranteed personally by Mr. DeMaria.¹³ Like the Line of Credit loan agreement, the guarantee agreement provides for a maximum exposure of \$1,000,000. Neither the Vicar Line of Credit nor the guarantee agreement contain a provision allowing BCU to appoint a receiver over the Woodland property in the event of a default.

20. The guarantee agreement is the only basis for a claim under the Second Woodland Mortgage. Vicar does not have an interest in Woodland, and Mr. DeMaria was not a party to the Vicar Line of Credit loan agreement; signed it only as a guarantor. The \$1,000,000 owed under the Vicar Line of Credit was debited from the Vicar account on April 7, 2015.¹⁴ Immediately before the transfer, the Vicar account had a positive balance of approximately \$11,770.¹⁵

21. It was Mr. DeMaria's understanding that, following the transfer of the Second Woodland Mortgage Security to the Vicar account and the opening of the Vicar Line of Credit, the Woodland Line of Credit had been terminated.¹⁶

22. As set out in its loan agreement, the purpose of the Woodland Line of Credit was to provide security for the expenses of The Cash House, a business which no longer belonged to Mr. DeMaria

¹² Application Record, Tab 2Y.

¹³ *Id.*, Tab 2Z.

¹⁴ Response to Request to Inspect Documents of BCU, December 11, 2018, p. 124.

¹⁵ *Ibid.*

¹⁶ Transcript of the cross-examination of Carlo DeMaria, p. 34, q. 136.

following its sale on March 27, 2015.¹⁷ After that point, the Woodland Line of Credit served no purpose and it would have been pointless to maintain it.

23. Mr. DeMaria understood that, while the Woodland property was still subject to a second mortgage, the total amount of indebtedness actually outstanding under that agreement was only \$1,000,000 – i.e., the amount of the Vicar Line of Credit.¹⁸

THE MAREVA ORDER AND THE UNAUTHORIZED TRANSACTIONS

24. On May 6, 2015, Justice Richetti of the Ontario Superior Court of Justice in Brampton issued an interim order in the form of a *Mareva* injunction (the “**Mareva Order**”) in an action bearing the court file number CV-15-2110-00 (the “**Brampton Action**”).¹⁹ Mr. DeMaria is a defendant in the Brampton Action, and he was, and remains, subject to the Mareva Order.

25. The Mareva Order prohibited the defendants in that action, including Mr. DeMaria, as well as any third parties with notice of the order, from “selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with” any of their assets. BCU was served with a copy of the Mareva Order on or around the date it was issued.

26. After being served with Mareva Order, BCU froze the accounts it held which belonged to Mr. DeMaria and corporations under his control.²⁰

¹⁷ Application Record, Tab 2W.

¹⁸ Transcript of the cross-examination of Carlo DeMaria, p. 32, qq. 127-28; pp. 46-47, qq. 197-98

¹⁹ Responding Application Record of Carlo DeMaria, Tab 1, para. 19. Application Record, Tab 2P.

²⁰ Transcript of the cross-examination of Oksana Prociuk, pp. 66-67, qq. 311-13.

27. Following the imposition of the Mareva Order, Mr. DeMaria was totally restricted in dealing with the assets he held at BCU and the debts he owed to it. After this point, BCU took it upon itself to manage Mr. DeMaria's loans and bank accounts.

28. Rather than managing Mr. DeMaria's accounts for his benefit and in accordance with its obligations to him as a client, BCU took this opportunity to manage his accounts for its own benefit without his authorization.

29. First, BCU unilaterally decided to help itself to funds from Mr. DeMaria's bank accounts without his permission. After the imposition of the Mareva Order, Mr. DeMaria's wife was making monthly payments towards the BCU loans,²¹ which Mr. DeMaria understood were being directed as appropriate by BCU to keep those loans in good standing.²² BCU did not tell Mr. DeMaria that, in addition to these monthly payments, the credit union was engaging in self-help by redirecting funds from his chequing account to the First Woodland Mortgage. As its CEO admitted on cross-examination, Mr. DeMaria "did not authorize any post-Mareva mortgage payments".²³ Instead, BCU "helped itself" to funds from his other accounts.

30. Even more troubling was BCU's conduct with respect to the Vicar Line of Credit.

31. By early 2017, the outstanding balance of the Vicar account was about the same as it had been in April 2015 when the Vicar Line of Credit was issued – depending on the day, carrying a debit of between approximately \$990,000 and \$1,001,000. Vicar used the account to operate its

²¹ Transcript of the cross-examination of Carlo DeMaria, p. 30, qq. 122-23.

²² Responding Application Record of Carlo DeMaria, Tab 1, paras. 14-15.

²³ Transcript of the cross-examination of Oksana Prociuk, pp. 68-69, qq. 323-24. Second Supplementary Application Record, tab 11, p. 135.

business and the balance varied to some extent over the course of each month. This variation was known of and tolerated by BCU, and the amounts were returned to approximately a debit of \$1,000,000 at the end of each month.²⁴ No further advances had been made by BCU under the Vicar Line of Credit in the intervening period.²⁵

32. In February and March 2017, however, BCU decided to again help itself to funds from Mr. DeMaria's accounts without his authorization. In response to the posting of a number of dishonoured cheques in another account, BCU withdrew funds from the Vicar account in order to make itself whole.

33. In order to do so, BCU unilaterally increased the size of the Vicar Line of Credit by more than \$800,000, or 80% of the agreed-upon amount.²⁶ BCU was aware that Mr. DeMaria had not authorized the increased credit limit, but nonetheless decided to take advantage of the still-available security under the Second Woodland Mortgage to protect its own interests.

34. BCU's inflation of the Vicar Line of Credit was carried out without Mr. DeMaria's knowledge, much less his authorization.²⁷ Its actions were in breach of the loan agreement establishing the Line of Credit, which specified an "aggregate maximum amount to be advanced ... including principal and interest" of \$1,000,000, and of Mr. DeMaria's personal guarantee agreement, which stated that "The liability of the Guarantor hereunder shall be limited to the sum of ONE MILLION ... dollars".²⁸

²⁴ Transcript of the cross-examination of Oksana Prociuk, p. 170, qq. 783-85.

²⁵ Transcript of the cross-examination of Carlo DeMaria, pp. 33-35, qq. 135-143.

²⁶ Transcript of the cross-examination of Oksana Prociuk, pp. 170-71, qq. 786-790.

²⁷ *Id.*, p. 171, qq. 789-791.

²⁸ Application Record, Tabs 2Y and 2Z.

35. The amount now claimed by BCU in connection with the Vicar Line of Credit is almost \$2,200,000 – more than double the maximum amount of liability that Mr. DeMaria agreed to take on in connection with that loan.²⁹

THE UNAUTHORIZED STAVEBANK MORTGAGE

36. Until August 2016, the BCU manager with responsibility for managing Mr. DeMaria's accounts was an employee named Roma Bereza. At the time, Ms. Bereza was BCU's Branch Operations Manager. In this role, she had responsibility for overseeing the operations of all of BCU's various branches.³⁰ This was a senior management position at the credit union, and Ms. Bereza reported directly to the CEO of BCU, Oksana Prociuk.³¹

37. Ms. Bereza was deeply involved in managing the loans at issue in this proceeding. She was the BCU employee who "assessed and recommended" the application for the Vicar Line of Credit.³² She also signed as a witness to all of the agreements between Mr. DeMaria and/or his companies and BCU that related to the Second Woodland Mortgage and the Vicar Line of Credit.³³

38. On February 8, 2016, BCU registered a \$3,000,000 mortgage on the title of a property municipally known as 1407 Stavebank Road, Mississauga, Ontario ("**Stavebank**"). This property belongs to Mr. DeMaria's mother, Linda DeMaria.³⁴ BCU registered this mortgage without Linda DeMaria's knowledge or consent.

²⁹ Application Record, tab 1, p. 7.

³⁰ Transcript of the examination of Roma Bereza, December 17, 2018, pp. 8-9, qq. 21-23.

³¹ *Id.*, December 17, 2018, pp. 11-12, qq. 38-44.

³² Application Record, Tab 2AA.

³³ *Id.*, Tabs 2V, 2X, 2Y. Ms. Bereza signed the documents in Tabs 2V and 2X as Roma Denderys, her former name. Examination of Roma Bereza, January 10, 2019, p. 144, qq. 667-69.

³⁴ Second Supplementary Application Record, Tab 22, p. 245.

39. On her examination, Ms. Bereza admitted that she completed the process for registering the Stavebank mortgage even though she knew that Linda DeMaria had not agreed to the mortgage. She never met with or spoke to Linda DeMaria, and she knew that the mortgage documentation had not been signed by Linda DeMaria.³⁵

40. Ms. Bereza signed the Stavebank mortgage documents as a witness, thereby attesting to Linda DeMaria's signature, although she knew full well that Linda DeMaria had not signed them.³⁶ Ms. Bereza testified that she did so at the behest of BCU, because "It was a job that just had to get done" in order to "solve a problem that Buduchnist had".³⁷

41. BCU registered the \$3,000,000 mortgage on title to Linda DeMaria's property by way of an acknowledgement and direction to solicitor from Linda DeMaria, also purportedly signed by Linda DeMaria and witnessed by Ms. Bereza, but in reality not signed or authorized by Linda DeMaria.³⁸

42. During her examination, Ms. Bereza also admitted that, on multiple occasions, she attested to having witnessed the signature of Mr. DeMaria on BCU documents, despite the fact that she had not actually observed him signing the documents. When asked if she would serve as the "witness of signatures that I didn't know that [Mr. DeMaria] did", she responded "Yes, I did".³⁹ At the time, even though Ms. Bereza was a senior manager at the bank, she claims she did not know that falsely witnessing signatures was contrary to banking compliance rules until after she

³⁵ Transcript of the examination of Roma Bereza, January 10, 2019, p. 185, q. 893.

³⁶ *Id.*, pp. 184-85, qq. 922-26.

³⁷ *Ibid.*

³⁸ Second Supplementary Application Record, Tab 22, p. 257.

³⁹ Transcript of the examination of Roma Bereza, January 10, 2019, p. 91, q. 419.

left BCU.⁴⁰ Given Ms. Bereza's senior role at BCU and experience in the finance industry, this does not accord with common sense.⁴¹

43. Ms. Bereza also admitted to having used the passwords of other BCU employees to defeat the credit union's controls on electronic transaction limits.⁴² She explained that "it wasn't uncommon that we [i.e., BCU employees] would do that."⁴³ Doing so would have allowed her to execute transactions that otherwise would have been blocked by BCU's compliance systems.

44. BCU's course of conduct with respect to the Stavebank mortgage, like its actions in connection with the unauthorized transactions under the First Woodland Mortgage and the Vicar Line of Credit, demonstrate dishonesty and a lack of respect for governance and compliance procedures and a failure to properly protect its clients' interests.

SUBSEQUENT INTERACTIONS BETWEEN MR. DEMARIA AND BCU

45. Between May 2015 and August 2018, Mr. DeMaria and/or Mrs. DeMaria had continued to make payments to BCU each month. At all times, Mr. DeMaria believed that his various loans were in good standing, and he was never given any indication to the contrary by BCU.⁴⁴

46. Mr. DeMaria first became aware of the unauthorized transactions on the Vicar Line of Credit during the summer of 2018. He also learned of the unauthorized mortgage that BCU had registered on the Stavebank property at around that time. Mr. DeMaria complained to BCU about

⁴⁰ Transcript of the examination of Roma Bereza, January 10, 2019, pp. 90-91, 416-19.

⁴¹ *Id.*, pp. 70-72, qq. 313-20.

⁴² *Id.*, pp. 93-94, qq. 433-37.

⁴³ *Id.*, p. 94, q. 435.

⁴⁴ Responding Application Record of Carlo DeMaria, Tab 1, paras. 14-18.

the registration of the unauthorized mortgage over the Stavebank property.⁴⁵ He also filed a complaint with BCU's regulator, the Deposit Insurance Corporation of Ontario.⁴⁶

47. After learning of BCU's misconduct, Mr. DeMaria became concerned that he did not understand how his accounts were being managed. He requested that BCU provide him with documentation regarding his accounts and any transfers that BCU had made on them. BCU did not provide the documentation that he requested.⁴⁷

48. As a result of these developments and the difficult financial situation that he found himself in due to the Mareva Order, Mr. DeMaria decided to place his payments to BCU on hold in August 2018.⁴⁸

49. Rather than attempting to work with Mr. DeMaria in good faith to clear up the unauthorized transactions on his accounts, BCU filed this Application, knowing that Mr. DeMaria is currently unable to refinance his debts with another lender as a result of the Mareva Order.

50. Mr. DeMaria is willing to reach an agreement to pay BCU the amounts that were actually advanced to him and Vicar, but BCU has refused to negotiate with him.

MR. DEMARIA'S MOTION TO LIFT THE MAREVA ORDER

51. Mr. DeMaria is currently seeking to set aside the Mareva Order. On January 11, 2019 his counsel circulated a notice of motion to the parties in the Brampton Action, and have proposed to

⁴⁵ Transcript of the cross-examination of Oksana Prociuk, pp. 187, qq. 855-58.

⁴⁶ *Id.*, pp. 193-94, qq. 885-91.

⁴⁷ Responding Application Record of Carlo DeMaria, Tab 1, paras. 25-26.

⁴⁸ *Id.*, para. 27.

bring the motion for a hearing in late January or early February, depending on the availability of the court.⁴⁹

52. The Notice of Motion alleges that the plaintiffs in the Brampton Action have failed to take meaningful steps to move the proceeding forward in the more than three-and-a-half years since the Mareva Order was issued. The only procedural step that has been taken since the close of pleadings is the delivery of the plaintiff's affidavit of documents, and no examinations for discovery have yet taken place, despite the time that has elapsed since the action was commenced.

53. If Mr. DeMaria's motion to lift the Mareva Order is successful, he will no longer be prohibited from dealing with his assets. As a result, he will be able to refinance the Woodland and 5th Line properties, and to repay the amounts he owes to BCU under the associated mortgages.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

54. The only issue to be decided on this Application is whether the appointment of a receiver over the 5th Line and Woodland properties is appropriate in light of the harm that this would cause Mr. DeMaria and his family and BCU's misconduct.

TEST FOR THE APPOINTMENT OF A RECEIVER

55. The court may appoint a receiver when it is "just or convenient to do so".⁵⁰

⁴⁹ A copy of that Notice of Motion is attached hereto as Schedule "C".

⁵⁰ *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101(1); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243(1).

56. In deciding whether it is appropriate to appoint a receiver, the court should “consider the circumstances of the case and balance the rights of the parties.”⁵¹ The onus of proof is on the party seeking the appointment of a receiver.⁵²

57. A receivership should not be ordered unless there is a clear need to do so. Before granting a receivership, the court should consider “the effect an appointment would have on the parties”.⁵³

THE CIRCUMSTANCES DO NOT JUSTIFY THE APPOINTMENT OF A RECEIVER

58. It is widely recognized that the appointment of a receiver is “an intrusive remedy”,⁵⁴ which should only be ordered “cautiously and sparingly where there is a showing of serious potential prejudice” to the creditor,⁵⁵ or where there is a “real risk that its recovery would otherwise be in serious jeopardy”.⁵⁶

59. In *Canadian Imperial Bank of Commerce v. John Taylor’s Truck Sales Ltd.*, Ground J. found that it was not just and convenient to appoint a receiver when the security in question was not at risk of depreciating in value and the only function to be performed by the receiver was “the sale of property which is resisted by [the respondent] and which may have an adverse impact on [the respondent’s] entitlement to redeem the property.”⁵⁷

⁵¹ *Gold Candle Ltd. v. GSR Mining Corp.*, 2016 ONSC 4472, para. 8. Book of Authorities of the Respondents, 2321197 Ontario Inc., Carlo DeMaria, 2321198 Ontario Inc. and Vicar Homes Ltd. (“BOA”), Tab 1.

⁵² *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090 (S.C.J.), para. 10 (lv. to appeal refused, [2009] O.J. No. 876 (S.C.J.)) [“*1468121 Ontario* (2008)”. BOA, Tab 2.

⁵³ *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2009] O.J. No. 876 (S.C.J.), para. 28. BOA, Tab 3.

⁵⁴ *1468121 Ontario* (2008), para. 9. BOA, Tab 2.

⁵⁵ *Canadian Imperial Bank of Commerce v. Jack*, [1990] O.J. No. 670 (H.C.J.), para. 12. BOA, Tab 4.

⁵⁶ *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368, para. 101. BOA, Tab 5.

⁵⁷ [2003] O.J. No. 1377 (S.C.J.), para. 2. BOA, Tab 6.

60. BCU has already been granted receiverships over two properties owned by the Respondents. Both of those were development properties, which Mr. DeMaria was expecting to sell for profit. That is not the case here. The two properties remaining at issue on this Application are not fungible: they are Mr. DeMaria's family's home and cottage.

61. If BCU is successful in its application, it plans to sell the properties.⁵⁸ When it does, Mr. DeMaria and his family will be evicted from their home, with little chance of reclaiming it.

62. In the circumstances, a balancing of the rights of the parties suggests that it is not just and convenient to grant a receivership over Mr. DeMaria's personal residence and cottage.

BCU'S MISCONDUCT DISENTITLES IT TO EQUITABLE RELIEF

63. The conduct of the parties to a receivership application is relevant to the granting of the relief sought.⁵⁹ A receivership is an equitable remedy, and is governed to the principles of equity, including the doctrine of unclean hands.⁶⁰ This doctrine disqualifies the applicant from receiving equitable relief, including the appointment of a receiver, when its "wrongdoing taints the appropriateness of the remedy being sought from the court".⁶¹

64. BCU has committed significant misconduct in connection with the Vicar Line of Credit. It increased the size of the loan by 80% without authorization from its clients and in violation of multiple agreements between them. It also improperly transferred funds to pay off the First Woodland Mortgage without the authorization of Mr. DeMaria.

⁵⁸ Factum of the Applicant, para. 38.

⁵⁹ *Royal Bank v. Chongsim Investments Ltd.*, [1997] O.J. No. 1391 (Gen. Div.), para. 23 ["Chongsim"]. BOA, Tab 7.

⁶⁰ *Royal Bank v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.), para. 51. BOA, Tab 8.

⁶¹ *Ibid.*

65. Epstein J. (as she then was) considered a similar fact pattern in *Royal Bank v. Chongsim Investments Ltd.* There, the plaintiff, Royal Bank, acted improperly by failing to inform the defendant, its client, of the nature of various transfers into its accounts. The bank also failed to disclose the decisions it took not to honour cheques deposited into the client's account.⁶² The bank delayed informing the defendant that it had defaulted on a loan, and, when the defendant learned of the default, the bank refused to provide particulars of the arrears owed. Instead, it bank demanded an immediate payment in full of the credit facility.⁶³

66. Justice Epstein held that, although the defendant had indeed defaulted on its loan, the default was not one that warranted the appointment of a receiver. While the conduct of the bank did not rise to the level of dishonesty, the court found that it had been "less than straightforward" in its dealings with the defendant, in breach of its "recognized obligation to treat its customers fairly".⁶⁴

67. The court took into account both the misconduct of the plaintiff and the fact that the balance of convenience weighed in favour of the defendant, given the costs of appointing a receiver and the lack of evidence that the plaintiff would suffer any harm.

68. BCU's conduct here is significantly worse than that of the Royal Bank in *Chongsim*. BCU's breach of its agreements with Vicar and Mr. DeMaria, and its registration of an unauthorized mortgage for \$3,000,000 against the property of Mr. DeMaria's mother, are clear breaches of its obligations to treat Mr. DeMaria fairly and honestly.

⁶² *Chongsim*, para. 14. BOA, Tab 7.

⁶³ *Id.*, paras. 15-16.

⁶⁴ *Id.*, para. 24.

69. BCU failed to be candid with Mr. DeMaria about the actions it had taken with respect to his accounts, even after the fact. Even in its application materials in this proceeding, BCU alleges that Mr. DeMaria owes approximately \$2.2 million under the Second Woodland Mortgage, without clarifying that at least \$800,000 of that total is the result of unauthorized transactions carried out by BCU itself.

70. Moreover, the BCU employee with responsibility for managing these loans admitted to having falsely witnessed “signatures” on multiple occasions. This is deeply concerning and casts a shadow over the credit union’s dealings with Mr. DeMaria, such that it is inappropriate for this court to grant BCU the equitable relief it seeks.

71. In short, BCU has not come to the court with clean hands. Accordingly, it is not entitled to the “intrusive” equitable remedy of the appointment of a receiver over Mr. DeMaria’s home.

MR. DEMARIA’S AGREEMENT TO GUARANTEE THE VICAR LINE OF CREDIT HAS BEEN DISCHARGED

72. BCU’s misconduct with respect to the Vicar Line of Credit also eliminates its ability to enforce the personal guarantee of Mr. DeMaria for that loan.

73. As the Supreme Court of Canada noted in *Bank of Montreal v. Wilder*, it is “trite law” that “any material variation” of the terms of the contract which is being guaranteed, including a breach of that agreement will discharge the guarantor’s obligation under the guarantee agreement.⁶⁵

⁶⁵ [1986] 2 S.C.R. 551, paras. 29, 38. BOA, Tab 9.

74. BCU's unauthorized increase of the Vicar Line of Credit by 80% beyond the amount authorized in the associated loan and guarantee agreements is certainly a material variation of the underlying agreement.

75. Accordingly, the Vicar Line of Credit guarantee agreement, which is the only basis for BCU's claim under the Second Woodland Mortgage in connection with the Vicar Line of Credit, has been discharged. BCU therefore has no basis for claiming against Mr. DeMaria, or seeking the appointment of a receiver over the Woodland property, pursuant to it.

PART IV - ORDER REQUESTED

76. The Respondents, 2321197 Ontario Inc., Carlo DeMaria, 2321198 Ontario Inc. and Vicar Homes Ltd., submit that this Application should be dismissed, or, in the alternative, stayed *sine die*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of January, 2019.



Andrew Winton / Philip Underwood

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Gold Candle Ltd. v. GSR Mining Corp.*, 2016 ONSC 4472
2. *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090 (S.C.J.) (lv. to appeal refused, [2009] O.J. No. 876 (S.C.J.))
3. *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2009] O.J. No. 876 (S.C.J.)
4. *Canadian Imperial Bank of Commerce v. Jack*, [1990] O.J. No. 670 (H.C.J.)
5. *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368
6. *Canadian Imperial Bank of Commerce v. John Taylor’s Truck Sales Ltd.*, [2003] O.J. No. 1377 (S.C.J.)
7. *Royal Bank v. Chongsim Investments Ltd.*, [1997] O.J. No. 1391 (Gen. Div.)
8. *Royal Bank v. Boussoulas*, 2012 ONSC 2070 (Div. Ct.)
9. *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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 or convenient to do so.

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

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

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

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

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

SCHEDULE "C"

Court File No. CV-15-2110-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

TRADE CAPITAL FINANCE CORP.

Plaintiff

and

PETER COOK, also known as Peter William Cook, MARC D'AOUST, also known as Jean Marc D'Aoust, THOMAS BARKER, also known as Thomas Richard Barker (personally and carrying on business as LC Exchange, Global Medical and Greenlink Canada Group), ROCKY PACCA, BRUNO DIDIOMEDE, ALAN KEERY, also known as Alan John Keery, CHRIS BENNETT JR., also known as Chris Bennett also known as Christoopher Bennett (personally and carrying on business as CJR Consulting), TODD CADENHEAD, DAYAWANSA WICKRAMASINGHE, BONNY LOKUGE, VIRTUCALL INC., VIRTUCALL INTERNATIONAL LLC, DEBT RESOLVE-MORTGAGE FUNDING SOLUTIONS INC., THE CASH HOUSE INC., 1160376 ONTARIO LIMITED, operating as THE CASH HOUSE, 2242116 ONTARIO INC., carrying on business as Superior Medical Services Inc. and Superior Medical Services, CARLO DE MARIA, also known as Carlo Vince De Maria also known as Carlo Vincent De Maria also known as Carlo Vincenzo De Maria, MATTEO PENNACCHIO, FRANK ZITO, also known as Francesco Zito, SIMONE SLADKOWSKI, JOBEC TRADE FIINANCE INC., 1461350 ONTARIO INC., 2299430 ONTARIO INC., WF CANADA LTD., JOBEC INVESTMENTS RT LTD., GREEN LINK CANADA INC., 2339989 ONTARIO INC., 2224754 ONTARIO LTD., 6980023 CANADA INC., operating as Living Benefits, JOSHUA COOK, ELIZABETH COOK, REBECCA COOK, MARK PINTUCCI, MARCO SANTONATO, also known as Marc Santonato, NEW ERA RESOLUTIONS & CONSULTING INC., 2252364 ONTARIO INC., MARCO SANTONATO, also known as Marc Santonato, NEW ERA RESOLUTIONS & CONSULTING INC., [REDACTED], DEBT RESOLVE-MORTGAGE FUNDING SOLUTIONS INC., carrying on business as Debtresolve Inc., MILLWALK ENTERPRISES INC. and OAK HILLS WATER DURHAM INC.

Defendants

NOTICE OF MOTION

The Defendants, 1160376 Ontario Limited, operating as THE CASH HOUSE and Carlo De Maria, also known as Carlo Vince De Maria also known as Carlo Vincent De Maria also known as Carlo Vincenzo De Maria, will make a Motion to a Judge on _____ at 10:00 a.m., or as soon after that time as the Motion can be heard at the court house, 7755 Hurontario Street, Brampton, Ontario, L6W 4T6.

PROPOSED METHOD OF HEARING: The Motion is to be heard:

in writing under subrule 37.12.1(1) because it is (insert one of on consent, unopposed or made without notice);

in writing as an opposed motion under subrule 37.12.1(4);

orally.

THE MOTION IS FOR

- (a) an Order setting aside and/or dissolving the Order of the Honourable Justice Richetti dated May 6, 2015 as against Mr. De Maria and 116;
- (b) costs on a substantial indemnity basis;
- (c) Such further and other relief as to this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE

1. On May 6, 2015, a Statement of Claim was issued by Trade Capital ("**Trade Capital**"), which alleges that it was the victim of a fraud perpetrated by Peter Cook, the former President of Trade Capital.

2. The claim was commenced against 30 different defendants, including 1160376 Ontario Limited, operating as The Cash House ("**116**") and Carlo De Maria, also known as Carlo Vince De Maria also known as Carlo Vincent De Maria also known as Carlo Vincenzo De Maria ("**De Maria**"), together with 116, the "**De Maria Defendants**").

3. Also on May 6, 2015, the Honourable Justice Richetti granted a Mareva injunction against the De Maria Defendants, along with other defendants (the "**Order**").

4. In May 2015, the De Maria Defendants brought a motion to set aside and/or vary the Order.

5. On June 1, 2015, the motion was dismissed. The De Maria Defendants sought leave to appeal the decision dismissing the motion.

6. On August 24, 2015, the leave to appeal motion was dismissed by the Divisional Court.

7. In December 2015, De Maria brought a motion to vary the Order seeking funds to pay legal fees and other amounts owed by De Maria. Justice Richetti ordered that, upon certain conditions being met, the Order be varied to allow for \$25,000 be provided to De Maria for legal fees.

8. Since the action was commenced in May 2015, Trade Capital has done little to move the action forward against the De Maria Defendants. The only step taken to advance past the pleadings stage was Trade Capital delivering its Affidavit of Documents on or about March 3, 2017.

9. Notwithstanding the Plaintiff's obligation to prosecute this action diligently, it has failed to do so. As at the date hereof, no examinations for discovery have taken place. Notwithstanding the passage of 3.5 years, nothing has been done to move this action to a trial.

10. The Plaintiff's failure to pursue this action with due diligence and reasonable dispatch is inordinate and inexcusable.

11. The De Maria Defendants have been prejudiced by the Order and the length of time it has been in place, which has resulted in receivership proceedings being commenced against De Maria (Toronto Commercial List Application CV-18-00608456CL).

12. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Affidavit of Carlo De Maria to be sworn;
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 11, 2019

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AND TO: **THE CASH HOUSE INC.**

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AND TO: **2224754 ONTARIO LTD.**

Defendant

AND TO: **6980023 CANADA INC., OPERATING AS LIVING BENEFITS**

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AND TO: **MILLWALK ENTERPRISES INC.**

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Plaintiff

-and-

PETER COOK, also known as Peter William Cook et al.
Defendants

Court File No. CV-15-2110-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT BRAMPTON

NOTICE OF MOTION

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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

FACTUM
(Receivership application, returnable January 16, 2019)

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